United States Department of Energy
Office of Hearings and Appeals

In the matter of Green Property Funds	)	
	)	
Filing Date: October 13, 2011	)	
	)	Case No.: FIA-11-0002
	)	

Appearance:

For the Appellant: Craig Immel

Issued: November 7, 2011

Decision and Order

On October 13, 2011, Green Property Funds (GPF) filed an Appeal from a determination issued by the Department of Energy's (DOE) Golden Field Office (GO). In that determination, GO responded to a request for information that GPF filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require GO to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On August 23, 2011, GPF submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for a copy of a proposal from Enersolv, LLC to the Caddo Tribe of Oklahoma (Enersolv Proposal). *See* DOE Headquarters FOIA Request Form from Craig Immel (August 23, 2011) (FOIA Request). DOE/FOIA forwarded the request to GO because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

GO conducted a search of its records but did not locate documents responsive to GPF's request. *See* E-mail from Carol Battershell, Manager, GO, to Craig Immel, GPF (September 12, 2011) (Determination Letter). On October 13, 2011, the Office of Hearings and Appeals (OHA) received GPF's Appeal in which it requests an additional search for the Enersolv Proposal. *See* Letter from Craig Immel to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted GO to ascertain the scope of its search for responsive documents. In its response, GO explained that the National Nuclear Security Administration (NNSA) issued the original award in October 2009 to the Caddo Tribe, of which Enersolv was a subcontractor or grantee. NNSA transferred the award to GO for monitoring and administration. *See* E-mail from Michele Harrington Altieri, Freedom of Information Officer, GO, to Avery R. Webster, Attorney-Examiner, OHA (October 24, 2011) (October 24 E-mail). GO conducted thorough searches of its records using the search terms "Caddo, 1638, Award Number DE-EE000168, and Enersolv." *See* October 24 E-mail. Of the 127 potentially responsive records that were found, there was no indication that the Caddo Nation of Oklahoma provided GO with the Enersolv Proposal.[2] *Id*.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that GO performed a search reasonably calculated to reveal documents responsive to GPF's request. Accordingly, the search was adequate under the FOIA and, therefore, GPF's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Green Property Funds on October 13, 2011, OHA Case No. FIA-11-0002, is hereby denied.

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

[2] In his FOIA Request, Mr. Immel states that the Enersolv proposal was sent to Ms. Polly Edwards, Environmental Director of the Caddo Nation of Oklahoma. *See* FOIA Request. Since Mr. Immel identified the Caddo Nation of Oklahoma as the potential holder of records, we suggest that he contact them to retrieve the information that he seeks.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 7, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Heart of America Northwest	)	
	)	
Filing Date: October 17, 2011	)	
	)	Case No.: FIA-11-0003
	)	

Issued: November 15, 2011

Decision and Order

On October 17, 2011, Heart of America Northwest (HOAN or "Appellant") filed an Appeal from a determination issued by the Department of Energy (DOE) Richland Operations Office (RO). In that determination, RO withheld information in response to a request for information that HOAN filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require RO to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On July 12, 2011, HOAN submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), and RO, for documents relating to Washington Department of Ecology's policy for the withholding or disclosure of DOE documents marked Official Use Only (OUO) or sensitive, in response to Public Record Act requests. *See* Letter from Ross Pearson, Legal Intern, HOAN (July 12, 2011) (FOIA Request). RO processed the request because any document responsive to HOAN's request, if it existed, would fall under the jurisdiction of that office.

RO conducted a search of its records and located one document responsive to HOAN's request. *See* Letter from Dorothy Riehle, FOIA Officer, RO, to Ross Pearson, HOAN (August 23, 2011) (Determination Letter). In its Determination Letter, RO withheld portions of the document claiming that the responsive material was shielded under the attorney-client and deliberative process privileges of Exemption 5. *See* Determination Letter. In withholding the information, RO stated that the information withheld in the responsive document summarized communications between RO attorneys and their clients and was based upon expressed opinions on legal and policy matters. *Id.* at 2. RO also withheld portions of the document as non-responsive to HOAN's FOIA Request. *Id.*

On October 17, 2011, the Office of Hearings and Appeals (OHA) received HOAN's Appeal, in which it requests an additional search for the requested information. *See* Letter from Alec Osenbach to OHA (Appeal Letter). HOAN also challenges RO's decision to withhold information under Exemption 5 and as non-responsive to its request. *See* E-mail from Gerry Pollet, Executive Director, HOAN to Avery R. Webster, Attorney-Examiner, OHA (October 21, 2011).

II. Analysis

A. Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted RO to ascertain the scope of its search for responsive documents. *See* E-mail from Avery R. Webster, Attorney-Examiner, OHA, to Dorothy Riehle, Freedom of Information Officer, RO (October 26, 2011). RO informed us that it conducted a manual search of its records in locations where documents would most likely be found. *See* E-mail from Dorothy Riehle, Freedom of Information Officer, RO, to Avery R. Webster, Attorney-Examiner, OHA (October 26, 2011) (October 26 E-mail). Specifically, files were searched in the Office of Chief Counsel in the Environmental Division; no responsive records were located. RO also conducted an electronic search of the Integrated Data

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

Management System (IDMS)[2] using the key words: Ecology, Washington State Department of Ecology, OUO, Official Use Only, and Office of the Attorney General. This search yielded one partially responsive document which was provided, in part, to the Appellant. *Id*.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that RO performed a search reasonably calculated to reveal documents responsive to HOAN's request.

B. Exemption 5 and "Non-Responsive" Withholdings

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. §1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

In withholding portions of the document from HOAN, RO relied upon both the "attorney-client" and "deliberative process" privileges of Exemption 5. Because, as discussed below, we find that the withheld information is subject to the attorney-client privilege, and thus protected by Exemption 5, we need not consider whether the deliberative process privilege is also applicable to the withheld information. *See, e.g., Another Way BPA*, TFA-0437 (2010).

An agency may withhold information under the attorney-client privilege if it is a "confidential communication . . . between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses opinions given by an attorney to a client based upon, and thus reflecting, those facts. *See, e.g., Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary

[2] IDMS is an electronic records repository that maintains all incoming and outgoing correspondence. *See* October 26 E-mail.

to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Power Wire Constructors*, Case No. TFA-0312 (May 27, 2009).

After reviewing the document at issue, we have concluded that RO's determination in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from HOAN is a portion of an e-mail containing comments and opinions drafted by a RO environmental attorney to a manager in one of its client offices. The communication consists of confidential discussions regarding a negotiation involving a policy determination. As such, this communication consists of a legal opinion arising from facts shared between the RO attorney and his client and is properly protected pursuant to the attorney-client privilege of Exemption 5.

Finally, HOAN challenges the withholding of information as "non-responsive." We have reviewed the redacted information, which consists of comments about the administrative record of a hazardous waste management permit. We determined that this information is not responsive to HOAN's FOIA Request and was therefore properly withheld. *See, e.g.*, *Environmental Defense Institute*, Case No. TFA-0295 (2009) (non-responsive material is not subject to disclosure under the FOIA); *see also Northwest Technical Resources, Inc.*, Case No. VFA-0611 (2000).

C. Public Interest Determination

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

In this case, no public interest would be served by release of the withheld material in the document at issue, which consists of the opinion of a RO attorney given to assist a manager with a negotiation strategy prior to the formulation of an agency response. Release of this information would reveal the analysis that the attorney used to advise the manager on how to proceed during the crux of the negotiation. It would also reveal the manager's final position. We therefore find that RO properly invoked the attorney-client privilege to withhold the negotiation strategy information contained in the document.

III. Conclusion

As discussed above, we find that RO performed a search reasonably calculated to reveal documents responsive to HOAN's request. In addition, we find that RO properly withheld the responsive material pursuant to the attorney-client privilege of Exemption 5 of the FOIA.

Finally, we find that RO properly withheld information as non-responsive to HOAN's FOIA request. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Heart of America Northwest on October 17, 2011, OHA Case No. FIA-11-0003, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 15, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Len Latkovski	)	
	)	
Filing Date: October 18, 2011	)	
	)	Case No.: FIA-11-0004
	)	

Issued: November 15, 2011

Decision and Order

On October 18, 2011, Len Latkovski ("Appellant") filed an Appeal from a determination issued by the Department of Energy (DOE) Office of Information Resources (OIR). In that determination, OIR responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On July 21, 2011, the Appellant submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for records relating to certain Soviet cities. *See* DOE Headquarters FOIA Request Form from Len Latkovski (July 21, 2011) (FOIA Request). DOE/FOIA forwarded the request to the Office of History and Heritage Resources (History) in the Office of the Executive Secretariat because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

History conducted a search of its records but did not locate responsive documents. *See* E-mail from Alexander Morris, FOIA Officer, OIR, to Len Latkovski (September 13, 2011) (Determination Letter). On October 18, 2011, the Office of Hearings and Appeals (OHA) received the Appellant's Appeal in which he requests an additional search for the information that he requested. *See* Letter from Len Latkovski to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted OIR to ascertain the scope of History's search for responsive documents. *See* E-mail from Avery Webster, Attorney-Examiner, OHA to Joan Ogbazghi, Information Access Specialist, OIR *(*November 7, 2011). In its response, History explained that it conducted thorough searches of its finding aids[2] using the Soviet city names that the Appellant provided. *See* E-mail from Terry Fehner, Historian, History, to Avery Webster, Attorney-Examiner, OHA *(*November 14, 2011) (Fehner E-mail). There were no references found and no responsive documents were located. *Id*. Based on the foregoing, we find that History performed a search reasonably calculated to reveal documents responsive to the FOIA Request. Accordingly, the search was adequate under the FOIA and, therefore, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Len Latkovski on October 18, 2011, OHA Case No. FIA-11-0004, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 15, 2011

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

[2] History's Finding Aids consist of a folder title listing and card catalog. *See* Fehner E-mail.

United States Department of Energy
Office of Hearings and Appeals

In the matter of National Security Archive	)	
	)	
Filing Date: November 1, 2011	)	
	)	Case No.: FIA-11-0006
	)	

Issued: December 7, 2011

Decision and Order

On November 1, 2011, National Security Archive (NSA or "Appellant") filed an Appeal from a determination issued by the Department of Energy's (DOE) Office of Information Resources (OIR). In that determination, OIR withheld information in response to a request for information that NSA filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to conduct a further search and release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On May 6, 2010, NSA submitted a FOIA request to the Office of Information Resources at DOE Headquarters (OIR), for documents pertaining to U.S. preparations for the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change and the Fifth Meeting of the Parties to the Kyoto Protocol held on December 7-18, 2009, in Copenhagen, Denmark. *See* Letter from Robert Wampler, Senior Fellow, NSA, to Carolyn Lawson, OIR (May 6, 2010) (FOIA Request). OIR forwarded the request to the Office of the Executive Secretariat (OES) and the Office of Policy and International Affairs (OPIA) because any documents responsive to the request, if they exist, would fall under the jurisdiction of those offices.

OES conducted a search of its records and did not locate responsive documents. *See* Letter from Alexander Morris, FOIA Officer, OIR, to Robert Wampler, NSA (September 29, 2011) (Determination Letter). OPIA conducted a search of its records and located 26 responsive documents. *Id*. In its Determination Letter, OIR released 22 of the OPIA documents in their entirety and withheld portions of two documents (labeled Documents 1 and 22) claiming that the responsive material was shielded under the deliberative process privilege of Exemption 5.[1] *See id*. In withholding the information, OIR stated that the information withheld in the responsive documents contained comments that do not represent final agency policy on the matters that they discuss. *Id*.

On November 1, 2011, the Office of Hearings and Appeals (OHA) received NSA's Appeal, in which it challenges OPIA's decision to withhold information under Exemption 5.[2] *See* Letter from Robert Wampler to OHA (Appeal Letter). NSA also challenges the search for responsive records and requests that DOE perform an additional search for briefing material and responsive records at the National Records Center. *Id*.

II. Analysis

A. Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[3]

During the processing of this Appeal, OHA contacted OPIA to ascertain the scope of its search for responsive documents, specifically with regard to briefing material and other records that may be stored at an off-site records holding center. *See* Memorandum of Telephone Conversation between Elmer Holt, OPIA, and Avery Webster, Attorney-Examiner, OHA (November 22, 2011); *see also* E-mail to Joan Ogbazghi, OIR, from Avery Webster, Attorney-

[1] Two of the responsive documents originated at other agencies and were referred to the agencies for review. *See* Determination Letter.

[2] Appellant does not appeal OES's determination of no responsive records. *See* Appeal.

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

Examiner, OHA (November 22, 2011); Memo To File, dated November 25, 2011. We have not yet received a response, and, therefore, are remanding this matter to OIR for a determination of whether responsive documents are located at an off-site records holding center. Any additional responsive documents and briefing material that are located will be identified and released to NSA, or the basis for their withholding will be explained in a new determination letter, with specific reference to one or more FOIA exemptions.

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. §1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of the document from NSA, OPIA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

Document 1

We have reviewed Document 1, a letter to "Amanda" from "Elmer," consisting of five paragraphs. The withheld portions of Document 1 consist of opinions, analysis and comments drafted by an OPIA manager regarding "R&D" (research and development) and technology financing. The comments and opinions contained in the letter are clearly predecisional and deliberative. The letter was drafted to assist a DOE employee formulate recommendations. In

addition, the document reflects the opinion of a DOE manager regarding a proposed agency position. These comments and opinions were subject to further agency review and do not represent the final agency decision. We therefore find that OPIA's determination in applying Exemption 5 was correct and consistent with the principles outlined above. We further find, however, that the first six words of the fourth paragraph constitute segregable information. The information is factual and does not represent opinion that reflects OPIA's deliberative process. OPIA must segregate and release this information or claim another exemption, explaining the basis for their withholding in a new determination letter.

Document 22

Document 22 consists of an electronic message (e-mail) chain with four e-mails regarding "Copenhagen talking point for S2 meeting with Ambassador Shankar on Dec. 15." We will discuss each e-mail in reverse chronological order, beginning at the top of the page.

E-mail 1, dated December 10, 2009, and sent at 10:49 am, consists of two sentences. The first sentence contains factual information concerning the Deputy Secretary's meeting with the Ambassador of India. The information contained in this sentence does not reveal the personal opinions, analyses, or recommendations of those individuals involved and as such, does not reflect OPIA's deliberative process. OPIA must either release this information or claim another exemption, explaining the basis for their withholding in a new determination letter. However, the second sentence consists of comments regarding possible future communications within the U.S. Government relating to the Deputy Secretary's future meeting with the Ambassador of India. As such, the second sentence is both predecisional and deliberative. It is predecisional because the comments were generated as part of a preparatory process in advance of the Deputy Secretary's meeting. It is also deliberative because it consists of internal deliberations regarding talking points to be provided to the Deputy Secretary in preparation for his meeting. We therefore find that the second sentence is protected under the deliberative process privilege of Exemption 5.

E-mail 2, dated December 3, 2009, and sent at 10:16 am, consists of three sentences which reference a meeting memorandum. We have reviewed this information and determined that the sentences contain factual information that does not represent opinion, analyses or recommendations that would reflect OPIA's deliberative process. OPIA must either release this information or claim another exemption, explaining the basis for their withholding in a new determination letter.

E-mail 3, dated December 3, 2009, and sent at 10:11 am, consists of two paragraphs. The first paragraph consists of opinion and comments regarding possible future communications within the U.S. Government relating to the Deputy Secretary's future meeting with the Ambassador of

India. As such, the first paragraph is both predecisional and deliberative. It is predecisional because its comments were generated as part of a preparatory process in advance of the Deputy Secretary's meeting. It is also deliberative because it consists of opinion and internal deliberations between DOE personnel regarding talking points to be provided to the Deputy Secretary in preparation for his meeting. We therefore find that the first paragraph is protected under the deliberative process privilege of Exemption 5. On the other hand, the information contained in the second paragraph is factual and does not represent opinion, analyses, or recommendations that reflect OPIA's deliberative process. OPIA must either release this information or claim another exemption, explaining the basis for their withholding in a new determination letter.

E-mail 4, dated December 3, 2009, and sent at 9:55 am, consists of one paragraph and five bullets of information that reference draft points of discussion at the Deputy Secretary's meeting. The second sentence of the first paragraph and the five bullets of information consist of opinion and comments regarding possible topics of discussion at a future meeting between the Deputy Secretary and the Ambassador of India. As such, this material is both predecisional and deliberative. The withheld text is predecisional since these e-mail comments were generated as part of a preparatory process in advance of the Deputy Secretary's meeting. Further, this information is deliberative since it consists of internal deliberations between DOE personnel regarding recommendations and talking points to be provided to the Deputy Secretary in preparation for a meeting. Given this, we find that this material is protected under the deliberative process privilege of Exemption 5. On the other hand, the first and third sentences of the first paragraph contain factual information and do not represent opinion that reflects OPIA's deliberative process. OPIA must segregate and release this information or claim another exemption, explaining the basis for their withholding in a new determination letter.

C. Public Interest Determination

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. *See* Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2.

OPIA concluded, and we agree, that disclosure of the information that we have identified in Document 1 and in the text of E-mails 1, 3 and 4 would have a chilling effect on the DOE's ability to consider similar issues in the future. Public revelation of preliminary employee deliberations regarding controversial issues could reduce the willingness of federal employees to

make candid assessments and recommendations. Therefore, release of the Exemption 5 information that we have identified in Document 1 and the text of E-mails 1, 3 and 4 would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by The National Security Archive on November 1, 2011, OHA Case No. FIA-11-0006, is hereby granted in part, as described in Paragraphs (2) and (3), below, and denied in all other respects.

(2) The matter is remanded to the Office of Information Resources so that the request submitted by The National Security Archive may be forwarded to the Office of Policy and International Affairs for a determination whether additional responsive documents, as described above, exist.

(3) The National Security Archive's Appeal is hereby granted regarding Document 1 and E-mails 1, 2, 3 and 4 of Document 22. The Office of Policy and International Affairs must segregate and disclose portions of those documents, as indicated in the discussion above, or issue a new determination justifying their withholding.

(4) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 7, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Wall Street Journal	)	
	)	
Filing Date: November 2, 2011	)	
	)	Case Nos.: FIA-11-0007
	)	FIA-11-0008

Appearance:

Issued: November 30, 2011

Decision and Order

On November 2, 2011, The Wall Street Journal (WSJ or "Appellant") filed an Appeal from two interim determinations issued by the Department of Energy's (DOE) Office of Information Resources (OIR), in response to two requests for documents that Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of Appellant's FOIA requests.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On September 23 and 26, 2011, Appellant filed two FOIA requests with OIR for records pertaining to the solar energy firm, Solyndra, LLC (Solyndra). Appellant's FOIA requests were assigned case processing numbers, HQ-2011-02010-F and HQ-2011-02017-F, respectively. In HQ-2011-02010-F, Appellant requested copies of "any documents, including term sheets and records detailing the terms, of a 2009 loan-guarantee and 2011 loan-guarantee restructuring given to Solyndra LLC by the Department of Energy under its loan-guarantee program." (FOIA Request A) In HQ-2011-02017-F, Appellant sought "access to any and all records and documents related to the Department of Energy's analysis and financial review of its investment in solar firm Solyndra LLC, including, but not limited to, a study performed for DOE by

Navigant, a market research firm and other external reviews performed by consultants and firms on DOE's behalf." (FOIA Request B) In both requests, Appellant identified itself as a representative of the news media and requested expedited processing contending that "an urgency to inform the public concerning actual or alleged Federal Government activity exists." Requests at 1.

On October 3, 2011, OIR issued two Interim Determination Letters in which it denied Appellant's requests for expedited processing because Appellant had not demonstrated a "compelling need" for expedited processing. *See* Letters to Deborah Solomon, WSJ, from Alexander Morris, FOIA Officer, OIR. (Interim Determination Letters) While OIR agreed that Appellant is "primarily engaged in disseminating information," it found that the request did not identify "an actual activity that poses any particular urgency that requires the dissemination of information in an expedited manner." Interim Determination Letters at 1.

On November 2, 2011, Appellant submitted the present Appeals.[1]

II. Analysis

The only issues under consideration in the present Appeals are Appellant's requests for expedited processing. Appellant has made a number of arguments in support of its contention that it has a compelling need for expedited processing of its request. In its requests, Appellant asserted:

(1) Release of the requested information will contribute to the public's understanding of "the government's initial agreement with [Solyndra] and its subsequent agreement to take a secondary position to other investors in the firm." FOIA Request A at 2;

(2) "The public has an urgent need to know about DOE's loan-guarantee program, including the research and analysis it undertook ahead of granting a loan-guarantee to Solyndra…" FOIA Request B at 2.

In its Appeals, Appellant asserts that its requests meet the requirements set forth by the D.C. Circuit Court to determine whether a requestor has demonstrated an urgency to inform the public. Appeal at 1. In this regard, Appellant contends that its requests concern a matter of current exigency to the American public. According to Appellant, a search of Westlaw's news database for articles discussing DOE's loan guarantees to Solyndra indicates that more than 1,300 articles have been published in the last ninety days by news outlets. *Id*. at 2. Appellant further contends that failing to grant expedited processing would prevent the review of material for preparation of an article that would enhance public debate on potential legislative action (*e.g.*, testimony by Secretary Chu and others at planned congressional hearings and legislative considerations measures). *Id.* at 3. Finally, Appellant argues that there is no question that its requests concern federal government activity, as they seek materials related to a federal agency's decision to grant loan guarantees by federal legislation to a particular company. *Id*. at 4.

[1] HQ-2011-02010-F has been designated as OHA Case No. FIA-11-0007, and HQ-2011-02017-F has been designated as OHA Case No. FIA-11-0008. This Decision will address both Appeals.

Agencies generally process FOIA requests on a "first in, first out" basis, *i.e.*, according to the order in which they are received. When an agency grants a requester expedited processing, that requester receives preference over previous requesters, by having its request moved ahead in line, thereby delaying the processing of earlier requests. Accordingly, the FOIA provides that expedited processing is to be offered when a requester is able to demonstrate "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I).

Under the FOIA, "compelling need" means:

> (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life of or physical safety of an individual; or
>
> (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to *inform the public* concerning actual or alleged *Federal Government activity*.

5 U.S.C. § 552(a)(6)(E)(v) (emphasis added). The relevant legislative history indicates that the "specified categories for compelling need are intended to be narrowly applied." H.R. Rep. No. 104-795 at 26 (1996).

The present case clearly does not involve information which could reasonably be expected to pose an imminent threat to the life or safety of an individual. It does, however, involve a requester which OIR has determined to be a "person primarily engaged in disseminating information." Determination Letters at 1. Therefore, the question before us is whether Appellant has demonstrated "urgency to inform." The legislative history states:

> The standard of "urgency to inform" requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

H.R. Rep. No. 104-795, at 26 (1996). Accordingly, the D.C. Circuit Court has ruled that in order to determine whether a requester has demonstrated an "urgency to inform" and, thus, a "compelling need," at least three factors should be considered: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). In previous cases before this office, we have applied these factors in order to determine whether a requester has demonstrated that its request is entitled to expedited processing. *See, e.g., Sierra Club,* Case No. TFA-0488 (2011); *Southeastern Legal Foundation, Inc.,* Case No. TFA-0389 (2010); *Center for Investigative Reporting,* Case No. TFA-0200 (2007).[2]

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

Applying these factors to the present case, we find that WSJ has not demonstrated an "urgency to inform" within the meaning of FOIA. First, Appellant has not established that the requested information is a matter of *current* exigency to the American public. It is true that the public has an interest in the award of loan guarantees to Solyndra, DOE's loan guarantee program, and oversight of this type of financial support. However, "[t]he public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the "urgency to inform"] standard." *Al-Fayed*, 254 F.3d at 310.

Further, Appellant has not made clear that the requested information will not be useful if processed within the time frame of a normal FOIA request (*i.e.*, 20 working days). Appellant argues that it has a significant recognized interest in enhancing public debate on potential legislative action and contends that failure to process its requests within the normal 20-day timeframe will stifle its participation. Appeal at 3. DOE's Loan Program Office has acknowledged that while the records responsive to Appellant's requests may be voluminous and exceedingly technical in nature, it will make "every effort" to process the FOIA Requests within 20 days. *See* Letters to Deborah Solomon, WSJ, from David Frantz, Director, Loan Guarantee Program Office (October 13, 2011). Moreover, Appellant acknowledges that there are a series of hearings examining the Solyndra loan guarantees that are "expected to continue" in which it may participate. Appeal at 3. Thus, the processing of Appellant's request within the normal 20-day deadline will not suppress its participation in public debate.

For the reasons set forth above, we cannot find that the request concerns a matter of current exigency to the American public or that processing the request within the time frame of a normal FOIA request would compromise a significant recognized interest. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed on November 2, 2011, by the Wall Street Journal, OHA Case Nos. FIA-11-0007 and FIA-11-0008, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 30, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of The National Security Archive	)	
Filing Date: November 3, 2011	)	Case No.: FIA-11-0009

Issued: November 22, 2011

Decision and Order

On November 3, 2011, The National Security Archive (NSA or "Appellant") filed an Appeal from a determination issued by the Department of Energy's (DOE) Oak Ridge Office (Oak Ridge). In that determination, Oak Ridge responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oak Ridge to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On September 15, 2011, the Appellant submitted a FOIA request to the Office of Information Resources at DOE Headquarters (OIR), for records concerning developments in the West German gas centrifuge program. *See* Letter from William Burr, NSA, to Alexander Morris, FOIA Officer, OIR (FOIA Request). OIR forwarded the request to Oak Ridge for a search for responsive documents.

Oak Ridge conducted a search of its records but did not locate responsive documents. *See* E-mail from Amy Rothrock, FOIA Officer, Oak Ridge, to William Burr, NSA (October 25, 2011) (Determination Letter). On November 3, 2011, the Office of Hearings and Appeals (OHA) received NSA's Appeal, in which it requests an additional search for the information that it requested. *See* Letter from William Burr, NSA, to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted Oak Ridge to ascertain the scope of its search for responsive documents. *See* E-mail from Avery Webster, Attorney-Examiner, OHA, to Amy Rothrock, FOIA Officer, Oak Ridge *(*November 7, 2011). In its response, Oak Ridge explained that it conducted thorough searches of the Oak Ridge classified vault, Oak Ridge National Laboratory, Paducah and Portsmouth Gaseous Diffusion Plants, the former Oak Ridge Gaseous Diffusion Plant (K-25), and its archives, using electronic and paper finding aids such as SF-135 forms for record shipments and retention or destruction. *See* E-mail from Amy Rothrock, FOIA Officer, Oak Ridge, to Avery Webster, Attorney-Examiner, OHA *(*November 15, 2011). There were no responsive documents found within the scope of the request. *Id*. Based on the foregoing, we find that Oak Ridge performed a search reasonably calculated to reveal responsive documents in its possession.

In its Appeal, NSA requests that DOE conduct a search of its "historical files" for the information that it requested. *See* Appeal Letter. We contacted OIR to determine whether it should have sent NSA's request to other offices. *See* E-mail from Avery Webster, Attorney-Examiner, to Alexander Morris, FOIA Officer, OIR (November 15, 2011). OIR indicated that the FOIA Request should also have been assigned to the Office of History and Heritage Resources (History). *See* E-mail from Alexander Morris, FOIA Officer, OIR, to Avery Webster, Attorney-Examiner, OHA (November 15, 2011). In light of this information, we will remand this matter back to OIR for a search of History's files.

It Is Therefore Ordered That:

(1) The Appeal filed by The National Security Archive on November 2, 2011, OHA Case No. FIA-11-0009, is hereby granted in part, as described in Paragraph (2), below, and denied in all other respects.

(2) The matter is remanded to the Office of Information Resources so that the request submitted by The National Security Archive may be assigned to the Office of History and Heritage Resources to search for responsive documents, as described above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 22, 2011

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

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Sierra Club	)	
	)	
Filing Date: November 3, 2011	)	
	)	Case No.: FIA-11-0010
	)	

Issued: December 29, 2011

Decision and Order

On September 27, 2011, Sierra Club (or "Appellant") filed an Appeal from a final determination issued by the Department of Energy's (DOE or "agency") Loan Guarantee Programs Office (LGPO). In that determination, LGPO responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO released a substantial amount of responsive information, but withheld responsive information under FOIA Exemptions 4 and 6. This Appeal, if granted, would require LGPO to release that information it has withheld to Appellant, and to conduct a new search for responsive documents.

I. Background

On January 5, 2010, Sierra Club submitted a FOIA request to the Office of Information Resources at DOE Headquarters (OIR), for information pertaining to DKRW Advanced Fuels' "Medicine Bow Fuel and Power LLC" project (Medicine Bow).[1] *See* DOE Headquarters FOIA Request Form from Andrea Issod (FOIA Request). Specifically, Sierra Club requested "all information in the DOE's file related to Medicine Bow's application for a federal loan guarantee, including the entire application that Medicine Bow submitted to DOE, and any other documents that DOE will review and use to draft the EIS [Environmental Impact Statement]." *Id.* OIR forwarded the request to the LGPO because any document responsive to the request, if it exists, would fall under the jurisdiction of that office.

LGPO conducted a search of its records and located approximately 200 responsive documents. *See* Letters from David G. Frantz, Director, LGPO, to Andrea Issod, Sierra Club (December 22,

[1] The Medicine Bow project is a coal to liquids project using GE and Exxon technology to make gasoline from coal.

2010, March 9, 2011, May 31, 2011, September 29, 2011) (First, Second, Third, and Final Determination Letters). Given the large scope of the FOIA request, LGPO provided partial responses to the FOIA Request on a rolling basis, as documents were located, reviewed, and made ready for release. In its first response, LGPO released one document consisting of 353 pages but withheld portions pursuant to Exemption 4. *See* First Determination Letter. In its second response, LGPO released 39 documents in their entirety. *See* Second Determination Letter. In its third response, LGPO released one document consisting of 300 pages but withheld portions pursuant to Exemption 4. *See* Third Determination Letter. In its final response, LGPO released approximately 150 documents but withheld portions pursuant to Exemptions 4 and 6. *See* Final Determination Letter.

On November 3, 2011, the Office of Hearings and Appeals (OHA) received Sierra Club's Appeal, in which it challenges LGPO's decision in the First and Final Determination Letters to withhold information under Exemptions 4 and 6.[2] *See* Letter from David Bahr to OHA (Appeal Letter). Sierra Club argues that LGPO improperly applied Exemptions 4 and 6 to certain withheld information. *Id*.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemptions 4 and 6 are at issue in the present case.

A. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be

[2] Sierra Club does not appeal LGPO's second or third responses to its FOIA Request. *See* Appeal at 1. Therefore, we will not consider these Exemption 4 withholdings.

exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, DKRW was required to submit the documents in question as part of its participation in the agency's loan application process. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under Exemption 4, the first requirement is that the withheld information be "commercial or financial."[3] The information submitted by DKRW, *i.e.*, financing plans, business strategies, and procurement plans, *etc.*, clearly satisfies the definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000).[4] DKRW, a limited liability company, satisfies that definition. Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the application process for the project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. The question, then, turns to whether release of the information would likely result in substantial competitive harm to the submitters of the information.

LGPO determined that release of the commercial and financial information contained in DKRW's loan applications and attachments would likely cause the company substantial competitive harm by granting undue advantage to DKRW's potential competitors who are now, due to consistently high oil prices, beginning to look at the same technologies for the production of gasoline. Given that the Medicine Bow project is the first of its kind, it is reasonable to conclude that the release of commercial, financial and proprietary information contained in the loan application would likely to cause substantial harm to DKRW's competitive position. *See, e.g., Alliance to Protect Nantucket Sound*, Case No. TFA-0479 (2011). Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents.

[3] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

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

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Turning to the present case, the withheld information under Exemption 6 consists of personal information concerning members of the public such as those individuals' names, personal addresses, phone numbers and signatures. The Appellant challenges the propriety of these deletions.

It is well settled that privacy interests of members of the public can be violated when information is released that can be identified as applying to them. *Washington Post, 456 U.S. 595, 602.* Accordingly, when disclosure of information which applies to a particular individual is sought from Government records, an agency must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. *Id.* Therefore, LGPO correctly concluded that the individuals whose personal information appears in the responsive documents have a privacy interest which would be invaded if certain information was released to the public.

With regard to the names, personal addresses, phone numbers of members of the public, it is clear that release of this information would not further the public interest by shedding light on the operations and activities of the Government. Release of personal information such as names, addresses, and phone numbers would contribute little, if any, to public understanding of any matter of public concern. Because we have found a privacy interest in the names, addresses and phone numbers of members of the public and no public interest in their disclosure, we find that release of this information would constitute a clearly unwarranted invasion of personal privacy.

In several documents, LGPO redacted the signatures of certain individuals whose names had been released. Accordingly, those redactions do not protect the identity of the individual but rather the individual's privacy interest in his signature. Three federal district court decisions have discussed whether the release of an individual's signature would constitute a clearly

unwarranted invasion of personal privacy. *See Calvert v. United States*, 662 F. Supp. 2d 27 (D.D.C. 2009) (Urbina, J.); *Trupei v. DEA*, 2005 WL 3276290, *2 (D.D.C. September 27, 2005) (Sullivan, J.); *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 84 (D.D.C. 2005) (Lamberth, J).

All three cases involved the signatures of federal employees. In *Brannum*, the court considered whether release of the names and signatures on personnel board documents would constitute a clearly unwarranted invasion of personnel privacy. In the court's view, release of the names and signatures would create an opportunity for misappropriation of the signatures and make employees less likely to voluntarily serve on the board, while most likely not shedding any light on the board's performance. *Id.* Accordingly, the court upheld the withholding of the names and signatures. In *Trupei* and *Calvert*, the issue was whether the release of the signatures of law enforcement agents would constitute a clearly unwarranted invasion of personal privacy, where their names had already been released. In *Trupei*, the court ordered the release of the signature, citing the agency's release of signatures in another case involving the same plaintiff, and viewing the concern of misappropriation as "too speculative" to compromise a "substantial, rather than a de minimis, privacy interest." *Trupei* at 2. *Trupei* distinguished *Brannum*, stating that *Brannum* relied not only on the claim of misappropriation of the signatures but also on the claim that release of the names and signatures might make employees less likely to voluntarily serve on the board. *Id.* at 2 n.2. In *Calvert*, the court stated that the agency had not adequately shown that the threat to privacy in release of the signature was "real rather than speculative." *Calvert* at 32. As a result, the court denied the agency's motion for summary judgment, but did so without prejudice, thereby leaving open the possibility of a further showing on that issue.

In its determination letter, LGPO did not explain why it believed that the release of the signatures would constitute a clearly unwarranted invasion of personnel privacy. Accordingly, consistent with *Calvert*, we are remanding the matter to LGPO to give it an opportunity to opine on this issue.[5]

C. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal case law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency may withhold pursuant

[5] We note that, in at least one instance, LGPO withheld a signature pursuant to Exemption 6, where it did not otherwise disclose the individual's name and where the disclosure of the name would reveal Exemption 4 information. *See* II.C. 8 Attachment 4. Such a signature is properly withholdable under Exemption 4 and need not be addressed under Exemption 6.

to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g.*, *Tom Marks*, Case No. TFA-0379 (2010). Accordingly, we may not consider whether the public interest warrants discretionary release of the information we have deemed properly withheld under Exemption 4. With respect to the material that we determined to be exempt from mandatory disclosure under Exemption 6, our analysis includes a determination that the public interest in disclosure does not outweigh the privacy interest at issue.

III. Conclusion

As discussed above, we find that LGPO properly withheld commercial, financial and proprietary information pursuant to Exemption 4 and names, addresses and phone numbers pursuant to Exemption 6 in the documents that it released to Sierra Club. However, we will remand this matter to LGPO to either release the signatures or to issue another determination to justify the continued withholding of this information under Exemption 6 or another exemption of the FOIA.[6]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Sierra Club, Case No. FIA-11-0010, is hereby granted in part, as described in Paragraph (2), below, and denied in all other respects.

(2) The matter is remanded to the Loan Guarantee Programs Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 29, 2011

[6] The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). We find that LGPO complied with the FOIA's segregability requirement by releasing to the Appellant all portions of the documents not withholdable under Exemptions 4 and 6, with the possible exception of the signatures. As indicated above, we have directed LGPO to again review the releasibility of that information.

United States Department of Energy
Office of Hearings and Appeals

In the matter of Janet Alyeshmerni	)	
	)	
Filing Date: November 7, 2011	)	
	)	Case No.: FIA-11-0011
	)	

Appearance:

For the Appellant: Janet Alyeshmerni

Issued: November 16, 2011

Decision and Order

On November 7, 2011, Janet Alyeshmerni (Appellant) filed an Appeal from a determination issued to her on October 11, 2011, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In its determination, Oak Ridge released documents as responsive to the Appellant's request, but withheld portions of the documents under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant challenges the adequacy of the search for documents responsive to her request. This Appeal, if granted, would require Oak Ridge to conduct an additional search for information.

On May 11, 2011, the Appellant filed a request with the Centers for Disease Control and Prevention (CDC) in Atlanta, Georgia. In that request, she asked for a number of documents regarding her father's exposure to radiation, radioactivity, and beryllium. Request Letter dated May 11, 2011, from the Appellant to Katherine Norris, FOIA Officer, CDC. CDC recognized that some of the information it found responsive to the Appellant's request originated at DOE. Therefore, on June 28, 2011, the CDC forwarded 57 pages to DOE Headquarters (DOE/HQ) to review and issue a determination regarding their release. Transmittal Letter dated June 28, 2011, from Katherine Norris, CDC FOIA Officer to DOE FOIA Officer. DOE/HQ forwarded the 57 pages of documents to Oak Ridge for a determination regarding releasability on October 6, 2011. On October 11, 2011, Oak Ridge released the documents to the Appellant, withholding the names, social security numbers, and birthdates of individuals mentioned in the documents.

On November 7, 2011, the Appellant appealed to the Office of Hearings and Appeals (OHA). Appeal Letter received November 7, 2011, from the Appellant to Director, OHA, DOE. In her

Appeal, the Appellant did not challenge Oak Ridge's withholding of names, social security numbers, and birthdates. *Id.* Rather, the Appellant claimed that her request was denied because she did not receive anything responsive to her request. *Id.*

The Appellant's FOIA request concerned CDC records. The CDC sent to DOE/HQ 57 pages of responsive documents that originated with DOE for a response with respect to their releasability. 45 C.F.R. § 5.23.[*/] Accordingly, the October 11, 2011, Determination Letter from Oak Ridge concerns only the 57 pages that CDC referred to DOE. As stated above, the Appellant does not challenge DOE's withholding of information in those documents. Thus, the Appeal relates to the adequacy of the CDC search. OHA has no jurisdiction regarding the adequacy of CDC's search for responsive information. Therefore, we will dismiss the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Janet Alyeshmerni, Case No. FIA-11-0011, is hereby dismissed.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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[*/] The CDC regulations state "[i]f you request records that were created by, or provided to us by, another Federal agency, and if that agency asserts control over the records, we may refer the records and your request to that agency. . . . In these cases, the other agency will process and respond to your request, to the extent it concerns those records, under that agency's regulation, and you need not make a separate request to that agency. We will notify you when we refer your request to another agency."

United States Department of Energy
Office of Hearings and Appeals

In the matter of Philip Premysler	)	
	)	
Filing Date: November 21, 2011	)	
	)	Case No.: FIA-11-0012
	)	

Issued: December 21, 2011

Decision and Order

On November 21, 2011, Philip Premysler ("Appellant") filed an Appeal from a determination issued by the Department of Energy (DOE) National Energy Technology Laboratory (NETL). In that determination, NETL withheld information in response to a request for information that Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NETL to release the withheld information.

I. Background

On September 28, 2011, Appellant submitted a FOIA request to NETL in which the Appellant sought copies of all documents referenced in "Appendix A" of a Document entitled "Final Report on Review of Phillips Lighting Company 60 Watt L Prize[1] Submission." *See* E-mail from Philip Premysler, to Ann Dunlap, FOIA Officer (September 28, 2011) (FOIA Request).[2]

On October 26, 2011, NETL responded to Appellant's request. *See* Letter from Anthony V. Cugini, Director, NETL, to Philip Premysler (October 26, 2011) (Determination Letter). In its Determination Letter, NETL explained that it did not own the requested documents because the documents contained "raw data and testing results" of subcontractors. *See id.*

[1] The L-Prize refers to the L-Prize Bright Tomorrow Lighting Prize. The L-Prize was established under the Energy Independence and Security Act of 2007.

[2] The documents listed in the Appendix and which are the subject of this appeal are: Sphere Results-Summary.xls (2 separate documents); LPrize60w-Gonio Results.doc; Final Pacific Northwest National Laboratory (PNNL) test report; PNNL Testing of ELCV dimmers; and PNNL L-Prize dimmer check.docx. We will refer to these documents collectively as "Documents."

On November 21, 2011, the Appellant appealed NETL's response to his FOIA Request. *See* Letter from Philip Premysler to OHA (Appeal Letter). Appellant asserts that because DOE funded the testing that produced the data, DOE does, in fact, "own" the data. *See id*.

II. Analysis

To determine whether documents are agency records subject to the FOIA, we ask (1) whether the organization is an "agency" for purposes of the FOIA; and (2) whether the requested documents are "agency records." *See, e.g., Faye Vlieger*, Case No. TFA-0250 (April 11, 2008); *Eugenie Reich*, Case No. TFA-0213 (November 13, 2007). It is beyond dispute that NETL is part of DOE. *See Minneapolis Star Tribune*, Case No. TFA-0091 (April 5, 2005). As to whether the Documents are "agency records," the FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

> (1) The intent of the document's creator to retain or relinquish control over the document;
>
> (2) The ability of the agency to use and dispose of the record as it sees fit;
>
> (3) The extent to which agency personnel have read or relied upon the record; and
>
> (4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (May 4, 2010).

Even in the event the DOE finds that documents are not agency records, it must also consider whether its contract with its contractors require that documents created in performance of the contract be provided for public disclosure. The DOE's FOIA regulations provide that when a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2). 10 C.F.R. § 1004.3(e). Consequently, in determining whether requested records may be withheld from disclosure, an agency must also review the relevant contracts to determine if there are specific provisions defining ownership of documents created pursuant to the contract.

Based upon the information available to us, we are unable to determine if the Documents are in fact agency records. Therefore, we will remand this matter to NETL to make a new determination to the Appellant regarding the Documents using the analytic methodology provided above.[3] In its new Determination, NETL should make another finding as to whether the

[3] NETL further stated in its Determination Letter that if it did own the records, the information would have been

Documents are agency records. If it finds that the Documents are not agency records, it should issue another Determination Letter to the Individual stating an adequate basis for this finding. If NETL finds that the Documents are agency records, it should either release the records to the Appellant or cite an applicable FOIA Exemption justifying the withholding of the Documents.[4]

It Is Therefore Ordered That:

(1) The Appeal filed by Philip Premysler on November 22, 2011, OHA Case No. FIA-11-0012, is hereby granted as described in Paragraph (2) below.

(2) The matter is remanded to the National Energy Technology Laboratory to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 21, 2011

withheld under Exemption 4 of the FOIA. *See* Determination Letter. Because NETL did not cite Exemption 4 as justification for withholding the Documents, we need not consider the applicability of Exemption 4 to the Documents in this Decision.

[4] Appellant also asserted in his Appeal that a search for responsive documents should have been conducted throughout all DOE. However, in the present case, it appears that all of the documents that have been requested have, in fact, been found. Consequently, given the facts of this case, any additional search for documents would be moot and we will not consider the Appellant's challenge to the adequacy of NETL's search.

United States Department of Energy
Office of Hearings and Appeals

In the matter of National Security Archive	)	
	)	
Filing Date: November 22, 2011	)	
	)	Case No.: FIA-11-0013
	)	

Issued: December 14, 2011

Decision and Order

On November 22, 2011, National Security Archive (NSA or "Appellant") filed an Appeal from a determination issued by the Department of Energy's (DOE) Office of Information Resources (OIR). In that determination, OIR responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 14, 2010, NSA submitted a FOIA request to the Office of Information Resources at DOE Headquarters (OIR), for documents relating to the Sixth Conference of the Parties (COP-6) to the United Nations Framework Convention on Climate Change (UNFCCC) and the resumed thirteenth sessions of the UNFCCC's subsidiary bodies, which were held in The Hague, the Netherlands, from 13-25 November 2000. *See* Letter from Robert Wampler, Senior Fellow, NSA, to Carolyn Lawson, OIR (October 14, 2010) (FOIA Request). Specifically, NSA requested that the scope of the search include documents prepared for the Secretary of Energy and any other agency officials who were involved in preparations for the conference or were part of the U.S. delegation to the conference. *Id*. NSA provided a list of individuals who participated in the conference: Margot Anderson, Director, Office of Policy; Richard A. Bradley, Senior Advisor on Global Change, Office of Policy; William Breed, Senior Environmental Scientist, Office of Policy and International Affairs (OPIA); Lisa Hanle, Economist, Office of Policy; Peter Karpoll, Senior Economist, Office of Policy; and Dan Reicher, Assistant Secretary for Energy Efficiency and Renewable Energy (EERE).

OIR forwarded the request to OPIA and EERE because any documents responsive to the request, if they exist, would fall under the jurisdiction of those offices. OPIA and EERE conducted searches of its records and neither located responsive documents. *See* Letter from Alexander Morris, FOIA Officer, OIR, to Robert Wampler, NSA (October 26, 2011) (Determination Letter). On November 22, 2011, the Office of Hearings and Appeals (OHA) received NSA's Appeal, in which it challenges the search for responsive records, including whether OPIA searched for responsive records at the National Records Center. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted OPIA and EERE to ascertain the scope of their search for responsive documents. *See* E-mail to Joan Ogbazghi, OIR, from Avery Webster, OHA (November 22, 2011); *see also* E-mails to Joan Ogbazghi, OIR; Edith Horne, OPIA; and Patrick Shipp, EERE, from Avery Webster, OHA (November 30, 2011) (December 5, 2011) (December 7, 2011). We have not yet received a response from OPIA, and, therefore, are remanding this matter to OIR for an explanation of OPIA's search for responsive documents and a determination of whether responsive documents are located at an off-site records holding center. The new determination letter should explain the parameters of the search of both on-site and off-site records, if any. Any additional responsive documents that are located will be identified and released to NSA, or the basis for their withholding will be explained in a new determination letter, with specific reference to one or more FOIA exemptions.

With regard to its search, EERE explained that the staff that was present during Dan Reicher's tenure was queried for information, and no results were found. *See* E-mail from Patrick Shipp, EERE, to Avery Webster, OHA (November 29, 2011). There was no external search for records requested because there was no indication from the staff members that documents were moved outside of the EERE offices. *Id*. EERE further informed us that Mr. Reicher's travel records were found, but were not responsive to the FOIA Request. *Id*. Based on the foregoing, we find

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

that EERE performed a search reasonably calculated to reveal documents responsive to the FOIA Request. Accordingly, the search performed by EERE was adequate under the FOIA and, therefore, this portion of the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive on November 22, 2011, OHA Case No. FIA-11-0013, is hereby granted in part, as described in Paragraph (2), below, and denied in all other respects.

(2) The matter is remanded to the Office of Information Resources so that the request submitted by National Security Archive may be forwarded to the Office of Policy and International Affairs for an explanation of its search for responsive records and a determination whether responsive documents, as described above, exist.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 14, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Kim Zetter	)	
	)	
Filing Date: November 28, 2011	)	Case Nos.: FIA-11-0014
	)	FIA-11-0015
	)	

Appearance:

For the Appellant: Kim Zetter

Issued: December 12, 1011

Decision and Order

On November 28, 2011, Kim Zetter (Appellant) filed two Appeals from determinations issued to her on October 11, 2011, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In the determinations, Idaho found that it did not have any documents responsive to the Appellant's requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Idaho to conduct an additional search for information.

On October 5, 2011, the Appellant filed two requests with Idaho. The first request, Request No. ID-2012-00118-F, was for "all documents, reports, testing plans and correspondence regarding the Stuxnet worm, also known as W32.Temphid and RootkitTmpHider." Request dated October 5, 2011, from Appellant to Idaho FOIA Officer. The second request, Request No. ID-2012-00119-F, was for "all documents, reports, testing plans, and correspondence regarding the so-called Aurora Generator Test, also called the Aurora Project, that Idaho National Laboratory conducted in 2007." Request dated October 5, 2011, from Appellant to Idaho FOIA Officer. On October 25, 2011, Idaho responded to both requests stating that it had no responsive documents and that the requests concerned Battelle Energy Alliance (BEA) "Work for Others" projects that were performed for the Department of Homeland Security (DHS).[1/] Determination Letters for Request Nos. ID-2012-00118-F and ID-2012-00119-F dated October 25, 2011, from Clayton Ogilvie, Idaho FOIA Officer, to Appellant.

On November 28, 2011, the Appellant appealed to the Office of Hearings and Appeals (OHA). Appeal Letters received November 28, 2011, from the Appellant to Director, OHA, DOE. In her

[1/] Idaho cited to DOE Contract No. DE-AC07-05ID14517 and the DEAR § 970.5204-3, both of which refer to "Access To and Ownership of Records."

Appeals, the Appellant challenged Idaho's determination that the requested records were not DOE records. *Id.*

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Idaho has stated that it did not create or obtain the information at issue. The information is stored on a computer that is owned by DHS and is in the possession of BEA. Likewise, Idaho does not have possession[2/] or control of the information. The documents were created by BEA under the clause in its contract with Idaho that allows it to do "Work for Others,"[3/] in this case, DHS. DOE was not involved in the projects, other than they were conducted at the Idaho National Laboratory. As the Appellant quotes in her Appeal, under clause I.15 of the contract and the DEAR, government-owned records are defined as "all records acquired or generated by the contractor *in its performance of this contract*." DOE Contract No. DE-AC07-05ID14517, Clause I.15; DEAR § 970.5204-3, Clause I.15; Appeal Letter at 2 (emphasis added). Because the requested records were not generated by BEA in its performance of the contract between it and DOE, the records are not DOE records. Therefore, we will deny the Appeals.

It Is Therefore Ordered That:

(1) The Appeals filed by Kim Zetter, Case Nos. FIA-11-0014 and FIA-11-0015, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Director
Office of Hearings and Appeals

Date: December 12, 2011

[2/] E-mail dated December 8, 2011, from Clay Ogilvie, Idaho FOIA Officer, to Janet Fishman, OHA, DOE.

[3/] Clause I.61 of DOE Contract No. DE-AC07-05ID14517 and the DEAR 970.5217-1 allow BEA to perform work for others at the Idaho National Laboratory. "Pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535), and the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq*.) or other applicable authority, the Contractor may perform work for non-DOE entities (sponsors) on a fully reimbursable basis in accordance with this clause." DOE Contract No. DE-AC07-05ID14517, Clause I.61 (a) Authority to Perform Work for Others; DEAR § 970.5217-1

United States Department of Energy
Office of Hearings and Appeals

In the Matter of La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee	)	
Filing Date: December 2, 2011	)	Case No.: FIA-11-0016

Issued: January 3, 2012

Decision and Order

On December 2, 2011, the La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee ("La Cuna") filed an appeal from determinations issued to it on September 15, 2011, and November 28, 2011, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In each determination, LGPO responded to a request for documents that La Cuna submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to the La Cuna's FOIA request, LGPO identified and released a number of responsive documents, but withheld portions of the documents pursuant to FOIA Exemption 4. This appeal, if granted, would require LGPO to release the withheld information to La Cuna.

I. BACKGROUND

On April 13, 2011, La Cuna filed a FOIA request for information pertaining to any DOE loan guarantee to BrightSource Energy, Inc. (BrightSource), in connection with the Ivanpah Solar Energy Generating System (Ivanpah), including any loan guarantee application from BrightSource, and any documents supporting a loan guarantee to BrightSource. *See* Letter from Mekaela M. Gladden, Briggs Law Corporation, to FOIA Officer, DOE (April 13, 2011).

In partial responses issued on September 15, 2011, and November 28, 2011, LGPO released six documents from which information was withheld pursuant to Exemption 4 of the FOIA. These six documents are (1) BrightSource's November 2008 Loan Guarantee Application; (2) an appendix to the application containing a detailed technical description of the projects for which it sought a loan guarantee; (3) an appendix to the application containing proposed terms of the loan guarantee; and (4) three documents dated January 29, 2010, in each of which the DOE "outlines the principal indicative terms and conditions" for a "potential" loan guarantee to BrightSource

related to three separate solar thermal electric generating plants. The latter three documents each bear the signature of the Chief Executive Officer of BrightSource, indicating acceptance of the terms contained therein. *See* Letter from David G. Frantz, Director, LGPO, to Mekaela M. Gladden, Briggs Law Corporation (September 15, 2011) (September Determination); Letter from David G. Frantz, Director, LGPO, to Mekaela M. Gladden, Briggs Law Corporation (November 28, 2011) (November Determination).

As grounds for its Appeal, La Cuna cites the lack of a final response from LGPO and contends that, having received "only six documents" responsive to the request, "an excessive amount of time has lapsed without a complete response." Appeal at 2. La Cuna also objects to the fact that the documents released have been "heavily redacted." *Id.* It notes that many of the topics of information withheld from the documents were discussed in a press release issued by BrightSource, a copy of which the La Cuna provided with its appeal. *Id.* La Cuna argues that the fact that information is of a type discussed in a press release "weighs against a determination that such information is confidential and proprietary, ..." *Id.*

After our receipt of the present Appeal, LGPO provided for our review unredacted versions of each of the documents at issue in this matter, as well as the redacted documents that were released to La Cuna.

II. ANALYSIS

Where the DOE decides to withhold information in response to a FOIA request, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. These requirements aid the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Russ Choma*, Case No. TFA-0495 (2011).

In the present case, LGPO clearly identified FOIA Exemption 4 as its basis for withholding information, and therefore its determinations met the second requirement above. With regard to the other two requirements, *i.e.*, whether LGPO adequately identified the information it withheld from the Appellant and whether it adequately justified its withholdings, we find below that LGPO's determinations were adequate in certain respects, but not in others. As a result we will remand this matter to LGPO for a new determination.

A. Whether LGPO Adequately Identified the Information It Withheld

In applying Exemption 4 to the information withheld in its September and November determinations, LGPO identified the withheld information as "sensitive commercial information that is maintained in confidence by [Bright Source] and not available in public sources," including "financing plans, business strategies, and procurement plans." *See* September Determination at 1-2; November Determination at 1-2. Having reviewed the information that was withheld from the documents at issue, we find that LGPO's determination provided a reasonable description of much of the information withheld. There is, however, other information withheld from the Appellant to which the identified categories do not readily apply.

For example, nearly all of the information withheld from one of the six documents, an appendix to BrightSource's application, consists of design specifications used in BrightSource's "LPT technology," which uses mirrors to reflect and capture solar energy. In response to our query as to which of the identified categories of withheld information these design specifications belonged, LGPO stated that "they are detailed technical descriptions of project technology that contain trade secrets and information that would give a competitor insights into how BrightSource designs its products. It seems such information could fall in either the 'business strategy' or 'procurement plans' category." Email from LGPO to Steven Goering, OHA (December 20, 2011).

We disagree, and cannot find that any of these terms, "financing plans," "business strategies," or "procurement plans," reasonably describes the design specifications withheld from the appellant. LGPO explained that this "exact language is used in every response letter that describes information withheld under" Exemption 4. *Id.* However, because a variety of types of information can be withheld under Exemption 4, it is simply not sufficient to apply the same descriptor to information withheld in every case. Instead, the description contained in a determination must accurately reflect the *actual information* being withheld in that particular case.

This does not mean that the descriptions used must necessarily be more specific than those used in LGPO's determinations, but the information being withheld must at least reasonably fall into one of the categories of information listed in the determination.[1] In the present case, LGPO's description in its response to our office, "detailed technical descriptions of project technology," would have sufficed, had it been used in the November determination. On remand, LGPO should review the information it has redacted from the documents it has released and provide, in its new determination, an accurate accounting of the types of information being withheld.

B. Whether LGPO Adequately Justified the Information It Withheld

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in

[1] Conversely, this issue cannot be addressed by merely providing, in every determination, the same exhaustive list of categories of information, unless all the categories listed apply to the actual information being withheld. As with a determination that too narrowly describes information being withheld, an overbroad description would not accurately reflect the information being withheld in a given case.

the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

1. Whether the Information Withheld was Commercial or Financial Information

Under Exemption 4, the first requirement is that the withheld information be "commercial or financial."[2] Here, we find that requirement is met, as information contained in a loan guarantee application, as well the proposed or accepted terms of a loan guarantee, are, by their very nature, commercial or financial.

2. Whether the Information Withheld was Obtained from a Person

The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000). BrightSource, a corporation, satisfies this definition of "person."

It is not as certain, however, that all of the withheld information at issue was "obtained from" BrightSource. Three of the documents at issue, BrightSource's loan guarantee application and two of its appendices, were submitted by BrightSource, and therefore the information contained in those documents was clearly obtained by the DOE from BrightSource. On the other hand, the other three documents, containing terms and conditions of a potential loan guarantee, originated from DOE, appear on DOE letterhead, and are addressed *to* BrightSource. We raised this issue with LGPO, which responded that it "is difficult to determine which exact terms were submitted by whom because presumably all of the terms within the term sheet were arrived at through negotiation and thus neither 'submitted by BrightSource' nor 'submitted by DOE.'" Email from LGPO to Steven Goering, OHA (December 20, 2011).

The federal courts have held that the fact that particular information was the subject of negotiation with the federal government does not necessarily preclude a finding that it was "obtained from a person" within the meaning of Exemption 4. Rather, the courts have looked to the identity of the party from whom the information originated. *See, e.g., Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because the agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the

[2] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., Research Focus, L.L.C.,* Case No. TFA-0247 (2008); *William E. Logan, Jr. & Associates*, Case No. VFA-0484 (1999).

Thus, we have found in a prior case that information withheld from similar documents was "obtained from a person," where "LGPO informed us that although the provisions in question were the subject of negotiations between the DOE and the three utilities, the utilities were the source of the information that was withheld." *SACE*, Case No. TFA-0442 (2011). In the present case, however, LGPO's response indicates that it has not determined whether BrightSource was the source of the information withheld from the documents at issue. On remand, if is it to continue to withhold information from these three documents, LGPO must make an affirmative finding that BrightSource was the source of the information being withheld, and therefore the information was "obtained from a person," as required under Exemption 4.

3. Whether the Information Withheld was Confidential

In order to be exempt from disclosure under Exemption 4, the information must also be "confidential." As noted above, whether information is considered "confidential" turns in part on whether the information was voluntarily submitted. Though the act of responding to a government solicitation is clearly voluntary, the federal courts have found that information required to be provided in response to such a solicitation is involuntarily submitted. *See, e.g., Mallinckrodt v. West*, 140 F. Supp. 2d 1, 5 (D.D.C. 2000) (where agency solicitation "distinguished 'added value items' from other information by not including them within the category of information that 'must' be included," only that information required to be included was submitted involuntarily).

In this case, BrightSource was required to submit the information in question as part of its participation in the agency's loan application process. 10 C.F.R. § 609.6 ("In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part."). Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met to find the information withheld to be confidential.

Under *National Parks*, involuntarily submitted information is considered confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. Because the application process for the project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. The question, then, turns to whether release of the information would likely result in substantial competitive harm to the submitters of the information.

LGPO stated in its determinations that it withheld information under FOIA Exemption 4 because its release would cause substantial harm to Bright Source's competitive interests. Specifically, according to LGPO, disclosing financing information and strategies "would provide an unfair

advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against [Bright Source]." Disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to [Bright Source], in addition to allowing vendors unlicensed use of [Bright Source's] original work product." Finally, public disclosure of financing information "would enable potential customers to exert undue leverage with regards to purchasing [Bright Source's] product." *See* September Determination at 2; November Determination at 2.

Having reviewed the information withheld in this case, we agree with LGPO that the documents in question contain information that, if released, would likely cause substantial competitive harm to BrightSource, including proprietary technical information, cost data, business plans, and risk assessments. We cannot make this finding, however, with respect to all of the information withheld from the Appellant.

First, some of the information withheld by LGPO is readily available in public sources, and therefore cannot be considered "confidential" under Exemption 4. For example, LGPO withheld the Federal Tax Identification Numbers of both BrightSource and Morgan Stanley BrightSource LLC, information that can be found on public websites, such as that of the U.S. Securities and Exchange Commission. We brought this to the attention of LGPO, and they have agreed that this and other information withheld that is publicly available should be released. On remand, LGPO must release all such information.[3]

Second, there is information that was withheld by LGPO that, while not identical to that information made publicly available, is of a similar nature. In this regard, as we note above, the Appellant submitted with its appeal a copy of a press release issued by BrightSource on February 22, 2010 (Press Release), and argued that certain categories of information withheld by LGPO were topics of the press release.

LGPO points out that, while the subject matter of some of the information withheld is the same as some of the information in the press release, the information withheld contains specific data that is not included in the press release. Email from LGPO to Steven Goering, OHA (December 20, 2011). We agree with LGPO that such information should not automatically be considered non-confidential, unlike publicly available information. Nonetheless, the fact that similar information appears in a press release issued by the company should be taken into account in determining whether release of the information withheld would in fact likely cause substantial competitive harm to BrightSource.

Thus, for example, the press release states that, by using "dry-cooling," the Ivanpah project "will use only 100 acre feet of water per year, . . . 25 times less water than competing solar thermal technologies that use wet-cooling." Press Release at 4. Information withheld from Appendix B

[3] This includes previously withheld information that identifies BrightSource's patent filings, which are public and available at the web site of the U.S. Patent Office, as well as any information withheld that is also contained in those public filings. In addition, LGPO must release publicly available information that was withheld regarding the approval process for transmission access to the Ivanpah site, any clauses in Power Purchasing Agreements that are required by law to be included in all PPAs, and information that generically describes the roles and duties of governmental agencies. We pointed out specific examples of information that appears to be publicly available in an email to LGPO. Email from Steven Goering, OHA, to LGPO (December 19, 2011).

of BrightSource's loan guarantee quantifies the amount of water required by dry-cooling and that required by wet-cooling, but uses different units of measurement. As such, while the information is not the same, both the withheld information and the press release quantify the amount of water to be used by the project and the amount that would be used by wet-cooling. On remand, LGPO should consider, in light of the information contained in the press release, whether the release of similar information that was withheld would likely cause Bright Source substantial competitive harm.

Finally, there is information that LGPO withheld from the Appellant that may in fact be confidential, but it is not apparent how the release of the information would likely cause substantial competitive harm to BrightSource. For example, from a section of its application discussing the meteorological considerations of siting a solar plant, LGPO withheld a quantification of the average amount of solar energy available to "[g]ood" solar energy sites. As this does not, on its face, appear to be data that are particular to BrightSource or obtained through some proprietary methodology, it is hard to understand how its release would likely cause substantial competitive harm to BrightSource. In response to our query, LGPO stated that it was awaiting a response from BrightSource regarding this particular information. On remand, LGPO can take into account any information or arguments by BrightSource before making an independent determination as to whether this information should be withheld under Exemption 4.

We also asked LGPO about particular clauses withheld from the documents containing terms and conditions of a potential loan guarantee, three of the documents at issue that are discussed above in Section II.B.2 of this decision. Email from Steven Goering, OHA, to LGPO (December 19, 2012). LGPO stated that BrightSource requested confidential treatment of this information, and indicated that the company was able to justify "the withholding of the information by describing the harm that would occur if the information were released." Email from LGPO to Steven Goering, OHA (December 20, 2011). If LGPO intends to continue to withhold this information, it should explain, in its new determination, how any of the specific harms to BrightSource's competitive interests cited in LGPO's determination letter would result from the release of the information in question.

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to LGPO for a new determination regarding its withholdings under FOIA Exemption 4. With respect to the fact that LGPO has not yet issued a final response to La Cuna's request, the DOE's regulations that implement the FOIA do not permit OHA to consider an appeal under these circumstances. 10 C.F.R. § 1004.8(a) (OHA may consider appeals when a DOE office "has denied a request for records in whole or in part or has responded that are no documents responsive to the request" or when an office "has denied a request for waiver of fees.") Accordingly, this portion of La Cuna's Appeal will be dismissed as not ripe for a determination.

It Is Therefore Ordered That:

(1) The Appeal filed on December 2, 2011, by the La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, OHA Case No. FIA-11-0016, is hereby granted in part, as set forth in Paragraph (2) below, and dismissed in part, as set forth in Paragraph (3) below.

(2) This matter is hereby remanded to the Department of Energy's Loan Guarantee Program Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) That portion of the present Appeal relating to the lack of a final response to the Appellant's request is hereby dismissed.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 3, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Scott A. Hodes	)	
	)	
Filing Date: December 2, 2011	)	
	)	Case No. FIA-11-0017
	)	

Issued: December 22, 2011

Decision and Order

On December 2, 2011, Scott A. Hodes (the Appellant) filed an Appeal from a September 30, 2011, final determination issued by the Department of Energy (DOE) Office of the Executive Secretariat (ES). ES responded to a Request for Information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, that Mr. Hodes filed with DOE on January 13, 2011. In its September 30, 2011, determination, which Mr. Hodes did not receive until November 4, 2011, ES identified 79 documents responsive to his request, provided 58 of them, and explained that the remaining 21 were to be reviewed by the originating organization within DOE. This Appeal, if granted, would require ES to conduct an additional search for responsive material.

I. BACKGROUND

On January 13, 2011, Mr. Hodes filed a request with DOE seeking documents relating to approval of indemnification clauses in government contracts. Appeal at 1. ES conducted a search of its records, including those of its History Division, and located 79 documents that contained responsive information. It determined that 21 of those documents had been created by the National Nuclear Security Administration (NNSA), and referred those 21 documents to NNSA for review and a determination regarding their releasability.

On September 30, 2011, ES issued a Determination Letter to Mr. Hodes in which it explained that it was releasing 37 documents to him in their entirety and 21 documents with portions withheld pursuant to Exemption 5 of the FOIA. It further explained that NNSA would provide a determination to Mr. Hodes when it completed its review of a separate group of 21 documents that ES referred to it.

On December 2, 2011, Mr. Hodes filed the present Appeal. He has not appealed ES's application of Exemption 5 to withhold portions of 21 documents from disclosure. He has, however, challenged the completeness of ES's response, asserting that several of the documents released to him indicate on their face that they contained attachments that were not provided to

him. He also raises on appeal the fact that NNSA has not yet issued a determination to him regarding the 21 documents that ES referred to NNSA.

II. ANALYSIS

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999), *quoting Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Project on Government Oversight*, Case No. TFA-0489 (2011).

To ascertain whether there were additional documents responsive to Mr. Hodes's request that ES had not provided in its initial determination letter, this office asked Mr. Hodes to provide a list of documents that he believed had attachments that had not been released to him. He provided such a list, which we forwarded to ES. ES has begun a search for the attachments Mr. Hodes listed, and has reported that it has already identified attachments that relate to the more recent documents already released to Mr. Hodes. A few of the responsive documents are quite old, and must be retrieved from storage to ascertain whether they contain attachments that may now be released to Mr. Hodes. We will therefore remand this matter to ES. After it has reviewed all the documents on the list that Mr. Hodes has provided, ES will issue a new determination letter in which it will provide any additional responsive documents to Mr. Hodes, or provide proper justification for the withholding of any such documents or portions thereof.

With respect to the fact that NNSA has not yet issued its determination regarding the 21 documents that ES referred for review, DOE's regulations that implement the FOIA do not permit OHA to consider an appeal under these circumstances. 10 C.F.R. § 1004.8(a) (OHA may consider appeals when a DOE office "has denied a request for records in whole or in part or has responded that are no documents responsive to the request" or when an office "has denied a request for waiver of fees.") Accordingly, this portion of Mr. Hodes's Appeal will be dismissed as not ripe for a determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Scott A. Hodes, FIA-11-0017, is hereby granted in part, as set forth in Paragraph (2) below, and dismissed in part, as set forth in Paragraph (3) below.

(2) This matter is remanded to the Office of the Executive Secretariat for a search for additional documents responsive to Mr. Hodes's January 13, 2011, request as described in the above Decision. Upon completion of its search, the Office of the Executive Secretariat shall issue a new determination letter as set forth in the above Decision.

(3) That portion of Mr. Hodes's Appeal that relates to the 21 documents currently under review by the National Nuclear Security Administration is dismissed.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 22, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Robert M. Balick	)	
	)	
Filing Date: December 16, 2011	)	Case No.: FIA-11-0018
	)	
	)	

Issued: January 12, 2012

Decision and Order

On December 16, 2011, Robert M. Balick (Appellant) filed an Appeal from a determination issued to him on November 28, 2011, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR denied the Appellant's fee waiver request in connection with a request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would waive the fees associated with the Appellant's request.

I. Background

On November 6, 2011, the Appellant filed a request with DOE for "[a]ll/any residual radiation data collected from the 3 nuclear test events – Longshot-1965, Milrow-1968 and Cannikin-1971 at Amchitka Island, Alaska." Request dated November 6, 2011, from Appellant to OIR. With the request, the Appellant asked for a waiver of the fees associated with the request. On November 28, 2011, OIR denied the fee waiver request.[1/] The Appellant filed this Appeal on December 16, 2011, asking that the fee waiver denial be overturned.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees if a requester can satisfy a two-part test. The requester must show that disclosure of the information (1) is in the public interest because it is likely to contribute

[1/] OIR noted in its November 28, 2011, determination that the request had been sent to the Office of Environmental Management (EM) and the Office of Legacy Management (LM). On December 6, 2011, LM responded to the Appellant's request stating that it found voluminous documents and the associated fees would total $358.80. In his Appeal, the Appellant narrowed the scope of his request to include only documents associated with the Cannikin test. OIR has since forwarded the narrowed request on to the offices currently searching for information, including LM and the National Nuclear Security Administration (NNSA). E-mail dated December 23, 2011, from Alexander Morris, FOIA Officer, OIR, to John Montgomery, LM, Ben Jaramillo, NNSA, and Elizabeth Poe, NNSA.

significantly to public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the above two-prong test, the regulations set forth the following four factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).[2/]

A. Factors A and B

Factor A requires that the requested documents concern the "operations or activities of the government." *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, *i.e.*, the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). In the present case, OIR and the Appellant agree that the requested material concerns the operations and activities of the government and that the information would likely contribute to the public's understanding of a specifically identifiable government operation. Determination Letter dated November 28, 2011. Because the applicability of Factors A and B are not disputed, we will not further consider OIR's determination with regard to these issues.

B. Factor C

[2/] With regard to the commercial-interest prong for the determination of the appropriateness of granting a fee waiver, the Part 1004 regulations specify two factors to be considered in determining whether the disclosure of information is not primarily in the commercial interest of the requestor. 10 C.F.R. § 1004.9(a)(8)(ii) (whether the requestor has a commercial interest that would be furthered by the requested documents and, if so, whether the identified commercial interest is sufficiently large in comparison with the public interest in disclosure, such that any disclosure would be primarily in the commercial interest of the requestor). As discussed *infra*, because we find that the Appellant has not satisfied the public-interest prong, we need not discuss whether the disclosure of information at issue in this case satisfies the commercial-interest prong of the fee waiver test.

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. The party seeking a fee waiver must show that the disclosure of the requested information will "contribute to the public understanding" of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." *Judicial Watch, Inc., v. Dep't of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002) quoting 28 C.F.R. § 16.11(k)(2)(iii). In assessing this factor, a court must consider the requester's "ability and intention to effectively convey" or disseminate the requested information to the public. *Id.* Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Roderick L. Ott*, Case No. VFA-0288 (May 16, 1997) (*Ott*); *see also Tod N. Rockefeller*, Case No. VFA-0468 (January 21, 1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).[3/] In his submission, the Appellant states that, "[m]any Amchitka Island workers are being treated for cancer of which the source is unknown. Disclosure of the requested information will aid in their treatments." Request Letter at 1. The Appellant does not state how he will disseminate the requested information, even to this relatively small number of interested individuals, the Amchitka Island workers. Consequently, OIR determined that the Appellant has not demonstrated his ability to disseminate the requested information to the public. We agree as the Appellant did not provide any further information regarding the dissemination of the information in his Appeal. Based on the information provided to us, we find that the Appellant has not satisfied the requirements of Factor C.

C. Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, slip op. at 5 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)). In the present case, it is not readily apparent how the public's understanding of the activities or operations of the government will be significantly enhanced by the disclosure of the requested documents. The Appellant states that "[a]lthough most nuclear device testing is internationally forbidden by treaties, residual radioactivity will remain for centuries." Request Letter at 2. This statement does not show that granting of the fee waiver and, therefore, release of the information, will significantly enhance the public's understanding of the activities or operations of the government. As a result, the Appellants' request for a fee waiver does not satisfy Factor D.

III. Conclusion

After considering each of the above factors, we have determined that because of the Appellant's failure to demonstrate that he would disseminate the information in the documents and the unlikelihood of the documents contributing significantly to the public's understanding of government activities and operations, the public-interest prong of the fee waiver test has not been

[3/] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

satisfied. Because the public-interest prong of the FOIA fee waiver test is not met, we need not address the commercial-interest prong. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert M. Balick, Case No. FIA-11-0018, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 12, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Kevin Leary	)	
	)	
Filing Date: January 3, 2012	)	
	)	Case No.: FIA-12-0001
	)	

Issued: January 27, 2012

Decision and Order

On January 3, 2012, Kevin Leary ("Appellant") filed an Appeal from a determination issued by the Department of Energy (DOE) Richland Operations Office (RO). In that determination, RO responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require RO to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 31, 2011, Appellant submitted a FOIA request to RO, for copies of e-mails, the associated metadata[1], and instant messages for Margot Voogd, Larry Romine and Bryan Foley, from August 1, 2005, through January 31, 2009. *See* Letter from Kevin Leary (October 31, 2011) (FOIA Request). RO informed Appellant that no documents existed. On November 18, 2011, Appellant specified that his request included any e-mails sent or received by the above-named individuals during the stated timeframe that were deleted and stored on DOE's server or back-up tapes. *See* E-mail from Dorothy Riehle, Freedom of Information Officer, RO, to Avery R. Webster, Attorney-Examiner, OHA (January 5, 2012) (January 5 E-mail).

RO conducted a search of its records but did not locate responsive documents. *See* Determination Letter. In its response, RO informed Appellant that its e-mail server maintains

[1] "Metadata" includes address fields, file types, file creation and modification dates, and the author of such modifications. *See* Letter from Dorothy Riehle, FOIA Officer, RO, to Kevin Leary (August 23, 2011) (Determination Letter).

records for up to 24 days[2] unless there is pending litigation or some other investigative reason (such as human resources, cyber security, or counterintelligence) to keep the records. *Id*.

On January 3, 2012, the Office of Hearings and Appeals (OHA) received Appellant's Appeal in which he questions the validity of RO's response, and requests an additional search for the information that he requested. *See* Letter from Kevin Leary to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[3]

During the processing of this Appeal, OHA contacted RO to ascertain the scope of its search for responsive documents. *See* E-mail from Avery R. Webster, Attorney-Examiner, OHA, to Dorothy Riehle, Freedom of Information Officer, RO (January 4, 2012). In its response, RO explained that a search was conducted using the names that the Appellant provided and no deleted e-mails or instant messages were found. *See* January 5 E-mail. RO informed us that its Chief Information Officer (CIO), the subject matter expert, confirmed that no e-mails relating to the named individuals were maintained for litigation or other purposes. *Id*. According to the CIO, unless saved, the e-mails are no longer retrievable from the e-mail server after 14 days from the date that they were created. *See* January 25 E-mail.

Based on the foregoing, we find that RO performed a search reasonably calculated to reveal documents responsive to the FOIA Request. Accordingly, the search was adequate under the FOIA and, therefore, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Kevin Leary on January 3, 2012, OHA Case No. FIA-12-0001, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review

[2] The "24-day" period is a typographical error and should actually reflect as 14 days. *See* E-mail from Dorothy Riehle, Freedom of Information Officer, RO, to Avery R. Webster, Attorney-Examiner, OHA (January 25, 2012) (January 25 E-mail).

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

may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 27, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of Erik Lerche	)	
	)	
Filing Date: January 3, 2012	)	
	)	Case No.: FIA-12-0002
	)	

Issued: January 31, 2012

Decision and Order

On January 3, 2012, Erik Lerche ("Appellant") filed an Appeal from a determination issued by the Department of Energy ("DOE") Office of Energy Efficiency and Renewable Energy ("EERE"). In that determination, EERE responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EERE to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 10, 2011, Appellant submitted a FOIA request for the addresses of the 42 houses weatherized under the Federal Weatherization Assistance Program ("WAP") in Page County, Virginia, from July 1, 2009, through June 30, 2011. *See* Letter from Erik Lerche to Robert Adams, WAP (October 10, 2011) (FOIA Request). The request was assigned to EERE's Office of Weatherization and Intergovernmental Programs ("OWIP") because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

EERE conducted a search of its records but did not locate responsive documents. *See* Letter from Kathleen B. Hogan, Deputy Assistant Secretary for Energy Efficiency, EERE, to Erik Lerche (December 12, 2011) (Determination Letter). In its response, EERE informed Appellant that OWIP does not require states to provide DOE with the addresses of weatherized homes and referred him to the rule which sets forth state requirements for maintaining the privacy of the WAP applicants. *See id*.

On January 3, 2012, the Office of Hearings and Appeals (OHA) received Appellant's Appeal in which he challenges EERE's response and requests release of the information that he requested. *See* Letter from Erik Lerche to OHA (Appeal Letter). Appellant argues that the public interest in

disclosing the participant's addresses (i.e., public validation of the WAP program) outweighs their privacy interest in anonymity. *Id*. at 2-6.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

During the processing of this Appeal, OHA contacted EERE to ascertain the scope of its search for responsive documents. *See* E-mail from Avery Webster, Attorney-Examiner, OHA to Kathleen B. Hogan, Deputy Assistant Secretary for Energy Efficiency, EERE *(*January 4, 2012). In its response, EERE explained that the WAP has no data in any database or other file that references the specific homes that were weatherized. *See* E-mail from Robert Adams, Supervisor, WAP *(*January 5, 2012) (Adams E-mail). According to EERE, the primary data is not maintained at the federal level but resides in the offices of the 1,007 subgrantees who provide direct services to families in need. *Id*.

Based on the foregoing, we find that EERE does not have the requested documents. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Erik Lerche on January 3, 2012, OHA Case No. FIA-12-0002, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 31, 2012

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

United States Department of Energy
Office of Hearings and Appeals

In the Matter of California-Arizona-Nevada District Organization Contract Compliance	)	Case Nos. FIA-12-0004 FIA-12-0005
Filing Date: February 2, 2012	)	

Issued: March 23, 2012

Decision and Order

On February 2, 2012, California-Arizona-Nevada District Organization Contract Compliance (CANDO) filed appeals from two final determinations issued by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE). In those determinations, LGPO responded to requests for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO released substantial amounts of information responsive to each of the requests, but withheld responsive information under FOIA Exemption 4. This Appeal, if granted, would require LGPO to release to CANDO some of the information it withheld previously.

I. BACKGROUND

CANDO filed requests for information with LGPO seeking copies of ten specified documents related to loan guarantee contracts for the Agua Caliente and Gila Bend Solar Energy Projects. On October 31, and November 8, 2011, LGPO issued determination letters releasing copies of the documents CANDO requested regarding the Agua Caliente and Gila Bend projects, respectively. In both instances, however, LGPO withheld portions of the responsive documents under Exemption 4. On February 2, 2012, CANDO filed the present appeals contending that LGPO had improperly applied Exemption 4 to withhold the names and other identifying information concerning contractors and sub-contractors listed in those documents. We have assigned Case No. FIA-12-0004 to CANDO's appeal regarding the Gila Bend documents and Case No. FIA-12-0005 to its appeal regarding the Agua Caliente documents.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that

the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."

In its determination letter, LGPO contended that the information it withheld from CANDO is confidential rather than privileged. In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, LGPO correctly concluded that the requested documents had been involuntarily submitted.

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009).[1] Accordingly, if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

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

Moreover, it is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

In the present case, LGPO stated in its determination letters, which are virtually identical in content, that the information it redacted from the responsive documents "includes project cost, financing plans and business strategies, procurements plans, and marketing plans and analysis." It then specified the competitive harm that the disclosure of each of those categories of information would cause to the submitter of the information. LGPO did not specify that it had withheld the names and other information that identified contractors and sub-contractors in these documents. Nor did it offer any reasonably specific justification for withholding such information. Of the categories of withheld information it identified in its determination letters, "business strategies" and "procurement plans" are the only categories within which contractor and sub-contractor information might possibly fall. In its determination letters, LGPO provided no specific explanation of the competitive harm that disclosure of business strategies might cause, and stated that disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to the applicant, in addition to allowing vendors unlicensed use of the applicant's original work product."

LGPO's determination letter regarding CANDO's request for the Gila Bend documents lacks the specificity required of an agency FOIA determination in two respects. First, it does not specify that names and other identifying information regarding contractors and sub-contractors have been withheld. Although such information might possibly fall within one of the broad withholding categories LGPO listed in its determination letter, even the informed requester would be hard pressed to reach this conclusion. LGPO's failure to identify with specificity the redacted information impedes the requester's ability to understand what information has been redacted from a document.[2] Moreover, the same lack of specificity does not permit a sufficient justification for withholding information under Exemption 4. *See* e.g. *Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter for a new determination explaining how Exemption 4 applies to withheld material). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). Because it did not specifically address how the disclosure of names and other information that identifies contractors and sub-contractors is likely to cause substantial competitive harm, it has not met its burden of justifying the withholding of that material. Accordingly, we are remanding to LGPO CANDO's appeal regarding the Gila Bend documents. On remand, LGPO should either release the names and other information identifying contractors and sub-contractors that it redacted from the documents it provided to CANDO or issue a new

[2] CANDO's appeals illustrate its inability to formulate a cohesive challenge to LGPO's determinations. Although CANDO appealed the withholding of contractor and sub-contractor information from both the Agua Caliente and Gila Bend documents, LGPO withheld that information from only the Gila Bend documents, as stated below.

determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in competitive harm.

With respect to the Agua Caliente documents, however, we reach a different result. LGPO has informed us that no names or other information that identifies contractors or sub-contractors was withheld, as no such information appears in those documents. Memorandum of Telephone Conversation between Janelle Jordan, LGPO, and William M. Schwartz, OHA (March 19, 2012). As a result, the challenge CANDO raises in its appeal of LGPO's determination regarding those documents lacks a factual basis and will be denied.

III. CONCLUSION

Our review of the contractor and sub-contractor information that LGPO withheld under Exemption 4 has revealed that LGPO failed to adequately describe some of the information it was withholding under Exemption 4 and failed to adequately justify its determination that release of that information would likely result in competitive harm to its submitter. Accordingly, we are remanding this matter to LGPO for further processing in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance, Case No. FIA-12-0004, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal in Case No. FIA-12-0004 is hereby remanded to the Loan Guarantee Program Office for further processing in accordance with the instructions set forth above.

(3) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance, Case No. FIA-12-0005, is hereby denied.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 23, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Jon Lipsky	)	
		)	
Filing Date:	February 14, 2012	)	
		)	Case No.: FIA-12-0007
		)	

Issued: March 21, 2012

Decision and Order

On February 14, 2012, Jon Lipsky filed an appeal from a determination issued to him on January 24, 2011, by the Department of Energy's (DOE) Office of Legacy Management (LM), in response to a request for documents that Mr. Lipsky filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LM identified one document responsive to Mr. Lipsky's request and released that document to him in its entirety. In his appeal, Mr. Lipsky challenges the adequacy of LM's search. This appeal, if granted, would require LM to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In December 2011, Mr. Lipsky filed a FOIA request with LM for "a copy of the 1989 Multispectral Scanner Survey (MSS) of the former Rocky Flats Nuclear Weapons Plant." Electronic FOIA Request Form, December 14, 2011 (Initial Request) at 1. In its January 2012 response, LM informed Mr. Lipsky that its search for documents yielded one document, which LM released to Mr. Lipsky in its entirety. Letter from John V. Montgomery, LM, to Jon Lipsky, January 24, 2012 (Determination Letter) at 1. Mr. Lipsky filed the instant appeal challenging the adequacy of LM's search for documents. *See* Letter from Jon Lipsky to OHA, received February 14, 2012 (Appeal). In his Appeal, Mr. Lipsky contends that LM's response was inadequate. Specifically, Mr. Lipsky maintains in his Appeal that "the provided document (1) does not refer to the complete assessments by Acting Rocky Flats Manager Edward Goldberg …, (2) does not include August 1989 or later data, (3) does not refer to the 1981 MSS survey, (4) is not a multi-volume report, (5) does not reference cesium-137, (6) does not reference strontium-90, [and] (7) the Department of Energy provided no indication of excluded or exempted materials." Appeal at 1.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[*]

In reviewing this appeal, we contacted LM to ascertain the scope of its search for responsive documents. LM informed us that LM's FOIA processing personnel searched "the DOE-LM's Electronic Recordkeeping System (ERKS) for all information potentially responsive to the request. The DOE-LM ERKS is an electronic information system database containing records, finding aids, and information for all records in LM's custody." *See* LM Response to FOIA Appeal, OHA Case No. FIA-12-0007, received March 16, 2012. LM personnel searched the ERKS database using combinations of the keywords "multispectral," "scanner survey," "survey," and "1989." *Id*. The ERKS searches indicated that a box stored at a Federal Records Center (FRC) facility contained a document potentially responsive to the request. *Id*. LM retrieved the box from the FRC facility and located the responsive document, "A Multispectral Scanner Survey of the United States Department of Energy's Rocky Flats Plant, Golden, Colorado." *Id*. LM's search yielded no other documents responsive to Mr. Lipsky's request. *Id*. Based on this information, we find that LM performed an extensive search reasonably calculated to reveal records responsive to Mr. Lipsky's FOIA request. Accordingly, the search was adequate and the instant Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on February 14, 2012, by Jon Lipsky, OHA Case No. FIA-12-0007, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 21, 2012

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

United States Department of Energy
Office of Hearings and Appeals

In the matter of Carter & Burgess, Inc.	)	
	)	
Filing Date: February 23, 2012	)	Case No.: FIA-12-0008
	)	
	)	

Issued: April 12, 2012

Decision and Order

On February 23, 2012, Carter & Burgess, Inc., (Appellant) filed an Appeal from a determination issued to it on January 27, 2012, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA released 73 documents responsive to requests the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA redacted portions of the released documents. This Appeal, if granted, would release the documents in full.

I. Background

On February 21, 2011, the Appellant filed 15 requests with NNSA. As all the requests referenced the same matter, NNSA consolidated its response. Determination Letter dated January 27, 2012, from NNSA to Andrew D. Keetch, Cantey Hanger, LLP, Appellant's Attorney. The documents at issue are copies of a Mutual Release and Settlement Agreement between Austin Commercial Contractors, L.P. (ACCLP) and Los Alamos National Security LLC (LANS), as well as a number of e-mails between LANS and DOE employees including the Settlement Agreement. NNSA withheld portions of the 73 responsive documents under Exemptions 4, 5, and 6 of the FOIA. *Id.* The Appellant challenges the withholding in those documents. Appeal dated February 22, 2012, from Andrew Keetch, to Office of Hearings and Appeals (OHA), DOE.

Initially, the Appellant argues that the documents were between two private entities, ACCLP and LANS, and therefore, cannot fall within Exemptions 4, 5, or 6. *Id.* Secondly, the Appellant argues that because the two private entities arbitrated a construction contract before the Civilian Board of Contract Appeals, all FOIA exemptions have been waived. *Id.* at 2. Thirdly, the Appellant argues that Exemption 4 does not apply because "[d]isclosure of this information will not impair the government's ability to obtain information in the future." *Id.* at 4. Fourthly, the Appellant claims that because LANS is not an agency of the United States, all documents that involve LANS cannot qualify for protection under Exemption 5. *Id.* at 3. Finally, the Appellant

contends that Exemption 6 is not applicable to any of the documents because it did not seek any information which would cause "injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id.* at 3.

II. Analysis

A. Agency Records

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). As evidenced by NNSA's response, it had possession and control of the documents at the time of the request. Intuitively, if the documents are subject to the FOIA, then they must also be subject to the FOIA Exemptions. Accordingly, we will address NNSA's application of Exemptions 4, 5, and 6 to the withheld information in the pertinent sections below.

B. Waiver of FOIA Exemptions

Courts have routinely held that an agency has waived its protection under a FOIA exemption where there has been an official disclosure or direct acknowledgment by authorized government officials. Thus, waiver of the privilege to withhold information under the FOIA depends upon prior official release of the information or disclosure under circumstances in which an authorized government official allowed the information to be made public. *See Wolf v. CIA*, 473 F. 3d 370, 379-80 (D.C. Cir. 2007) (holding that an agency waived its ability to refuse to confirm or deny the existence of responsive records pertaining to an individual because a top agency official had discussed that individual during congressional testimony); *see also Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver).

In the instant case, the Appellant argues that because ACCLP and LANS arbitrated a construction contract dispute before the Civilian Board of Contract Appeals, all FOIA exemptions have been waived. Appeal Letter at 2. In other words, the Appellant claims that when a document has been produced or available through litigation, pertinent FOIA exemptions are waived. Appeal at 2, *citing Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184 (D.D.C. 2009) and *N.D. ex rel. Olson v. Andrus*, 581 F.2d 177 (8th Cir. 1978). A clear reading of both cited cases shows that the documents in question were released by the governmental agency--not by a private entity. Here, at no time did an authorized government official allow the information to be made public. Therefore, we cannot accept the Appellant's argument that because ACCLP and LANS arbitrated the matter that is the heart of its requests, all FOIA exemptions have been waived.

C. Exemptions 4, 5, and 6

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R.

§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemptions 4, 5, and 6 are at issue in this Appeal.

1. Exemption 4

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is commercial or financial, "obtained from a person" and "privileged or confidential."

The first requirement is that the withheld information be "commercial or financial." Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d 1290. The information submitted by LANS, *i.e.*, financial information, business strategies, legal strategies, etc., clearly satisfies the definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc., v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000). LANS satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." In this case, LANS was required to submit the documents in question as part of its contract with NNSA. Accordingly, we find that the withheld information was "involuntarily submitted." In order for the application of Exemption 4 to be proper, the *National Parks* test must be applied. Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770.

The Appellant argues that NNSA applied Exemption 4 too broadly because disclosure will not impair the government's ability to obtain the information in the future nor will it cause substantial harm to the competitive position of LANS. Appeal at 3. We agree that because the contract between NNSA and LANS required the information be submitted, it is not likely that release of the information would impair DOE's ability to obtain similar information in the future.

We must address, however, whether release of the information would likely result in substantial competitive harm to the submitters of the information.

NNSA determined that release of the commercial and financial information contained in the documents would likely cause LANS substantial competitive harm. We believe that release of the information would give LANS' competitors an undue advantage when negotiating settlements in the future. In addition, release of the financial information would give LANS' competitors an undue advantage in bidding on future contracts against LANS. Therefore, we find that NNSA properly applied Exemption 4 to the withheld information in the released documents.

2. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

A communication between an agency and a private party is also an intra-agency communication when the "common interest" doctrine applies. *Hunton & Williams v. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord Klamath*, 532 U.S. at 10. The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-83. "[I]n a limited sense," the private party "becomes a part of the enterprise that the agency is carrying out." *Id*. at 280. Therefore, the communications "can be understood as 'intra-agency' for the purposes of Exemption 5." *Id*.

In *Hunton & Williams*, a technology company sued a manufacturer for patent infringement. *Id*. at 274. A trial court enjoined the manufacturer from making the infringing product. During the appeal, the agency and the manufacturer exchanged litigation-related information. The technology company filed a FOIA request for the communications between the agency and the manufacturer. *Id*. at 275. Under Exemption 5, the agency invoked a privilege to withhold the communications. On appeal, the technology company argued that the agency improperly withheld the communications because they were not inter-agency or intra-agency communications. *Id*. at 276-77.

The court held that under the common interest doctrine, the communications between the agency and the manufacturer were considered intra-agency communications. *See id*. at 282. The agency and the manufacturer shared an interest in the government's continued use of the manufacturer's products and decided to exchange information to further that goal. Therefore, the agency and the

manufacturer "could rely on one another's advice, secure in the knowledge that privileged communications would remain just that." *Id*. at 282-83.

Here, NNSA is a federal agency that shares a common interest with a private party, LANS. As in *Hunton & Williams*, NNSA and LANS share a mutual interest since a decision adverse to LANS could result in increased costs borne by NNSA. For this reason, we find that the litigation-related information satisfies *Klamath*'s first condition. Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," such as the attorney-client privilege, the attorney work product privilege, or the deliberative process privilege. *Klamath*, 532 U.S. at 8 (citations omitted). NNSA invoked both the deliberative process privilege and the attorney work-product privilege to withhold the redacted information.

a. Deliberative Process Privilege

An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp*, 617 F.2d at 866. "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position . . . ." *Coastal States*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Coastal States*, 617 F.2d at 866. The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*. The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

We find that NNSA properly invoked the deliberative process privilege to withhold portions of the documents. Many of these documents are e-mails that are predecisional – *i.e.*, they precede the issuance of a final agency decision. The documents are also deliberative – *i.e.*, they contain evaluation of the settlement agreement by the DOE prior to it being executed by ACCLP and LANS.

b. Attorney Work-Product Privilege

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

We find that NNSA properly invoked the attorney work-product privilege to withhold portions of the documents in this case. Many of these documents contain the opinions, conclusions, or legal theories of an attorney or other representative of DOE or LANS concerning the subject matter of the requested documents. The documents also include the mental impressions of DOE attorneys.

c. Segregability

Notwithstanding the above the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). We reviewed the withheld information and did not find any non-exempt, segregable information.

d. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. NNSA concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to NNSA's ongoing decision-making process. Therefore, release of the withheld information would not be in the public interest.

e. Conclusion on Exemption 5

We have reviewed a large sample of the documents from which information was withheld under Exemption 5. Given the nature and our review of the sample documents, we find that Exemption 5's deliberative process privilege and attorney work-product privilege were properly applied.

3. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

a. Privacy Interest

NNSA invoked FOIA Exemption 6 to redact the names and contact information of LANS employees from the documents it released to the Appellant. The Appellant contends that the NNSA improperly withheld information under Exemption 6, contending, that "[t]here is no expectation of privacy, even by government contractors, because all information at issue was done in a person's capacity as an employee or representative and has no bearing on one's personal affairs." Appeal at 3.

It is well settled that the release of an individual's name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). The privacy interests protected by the exemptions to FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. The Appellant's allegation that there is no expectation of privacy, even by government contractor employees, is erroneous. As stated above, courts have found a broad privacy interest. Therefore, NNSA correctly concluded that the contractor employees whose names appear in the documents have a legitimate expectation of privacy under the FOIA.

b. Public Interest

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Comm.*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of information, its disclosure is not "affected with the public interest." *Id*.; *see also Nat'l Ass'n of Retired Employees v. Horner*, 879 F.2d at 879.

It is clear that release of the names of LANS employees would not further the public interest by shedding light on the operations and activities of the government. Release of the names and contact information of the LANS employees who assisted in the negotiation between LANS and ACCLP would contribute little, if any, to public understanding of the issues surrounding the negotiation or any other matter of public concern. The withheld names and contact information are contained in communications between LANS employees and the DOE who are forwarding information from one entity to another, rather than actually taking part in the workings of the DOE. The emails from which the privacy information was withheld are asking for a concurrence from the DOE. In no way does the Exemption 6 information withheld from these documents shed light on the operations and activities of the DOE. In the present case, we find that the public interest in the withheld information at issue here is minimal at best. The Appellant has not established how release of the identities of the contractor employees would serve any public interest. To the contrary, we find that release of the identifying information of the contractor employees would reveal little, if anything, to the public about the workings of the government.

c. Balancing Test

Because we have found a privacy interest in the names of the contractor employees and no public interest in their disclosure, we find that release of the contractor employee's names would constitute a clearly unwarranted invasion of personal privacy. Therefore, NNSA properly withheld the information under Exemption 6.

D. Review of the Documents

We have reviewed a large sample of the documents from which information was redacted. NNSA appeared to be very careful with most of its redactions. Nonetheless, our review of the documents leads us to question some of the withholdings. In at least three instances, information was withheld and we cannot determine which Exemption was used. As an example, in Attachment 69 the names LANS and ACCLP were withheld. The redacted page references all three Exemptions for withholding information on the page. Because this information has previously been released, we are unclear why it was withheld on this document. Another example is Attachment 68, where the caption of the case, including the companies' names, before the Civilian Board of Contract Appeals was withheld. The redacted page references Exemptions 4 and 5 for withholding the information on the page. Again, because this information was released in other documents, we are unclear why it was withheld on this document. As a final example, Attachment 7 withholds the case caption, but page 2 of

Attachment 6 releases it. The redacted page in Attachment 7 references Exemptions 4 and 5 for withholding the information on the page. On remand, NNSA should clarify these inconsistencies and either release the information or issue a determination explaining the basis for the withholding.

III. Conclusion

After considering the Appellant's arguments, we are convinced that NNSA properly withheld the redacted information from the documents under Exemptions 4, 5, and 6. The Appellant's argument that the documents are subject to the FOIA but not subject to the Exemptions because the documents were between two private entities lacks merit. It is intuitive that a document that is subject to release under the FOIA is also subject to the FOIA exemptions. Second, the Appellant's argument that NNSA has waived the right to use any exemptions to the FOIA because LANS and ACCLP were involved in arbitration is erroneous. The government did not undertake an authorized, official release of the documents. Third, we find that NNSA properly applied Exemptions 4, 5, and 6 of the FOIA to the withheld information. In those instances where pages indicate that two or more Exemptions were used to withhold information on the same page, we have reviewed the documents and found that no factual information could be segregated from the withheld information**.** Finally, NNSA inconsistently withheld some of the information, *i.e.*, the case caption. For that reason, we will remand the matter to NNSA for a new determination. NNSA must review the documents for consistency of its withholdings. Accordingly, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Carter & Burgess, Inc., Case No. FIA-12-0008, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) The matter is hereby remanded to the National Nuclear Security Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 12, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Cynthia Brown	)	
		)	
Filing Date:	February 29, 2012	)	
		)	Case No.: FIA-12-0009
		)	

Issued: March 27, 2012

Decision and Order

On February 29, 2012, Cynthia Brown filed an appeal from a determination issued to her on January 24, 2012, by the Department of Energy's (DOE) Richland Operations Office (RO), in Richland, Washington, in response to a request for documents that Ms. Brown filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. RO did not locate any documents responsive to Ms. Brown's request. In her appeal, Ms. Brown challenges the adequacy of RO's search. This appeal, if granted, would require RO to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In December 2011, Ms. Brown submitted a FOIA request to RO in which she sought records pertaining to her late mother. Letter from Dorothy Riehle, RO, to Cynthia Brown, January 24, 2012 (January Determination Letter) at 1. In a December 2011 determination letter, RO informed Ms. Brown that it located her late mother's medical record, and that the record would be released to her directly by CSC Hanford Occupational Health Services, a company that maintains occupational health records for the DOE's Hanford site. *Id.* On January 13, 2012, Ms. Brown submitted an email to RO, questioning why certain records pertaining to her mother were not provided to her. *Id.* Based on Ms. Brown's email, RO conducted a new search for responsive documents. In the January Determination Letter, RO informed Ms. Brown that the new search did not return any new records. *Id.*

Ms. Brown filed the instant appeal challenging the adequacy of RO's search. *See* Letter from Cynthia Brown to OHA, dated February 17, 2012 (Appeal). In her Appeal, Ms. Brown

alleges that RO's search was inadequate because she did not receive all of the records which she sought. Appeal at 1. Specifically, Ms. Brown seeks certain missing records pertaining to her late mother's hospital stays. *Id*. at 2-5.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[*]

In reviewing the Appeal, we contacted RO to ascertain the scope of its search for responsive documents. *See* Email from Diane DeMoura, OHA, to Dorothy Riehle, RO, March 7, 2012. RO informed us that, after receiving Ms. Brown's January 13, 2012, email questioning why certain records she requested were missing, RO conducted a second search for responsive documents and located no new records. *See* Email from Dorothy Riehle, RO, to Diane DeMoura, OHA, March 8, 2012. According to RO, "this search was conducted by those within the agency who are most familiar with the subject matter of the request, in locations where documents would most likely be found. Specifically, [RO] searched the files of CSC and the Records Holding Area which stores and maintains archive records for the Hanford site." *Id*. RO conducted the search using Ms. Brown's mother's name and social security number, and searched records both manually and electronically. *Id*. In addition, RO conducted a search of Ms. Brown's father's medical record, in case documents pertaining to Ms. Brown's mother were inadvertently misfiled. However, the search of Ms. Brown's father's medical record also yielded no responsive documents. *Id*.

Based on this information, we find that RO performed an extensive search reasonably calculated to reveal records responsive to Ms. Brown's FOIA request, despite the fact that the search did not yield the records that she seeks. Accordingly, the search was adequate and the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on February 29, 2012, by Cynthia Brown, OHA Case No. FIA-12-0009, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in

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

the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 27, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Case No.:	FIA-12-0010
Hughes Socol Piers Resnick DYM, Ltd.	Filed:	March 9, 2012

Issued: March 30, 2012

Decision and Order

On March 9, 2012, Hughes Socol Piers Resnick DYM, Ltd. (Hughes Socol) appealed a determination issued to it on February 15, 2012, by the Chicago Office of the Department of Energy (DOE). The Chicago Office had responded to a request that Hughes Socol had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Chicago Office had identified eight responsive documents, but it withheld them under FOIA Exemption 4. This appeal, if granted, would require the Chicago Office to release the withheld information to Hughes Socol.

I. Background

On January 19, 2012, Hughes Socol filed a FOIA request with the Chicago Office for "Disclosure Statements, and any amendments to them, submitted by UChicago-Argonne, LLC, operator of Argonne National Laboratory, between January 1, 2008 and January 1, 2012, that disclose cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs." Appeal Letter at 1.

The Chicago Office found the following eight documents:

1. Final version of the Disclosure Statement effective October 1, 2010 (submitted March 11, 2011);
2. Revised Disclosure Statement effective October 1, 2008 (submitted February 2, 2009);
3. Second revised Disclosure Statement effective October 1, 2007 (submitted June 26, 2008);
4. Revised Disclosure Statement effective October 1, 2007 (submitted March 28, 2008);
5. Updated version of the Disclosure Statement effective October 1, 2011 (submitted December 22, 2011);

6. Disclosure Statement effective October 1, 2010 (submitted July 30, 2010);
7. Revised Disclosure Statement effective October 1, 2009 (submitted March 5, 2010); and
8. Revised Disclosure Statement effective April 1, 2009 (submitted May 7, 2009).

Determination Letter at 1. The Chicago Office invoked Exemption 4 to withhold each document in its entirety. *Id*. It explained that the documents contain confidential commercial information from UChicago-Argonne, LLC, such as direct and indirect operation costs, employee benefit plans, depreciation and capitalization practices, deferred compensation, insurance costs, and other costs and credits. Releasing this information, the Chicago Office explained, would "likely . . . cause substantial harm to [UChicago-Argonne, LLC's] competitive position . . . by making known information to potential competitors for the Argonne National Laboratory Prime Contract to operate the Argonne facility that would enable such competitors to undercut Argonne's positions." *Id*. at 2.

On Appeal, Hughes Socol argues that the Disclosure Statements should be released for three reasons. First, the current Disclosure Statement supersedes six of the eight responsive documents. Thus, those six documents contain information that is stale, not competitive. Appeal Letter at 5. Second, it argues that the University of Chicago has managed the Argonne National Laboratory since 1946, under long-term contracts (the most recent ending on Sept. 30, 2015). Thus, it says, "The relevant 'market' is not characterized by actual competition." *Id*. Third, Hughes Socol notes that Congress has held hearings on the indirect costs of DOE facilities and the need for oversight. Thus, it says, the DOE should release the information out of a "compelling public interest." *Id*. at 6.

II. Analysis

A. Exemption 4

1. The Chicago Office Properly Invoked Exemption 4 to Withhold the Disclosure Statements

Exemption 4 protects information from disclosure when it is a trade secret or when it is (i) commercial or financial; (ii) obtained from a person; and (iii) privileged or confidential. 5 U.S.C. § 552(b)(4).

i. *Commercial or Financial*

Information is "commercial" if "it serves a 'commercial function' or is of a 'commercial nature.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations omitted).

The Disclosure Statements are commercial information. They serve a "commercial function" – they describe UChicago-Argonne, LLC's cost accounting practices and procedures for its business of running the Argonne National Laboratory.

ii. *Obtained from a Person*

"Person" includes individuals, partnerships, corporations, associations, and public or private organizations other than an agency. *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (applying the definition of person in 5 U.S.C. § 551(2)).

The Disclosure Statements were obtained "from a person." The FOIA's broad definition of a person includes business organizations such as UChicago-Argonne, LLC.

iii. *Privileged or Confidential*

The definition of "confidential" depends on whether the information was voluntarily or involuntarily submitted to the agency. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). To determine whether a document was submitted voluntarily or involuntarily, the agency must rely upon "legal authority, rather than the parties' beliefs or intentions. . . ." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001). Information was submitted involuntarily where "any legal authority compel[led] its submission, including informal mandates that call[ed] for the submission of the information as a condition of doing business with the government." *Lepelletier v. Fed. Deposit Ins. Corp.*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *rev'd in part on other grounds*, 164 F.3d 37 (1999).

Voluntarily submitted information is confidential if the submitter would not customarily release it to the public. *Critical Mass Energy Project*, 975 F.2d at 879. The agency has the burden of proving the submitter's custom. *Id*.

Involuntarily submitted information is confidential if releasing it is likely to impair the government's ability to obtain necessary information or cause substantial harm to the submitter's competitive position. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). "Conclusory and generalized allegations of substantial harm . . . cannot support an agency's decision to withhold requested documents." *Pub. Cit. Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

Here, the Disclosure Statements contain information submitted by UChicago-Argonne, LLC, and we find that that information is confidential. UChicago-Argonne, LLC submitted the information involuntarily because the government required it to complete the Disclosure Statements as part of a response to a solicitation from the government. *See* 48 C.F.R. 9903.202-1 (requiring Disclosure Statements from certain institutions receiving prime contracts). The information reflects UChicago-Argonne, LLC's business format, types of sales, methods of charging the government, and whether it charges the government average costs or another rate for materials and labor. Releasing this information would allow the competitors of UChicago-Argonne, LLC to know its bidding strategy, while UChicago-Argonne, LLC would not know the bidding strategy of its competitors. This asymmetry of information would likely cause substantial competitive harm to UChicago-Argonne, LLC, by allowing its competitors to submit lower bids.

2. Hughes Socol's Arguments

i. *The Current Disclosure Statement Supersedes Six Others*

Hughes Socol argues that six of the eight Disclosure Statements contain no competitive information because they have been superseded by more recent Disclosure Statements. Appeal Letter at 5.

We find this argument unpersuasive. Much of each Disclosure Statement consists of form responses with a series of boxes to check. Regardless of whether the responses changed between earlier and current Disclosure Statements, the responses still reveal the confidential commercial information that consists of UChicago-Argonne, LLC's proprietary business strategies.

ii. *The Prime Contract Lacks Competition*

Hughes Socol also argues that the University of Chicago has managed the Argonne National Laboratory since 1946, under long-term contracts (the most recent ending on Sept. 30, 2015). Thus, it says, "The relevant 'market' is not characterized by actual competition." Appeal Letter at 5.

We find this argument unpersuasive. When the current operating contract began in October 2006, a number of companies expressed interest.[1] The contract expires every 10 years. Moreover, at any time, a competitor may express interest, and the Chicago Office can terminate UChicago-Argonne, LLC's contract.[2]

iii. *Releasing the Disclosure Statements Would Further the Public Interest*

If the FOIA exempts information from mandatory disclosure, the DOE should generally release it if doing so would further the public interest. 10 C.F.R. § 1004.1. Hughes Socol argues that releasing the Disclosure Statements would further the public interest. Appeal Letter at 6.

Even if that were so, agencies lack the discretion to release information properly withheld under Exemption 4. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987). The Trade Secrets Act bars the agencies from the discretionary release of information covered by the Act. 18 U.S.C. § 1905. Exemption 4 co-extends with the Trade Secrets Act, so the Trade Secrets Act also bars the agencies from the discretionary release of information withheld under Exemption 4. *CNA Fin. Corp.*, 830 F.2d at 1151-52.

B. Segregability

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

[1] E-mail from Jennifer Gilbert, Attorney, General Law Division, Chicago Office, Mar. 22, 2012.
[2] *Id.*

Exemption 4 protects UChicago-Argonne, LLC's confidential commercial information in the Disclosure Statements. But the Disclosure Statements also contain much additional, segregable information that Exemption 4 may not protect. For example, each Disclosure Statement contains instruction segments that contain no responses from UChicago-Argonne, LLC. We will remand this matter to the Chicago Office for it to release reasonably segregable information. It may do so by redacting UChicago-Argonne, LLC's responses from each Disclosure Statement.

It Is Therefore Ordered That:

(1) The Appeal that Hughes Socol Piers Resnick DYM, Ltd. filed on March 9, 2012, OHA Case No. FIA-12-0010, is granted in part, as explained in Paragraph (2), below, and denied in all other respects.

(2) This matter is remanded to the Chicago Office for it to release reasonably segregable information to Hughes Socol Piers Resnick DYM, Ltd.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Preston P. Straub	)	
		)	
Filing Date:	March 29, 2012	)	
		)	Case No.: FIA-12-0011
		)	

Issued: April 18, 2012

Decision and Order

On March 29, 2012, Preston P. Straub appealed a determination issued to him on February 14, 2012, by the Chicago Office of the Department of Energy (DOE). The Chicago Office had responded to a request that Mr. Straub had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Chicago Office located two documents but found that they are not agency records subject to release under the FOIA. This Appeal, if granted, would require the Chicago Office to review the requested documents as agency records and either release them or justify their withholding under the FOIA.

I. Background

UChicago-Argonne, LLC (UCA), a private contractor, manages and operates the Argonne National Laboratory for the DOE. Mr. Straub filed a FOIA request for "copies of any emails sent by [a particular UCA employee] on November 14th or 15th [of] 2011 which contain my name." Determination Letter at 1. Mr. Straub specified the division where the employee works and the e-mail address that the employee used. *Id.*

The Chicago Office denied Mr. Straub's FOIA request. It stated that the UCA found two documents. Determination Letter at 1. But the Chicago Office withheld them because they "are personal records, not agency records subject to [the] FOIA." *Id.* The documents consist of two e-mails that a contractor employee sent, using the contractor's e-mail program, only to private individuals outside of the government. E-mails from Mimi R. Bartos, FOIA/ PA Officer, Chicago Office, Department of Energy, Mar. 29, 2012 and April 9, 2012. The e-mails were not accessed by any other agency employee or contractor employee. *Id.*

On appeal, Mr. Straub states that the Chicago Office "erred" in withholding the documents. Appeal Letter at 1. He argues that he has a "fundamental right to [a] copy" of the e-mails

because they (1) were "published from a .gov" e-mail address; (2) contain his name "for no proper governmental reason;" and (3) are not classified. *Id*.

II. Analysis

A. Whether the Documents at Issue are Agency Records – Subject to the FOIA – or Personal Records

Under the FOIA, an agency need only release agency records. *See* 5 U.S.C. § 552(a)(4)(B). It need not release personal records. *Id*. Here, we determine whether the requested e-mails are agency records or personal records.

The FOIA does not define "agency records." Instead, it lists examples of the types of information that agencies must make public, such as final opinions and administrative staff manuals. *See* 5 U.S.C. §§ 552(a)(2)(A), (C). Personal records, on the other hand, are documents created by an agency employee but not attributable to the agency for purposes of the FOIA. *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1489 (D.C. Cir. 1984).

To distinguish agency records from personal records, we evaluate the "totality of the circumstances." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006); *accord BPA Watch*, Case No. TFA-0263 (2008).[1] To evaluate the totality of the circumstances, we examine the creation, possession, control, and use of the document by an agency. *Consumer Fed'n of Am.*, 455 F.3d at 287 (citing *Bureau of Nat'l Affairs, Inc.*, 742 F.2d at 1490).

In *Consumer Fed'n of Am.*, the federation asked the U.S. Dep't of Agriculture (USDA) to release portions of the electronic appointment calendars of six agency officials. *Consumer Fed'n of Am.*, 455 F.3d at 285. (The federation sought the portions for "all meetings with non-government individuals, businesses, trade associations and/or other organizations[,] and the subject of the meetings." *Id*.) Each of the six agency officials created and continually updated the electronic calendars on the USDA computer system to schedule meetings and prevent conflicts. *Id*. at 285-86, 292-93. Five of the calendars were distributed to agency secretaries, special assistants, and senior management. *Id*. at 286. The sixth calendar was distributed only to the employee's secretary. *Id*.

The court found that the five calendars were agency records but that the sixth was not. *Consumer Fed'n of Am.*, 455 F.3d at 291-93. The five calendars were relied on by special assistants and senior management in running the daily operations of the USDA. *Id*. at 292. The sixth calendar was not similarly relied on in running daily operations; it was distributed to and relied on only by the employee's secretary. *Id.* at 293. The court noted that its "focus on use helps to ensure that a document subject to disclosure under the FOIA is an agency record and not an employee's record that happens to be located physically within an agency." *Id*. at 292 (citation and internal quotations removed).

Here, the requested e-mails resemble all six calendars of *Consumer Fed'n of Am.* in that the e-mails were also created and stored on a computer system owned by an agency.[2] But the

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

[2] UChicago-Argonne, LLC operates and maintains the computer system, but the DOE owns it. E-mail from Mimi R. Bartos, FOIA/ PA Officer, Chicago Office, Department of Energy, April 9, 2012.

e-mails were created by a contractor employee, not an agency employee. And the computer system is possessed by a contractor, not an agency. Most importantly, unlike the five calendars of *Consumer Fed'n of Am.* that were found to be agency records, no other employee (agency or contractor) received the e-mails and relied on them to conduct agency business. The e-mails were distributed and relied on even less than the sixth calendar of *Consumer Fed'n of Am.*, which was distributed to and relied on by the employee's secretary and still found to be a personal record. Therefore, the totality of the circumstances shows that the requested e-mails are personal records, not agency records.

B. Mr. Straub's Arguments

As noted above, Mr. Straub argues that he has a "fundamental right" to the e-mails because they were sent from a government e-mail address, they contain his name for no "proper" purpose, and they are not classified. We address his arguments in turn.

The FOIA does not require disclosure of all e-mails sent from a government address. Next, the e-mails related to no government purpose, which supports our finding that they are personal records rather than agency records. Lastly, the FOIA does not require disclosure of all non-classified information.

III. Conclusion

The requested e-mails are personal records, not agency records subject to the FOIA. Therefore, we will deny Mr. Straub's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Preston P. Straub, OHA Case No. FIA-12-0011, on March 29, 2012, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 18, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Another Way BPA	)		
		)	Case Nos.:	FIA-12-0012
Filing Date:	March 26, 2012	)		FIA-12-0013
		)		FIA-12-0014
		)		

Issued: April 20, 2012

Decision and Order

On March 26, 2012, Another Way BPA filed appeals from three determinations issued to it on March 8, 2012, by the Department of Energy's (DOE) Bonneville Power Administration (BPA). In those determinations, BPA responded to requests for documents that Another Way BPA filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to each of the three requests, BPA located numerous documents responsive to Another Way BPA's requests. BPA identified and released a number of responsive documents, but withheld portions of the documents pursuant to FOIA Exemptions 5 and 6. In its appeals, Another Way BPA challenges the adequacy of BPA's search, as well as the applicability of Exemption 5 to the withheld information. This appeal, if granted, would require BPA to (1) release the information it previously withheld under Exemption 5, and (2) perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

Another Way BPA submitted FOIA requests to BPA for records pertaining to BPA's I-5 Corridor Reinforcement Project, also known as the I-5 Corridor Project, which proposes to build a high-voltage transmission line near the Interstate 5 corridor in southwestern Washington. In two of its requests, Another Way BPA requested emails, meeting agendas and minutes, planning documents, preliminary designs, CAD drawings, and mitigation plans for two proposed substations, the Pearl substation and the Troutdale substation. *See* Letters from Christina J. Munro, BPA, to Richard van Dijk, Another Way BPA, March 8, 2012 (collectively, the "Determination Letter"). In a third FOIA request, Another Way BPA requested emails, meeting agendas, minutes and strategies, and handwritten notes pertaining to a December 2011 Public

Meeting, also referred to as a "listening meeting," held by BPA regarding the I-5 Corridor Reinforcement Project. *See* Determination Letter.

In its three March 2012 determinations, BPA identified numerous documents as responsive to the requests, and released some in their entirety and others with information withheld pursuant to FOIA Exemptions 5 and 6. *See* Determination Letter. BPA withheld the remaining responsive documents in their entirety under FOIA Exemption 5. *Id*. In applying Exemption 5, BPA noted that the documents it withheld under Exemption 5 are "draft documents that discuss several options for the design/function" of proposed BPA substations. *Id*. BPA further noted that it withheld under FOIA Exemption 6 some "names and personal contact information (address, email, and/or phone numbers) of individual citizens who have expressed an interest in [the I-5 Corridor] Project, as well as the personal cell phone numbers and email addresses of various individuals working on this project." *Id*.

After receiving the Determination Letter and the accompanying released documents, Another Way BPA filed the instant appeals. With respect to the determinations pertaining to the requests for information regarding the proposed Pearl and Troutdale substations, the Appellant challenges both the adequacy of BPA's search, and BPA's withholding of information under FOIA Exemption 5.[1] *See* Email from Richard van Dijk, Another Way BPA, to OHA, March 26, 2012 (Appeals, Case Nos. FIA-12-0012 and FIA-12-0013). Specifically, the Appellant argues that the searches for records responsive to these requests cannot be adequate because, given the complexity of the I-5 Corridor Project and the two-year period of time for which the Appellant requested records, it is likely that more records exist. *Id*. In addition, the Appellant maintains that the Exemption 5 withholdings in each case were improper because decisions have been made regarding the Pearl and Troutdale substations and, therefore, documents generated regarding those substations can no longer be considered predecisional. *Id*. With respect to BPA's response regarding the December 2011 public meeting records, Another Way BPA alleges that BPA's search was inadequate because several BPA employees were seen taking notes during the meeting, and the documents released by BPA contained "only one unidentified person['s]" handwritten notes. *See* Email from Richard van Dijk, Another Way BPA, to OHA, March 26, 2012 (Appeal, Case No. FIA-12-0014).

II. Analysis

A. Adequacy of the Searches

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not

[1] Another Way BPA did not challenge the Exemption 6 withholdings in the three determinations. Therefore, the Exemption 6 withholdings fall outside the scope of this Appeal and will not be considered.

hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[2]

In reviewing the instant appeals, we contacted BPA to ascertain the scope of its searches for responsive documents. *See* Email from Diane DeMoura, OHA, to Christina J. Munro, BPA, March 27, 2012. BPA informed us that the searches for records responsive to each of the three FOIA requests were conducted in a substantially similar manner. The requests were forwarded to the project manager for the I-5 Corridor Project. *See* Email from Paul Mautner, BPA, to Diane DeMoura, OHA, April 13, 2012. The project manager then made a list of each person working on the project in question (the proposed Pearl substation, the proposed Troutdale substation, and the December 2011 Public Meeting), and emailed each of those individuals "requesting that they search all electronic and paper documents that they have or have access to related to the I-5 project." *Id*. With respect to the request for information on the proposed substations, the project manager specifically requested that those individuals search for emails, meeting agendas and minutes, preliminary designs, CAD drawings, tower designs, and mitigation plans for the period indicated by the Appellant (January 2008 through February 2010 for the Pearl substation, and January 2008 through July 2010 for the Troutdale substation). The project manager also directed those individuals to use the search terms "Pearl," " Troutdale," and "Sundial" in performing their searches. *Id*. As to the request for information pertaining to the December 2011 Public Meeting, the project manager specifically requested that the pertinent individuals search for emails, meeting agendas, minutes and strategies, including all documents from before and after the meeting, as well as any handwritten notes made during the meeting. *Id*. Finally, the project manager followed up with each of the individuals to ensure that they understood the request, and requested that they inform him if no responsive documents were located. *Id*.

Based on this information, we find that BPA performed an exhaustive search reasonably calculated to reveal records responsive to the Appellant's FOIA requests, despite the fact that the searches did not yield the volume of information that the Appellant expected. Therefore, the search was adequate.

B. Exemption 5

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters

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

which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1974). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*. The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

In this case, we have reviewed the documents containing information that BPA withheld under Exemption 5 and find that BPA properly invoked the deliberative process privilege. The information that BPA withheld under Exemption 5 consists of email communications among individuals working on the I-5 Corridor Project containing recommendations, proposals, opinions, etc. The withheld information also includes draft designs and other related data. This information is clearly predecisional, because, despite the Appellant's contentions that decisions have been made regarding specific substations, the I-5 Corridor Project is an ongoing project and no final decisions have been rendered regarding if, and how, the project should proceed. *See* Email from Paul Mautner, BPA, to Diane DeMoura, OHA, April 13, 2012. Moreover, the withheld information is deliberative because it is part of an internal BPA process used to evaluate and analyze the various alternatives at issue in this project. *Id*. Releasing such information could well compromise the ability and willingness of BPA employees to make honest and open recommendations regarding the I-5 Corridor Project or other similar projects in the future. Accordingly, we find that BPA properly applied Exemption 5 in withholding certain portions of documents that it released to the Appellant.

C. Public Interest in Disclosure

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the

policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. BPA concluded, and we agree, that discretionary release of the information withheld under Exemption 5 would cause harm to the agency's ongoing decision-making process. Therefore, discretionary release of the withheld information would not be in the public interest.

D. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). BPA has informed us that it inadvertently withheld segregable portions of certain email communications. BPA has corrected this oversight by releasing that information to the Appellant. *See* Letter from Christina J. Munro, BPA, to Richard van Dijk, Another Way BPA, April 12, 2012. We reviewed the remaining withheld information and did not find any additional non-exempt, segregable information.

III. Conclusion

As discussed above, we have concluded that BPA's searches for records responsive to Another Way BPA's three FOIA requests were adequate. We have further found that BPA properly withheld information pursuant to FOIA Exemption 5 in the documents it released to the Appellant. Finally, BPA complied with the requirements of the FOIA by releasing to the Appellant all non-exempt portions of the responsive documents.

It Is Therefore Ordered That:

(1) The Appeals filed on March 26, 2012, by Another Way BPA, OHA Case Nos. FIA-12-0012, FIA-12-0013, and FIA-12-0014, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 20, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Local 94, IFPTE	)	
		)	
Filing Date:	March 27, 2012	)	
		)	Case No.: FIA-12-0016
		)	

Issued: April 20, 2012

Decision and Order

On March 27, 2012, Local 94, IFPTE (Local 94), appealed a determination issued to it on March 2, 2012, by the Idaho Operations Office of the Department of Energy (DOE). The Idaho Operations Office had responded to a request for information filed by Local 94. The Idaho Operations Office found responsive agency records but withheld information under Freedom of Information Act (FOIA) Exemptions 5, 6, and 7(C). This Appeal, if granted, would require the Idaho Operations Office to release the withheld information to Local 94.

I. Background

Local 94 asked the Idaho Operations Office to release "the results from the Human Capital Management Accountability Program (HCMAP) audit of the Idaho Operation's Human Resources Office," which was conducted in May 2011. Determination Letter at 1. The Idaho Operations Office released the HCMAP report with numerous redactions under FOIA Exemptions 5, 6, and 7(C). *Id.*

On Appeal, Local 94 challenges the appropriateness of invoking Exemption 7. Appeal Letter. Exemption 7 applies to law enforcement records, Local 94 explains, and the HCMAP report concerns no law enforcement. Further, Local 94 points out that the Idaho Operations Office failed to label each redaction with the exemption invoked. Local 94 asks for the Idaho Operations Office to label its redactions and withhold only appropriately exempted information. *Id.*

The Idaho Operations Office explained that it labeled no redactions with exemption numbers because Local 94 did not label its request for information a FOIA request. E-mail from Clayton Ogilvie, Office of Public Affairs, Idaho Operations Office, April 2, 2012.

II. Analysis

A. Adequacy of the Determination

Our review of the documents confirms that the Idaho Operations Office labeled no redactions with exemption numbers. Without knowing which exemption or exemptions the Idaho Operations Office invoked for each redaction, we cannot consider Local 94's appeal. When offices do not specify the exemption or exemptions invoked, we remand the request to the office with instruction to issue a new determination letter. *Tom Marks*, Case No. TFA-0288 (2009).* The new determination letter must specify the exemption or exemptions invoked for each redaction and how the exemption or exemptions apply so that Local 94 will know the rationale for each withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by Local 94, IFPTE, OHA Case No. FIA-12-0016, on March 27, 2012, is hereby granted in part, as explained in Paragraph (2), and denied in all other respects.

(2) The Idaho Operations Office must issue a new determination letter consistent with the instructions in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 20, 2012

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

United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Competitive Enterprise Institute		
Filing Date: March 29, 2012	Case No.:	FIA-12-0017

Issued: April 16, 2012

Decision and Order

On March 29, 2012, the Competitive Enterprise Institute (the Appellant) filed an Appeal from two final determinations, one issued by the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy (EE) on March 26, 2012, and the other issued by the DOE's Office of Congressional and Intergovernmental Affairs (CI) on March 15, 2012. In these determinations, EE and CI responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. EE released a substantial amount of responsive information, but withheld responsive information under FOIA Exemptions 4 and 6. CI indicated that it had conducted a search for responsive documents, but had not found any responsive information. This Appeal, if granted, would require EE to release that information it has withheld to the Appellant, and would require CI to conduct a new search for responsive documents.

I. BACKGROUND

The Appellant filed a broad request for information with DOE Headquarters seeking all correspondence between a number of individuals and organizations and EE and CI.[1]

[1] Specifically, the request sought all "Correspondence and any memoranda, analysis, other communications cited therein or attached, which were created, received and/or held by DOE's Office of Congressional & Intergovernmental Affairs, or Office of Energy Efficiency and Renewable Energy, which were sent to or from any of the following: 1) the office(s) of Congressman Fortney "Pete" Stark; 2) the company Solyndra; 3) any of the following individuals, all of whom are identified in public records as being paid

DOE Headquarters referred the request to EE and CI. On March 15, 2012, CI issued a determination letter (the CI Determination Letter) in which it indicated that it had not located any documents that were responsive to the Appellant's request. On March 26, 2012, EE issued a partial determination letter (the EE Determination Letter) in which it released several documents to the Appellant. However, EE withheld portions of these documents under Exemptions 4 and 6. EE Determination Letter at 1-2.[2] On March 29, 2012, the Appellant filed the present appeal contending EE had improperly withheld information under Exemption 6, and that CI had not conducted a reasonable search for responsive documents.

II. ANALYSIS

Exemption 6

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 6 is at issue in the present case.[3]

The information withheld by EE under Exemption 6 consists solely of an e-mail message authored by an EE official to a member of the public, with the subject heading: "Dinner." EE informed us that the author of this e-mail does not object to its release. April 9, 2012,

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representatives of and advocates for Solyndra before the federal government: i) Catherine Ransom; ii) Alex Mistri; iii) Gregg Rothschild; iv) Joe Pasetti; v) Victoria Sanville; vi) Andy Quinn; vii) Steve Ham; viii) Chris Fish; ix) Kyle Winslow; x) Steve McBee; xi) Angela Becker-Dippmann; 4) any individuals whose email addresses reflect affiliation with the entities cited below, all of whom are identified in public records as being paid representatives of and advocates for Solyndra before the federal government: i) Glover Park Group; ii) McAllister & Quinn; iii) McBee Strategic Consulting." Request at 1-2.

[2] The EE Determination Letter indicated that it is currently reviewing a number of other documents that it had identified as responsive to the Appellant's request. EE Determination Letter at 1. The present appeal concerns only those documents released to the Appellant in EE's March 26, 2012, Determination Letter.

[3] EE withheld portions of a patent application under Exemption 4 in its March 26, 2012, Determination Letter. The present appeal does not contest EE's withholdings under Exemption 4.

E-mail from Patrick Shipp, Office of Project Management and Evaluation, Office of Energy Efficiency and Renewable Energy to Steven L. Fine, Office of Hearings and Appeals. Accordingly, EE told us it would release the information it withheld under Exemption 6 to the Appellant in the near future. *Id.* Therefore that portion of the present Appeal concerning EE's withholdings under Exemption 6 is now moot and will be dismissed.

Adequacy of the Search

In responding to a request for information filed under the Freedom of Information Act (FOIA), an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted CI to gain additional information to evaluate the adequacy of its search. CI informed us that it conducted an extensive search for documents responsive to the Appellant's request. April 4, 2012, Letter from James Secreto, Office of Intergovernmental and Congressional Affairs to Steven L. Fine, Office of Hearings and Appeals at 1-3 (Secreto Letter). This search included two electronic searches of DOE's Headquarters E-mail database. *Id.* In addition, CI required each employee to conduct self-searches of both their e-mail and written correspondence records for responsive documents. *Id.*

The Appellant correctly notes that EE found a number of responsive documents while CI found none. The Appellant contends that CI is more likely than EE to have received responsive correspondence, and therefore CI's search is deficient on its face. CI however, has provided the following explanation:

> CI did not produce this correspondence because CI believed [EE] conducted a search of DOE's Office of the Executive Secretariat's Electronic Document Online Correspondence and Concurrence System and produced the responsive documents identified in those search results. Therefore, an additional search of the Electronic Document Online Correspondence and Concurrence System is unlikely to identify additional responsive documents that have not already been provided to [the Appellant] with [EE's] March 26, 2012 letter and production.

Secreto Letter at 3. EE informed this Office that it had included DOE's Office of the Executive Secretariat's Electronic Document Online Correspondence and Concurrence System in its search for responsive documents. April 10, 2012, E-mail from Patrick Shipp, Office of Energy Efficiency and Renewable Energy, to Steven L. Fine, Office of Hearings and Appeals.

After reviewing the search for responsive documents conducted by EE in response to the Appellant's initial request, we find that it was reasonably calculated to uncover any responsive documents and was therefore adequate.

III. CONCLUSION

Since EE stated that it will release that information it withheld under Exemption 6, we are dismissing that portion of the Appeal. Because we have found that CI's search for responsive documents was adequate, we require no further action by CI on that portion of the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by the Competitive Enterprise Institute, Case No. FIA-12-0017, is hereby dismissed in part and denied in all other aspects.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 16, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of Mark D. Siciliano	)	
	)	
Filing Date: April 4, 2012	)	Case No.: FIA-12-0019
	)	
	)	

Issued: May 2, 2012

Decision and Order

On April 4, 2012, Mark D. Siciliano (Appellant) filed an Appeal from a determination issued to him on March 8, 2012, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho released one document responsive to the request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Idaho to conduct an additional search for responsive documents.

I. Background

On February 14, 2012, the Appellant filed a request with DOE Headquarters (DOE/HQ). Request E-mail dated February 14, 2012, from Appellant to DOE/HQ. DOE/HQ forwarded the request to Idaho on February 17, 2012. Memorandum dated February 17, 2012, from Alexander C. Morris, FOIA Officer, Office of Information Resources, DOE, to Clayton Ogilvie, FOIA Officer, Idaho. On March 8, 2012, Idaho responded to the request and released a copy of the Idaho's National and Homeland Security Internal Assessment Review along with its transmittal memo. Determination Letter dated March 8, 2012, from Clayton Ogilvie to Appellant. In the instant Appeal, the Appellant challenges Idaho's search for responsive documents. Appeal Letter dated March 28, 2012, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of*

State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

A. Item One

The Appellant first asked for the "[f]inal report and all supporting information regarding an assessment . . . of [Idaho] that was conducted in the May-October, 2011 timeframe. Subject of the report concerned the business volume at [Idaho's National and Homeland Security Division] who experienced a significant downward trend in business." Request E-mail. Idaho responded to this request by releasing the final report and the transmittal memo. Determination Letter at 1. In his Appeal, the Appellant states that he asked for "ALL government owned documents that support the findings," not just the final report and transmittal memo. Appeal Letter at 2.

We contacted Idaho to find out what type of search it conducted and its understanding of the scope of the request. Idaho replied that it contacted the person with the most knowledge on the matter to resolve what information existed that was responsive to the request. Idaho was given a number of papers and determined that only the final report, along with its transmittal memo, was responsive to the Appellant's request. Idaho indicated that it understood the request to be for the final report and any information which supported the report's factual conclusion. E-mail dated April 19, 2012, from Clayton Ogilvie to Janet Fishman, Attorney-Examiner, OHA. In his Appeal, the Appellant contends that his request included "all supporting information, including emails, draft reports, interview notes, and all government owned documents." Appeal Letter at 1. Although a requester cannot broaden the request on Appeal, we do not believe that the Appellant has broadened his Appeal by asking for emails and interview notes. *Snake River Alliance*, Case No. TFA-0468 (2011); *Barbara Schwarz*, Case No. VFA-0641 (2001), citing *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991). Therefore, we will remand the matter to Idaho to conduct a search for "all supporting" documents, including emails and interview notes. "Drafts of the report," however, are not "supporting documents" and, therefore, are outside the scope of the request and this Appeal. If the Appellant seeks documents outside the scope of the request, the Appellant needs to file another request.

B. Item Two

Second, the Appellant asks for the "[f]inal report and supporting information regarding the Associate Laboratory Director of [Idaho's National and Homeland Security Division] (Dr. KP Ananth) requiring personnel to remain in a room against their will during an extended alarm drill including DOE/HQ assessment of [Idaho] and Battelle Energy Alliance's (BEA) Employee Concerns Programs." Request E-mail. Idaho responded that any responsive documents were maintained by BEA and were not agency records. Determination Letter at 1-2. In his Appeal, the Appellant claims that Idaho's claim that no government-owned documents exist is simply impossible. Appeal Letter at 2.

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

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Idaho concluded that the records were neither in the possession or control of Idaho at the time of the request and, therefore, were not agency records. Determination Letter at 1-2. Further, Idaho determined that any documents that may exist were BEA's records under the contract between BEA and DOE. Determination Letter at 1. We agree.

However, the Appellant specifically asked for information from DOE/HQ, which did not conduct a search for responsive records. He supports his claim that documents may exist at DOE/HQ, stating that senior members from DOE/HQ conducted an investigation/assessment into the safety incident at Idaho, and those officials interviewed him. Given that DOE/HQ did not conduct a search for responsive records because it believed all records would be in Idaho, we will remand the matter to DOE/HQ for a determination about whether responsive documents exist at DOE/HQ.

C. Item Three

Third, the Appellant asks for the "[n]ames of individuals that have filed employee concerns with BEA and/or [Idaho] that have rescinded their complaints after 01, August 2011." Request E-mail. Idaho replied that it conferred with the Idaho Employee Concerns Program, which indicated that no employee filing a concern since August 1, 2011, has retracted or rescinded their complaint. Determination Letter at 2. The Appellant asks that OHA remand the matter to Idaho to revisit the request. He states, "[a]t a minimum, due to the importance of a healthy reporting culture, [Idaho] should be ordered to investigate this incident[2/] to determine the validity of this concern." Appeal Letter at 2. This is not a challenge to the adequacy of the search but rather a request for an investigation of an incident, a request that is outside the scope of a FOIA request or appeal. In any event, we believe that the search was reasonable. Idaho contacted the Idaho Employee Concerns Office, which stated that there was no responsive information, and the Appellant has provided no reason to believe otherwise. E-mail dated April 12, 2012, from Clayton Ogilvie to Janet Fishman. Accordingly, we will uphold Idaho's search for this information as reasonable.

III. Conclusion

After considering the Appellant's arguments, we believe that Idaho may possess emails and interview notes that are responsive to the first item of the request. Therefore, we will remand the matter to Idaho to issue a new determination after conducting a search for emails and interview notes. We are convinced that Idaho conducted a search reasonably calculated to uncover the information requested by the Appellant in items two and three of his request. However, DOE/HQ did not conduct a search for information responsive to the Appellant's second item. Accordingly, we will remand the matter to DOE/HQ for a search for documents responsive to

[2/] We assume that the Appellant is referring to the incident he described above where he claims that employees were required to remain in a room where an alarm was blaring. We are unclear how this incident relates to complaints filed with the Employee Concerns Program.

Item two. As the foregoing indicates, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Mark D. Siciliano, Case No. FIA-12-0019, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) The matter is hereby remanded to the Idaho Operations Office and the Department of Energy Headquarters, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of California-Arizona-Nevada District Organization Contract Compliance	)	Case No. FIA-12-0020
Filing Date: February 2, 2012	)	

Issued: April 27, 2012

Motion for Reconsideration

This Decision concerns a Request for Reconsideration filed with the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) by California-Arizona-Nevada District Organization Contract Compliance (CANDO). In this Request, CANDO requests that OHA modify a Decision and Order that we issued in response to one of two appeals CANDO filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. *See California-Arizona-Nevada District Organization Contract Compliance*, Case Nos. FIA-12-0004 and FIA-12-0005 (2012) (*CANDO*).[1]

I. BACKGROUND

CANDO filed requests for information with the Loan Guarantee Program Office (LGPO) seeking copies of documents responsive to ten specified topics related to loan guarantee contracts for the Agua Caliente and Gila Bend Solar Energy Projects. On October 31, and November 8, 2011, LGPO issued determination letters releasing copies of the documents CANDO requested regarding the Agua Caliente and Gila Bend projects, respectively. In both instances, however, LGPO withheld portions of the responsive documents under Exemption 4 of the FOIA.[2] On February 2, 2012, CANDO filed appeals contending that LGPO had improperly applied Exemption 4 to withhold the names and other identifying information concerning contractors and sub-contractors listed in those documents.[3]

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

[2] Exemption 4 permits an agency to withhold from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

[3] CANDO did not challenge LGPO's application of Exemption 4 to withhold other information from the responsive documents.

On March 23, 2012, OHA issued a Decision and Order in which it addressed LGPO's determinations regarding both sets of documents that CANDO had requested. Regarding the Agua Caliente documents (Case No. FIA-12-0005), OHA determined, based on representations it received from LGPO, that "no names or other information that identified contractors or sub-contractors was withheld." *CANDO* at 4. Relying on those representations, OHA concluded that CANDO's contention on appeal did not apply to any of the information withheld from the Agua Caliente documents, and it denied CANDO's appeal with respect to those documents.

In its Request for Reconsideration, CANDO asserts that the material LGPO identified and provided as responsive to the fifth enumerated topic of its request for Agua Caliente documents bore deleted information that, in the context of the surrounding, unredacted portions of the information CANDO received, "appears to refer to contractors." Request for Reconsideration at 1.

II. ANALYSIS

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g., Tarek Farag*, Case No. TFA-0385 (2010). We have deemed CANDO's current Request a Motion for Reconsideration. In reviewing Motions for Reconsideration, we look to OHA's procedural regulations regarding modification or rescission of its orders. *See* 10 C.F.R. Part 1003, Subpart E; *see also Terry M. Apodaca*, Case No. TFA-0237 (2007). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application "demonstrates that it is based on significantly changed circumstances." 10 C.F.R. § 1003.55(b)(1).

Significantly changed circumstances includes "the discovery of material facts that were not known or could not have been known" at the time of the original proceeding; "the discovery of a law, rule, regulation … that was in effect" at the time of the original proceeding "and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome;" or "a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between the issuance of such order and the date of the application [for modification or rescission] and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R § 1003.55(b)(2).

Applying these standards to the case at hand, we find that CANDO has presented evidence in its Motion warranting modification or rescission of our prior decision in *CANDO*. After receiving CANDO's Motion, we obtained and reviewed an unredacted version of the Agua Caliente material LGPO provided to CANDO's fifth topic of its request: "A copy of the Technical Information Section C – Part II 2. Engineering and Construction Plans, a copy of the list of engineering design contractors and the construction contractors selected to perform the construction of the project . . ." Among the information withheld from the redacted version of the responsive material are the names of three finalists. According to the document, one of these three companies had not yet, but was to be, selected to serve as the Engineering and Construction

Plans (EPC) contractor for the project. Immediately following the first deletion of these companies' names, the text of the application states: "These EPC [Engineering and Construction Plans] companies are extremely qualified and experienced to serve as the EPC Contractor for the Project." Agua Caliente Application at 13.

As stated above, although LGPO withheld a significant amount of information from the responsive documents under Exemption 4, CANDO limited its appeal to LGPO's application of Exemption 4 specifically to "names of the contractors and subcontractors, and identifying information." We spoke with LGPO after we received this Motion for Reconsideration. LGPO informed us that the names deleted from the material responsive to the fifth topic of CANDO's request were not the names of selected contractors, but rather a list of companies from which the contractor was to be selected at a later date, and therefore not responsive to CANDO's request. Memoranda of Telephone Conversation between Janelle Jordan, LGPO, and William Schwartz, OHA (April 13, 2012); E-mail from Janelle Jordan to William Schwartz (April 16, 2012).

We reject LGPO's position. Because CANDO specifically requested the entire section of the application entitled "Agua Caliente/II/C/2/Engineering and Construction Plans," no portion of that section can be considered not responsive to the request. Moreover, because the names of potential contractors contained in that section are responsive to CANDO's request, LGPO must either release those names or adequately justify applying Exemption 4, or any other basis for withholding, to those names. [4] In our previous Decision, we stated that adequate justification for applying Exemption 4 to any information requires, as an initial step, a description of the withheld information that is sufficient to permit the requester to understand what information has been redacted from a document. *CANDO* at 3. LGPO failed to describe the information it withheld from CANDO to include the names and identifying information of contractors and subcontractors, both selected (in the Gila Bend documents) and potential (in the Agua Caliente documents). On remand, it must describe the information withheld from the Agua Caliente documents in a more detailed manner, and, for the reasons set forth in *CANDO*, explain to the requester how the disclosure of any potential as well as selected contractors or subcontractors contained in the Agua Caliente documents is likely to cause competitive harm to the applicant.

III. CONCLUSION

CANDO has presented material facts that were not known at the time of the appeal proceeding. It has therefore demonstrated "significantly changed circumstances" warranting modification of our decision in *CANDO*, Case No. FIA-12-0005 (2012). Consequently, the Motion for Reconsideration should be granted.

Accordingly, we are remanding to LGPO CANDO's appeal concerning its request for information about the Agua Caliente Solar Energy Project (Case No. FIA-12-0005). LGPO should, on remand, review its withholding of any names or identifying information regarding potential or selected contractors or subcontractors throughout the material it identified as responsive to that request, and either release that information or issue a new determination in

[4] We note that LGPO indicated on the redacted material it provided to CANDO that the names of the potential contractors were withheld pursuant to Exemption 4.

which it properly describes the information it is withholding and provides a sufficient explanation for withholding the information.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by California-Arizona-Nevada District Organization Contract Compliance (CANDO) on April 10, 2012, OHA Case No. FIA-12-0020, is granted.

(2) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance in Case No. FIA-12-0005 is hereby remanded to the Loan Guarantee Program Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 27, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Thomas R. Thielen	)	
	)	
Filing Date: April 27, 2012	)	Case No.: FIA-12-0023
	)	
	)	

Issued: June 28, 2012

Decision and Order

On April 27, 2012, Thomas R. Thielen filed an Appeal from a determination issued to him on March 9, 2012, by the Richland Operations Office (Richland) of the Department of Energy (DOE). That determination was issued in response to a request for information that Mr. Thielen submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require Richland to release additional responsive material.

I. Background

Mr. Thielen filed a request for information with the DOE's Richland Operations Office concerning an investigation of retaliation for raising a safety concern. In this request, he sought a copy of documents regarding a safety concern he raised to CH2M Hill Plateau Remediation Company (CHPRC). On March 9, 2012, Richland issued a determination letter which stated that, according to CHPRC's contract with DOE, CHPRC's employee concern records are the property of the contractor and not subject to the provisions of the Freedom of Information Act or Privacy Act. *See* Determination Letter at 1. Richland released a copy of Mr. Thielen's DOE employee concern file, but withheld portions of the investigation summary included in the file pursuant to 5 U.S.C. § 552a(k)(5) (Exemption (k)(5) of the Privacy Act). According to the DOE, the information deleted from this document was obtained from sources who were promised confidentiality in exchange for their information. *Id.* On April 27, 2012, Mr. Thielen filed the present Appeal with the Office of Hearings and Appeals (OHA). He contends that the withheld information should be released to him because (1) he was retaliated against by CHPRC; (2) statements made during an investigation were not true, defamed his character and damaged his reputation; and (3) he has the right to defend allegations made against him and to clear his name. *See* Appeal Letter.

II. Analysis

Privacy Act Exemption (k)(5)

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, under the Privacy Act, agencies may provide that some systems of records are not subject to the Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(k).

In first-party requests such as this one, information responsive to the request is provided to the requester unless there is an exemption authorizing withholding. Applicable here is Privacy Act Exemption (k)(5).

Exemption (k)(5) of the Privacy Act permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence . . ." 5 U.S.C. § 552a(k)(5). *See Robert H. Calhoun*, 27 DOE ¶ 80,283 (2000). In creating Exemption (k)(5), Congress recognized the need to protect the sources of information to whom promises of confidentiality had been made. *See Chey Temple*, 25 DOE ¶ 80,194 (1996).

Richland informed us that the record requested by Mr. Thielen, his DOE employee concern file, was located in a system of records established under the Privacy Act, specifically DOE System of Records 3, Employee Concerns Program Records. *See* Appeal Letter; *see also* Record of E-mail Communication between Dorothy C. Riehle, Richland, and Kimberly Jenkins-Chapman, OHA (May 8, 2012). Pursuant to Exemption (k)(5) of the Privacy Act, Richland deleted the names of witnesses who were interviewed during the course of an investigation, specific job titles that could be used to identify witnesses and specific comments made by the witnesses, if they could be used to identify the witnesses. *Id.* Richland further informed us that the witnesses whose names and job titles were deleted requested confidentiality at the time of the interview and that there was an expressed promise between the government and the individuals that the identity of the sources would be held in confidence. However, after a careful review, we find that Privacy Act Exemption (k)(5) does not apply to the Appellant's employee concern file at issue. The information in question is not "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information . . .", and therefore Richland's initial determination to withhold under Exemption (k)(5) was incorrect. At this point, there is no basis to withhold any

portion of the requested information under the Privacy Act. Therefore we will remand this matter to Richland to either release the requested information in its entirety or justify withholding any portions of it under the Privacy Act. */

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas R. Thielen, OHA Case No. FIA-12-0023, on April 27, 2012, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Richland's Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought
in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos

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*/ We note that courts have upheld the withholding of third-party personal information, including the identities of third parties, under the Privacy Act on the ground that the third-party information is not "about" the requester, and is therefore outside the scope of the Privacy Act and not subject to disclosure, pursuant to the Privacy Act's definition of a "record" as "any item, collection, or grouping of information about an individual . . ." (At 5 U.S.C. § 552a(a)(4)). *Haddon v. Freeh*, 31 F. Supp.2d 16, 22 (D. D.C. 1998). In addition, cases in which this issue have been raised typically require that agencies process first-party requests separately and independently under both the Privacy Act and the Freedom of Information Act (FOIA). *See Shapiro v. DEA,* 762 F.2d 611, 612 (7th Cir. 1985). It is DOE's established policy and practice to comply with this requirement and process requests under both the Privacy Act and the FOIA. Accordingly, Mr. Thielen's request should have been processed under the FOIA as well as the Privacy Act. However, only if there were grounds to withhold under each statute would the information be withheld from a requester. Under the FOIA, it is clear that Exemption 6, which shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" would justify the withholding of the information Richland initially withheld from the Appellant under the Privacy Act: the names of witnesses, and their job titles and comments to the extent they would reveal the witnesses' identities. 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Release of this third-party information could result in harassment or harm to individuals who provided confidential information to the DOE. Furthermore, there would be no overriding public interest in disclosure. Accordingly, we determine here that the information at issue would appropriately be withheld under the FOIA. Nevertheless, since we have determined that Privacy Act Exemption (k)(5) cannot be applied to withhold that information from the Appellant, Richland may withhold that information only if, on remand, it justifies that withholding under the Privacy Act on another ground, such as the definition of "record" in 5 U.S.C. § 552a(a)(4). We also note that courts have recognized a privilege to protect information obtained based on promises of confidentiality when disclosure "would hamper the efficient operation of an important Government program." *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963). *Accord Cooper v. Dept. Of Navy*, 558 F.2d 274, 277 (5th Cir. 1977) ("To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one.").

Director
Office of Hearings and Appeals

Date: June 28, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of Len Latkovski	)	
	)	
Filing Date: May 1, 2012	)	
	)	Case No.: FIA-12-0024
	)	

Issued: May 24, 2012

Decision and Order

On May 1, 2012, Len Latkovski ("Appellant") filed an Appeal from a determination issued by the Department of Energy (DOE) Office of Information Resources (OIR). In that determination, OIR responded to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to perform an additional search and require other DOE offices to search for responsive documents.

I. Background

On July 21, 2011, the Appellant submitted a FOIA request to the OIR, for records relating to certain "closed" cities of the former Soviet Union during the years 1945-1960.[1] *See* DOE Headquarters FOIA Request Form from Len Latkovski (July 21, 2011) (FOIA Request). On September 13, 2011, OIR sent the Appellant a partial determination letter stating that it referred the request to the Office of History and Heritage Resources (Office of History) in the Office of the Executive Secretariat so that responsive documents, if existing, could be located. The letter went on to state that the Office of History could find no documents responsive to his request.[2]

[1] These are cities with travel and residency restrictions which were associated with the former Soviet Union's production of nuclear weapons and other defense and research projects.

[2] The Appellant appealed the adequacy of the search for responsive documents conducted by the Office of History. In a November 15, 2011, Decision and Order, OHA found that the Office of History had conducted an adequate search under the FOIA. *Len Latkovski*, Case No. FIA-11-0004 (November 15, 2011). OHA FOIA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

OIR subsequently decided to expand the search for documents responsive to the Appellant's FOIA Request to other DOE organizations.[3] On March 22, 2012, OIR issued the Appellant another determination letter stating that an additional search had been made at the DOE's Office of Health, Safety and Security (HSS) but that no responsive documents had been located at that Office. Determination Letter at 2. The Letter also informed the Appellant that additional searches were being conducted at DOE's Office of Intelligence and the National Nuclear Security Administration (NNSA) and that the Appellant would receive responses from those offices regarding any responsive documents in their possession.[4] Determination Letter at 1.

In his May 1, 2012, Appeal of OIR's March 22 determination, the Appellant argues that the search for responsive documents was inadequate. Appeal Letter at 2. The Appellant asserts that an adequate search would consist of a search of various DOE agencies he lists in his appeal. Appeal Letter at 2.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).

During the processing of this Appeal, OHA first contacted OIR to ascertain the scope of the HSS search for responsive documents. *See* E-mail from Richard Cronin, Attorney-Examiner, OHA to Joan Ogbazghi, Information Access Specialist, OIR (May 2, 2012). In its response, an official of HSS informed OHA that the only potential source of responsive records would be contained in its records of the Russian Health Studies Program (RHSP) and that those records would not have any references to the listed "closed" cities especially since the RHSP did not include any of these cities in its studies and that it only possessed records from 1994 onward. *See* E-mail from Barrett Fountos, Program Manager, Russian Health Studies Program, Office of Domestic and International Health Studies Program (May 10, 2012). Additionally, the official had conducted a prior manual search of files for similar documents, pursuant to another FOIA request, but found no responsive documents. *Id.* Given that HSS entrusted the search to a knowledgeable official as to the possible existence of responsive documents and that the official had a reasonable basis to conclude that such documents did not exist in HSS, we find that the search conducted by HSS was adequate for the purposes of the FOIA. *See National Association of Home Builders*, Case No. TFA-0401, *slip op*. at 3 (August 9, 2010) (knowledgeable official's determination that

[3] The Appellant's FOIA Request, Request No. HQ-2011-01057-F, was subsequently given a new FOIA Request number – HQ-2012-00181-F.

[4] During the pendency of this Appeal, OIR requested that the Office of Scientific and Technical Information (OSTI) also conduct a search for documents responsive to the Appellant's request. *See* E-mail from Joan Ogbazghi, Information Access Specialist, OIR (May 15, 2012).

responsive documents were not maintained at a particular office held to constitute an adequate search under the FOIA).

With regard to the Appellant's challenge to the scope of OIR's overall DOE-wide search for responsive documents, we find that this challenge must fail. OIR has forwarded the Appellant's request to the Office of History, HSS, NNSA, OSTI, and the Office of Intelligence. OIR's selection of these offices represents a reasonable determination as to where documents relating to the specified "closed" cities in the former Soviet Union might exist.[5] Consequently, we find that OIR's search for responsive documents throughout DOE is also adequate.[6]

Based on the foregoing, we find that HSS conducted an adequate search for responsive documents pursuant to the Appellant's FOIA Request. Additionally, we believe that OIR has conducted a DOE-wide search reasonably calculated to discover responsive documents. Therefore, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Len Latkovski on May 1, 2012, OHA Case No. FIA-12-0024, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 24, 2012

[5] The Individual will receive separate determinations from NNSA, OSTI, and the Office of Intelligence.

[6] We note that almost all of the offices or agencies the Appellant listed in his Appeal would have had their existing documents, if any, archived at the Office of History or the Office of Intelligence. E-mail from Joan Ogbazghi, Information Access Specialist, OIR to Richard Cronin, Attorney-Examiner (May 16, 2012). The Appellant may appeal the determinations regarding his FOIA Request which will be issued by NNSA, OSTI, and the Office of Intelligence.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Center for Contract Compliance	)	
	)	
Filing Date: May 8, 2012	)	
	)	Case No.: FIA-12-0025
	)	

Issued: May 31, 2012

Decision and Order

On May 8, 2012, the Center for Contract Compliance ("CCC") filed an appeal from a determination the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO) issued on March 19, 2012. In its determination, LGPO responded to a request for documents that CCC submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to the CCC's FOIA request, LGPO identified and released one responsive document, but withheld portions of the document pursuant to FOIA Exemption 4. This appeal, if granted, would require LGPO to release the withheld information to CCC.

I. BACKGROUND

In a September 12, 2011, request, CCC sought documents related to the Desert Sunlight Solar Farm Project, a 550-megawatt solar photovoltaic (PV) power plant project to be constructed in Riverside County, California. *See* Letter from Branden Lopez, CCC, to Alexander Morris, FOIA Office, DOE (September 12, 2011). LGPO issued a partial response to the request on February 6, 2012, and a second response on March 19, 2012. Letter from David G. Frantz, Director, LGPO, to Branden Lopez, CCC (March 19, 2012) (Determination).

With the latter determination, which is the subject of the present appeal, LGPO released, in part, one document responsive to a portion of CCC's request seeking the names of contractors and subcontractors to be used on the project. Withheld from the document, under FOIA Exemption 4, were the names of two subcontractors, with additional information pertaining to one of the subcontractors. Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

As grounds for its Appeal, CCC contends that the name of a contractor working on a project that has received a DOE loan guarantee is not a trade secret, and that such information is normally provided in response to requests for certified payroll records of contractors required to comply with the provisions of the Davis-Bacon Act. CCC further asserts that the names of contractors do not

constitute privileged commercial or financial information, as the names of contractors licensed in the State of California are among information that can be found in an online database maintained by the California State License Board.

II. ANALYSIS

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009). [*] Accordingly, if the DOE decides to withhold information, the FOIA requires the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

To determine whether information is "confidential" under Exemption 4, the agency must first decide whether the information was voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

If an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

To aid us in reviewing the present appeal, LGPO provided an unredacted copy of the document that it released, with redactions, to CCC. As such, we can see that LGPO withheld from the document the names of two subcontractors on the project in question, as well as the labor categories of two of the workers to be employed by one of the subcontractors on the project. However, the requester did not have the benefit of a specific identification of the information withheld, as LGPO's determination only generally referred to the withheld information as "subcontractor information" and "sensitive commercial information that is maintained in confidence by the applicant and not available in public

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

sources," and that "[s]uch proprietary information being withheld includes confidential commercial information." Determination at 2.

Further, in explaining why the information in question was withheld, the determination provided an equally generic basis, stating that disclosure of the information "would cause substantial harm to the applicant's competitive interest and it is not the type of commercial information that is ordinarily released to the public." *Id.* LGPO's determination did not state whether the information withheld was voluntarily or involuntarily submitted, but instead invoked the standard bases, noted above, for withholding both types of information. Moreover, the determination simply stated that the release of information would cause competitive harm, while providing no reasons for believing such harm will result. As we state above, such a conclusory and generalized allegation cannot form the basis for the withholding of information under the FOIA.

Accordingly, we are remanding this matter to LGPO. On remand, LGPO should either release the information that it redacted from the document it provided to CCC or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in competitive harm.

It Is Therefore Ordered That:

(1) The Appeal filed on May 8, 2012, by the Center for Contract Compliance, OHA Case No. FIA-12-0025, is hereby granted in part, as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Loan Guarantee Program Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 31, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Russell Carollo	)	
	)	
Filing Date: May 8, 2012	)	Case No. FIA-12-0026
	)	
_____	)	

Issued: June 7, 2012

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Decision and Order

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On May 8, 2012, Russell Carollo (Appellant) filed an Appeal from a determination issued to him on April 19, 2012, by the Department of Energy's Office of Inspector General (OIG), in Washington, D.C., in response to a request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. OIG, in its April 19, 2012, determination letter, informed the Appellant, *inter alia*, that it neither confirmed nor denied the existence of any records described in the Appellant's request. This Appeal, if granted, would require OIG to either release any discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In his February 24, 2012, FOIA request (Request), the Appellant asked for the following information:

1. "All correspondence with or concerning in any way Masters Capital Management and/or its CEO Michael Masters. This would include, but not limited to, congressional correspondence."
2. "All FOIA request letters from or concerning in any way Masters Capital Management and/or its CEO Michael Masters."
3. "All information related in any way to any complaints of any kind (including for fraud or suspicious activity), investigations, administrative actions and/or prosecutions involving Masters Capital Management and/or its CEO Michael Masters."
4. "Reports of any kind about or containing information related in any way to Masters Capital Management and/or its CEO Michael Masters."

See April 19, 2012, letter from John Hartman, Assistant Inspector General for Investigations, OIG, to Russell Carollo at 1 (Determination Letter). In its April 19, 2012, Determination Letter, OIG informed the Appellant that, with respect to one portion of his request, it neither confirmed or

denied the existence of any such records described in the request.[1] *Id*. The Determination Letter, citing FOIA Exemption 7(C), 5 U.S.C. §552(b)(7)(C)[2] as support, went on to state that, lacking an individual's consent, an official acknowledgement of an investigation or an acknowledgment of the existence of investigatory records about an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. In his Appeal, the Appellant challenges this portion of the OIG's determination.

II. Analysis

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records are kept would jeopardize the privacy interests that FOIA exemptions are designed to protect and that a *Glomar* response neither confirming nor denying the existence of responsive records is appropriate. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983) (*Antonelli*). In reviewing the interests to be balanced to justify Exemption 7(C) protection, it is apparent that the request at issue might reveal whether an individual is the subject of an OIG law enforcement investigation.[3] The courts and OHA have consistently held that individuals have a strong privacy interest in avoiding the stigma of being associated with a law enforcement investigation. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d. 755, 767 (D.C. Cir. 1990); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *Westinghouse Savannah River Co., LLC,* Case No. VFA-0556 (March 13, 2000), *slip op.* at 3 (*Westinghouse*).[4] This strong interest is balanced against the fact that the Appellant has not referenced any specific public interest that would be furthered by the release of the requested documents. Given these interests, I find that the potential privacy interest threatened by release of any potentially responsive documents greatly outweighs any generalized, non-specific, public interest that would be furthered by release of such potential documents. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1492-94 (D.C. Cir. 1994); *Massey*, 3 F.3d at 624; *McNamera v. Dep't of Justice*, 974 F. Supp. 956, 957-60 (W.D. Tex. 1997); *Westinghouse*, *slip op.* at 3. Consequently, any potentially responsive documents would be protected by FOIA Exemption 7(C). Using this rationale, the courts and OHA have upheld the use of a *Glomar* response where a FOIA request might reveal Exemption 7(C) information disclosing the identity of individuals who are subjects of investigations or are otherwise mentioned in law enforcement records and who have not previously waived their privacy rights. *See, e.g., Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 775 (1989); *Massey*; *Antonelli*; *Westinghouse*.

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[1] An agency response to a FOIA Request, which states that the agency "can neither confirm or deny" the existence of responsive records because the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information or constitute an unwarranted invasion of personal privacy is often called a *Glomar* response. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). We will refer to OIG's response as a *Glomar* response.

[2] Exemption 7(c) of the FOIA protects records or information compiled for law enforcement purposes but only " to the extent that production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

[3] OHA has consistently held that OIG is a law enforcement body and its investigations and reports are records compiled for law enforcement purposes within the meaning of Exemption 7(C). *See Westinghouse Savannah River Co., LLC,* Case No. VFA-0556 (March 13, 2000), *slip op.* at 2.

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

We have spoken to an OIG official who was familiar with the processing of the Appellant's FOIA Request. After reviewing the subject matter of the Request, the method by which the Request was processed, and the OIG justification offered in the determination letter, we find that OIG appropriately invoked its *Glomar* response. Thus, we agree that providing any other response to the FOIA Request could reasonably be expected to constitute an unwarranted invasion of personal privacy, such as that protected by Exemption 7(C). Consequently, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on May 8, 2012, by Russell Carollo, OHA Case No. FIA-12-0026, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 7, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of USA Today	)	
	)	
Filing Date: May 16, 2012	)	
	)	Case No.: FIA-12-0028
	)	

Issued: June 5, 2012

Decision and Order

On May 16, 2012, Gregory Korte, on behalf of USA Today, filed an appeal from a determination the Department of Energy's (DOE) Office of Information Resources (OIR) issued on April 12, 2012. In its determination, OIR responded to a request for documents that Mr. Korte submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of Mr. Korte's FOIA request.

I. BACKGROUND

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On March 30, 2012, Mr. Korte filed a request with OIR for records pertaining to a loan guarantee application filed by the United States Enrichment Corporation (USEC) for the American Centrifuge Project. Mr. Korte asked for expedited processing of the request, stating that the requested information was urgently needed to inform the public about Congressional oversight of energy loan guarantee and grant programs and would enhance public debate on a transportation reauthorization bill that included $106 million in research, demonstration, and development grants for the American Centrifuge Project.

OIR issued a determination on April 12, 2012, finding that Mr. Korte's request did not satisfy the requirements for expedited processing. Determination Letter from OIR to Mr. Korte (April 12, 2012) (Determination). Specifically, OIR found that Mr. Korte did not provide material establishing any threat to the life or safety of an individual that would justify expedited processing, or identify "any actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner." *Id*. at 2-3. On May 16, 2010, we received Mr. Korte's Appeal of OIR's denial of expedited processing. Appeal Letter from Gregory Korte, USA Today, to OHA (May 8, 2012).

II. ANALYSIS

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person preference over previous requesters, by moving his or her request "up in line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when the failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs if the requester is primarily engaged in disseminating information and has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v). The request at issue in this Appeal clearly does not involve information which could reasonably be expected to pose an imminent threat to the life or safety of an individual. Therefore, our analysis turns to the second situation – the "urgency to inform."

In order to determine whether a requester has demonstrated an "urgency to inform" and, thus, a "compelling need," we consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C.Cir. 2001); *see also Southeastern Legal Foundation, Inc.*, Case No. TFA-0389 (2010);[*] *Center for Investigative Reporting*, Case No. TFA-0200 (2007).

In its determination, OIR cited the above three factors and, in denying Mr. Korte's request for expedited processing, found that the "request does not address factor two." Determination at 3. Mr. Korte, however, contends in his appeal that "USA Today did address this criterion, noting that Congress is considering legislation directly related to the American Centrifuge Project loan guarantee." Appeal at 1. Mr. Korte cites a federal court decision finding "a significant recognized interest in enhancing public debate on potential legislative action." Appeal at 1 (quoting *Gerstein v. C.I.A.*, No. C-06-4643 MMC, 2006 WL 3462658, at *7 (N.D. Cal. Nov. 29, 2006)).

We agree with Mr. Korte that the courts have found sufficient urgency to grant expedited processing where there is a significant interest in quickly disseminating news regarding a subject currently under debate by Congress. In *Gerstein,* for example, the court granted expedited processing of a request for documents related to unauthorized disclosure of classified information, based upon the requester's assertion that members of Congress were considering legislation to address leaks of classified information and that the subject had been discussed in hearings before the Senate Intelligence Committee. *Id.* at *1, *7; *see also Leadership Conference on Civil Rights v. Gonzales,* 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (granting expedited processing to requester who was "monitoring election law reform and coordinating the legislative campaign to reauthorize provisions of the Voting Rights Act"); *American Civil Liberties Union v. United States Department of Justice,* 321 F. Supp. 2d 24 (D.D.C. 2004) (granting expedited processing where a principal "aim of plaintiff's FOIA request is to provide information for the ongoing national debate about whether Congress should renew Section 215 and other Patriot Act surveillance provisions before they expire").

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

In the present case, Mr. Korte notes that the President

> has included $150 million in his FY 2013 budget for a research and demonstration project for the centrifuge technology that is the subject of the loan application. There are now provisions pending in both the House and the Senate that would fund the project, with the expressed intent to provide a "bridge" to the loan guarantee. That is, there is a direct connection between the pending legislation and the requested records.

Appeal at 1-2. Subsequent to filing the present Appeal, Mr. Korte reported in USA Today that a "$150 million 'backdoor earmark' for a uranium processing facility survived a vote in the House on Friday, [May 18,] keeping the Ohio project alive while the company seeks $2 billion in federal loan guarantees." Gregory Korte, *House Preserves 'Backdoor Earmark' for Ohio Nuclear Facility*, USA Today, May 18, 2012, http://www.usatoday.com/news/washington/story/2012-05-18/USEC-earmark/55056188/1. The article noted that "the provision still must be negotiated with the Senate, which included similar language in a 2012 transportation bill." *Id.*

Given the pendency of legislation before Congress concerning funding of the American Centrifuge Project, we find that Mr. Korte has demonstrated a sufficient "urgency to inform" the public regarding the actions of the government with respect to the project. We therefore find that the DOE should grant Mr. Korte's request for expedited processing of his request for documents related to USEC's loan guarantee application. Accordingly, we are remanding this matter to OIR, which "shall process as soon as practicable" Mr. Korte's FOIA request. 5 U.S.C. § 552 (a)(6)(E)(iii).

It Is Therefore Ordered That:

(1) The Appeal filed on May 16, 2012, by USA Today, OHA Case No. FIA-12-0028, is hereby granted in part, as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 5, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Ryan Noah Shapiro	)	
	)	
Filing Date: May 16, 2012	)	
	)	Case No.: FIA-12-0030
	)	

Issued: June 8, 2012

Decision and Order

On May 16, 2012, Ryan Noah Shapiro filed an appeal from a determination the Department of Energy's (DOE) Office of Intelligence and Counterintelligence (IN) issued on April 5, 2012. In its determination, IN responded to a request for documents that Mr. Shapiro submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from the DOE any "records that were prepared, received, transmitted, collected and/or maintained by the [DOE], the National Joint Terrorism Task Force, or any Joint Terrorism Task Force relating or referring to the 'analysis of the animal rights movement in the U.S.'" referenced in a May 11, 1989, letter from the director of the DOE's Office of Threat Assessment to a British law enforcement official. Letter from Ryan Noah Shapiro to DOE FOIA Requester Service Center (March 2, 2012) (quoting Letter from Robert A. O'Brien, Jr., Director, Office of Threat Assessment, Defense Programs, to Detective Superintendent Malcolm MacLeod, Scotland Yard (May 11, 1989)).[1] The request was referred to IN, which issued a determination stating that it had located no documents responsive to the request. Letter from Steven K. Black, Principal Deputy Director, IN, to Ryan Shapiro (April 5, 2002). In his Appeal of the determination, Mr. Shapiro contends that "the DOE conducted an inadequate search for records responsive to my request." Appeal at 1.

[1] Though the request referenced Joint Terrorism Task Forces, the DOE treated the request as one for documents in the possession of the DOE, which could include documents that had been "prepared, received, transmitted, collected and/or maintained" by the DOE or by a Joint Terrorism Task Force.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Natural Resources Defense Council*, Case No. TFA-0127 (2005).[2] The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore contacted the DOE's Office of Information Resources (OIR) for information regarding the search that was performed in this case. OIR informed us that it initially considered referring Mr. Shapiro's request to the National Nuclear Security Administration (NNSA), but NNSA told OIR that the request did not fall under its jurisdiction. See E-mail from Ben Jaramillo, NNSA, to Diana P. Ngo, OIR (March 14, 2012). OIR also inquired with the DOE's Office of History and Heritage Resources (OHHR), which informed OIR that the Office of Threat Assessment, from which originated the 1989 letter referenced above, had, by 1990, been transferred to the DOE's Office of Intelligence. Email from Terry Fehner, Office of History and Heritage Resources, to Diana Ngo (April 2, 2012). On this basis, OIR referred Mr. Shapiro's request to IN.

In reviewing the present Appeal, it became apparent to us that any documents responsive to Mr. Shapiro's request, if such documents still exist, would be located in whatever DOE office assumed the responsibilities of the former Office of Threat Assessment (OTA). We consulted a source that indicated that, although the OTA became a part of the DOE's Office of Intelligence in 1990, it was separated from that office as part of a 1994 reorganization. JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 133 (4th ed. 1999). OHHR confirmed the accuracy of this source, and informed us that, as of 1999, the functions of OTA appear to have resided within the DOE's Office of Security and Emergency Operations. Email from Terry Fehner, OHHR, to Steven Goering, OHA (May 24, 2012).

OHHR also provided us with contacts within the NNSA who might have knowledge of these matters, and we ultimately contacted a Senior Policy Advisor within the NNSA's Office of Counterterrorism and Counterproliferation. This official told us that the functions of OTA that would have been responsible for the documents being requested became part of NNSA upon its creation in 2000, but that any such documents would no longer exist, as they would have been disposed of several years ago. Email from Patrick Daly, NNSA Office of Counterterrorism and Counterproliferation, to Steven Goering, OHA (May 25, 2012). Nonetheless, this official coordinated a search of his office, after which he informed us that the office located no responsive documents. Email from Patrick Daly to Steven Goering (May 31, 2012).

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Based on the information available to us, we are now convinced that the DOE has conducted a search reasonably calculated to uncover the materials sought by Mr. Shapiro, and that this search was, therefore, adequate under the FOIA. Thus, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on May 16, 2012, by Ryan Noah Shapiro, OHA Case No. FIA-12-0030, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 8, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Patsy Cornwell Sherriff	)	
	)	
Filing Date: May 31, 2012	)	Case No.: FIA-12-0032
	)	
	)	

Issued: July 3, 2012

Decision and Order

This Decision concerns an Appeal that Patsy Cornwell Sherriff filed in response to a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to her. In that determination, ORO replied to a request for documents that Ms. Sherriff submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the DOE conduct another search for responsive documents. [1]

In her FOIA request, Ms. Sherriff sought access to all medical records, absentee records, hospital reports, dosimetry badge readings, hazardous chemical readings, and radiation exposure records for her grandfather, William D. Goldsby, who was employed at the Paducah Gaseous Diffusion Plant in Paducah, Kentucky from 1953 until his death in 1954. [2] She also requested information

1/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

2/ Ms. Sherriff also filed a similar request for documents relating to her father, Raleigh Cornwell, who also worked at the Paducah Plant. Although ORO processed the two requests separately, Ms. Sherriff's Appeal attempts to combine the two cases, as she is also requesting that documents relating to her father be located and released. For purposes of administrative

(continued...)

concerning Mr. Goldsby's former employers. In response to this request, ORO released several documents that contained information concerning Mr. Goldsby's former employers. However, ORO was unable to locate any medical or hazardous material exposure information regarding Mr. Goldsby. In her Appeal, Ms. Sherriff challenges the adequacy of the search that was performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Mark D. Siciliano,* Case No. FIA-12-0019 (2012); *Glen Bowers,* Case No. TFA-0138 (2006). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dept. of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord, Weisberg v. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to obtain further information concerning the scope of the search that was performed, we contacted ORO. We were informed that Ms. Sherriff's request was referred to (i) the Oak Ridge Associated Universities, which operates a research hospital and the Oak Ridge Institute of Nuclear Studies, and which maintains records relating to beryllium exposure, (ii) the ORO's records holding area, and (iii) the Paducah Gaseous Diffusion Plant. No medical or exposure records were located at these sites. However, ORO informed us that after reviewing Ms. Sherriff's Appeal, it had determined that an additional location at which responsive documents might be located had not been searched: the repository at which records from the former K-25 plant are being stored in Knoxville, Tennessee. Accordingly, we will remand this matter to ORO so that a search of the K-25 records repository can be performed. Upon completion of this search, ORO should issue a new determination to Ms. Sherriff setting forth the results of the new search. [3]

2/ (...continued)
efficiency, it would be inappropriate for the OHA to consider Appeals concerning separate FOIA requests under the same case number. Moreover, it is unclear whether ORO has issued a final determination regarding this second request. Therefore, this Decision considers only the determination that was issued to Ms. Sherriff regarding her request for records concerning her grandfather, William D. Goldsby, request number ORO-2012-00884-F.

3/ ORO has also informed us that it will search the K-25 records repository for documents relating to Ms. Sherriff's father, Raleigh L Cornwell. She is, of course, free to file new FOIA Appeals if the results of these searches are not satisfactory.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Patsy Cornwell Sherriff, OHA Case Number FIA-12-0032, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Oak Ridge Office for additional proceedings consistent with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 3, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of National Security Archive	)	
	)	
Filing Date: June 12, 2012	)	Case No.: FIA-12-0034
	)	
_____ _____	)	

Issued: July 9, 2012

Decision and Order

This Decision concerns an Appeal that the National Security Archive (NSA) filed in response to a determination that the Department of Energy's (DOE) Office of Information Resources (OIR) issued to it. In that determination, the OIR replied to a request for documents that NSA submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the DOE conduct another search for responsive documents.[1]

In its FOIA request, NSA sought access to documents relating to the Bonn Climate Change talks held in August 2010. OIR determined that any responsive documents would be located in the Office of Policy and International Affairs (OPIA), and referred the request to that Office. OPIA conducted a search, and located one document that was responsive to the request. That document was released to NSA in its entirety. In its Appeal, NSA challenges the adequacy of the search. It claims that, in addition to OPIA, the DOE's retired records at the Washington National Records Center should have been searched.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Patsy Cornwell Sherriff,* Case No. FIA-12-0032 (2012); *Glen Bowers,* Case No. TFA-0138 (2006). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord*, *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

In order to obtain further information concerning the scope of the search that was performed, we contacted OIR and OPIA. OIR has agreed to expand the scope of the search that was performed to include the Washington National Records Center. *See* Memorandum of June 21, 2012, telephone conversation between James Little, Office of Hearings and Appeals, and Vera Dunmore, OIR. OPIA informed us that NSA's request was referred to Elmer Holt, a senior economist in that Office who participated in the conference. He notified us that he searched his records thoroughly and only found the one responsive document.[2] *See* Memorandum of June 21, 2012, telephone conference between Mr. Little and Mr. Holt, OPIA. Therefore we will remand this matter to OIR so that the search of the retired DOE records at the Washington National Records Center can be performed. Upon completion of this search, DOE should issue a new determination to NSA setting forth the results of the new search.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by National Security Archive, OHA Case Number FIA-12-0034, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Information Resources for additional proceedings consistent with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 9, 2012

[2] During our conversations with Mr. Holt, we learned that he has notes that he took for personal use at the conference and correspondence concerning the conference. However, he did not share those notes with other employees, nor were they ever maintained in an agency system of records. *See* Memorandum of June 27, 2012 telephone conversation between Mr. Little and Mr. Holt. Consequently, Mr. Holt's personal notes are not agency records and are therefore not subject to the FOIA.

Mr. Holt further informed us that the correspondence is of a logistical nature. Since NSA's request specifically excluded logistical or administrative materials, the correspondence was also properly identified as non-responsive.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Judicial Watch	)	
	)	
Filing Date: June 25, 2012	)	Case No.: FIA-12-0036
	)	
	)	

Issued: July 3, 2012

Decision and Order

On June 25, 2012, Judicial Watch (Appellant) filed an Appeal from a determination issued to it on May 31, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR did not locate any documents responsive to the request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to conduct an additional search for responsive documents.

I. Background

On April 30, 2012, the Appellant filed a request with OIR for "[a]ll communications with Nancy-Ann DeParle, any other member of the Obama administration, or any third party regarding the development and implementation of 'alternative administrative measures' to advance the President's [sic] dianpolicy goals in circumvention of the legislative branch of the federal government." Request dated April 30, 2012, from Appellant to OIR. On May 31, 2012, OIR responded that it could not locate any responsive information. Determination Letter dated May 31, 2012, from Alexander C. Morris, FOIA Officer, OIR, to Appellant. In the instant Appeal, the Appellant challenges OIR's search for responsive documents. Appeal Letter dated June 25, 2012, from Appellant to Secretary Steven Chu, care of Poli Marmolejos, Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a

case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Bowers*, Case No. TFA-0138 (2006); *Mark D. Siciliano*, Case No. FIA-12-0019 (2012).[1/]

We contacted OIR to determine what type of search was conducted. OIR indicated that it asked the Office of the Chief Information Officer (CIO) to conduct a search of the email accounts belonging to Steven Chu, Daniel Poneman, and Arunava Majumdar, for information regarding "alternative administrative measure." Attachment to E-mail dated June 25, 2012, from Angelia Bowman, OIR, to Janet R. H. Fishman, OHA. The CIO found nothing responsive. *Id.* In addition, OIR conducted a search of the Electronic Document Online Correspondence and Concurrence System (eDOCS). *Id.* OIR conducted a search of the White House Congressional Correspondence folder within eDOCS, as well as all White House mail, including any correspondence from the President or his direct staff. E-mail dated June 26, 2012, from Alexander C. Morris, FOIA Officer, OIR, to Janet R. H. Fishman, OHA. Finally, OIR conducted a search for the term "Deparle." *Id.* No responsive information was found. *Id.* After receiving a copy of the Appeal, OIR confirmed the previous findings that there were no responsive documents. *Id.* Based on additional information included in the Appeal but not in the original request,[2/] OIR conducted a further search of the eDOCS to look for anything related to "advanced drop-in aviation or marine biofuels." *Id.* Again, OIR found nothing responsive. *Id.*

As the foregoing indicates, OIR searched the proper database for records pertaining to the Appellant's request. OIR searched eDOCS, which contains both incoming and outgoing documents. E-mail dated June 27, 2012, from Alexander Morris to Janet R. H. Fishman. OIR used the proper search terms, including "alternative administrative measures" and "Deparle." It even extended its search based on information provided in the Appeal to include the terms "marine fuels" and "drop-in aviation." *Id.* We find that OIR conducted a search reasonably calculated to uncover responsive information. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Judicial Watch, Case No. FIA-12-0036, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 3, 2012

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

[2/] The FOIA does not allow a requester to broaden its request on Appeal. *Snake River Alliance*, Case No. TFA-0468 (2011); *Barbara Schwarz*, Case No. VFA-0641 (2001), citing *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991). OIR undertook the new search for possibly responsive information based on the terms "marine fuels" and "drop-in aviation" on its own initiative. June 26, 2012, E-mail.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of National Security Archive	)	
	)	
Filing Date: June 25, 2012	)	Case No.: FIA-12-0037
	)	
	)	

Issued: July 19, 2012

Decision and Order

On June 25, 2012, the National Security Archive (Appellant) filed an Appeal from a determination issued to it on June 4, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR did not locate any documents in responding to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require OIR to conduct a further search for responsive documents.

I. Background

On May 2, 2012, the Appellant requested documents related to the Tianjin Climate Change Talks held October 4 to 9, 2010. Request Letter from Robert A. Wampler, Senior Fellow, Appellant, to Carolyn Lawson, FOIA/Privacy Act Group, DOE. The Appellant indicated that the search for relevant documents would include anything prepared for the Secretary of Energy and any other agency officials. *Id.* The Appellant included a list of DOE officials who participated in the conference. *Id.*

On June 4, 2012, OIR responded stating that the request was assigned to the Office of Policy and International Affairs (PI), which conducted a search of its files and found nothing responsive. Determination Letter dated June 4, 2012, from Alexander C. Morris, FOIA Officer, OIR, DOE, to Appellant. On June 25, 2012, the Appellant appealed the Determination, claiming that the search was insufficient and that it is unclear from the Determination whether PI searched retired DOE records stored at the Federal Records Center. Appeal Letter dated June 25, 2012, from Appellant to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Mark D. Siciliano*, Case No. FIA-12-0019 (2012).[1/]

We contacted PI to determine what type of search was conducted. Elmer Holt of PI, one of those individuals identified by the Appellant as having attended the conference, indicated that he searched his work e-mail account, documents stored on his computer, and hard copy files/papers/notes in his possession related to the activities taking place at the UNFCCC climate meeting in Tianjin, China, during the Fall of 2010. He did not locate any responsive documents. E-mail dated July 9, 2012, from Elmer Holt, PI, to Janet Fishman, OHA, DOE. He also indicated that he did not forward any documents to the Washington National Records Center for storage. E-mail dated July 11, 2012, from Elmer Holt to Janet Fishman. We also contacted Casey Delhotal and Richard Duke to determine what responsive records they might possess. They both stated that, although they were in Tianjin at the time of the summit, they were there because they "wanted to talk to National Development Reform Commission (who hosted the Tianjin conference) about Clean Energy Ministerial initiatives (a program completely separate from the United Nations Framework Commission on Climate Change conference). [They were] not part of the official U.S. negotiating team at the conference and did not have any of the documents produced by the State-lead negotiating team." E-mail dated July 11, 2012, from Casey Delhotal, PI, to Janet Fishman. Mr. Duke concurred with Dr. Delhotal that he was in Tianjin to meet with Chinese officials, not to attend the conference. E-mail dated July 12, 2012, from Richard Duke, Deputy Assistant Secretary, PI, to Janet Fishman.

The three people from DOE who the Appellant identified as having attended the conference searched their records for responsive information. Nothing responsive was found. Mr. Holt, who actually did attend the conference, indicated that he did not send anything to the Washington National Records Center. Dr. Delhotal and Mr. Duke indicated that they did not bring any records back with them as they were not in Tianjin to attend the conference. Based on the foregoing, we believe that the search was reasonably calculated to uncover responsive information. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive, Case No. FIA-12-0037, is hereby denied.

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

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 19, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Firas Shaikh	)	
	)	
Filing Date: July 3, 2012	)	Case No.: FIA-12-0038
	)	
	)	

Issued: July 30, 2012

Decision and Order

On July 3, 2012, Firas Shaikh filed an Appeal from a final determination issued by the Office of Information Resources (IR) of the Department of Energy (DOE). In that determination, IR responded to a Request for Information that Mr. Shaikh filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008 (Request No. HQ-2011-00179-PA). IR released portions five responsive documents, but withheld other portions of these documents under Exemption (k)(1) of the Privacy Act and Exemptions 1, 3 and 6 of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). This Appeal, if granted, would require the DOE to release to Mr. Shaikh only those portions of the documents that were withheld under FOIA Exemptions 3 and 6.

I. Background

Mr. Shaikh requested a copy of his personnel security file as maintained by the DOE. On May 1, 2012, the DOE responded with a partial determination, providing copies of 79 documents from his file. On May 22, 2012, IR issued a final determination letter regarding Documents 80 through 84, withholding portions of each document under the exemptions set forth in the above paragraph. On July 3, 2012, Mr. Shaikh submitted the present Appeal. Because our consideration of IR's withholdings under Privacy Act Exemption (k)(1) and FOIA Exemption 1 in this case requires consultation with the DOE's Office of Classification,[1] we determined that bifurcation of the present Appeal would allow for a more timely consideration of IR's withholdings under FOIA Exemptions 3 and 6. IR's withholdings under FOIA Exemptions 3 and 6 will therefore be considered in the present decision (OHA Case No. FIA-12-0038). Our consideration of IR's

[1] Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 522(b)(1). Exemption (k)(1) of the Privacy Act exempts from disclosure information this is subject to the provisions of Exemption 1 of the FOIA. 5 U.S.C. § 552a(k)(1).

withholdings under Privacy Act Exemption (k)(1) and FOIA Exemption 1 will be considered in a separate decision that will be issued as OHA Case No. FIC-12-0001.

II. Analysis

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her that is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). Personnel security files, such as the one Mr. Shaikh requested, are maintained in one such system of records, DOE-43.[2] Courts have consistently recognized that requests of this type, where an individual is requesting information pertaining to him or her, are to be processed under both the Privacy Act and the FOIA, holding that each statute provides the requester with an independent basis for access to these records. *Shapiro v. DEA*, 762 F.2d 611, 612 (7th Cir. 1985); *Blazy v. Tenet*, 979 F. Supp. 10, 16 (D.D.C. 1997), *summary affirmance granted*, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998). Information about an individual contained in a system of records may be withheld from disclosure to that individual only when both the Privacy Act and the FOIA provide bases for withholding the information. *See* 5 U.S.C. § 552a(t) (prohibiting reliance on FOIA exemptions to withhold under the Privacy Act, and vice versa); *Nat'l Whistleblower Ctr. v. Dep't of Health and Human Svcs.*, CIV. A. 10-2120 JEB, 2012 WL 1026725 at *4 (D.D.C. Mar. 28, 2012) (to withhold requested information subject to both acts, agency must demonstrate that it falls "within some exemption under *each* Act"). OHA has consistently followed this rule in its Decisions. *See Thomas R. Thielen*, Case No. FIA-12-0023 (June 28, 2012); *Martin Salazar*, Case No. VFA-0773 (Oct. 3, 2002); *Mark J. Chugg*, Case No. VFA-0714 (Feb. 14, 2002); *Robert H. Calhoun, Jr.*, Case No. VFA-0571 (June 14, 2000); *David R. Berg*, Case No. VFA-0376 (April 2, 1998).[3]

In the present case, with respect to the information withheld from Mr. Shaikh pursuant to Exemptions 3 and 6 of the FOIA, IR has not provided any justification for withholding that information under the Privacy Act. Therefore, even if we were to uphold IR's application of the claimed FOIA exemptions to the withheld information, we could not find that the information had been properly withheld from Mr. Shaikh. This matter must be remanded to IR for a new determination. In that determination, IR will either justify withholding the information independently under the Privacy Act that it withheld under FOIA Exemptions 3 and 6 or release that information to Mr. Shaikh.

It Is Therefore Ordered That:

(1) The Appeal filed on July 3, 2012, by Firas Shaikh, OHA Case No. FIA-12-0038, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

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[2] The Privacy Act defines the term "system of records" as " a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

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

(2) This matter is remanded to the Department of Energy's Office of Information Resources for further consideration in accordance with the instructions set forth in the foregoing decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 30, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of National Security Archive	)	
	)	
Filing Date: July 12, 2012	)	Case No.: FIA-12-0039
	)	
	)	

Issued: July 30, 2012

Decision and Order

On July 12, 2012, the National Security Archive (Appellant) filed an Appeal from a determination issued to it on June 21, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR did not locate any documents in responding to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 (Request No. HQ-2012-01104-F). The Appeal, if granted, would require OIR to conduct a further search for responsive documents.

I. Background

On April 17, 2012, the Appellant submitted a FOIA request to the OIR, for documents relating to the "First Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Held in Helsinki, Finland, on May 2-5, 1989." Request Letter dated April 17, 2012, from Robert Wampler, Senior Fellow, Appellant, to Carolyn Lawson, OIR.

OIR forwarded the request to the Office of Policy and International Affairs (OPIA) and to the Office of the Executive Secretariat (ES) because any documents responsive to the request, if they exist, would fall under the jurisdiction of those offices. ES advised OIR that it was not a matter under its jurisdiction and OIR sent a letter to the Appellant advising it of that fact. E-mail dated July 13, 2012, from Alexander Morris, FOIA Officer, OIR, to Janet R. H. Fishman, Office of Hearings and Appeals (OHA), DOE. OPIA conducted searches of its records and failed to locate responsive documents. *See* Determination Letter dated June 21, 2012, from Alexander Morris, FOIA Officer, OIR, to Appellant. On July 12, 2012, OHA received the Appellant's Appeal, in which it challenges the search for responsive records, including whether OPIA searched for responsive records at the National Records Center. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Mark D. Siciliano*, Case No. FIA-12-0019 (2012).[*/]

During the processing of this Appeal, OHA contacted OPIA to ascertain the scope of its search for responsive documents. E-mail dated July 12, 2012, to Alexander Morris, from Janet Fishman; E-mail dated July 16, 2012, to Edith Horne, OPIA, from Janet Fishman. We have not yet received a response from OPIA, and, therefore, are remanding this matter to OIR for an explanation of OPIA's search for responsive documents and a determination of whether responsive documents are located at an off-site records holding center. The new determination letter should explain the parameters of the search of both on-site and off-site records, if any. Any responsive documents that are located will be identified and released to NSA, or the basis for their withholding will be explained in a new determination letter, with specific reference to one or more FOIA exemptions.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive, OHA Case No. FIA-12-0039, is hereby granted in part, as described in Paragraph (2), below, and denied in all other respects.

(2) The matter is remanded to the Office of Information Resources so that the request submitted by National Security Archive may be forwarded to the Office of Policy and International Affairs for an explanation of its search for responsive records and a determination whether responsive documents, as described above, exist.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

(4) The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 30, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Idaho Conservation League	)	
	)	
Filing Date: July 17, 2012	)	Case No. FIA-12-0040
	)	
	)	

Issued: August 16, 2012

Decision and Order

On July 17, 2012, the Idaho Conservation League (Appellant) filed an Appeal from a determination issued to it on June 13, 2012, by the Department of Energy's Bonneville Power Administration (BPA) (FOIA Request Number HQ-2012-00243-F), in response to a request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, BPA provided the Appellant with a number of documents in their entirety. However, BPA also withheld some documents in part. This Appeal, if granted, would require BPA to release the information withheld in the previously provided documents.

I. Background

On November 7, 2011, the Appellant submitted a FOIA request seeking the Project file for the Albeni Falls Dam Flexible Winter Operations Environmental Assessment. The request also included correspondence between agencies regarding this proposal as well as other materials related to the environmental assessment and the final decision. In a February 7, 2012, Determination Letter, BPA released some of the documents responsive to Appellant's request, but indicated that other documents were still under review. On February 22, 2012, BPA issued another Determination Letter releasing one additional document, but indicated that 66 documents which were responsive to the Appellant's request would be withheld under FOIA Exemption 5. On March 22, 2012, the Appellant appealed BPA's decision to withhold the 66 documents and on April 30, 2012, BPA responded by indicating that it would review the 66 documents again to determine if any additional documents could be released. On May 16, 2012, BPA released seven documents in their entirety, stated that 15 documents originated from the U.S. Army Corps of Engineers (the Corps) and that those documents would be forwarded to the Corps for a FOIA determination, and that the remaining of the 66 documents would be reviewed further for possible discretionary release. In a June 13, 2012, Determination Letter, BPA issued its final response to the Appellant's FOIA request, releasing 17 more documents in their entirety, releasing one

partially redacted document, withholding two documents as non-responsive, withholding 25 documents in their entirety under Exemptions 5 an 6 and providing a list of the electronic file names for the 25 documents which were withheld in full. *See* June 13, 2012 Determination Letter.

On July 17, 2012, the Appellant filed the present appeal, asserting that (1) BPA failed to justify the withholding of deliberative documents under Exemption 5; (2) BPA failed to justify any withholdings under Exemption 6; (3) BPA failed to state why discretionary release of the 25 withheld documents is not appropriate; (4) BPA failed to determine whether non-exempt information could be segregated from the 25 withheld documents; and (5) BPA improperly withheld the 15 documents which were forwarded to the Corps. *See* Appeal Letter.

II. Analysis

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552 (a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

An agency therefore has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Servs., Inc.*, Case No. VFA-0235 (1996) (*RIS*).[1] Generally a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *State of New York*, Case No. TFA-0269 (2008). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determination. *RIS*.

A. Adequacy of the Determination and the Adequacy of the Justifications

For our review of this Appeal, we obtained the documents that BPA withheld. After examining these documents, we conclude that BPA's determination letter is inadequate to permit the Appellant to file an informed appeal. As stated above, BPA withheld 25 documents in their entirety pursuant to Exemptions 5 and 6, and withheld two documents as non-responsive. BPA provided the Appellant with an index listing the electronic file names of all 27 documents. However, as the Appellant has asserted, BPA has failed to identify which documents were withheld under FOIA Exemptions 5 and 6 and which documents are the two non-responsive documents. In addition, while BPA generally stated in its determination letter that Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency . . ." and incorporates both the deliberative process privilege and the attorney work-product privilege, it

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

does not indicate whether any of the withheld documents are inter-or intra-agency documents nor does it specify which Exemption 5 privilege is being applied to the withheld documents. With respect to Exemption 6, while BPA states that the withheld information consists of names and personal contact information of individual citizens who have expressed an interest in the project at issue; again, it does not identify the documents to which BPA applied the exemption.

Moreover, BPA's description of the withheld documents is vague. Simply listing the electronic file name of a document is insufficient and does not adequately describe the subject mater. Again, the description of the document need not contain information that would compromise the privileged nature of the document, but rather a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date on which the document was produced, its authors and recipients. *State of New York* at 3.

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination so that the Appellant and our office will understand the rationale for withholding the information. Therefore, we will remand this matter to BPA to issue another determination which will inform the Appellant which documents are being withheld pursuant to Exemptions 5 and 6 and adequately explain how Exemption 5 and 6 apply to the withheld documents.

B. Segregability of Non-Exempt Material and Discretionary Public Interest Disclosure

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . ." 5 U.S.C. § 552(b). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. In its determination letter, BPA stated that it withheld 25 documents in their entirety pursuant to Exemption 5, but did not address the issue of segregability in the determination. This office reviewed a sample of material that was withheld in its entirety, and based on our review, we find that there may be some non-exempt, factual material in the responsive documents. BPA should consider what non-exempt, factual material may be segregated and released on remand.

In addition, the DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. Although, in its determination letter, BPA asserts Exemption 6 and states that there is no public interest in the disclosure of information because it does not shed any light on how BPA has performed it statutory duties, it does not provide a public interest analysis with respect to documents withheld pursuant to Exemption 5. This analysis should also be provided on remand. [2]

III. Conclusion

For all the reasons stated above, we will remand the matter to BPA to issue a new determination. Therefore, we will grant the Appeal in part and remand it to BPA.

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[2] With respect to the 15 documents which BPA asserts were improperly withheld and forwarded to the Corps to issue a determination, we find that BPA appropriately determined that these documents originated with the Corps and correctly forwarded the Appellant's request to the Corps for a direct response to the Appellant. 10 C.F.R. § 1004.5(c).

It Is Therefore Ordered That:

(1) The Appeal filed by Idaho Conservation League, OHA Case No. FIA-12-0040, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia. The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 16, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Cynthia Brown	)	
		)	
Filing Date:	July 26, 2012	)	
		)	Case No.: FIA-12-0044
		)	

Issued: August 17, 2012

Decision and Order

On July 26, 2012, Cynthia Brown filed an appeal from a determination issued to her on July 6, 2012, by the Department of Energy's (DOE) Office of Health, Safety and Security (HSS), in Washington, DC (FOIA Request Case No. HQ-2012-01037-F), in response to a request for documents that Ms. Brown filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. HSS did not locate any documents responsive to Ms. Brown's request. In her appeal, Ms. Brown challenges the adequacy of HSS's search. This appeal, if granted, would require HSS to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

On March 22, 2012, Ms. Brown submitted a FOIA request to HSS at DOE Headquarters in which she sought records pertaining to her late mother.[1] HSS informed Ms. Brown in its July 2012 Determination Letter that HSS was unable to locate any additional documents. Letter from Patricia Worthington, Director of Health and Safety, HSS, to Cynthia Brown, July 6, 2012 (July 2012 Determination Letter) at 1.

Ms. Brown filed the instant appeal challenging the adequacy of HSS's search. *See* Letter from Cynthia Brown to OHA, dated July 26, 2012 (Appeal). In her Appeal, Ms. Brown

[1] In December 2011, Ms. Brown sent a similar FOIA request to the DOE's Richland Operations Office. As a result of that request, Ms. Brown was provided various records concerning her mother. *See Cynthia Brown* Case No. FIA-12-0009 (March 27, 2012).

alleges that HSS's search was inadequate because she did not receive a list of places searched, as well as information regarding a comprehensive list of relevant contracts.[2]

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (August 26, 2002).[3]

In reviewing the Appeal, we contacted HSS to ascertain the scope of its search for responsive documents. *See* Email from Pamela Pontillo, OHA, to Dr. Isaf Al-Nabulsi, HSS, August 1, 2012. Dr. Al-Nabulsi explained that HSS contacted Richland Operations Office (RO) because Ms. Brown's mother was a former employee at the Hanford site and her employment ended in 1945. According to Dr. Al-Nabulsi, RO contacted senior records personnel at Kadlec Hospital[4] and requested that they look for potentially responsive records relating to Ms. Brown's mother in their archives. Kadlec Hospital did not find any responsive material,[5] but RO suggested she might consider contacting the principal of an environmental consulting company who might have some relevant information. *See* Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

Dr. Al-Nabulsi also stated that DOE next contacted a senior research analyst from the Office of Legacy Management (LM) who was assigned to oversee HSS search efforts, with regard to Ms. Brown's request, because he was knowledgeable about and involved with the Human Radiation Experiments report dated July 1995.[6] We also contacted the senior research analyst

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[2] In her Appeal, Ms. Brown states that in follow-up conference calls and e-mails with HSS, she provided website links and contract numbers to facilitate her request for a list of specific contracts in force between August 7-14, 1951, between the U.S. Atomic Energy Commission (AEC) and the University of Chicago Labs and Clinics that might provide clues as to the location of documents responsive to her request.

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

[4] Kadlec Hospital was established in 1944 to care for workers in the Hanford, Washington area.

[5] HSS told Ms. Brown in a May 2012 conference call that because the physicians at Kadlec Hospital were not direct employees of the Manhattan Engineer District (MED) or the AEC, they typically retained those records created from research treatment studies, such as those that might have been created concerning Ms. Brown's mother.

[6] From 1995 through early FY 2006, the records supporting the report were accessioned to the National Archives and Records Administration (NARA). Because DOE no longer has custody of those records, it cannot search them.

to inquire about his scope of search for pertinent documents. The senior research analyst told us that he 1) searched all records in the custody of HSS that are stored at DOE's LM in Grand Junction, Colorado; 2) reviewed manual indexes to the records collected from Oak Ridge National Laboratory during the Human Radiation Experiments initiative and those searches did not locate any responsive documents; 3) contacted the DOE Oak Ridge federal records officer to inquire about any records that may still be in its custody but the records officer had no knowledge of the existence of such records; and, 4) contacted the National Institute for Occupational Safety and Health (NIOSH) which informed him that it did not possess any responsive documents to Ms. Brown's request.[7] *See* Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

In an effort to assist Ms. Brown, HSS, RO and LM participated in a telephone conversation with Ms. Brown on May 10, 2012, and DOE suggested that she submit a FOIA request to the U.S. Department of Defense, and a request for information to the Center for Cancer Research at Johns Hopkins University and at Purdue University. [8] *See* Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

We find that DOE personnel made inquiries beyond what the FOIA requires of them in searching for responsive documents. Based on information provided to us, we find that HSS performed a search reasonably calculated to reveal records responsive to Ms. Brown's FOIA request. HSS collaborated with knowledgeable officials to ascertain where responsive documents might exist and had searches made of those locations. Accordingly, we find that the search was adequate for purposes of the FOIA and the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on July 26, 2012, by Cynthia Brown, OHA Case No. FIA-12-0044, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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[7] Although NIOSH did not have any responsive records, it indicated that potentially responsive records from the MED medical research for the period may reside with the National Security Archive at George Washington University. HSS included an internet link to this facility in its July 2012 Determination Letter to Ms. Brown.

[8] This suggestion was based on historical relationships of those entities with the MED, AEC, and the Billings Hospital of the University of Chicago.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 17, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of National Security Archive	)	
	)	
Filing Date: August 1, 2012	)	
	)	Case No.: FIA-12-0045
	)	

Issued: August 27, 2012

Decision and Order

On August 1, 2012, the National Security Archive ("Appellant") filed an Appeal from a determination issued by the Department of Energy's (DOE) Richland Operations Office (ROO). In that determination, ROO responded to an amended request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require ROO to perform an additional search and require other DOE offices to search for a specific report dealing with a natural uranium graphite reactor that was numbered KB-789.

I. Background

On June 8, 2012, the Appellant submitted a FOIA request to DOE Headquarters asking for "a report prepared in early 1960 by the Atomic Energy Commission's Richland Operations Office evaluating the natural uranium-graphite reactor method for the production of plutonium for nuclear weapons" (Request). Request letter from William Burr, National Security Archive to FOIA Requester Service Center, DOE Headquarters at 1 (June 8, 2012). The DOE's Office of Information Resources (OIR) referred the Request to ROO as the location where it was most likely that a copy of the Report might be located. Memorandum from Alexander C. Morris, FOIA Officer, OIR to Dorothy Riehle, ROO (June 11, 2012). On June 19, 2012, ROO, in response to the Request, provided the Appellant with a report entitled "The Nuclear Parameters of some Graphite – Natural Uranium Lattices Measured in the PCTR" (Graphite Report) Letter from Dorothy Riehle, Freedom of Information Act Officer, ROO to William Burr, National Security Archive (June 19, 2011).

In a June 28, 2012 E-mail, the Appellant informed ROO that the Graphite Report was not the report he sought with his Request. He asked to amend his Request to ask for a report numbered "KB-789" which was authored in early 1960 or late 1959 which evaluated the natural uranium

graphite method (Report).[1] E-mail from William Burr, National Security Archive to Dorothy Riehle, ROO (June 28, 2012). In a July 11, 2012 letter, ROO informed the Individual that it was unable the locate the Report. Letter from Dorothy Riehle, ROO, to William Burr, National Security Archive (July 11, 2012) (Notification Letter).

In his Appeal, the Appellant asserts that the Report must exist somewhere within DOE and has submitted a portion of the AEC document that refers to the Report. The Appellant asks that a broader search be made of other DOE offices.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (August 26, 2002).[2]

During the processing of this Appeal, OHA first contacted ROO to ascertain the scope of the ROO's search for responsive documents. *See* E-mail from Richard Cronin, Attorney-Examiner, OHA to Dorothy Riehle, ROO (August 2, 2012). In response to this inquiry, ROO informed us that it consulted with its employees most likely to have knowledge concerning the location of the Report. ROO employees at the Records Holding Area conducted an electronic search of the DOE's Hanford, Washington site archive databases.[3] In its initial search of the electronic databases, the keywords: "natural uranium," "reactor," "natural," "uranium-graphite," "reactor route" were used to find documents originating from the early 1960's. Upon receiving additional information from the Appellant in his amended complaint, the employees also searched the databases using the term "KB-789." The only document that was located was the Graphite Report. E-mail from Dorothy Riehle, ROO, to Richard Cronin, Attorney-Examiner, OHA (August 2, 2012).

During our review of this Appeal, we provided a copy of the Appellant's revised Request (specifying report no. KB-789) to the OIR. OIR then initiated a search for the Report using the additional information provided by the Appellant. OIR determined that OH was the DOE HQ office most likely to possess the Report. An OH official then conducted a manual search in the file in the AEC Secretariat where the AEC Document was stored but did not find a copy of the

[1] The Appellant apparently discovered that the report he sought was numbered "KB-789" during the pendency of his original request. Specifically, a reference to the report - "KB-789" was contained in an Atomic Energy Commission (AEC) document (AEC Document) that had been provided to him in a previous FOIA Request to DOE. *See* E-mail from Terry Fehner, Office of History (OH), to Richard Cronin, Attorney-Examiner, OHA (August 20, 2012).

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[3] The ROO manages the DOE's facility in Hanford, Washington.

Report. This official than searched AEC document holdings by using various electronic finding aids using the Report's document number (KB-789) as a key word but did not find the Report. Lastly, the official made a search of the AEC Secretariat card catalogue but could not find any reference to the Report. *See* E-mail from Terry Fehner, Office of the Secretariat, to Richard Cronin, OHA Attorney-Examiner (August 20, 2012).

After reviewing the details of the search that was conducted by ROO and OH, we conclude that their search for the Report was adequate for the purposes of the FOIA. ROO and OH searched its relevant document databases using search terms, based on the Appellant's Request. Given the description of the Report provided by the Appellant, we find that ROO and OH used database search terms that were likely to reveal the existence of the Report. Consequently, we find that ROO and OH conducted a search reasonably calculated to find the Report and thus, the Appellant's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on August 1, 2012, OHA Case No. FIA-12-0045, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 27, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Larry W. Long	)	
	)	
Filing Date: August 10, 2012	)	Case No.: FIA-12-0046
	)	
	)	

Issued: September 7, 2012

Decision and Order

On August 10, 2012, Larry W. Long (Appellant) filed an Appeal from a determination issued to him on July 24, 2012, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE) (Request No. ORO-2012-01507-F). In that determination, Oak Ridge stated that it did not locate any documents responsive to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Oak Ridge to conduct a further search for responsive documents.

I. Background

On April 17, 2012, the Appellant submitted a FOIA request to Oak Ridge for copies of the Benefit Value Studies (Ben-Val Study) for URS | CH2M Oak Ridge LLC (UCOR) and Bechtel Jacobs Company, LLC, "Mercer or AON/Hewitt Studies,"[*/] and similar information from DOE. Request Letter dated June 13, 2012, from Appellant, to Amy Rothrock, FOIA Officer, Oak Ridge. Oak Ridge, in response to the request, stated that the Ben-Val Study for UCOR and Bechtel Jacobs are contractor records, and therefore, not subject to the FOIA. Determination Letter dated July 24, 2012, from Amy Rothrock to Appellant. In addition, Oak Ridge indicated that any documents pertaining to the Mercer or AON/Hewitt studies were in the possession of procurement at DOE Headquarters. *Id.* Therefore, Oak Ridge forwarded that portion of the request to the Office of Information Resources at DOE Headquarters. *Id.* That portion of the request is not at issue in this Appeal.

* Because these documents are within the purview of DOE Headquarters, Oak Ridge did not know what "AON" stood for or whether Mercer was the full name of the company. E-mail dated August 29, 2012, from Amy Rothrock, FOIA Officer, Oak Ridge, to Janet R. H. Fishman, Attorney-Examiner, Office of Hearings and Appeals (OHA).

On August 10, 2012, OHA received the Appellant's Appeal, which challenges Oak Ridge's claim that the documents are contractor records. Appeal Letter dated July 31, 2012, from Appellant to OHA, DOE.

II. Analysis

The Appellant challenges Oak Ridge's claim that all responsive documents are not "agency records" but rather contractor records and, therefore, not subject to the FOIA. The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Oak Ridge, after conferring with its procurement attorneys and the head of the Industrial Personnel Branch of its Human Resources Division, concluded that the records were neither in the possession nor control of Oak Ridge at the time of the request and, therefore, were not agency records. Determination Letter at 1-2

However, a finding that certain documents are not agency records does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e). The Appellant argues that UCOR could not have conducted the Ben-Val study without direction from the DOE because the study is only required to be conducted every three years. Appeal Letter at 1. He also argues that the Ben-Val study must be in DOE's possession. Oak Ridge determined that any documents that may exist were contractor records under the contract between UCOR and DOE. Determination Letter at 1; E-mail dated August 16, 2012, from Amy Rothrock to Janet Fishman, OHA, DOE. We have reviewed the pertinent contract clause and we agree with Oak Ridge's interpretation. The contract between UCOR and DOE clearly states that the components of the study, *i.e.*, records on salary and employee benefits, are contractor records. DOE Contract No. DE-SC-0004645 (DEAR § 970.5204-3, "Access To And Ownership of Records"). In view of the explicit language of the contract, we must deny the Appeal.

For the reasons give above, we have determined that UCOR's records were not agency records. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Larry W. Long, OHA Case No. FIA-12-0046, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Toll-free: 1-877-684-6448

Poli A. Marmolejos

Director

Office of Hearings and Appeals

Date: September 7, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of William B. Ray	)	
	)	
Filing Date: September 10, 2012	)	Case No.: FIA-12-0049
	)	
	)	

Issued: October 1, 2012

Decision and Order

On September 10, 2012, William B. Ray filed an appeal from a determination the Department of Energy's (DOE) Oak Ridge Office (OR) issued on August 21, 2012. In its determination, OR responded to a request for documents that Mr. Ray submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

I. Background

The Appellant requested from OR a copy of his Personnel Security File. On April 13, 2012, OR provided Mr. Ray with certain documents responsive to his request. Letter from Larry C. Kelly, Manager, OR, to William Brian Ray (August 21, 2012) (Determination Letter). Mr. Ray, on April 18, 2012, requested a document referenced in one of the documents that OR had provided him, an opinion from OR's Office of Chief Counsel. On August 21, 2012, OR issued a determination stating that it was withholding this document in its entirety pursuant to 5 U.S.C. §§ 552a(d)(5) and 552a(k)(2) (Exemption (d)(5) and (k)(2) of the Privacy Act), and 5 U.S.C. § 552(b)(5) (Exemption 5 of the Freedom of Information Act). *Id.* In his Appeal, Mr. Ray contends that the document at issue is not exempt from disclosure under either the Freedom of Information Act (FOIA) or Privacy Act.

II. Analysis

A. FOIA Exemption 5

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's

goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In its determination, OR characterized the document in question as being subject to both the attorney work-product and attorney-client privileges. Determination Letter at 2.

The attorney work-product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work-product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g., Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to court proceedings, but extends to administrative proceedings as well. *See e.g., Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

With regard to the applicability of the attorney work-product privilege to the document at issue, the Appellant cites *Adlman* for the proposition that the Exemption 5 work-product privilege does not extend to

> documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well

> established that work-product privilege does not apply to such documents. Even if such documents might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created "because of" actual or impending litigation.

Adlman, 134 F.3d at 1202 (citations omitted); Appeal at 6-7. The Appellant argues that the document at issue in this case, an opinion from the OR's Office of Chief Counsel, was prepared in the ordinary course of business, and therefore is not shielded by the attorney work-product privilege. Appeal at 6.

We disagree. First, the Appellant states that the determination of "whether to suspend or continue Access Authorization is an everyday activity of [OR's] Access Authorization Branch." *Id.* The document in question, however, was prepared not by OR's Access Authorization Branch, but rather by OR's Office of Chief Counsel. Moreover, even if we were to assume, *arguendo*, that such documents are produced in the ordinary course of business of the Office of Chief Counsel, this fact would only be relevant if the document at issue "would have been created in essentially similar form irrespective of the litigation." *Adlman*, 134 F.3d at 1202.

It is clear from our review of the withheld document, however, that it contains the author's analysis of a case being considered under 10 C.F.R. Part 710, in particular concerning OR's proposal to conduct an Administrative Review proceeding, the procedures of which allow an individual to request a hearing before a DOE Hearing Officer "to present evidence in his own behalf, through witnesses, or by documents, or both; and . . . to be present during the entire hearing and be accompanied, represented, and advised by counsel or representative of the individual's choosing . . . ." 10 C.F.R. § 710.21(b). Thus, there is no question that this document was created by the OR's Office of Chief Counsel in anticipation of, and *solely because of* the prospect of administrative litigation under 10 C.F.R. Part 710. As such, we find that it was properly withheld under the Exemption 5 attorney work-product privilege.

Though OR also invoked the *attorney-client* privilege in withholding the document at issue, we need not address the application of that privilege, as we have found a proper basis for the withholding of the document under the work-product privilege. We, therefore, turn to whether OR properly withheld the document under the Privacy Act.

B. Privacy Act Exemption (d)(5)

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, the Privacy Act also states that it does not "allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). In its determination, OR states that the "Chief Counsel opinion was prepared in anticipation of a potential Personnel Security Hearing." Determination Letter at 1. For the reasons explained below, we conclude that the document in question was properly withheld under Privacy Act Exemption (d)(5).

First, the longstanding guidelines of the Office of Management and Budget (OMB) regarding implementation of the Privacy Act state that the term "civil action or proceeding" as set forth in

the Act "was intended to cover . . . quasi-judicial and preliminary judicial steps . . . ." Privacy Act Guidelines, 40 Fed. Reg. 28948, 28960 (July 9, 1975). Further, the OMB has, in another context, specifically recognized the "quasi-judicial nature of hearing and review functions" under 10 C.F.R. Part 710. Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material, 59 Fed. Reg. 35178, 35179 (July 8, 1994).

The U.S. Court of Appeals for the District of Columbia has cited the OMB Privacy Act guidelines in finding that "Privacy Act Exemption (d)(5) protects documents prepared in anticipation of quasi-judicial administrative hearings." *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987). Though the court's holding did not rely solely on OMB's interpretation of Congress's intent, the court considered that interpretation worthy of its "attention and solicitude." *Id.*

Aside from the OMB guidelines, the court in *Martin* relied on its own reasoning that, of "all types of administrative hearings, quasi-judicial hearings are most like the formal civil actions Congress clearly and specifically intended to protect." *Id.* at 1188. At issue in *Martin* were documents prepared in anticipation of proceedings before the Merit System Protection Board (MSPB). The court noted similarities both in the functions of tribunals such as the MSPB, and found that "[w]hatever Congress may have intended for other types of administrative proceedings, it must have intended quasi-judicial hearings to fall within the term 'civil proceedings.'" *Martin*, 819 F.2d. at 1188.

The court in *Martin* stated that its holding specifically applied to documents prepared in anticipation of "adversarial proceedings, subject to the rules of evidence and with opportunity for discovery," all characteristics of proceedings before the MSPB. In this regard, we note that proceedings under Part 710 share similar characteristics with those before the MSPB. Part 710 hearings are adversarial in nature, with counsel for the DOE, on the one hand, "participating on behalf of and representing the Department of Energy," which has determined that there is "substantial doubt" regarding an individual's clearance eligibility, and the individual, on the other hand, presenting (often through legal counsel) "evidence in his own behalf, through witnesses, or by documents, or both," for "the purpose of affording the individual an opportunity of supporting his eligibility for access authorization; . . . ." 10 C.F.R. § 710.21(b).

Moreover, in Part 710 hearings, as in proceedings before the MSPB, formal rules of evidence do not apply, but the Federal Rules of Evidence may be used as a guide. 10 C.F.R. § 710.26(h); *Bowen v. Department of Navy*, 112 M.S.P.R. 607, 618 (2009) ("Although the Federal Rules of Evidence do not apply to Board proceedings, the Board will look to them for guidance"). And though the Part 710 regulations do not contain formal discovery procedures, the practice of this office in conducting Part 710 hearings allows for the pre-hearing exchange of documents, including the provision by the DOE Counsel to the individual of documents not being offered as hearing exhibits.

In sum, we find that, following the guidance of the OMB and the reasoning set forth in *Martin*, if not its explicit holding as applied to the MSPB, proceedings conducted under Part 710 are sufficiently similar to formal civil actions that they should be considered "civil proceedings" under Privacy Act Exemption (d)(5). As we discussed above, the document at issue in this case

was prepared in anticipation of a Part 710 administrative review proceeding, and therefore we find that the document was properly withheld by OR under Exemption (d)(5).

Finally, as with our analysis above of OR's withholding under the FOIA, although OR also based its withholding of this document on Privacy Act Exemption (k)(2), we need not address the application of that Exemption here, as we have found that OR had a sufficient basis for withholding the document at issue under Exemption (d)(5). Thus, having found that OR properly withheld the requested document under both the FOIA and the Privacy Act, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on September 12, 2012, by William B. Ray, OHA Case No. FIA-12-0049, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 5 U.S.C. § 552a(g)(1) (Privacy Act). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 1, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Cause of Action	)	
	)	
Filing Date: September 10, 2012	)	
	)	Case No. FIA-12-0050
	)	

Issued: October 3, 2012

Decision and Order

Cause of Action (the Appellant) filed an Appeal from a determination issued by the Department of Energy's Loan Guarantee Program Office (LGPO) on August 6, 2012. In that determination, LGPO denied a request for information that the Appellant had submitted on June 12, 2012, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. LGPO withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under FOIA Exemptions 3 and 4. This Appeal, if granted, would require LGPO to release this information.

I. Background

On June 12, 2012, the Appellant requested "[A]ll documents referring or relating to requests, including the requests themselves, by U.S. Department of Energy Secretary Steven Chu or his representatives to the IRS for information concerning whether an applicant for a loan under any DOE program has a tax delinquent account." Request at 1 (footnotes omitted). The Appellant further requested that it be granted a waiver from search, review, and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *Id.* at 6.

On August 6, 2012, LGPO issued a determination in which it stated that it had identified an unspecified number of responsive documents, and stated that it was withholding these documents in their entirety.[1] LGPO stated that the responsive documents contained "[tax]

[1] LGPO did not provide any description of these withheld documents. It merely stated that they contained "tax account information." If the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v.*

return information" under 26 U.S.C. § 6103(a) and were therefore exempt from disclosure under Exemption 3. LGPO also contended that "information related to an applicant's tax account or any other tax information is confidential and if released could cause a substantial competitive harm to an applicant" and therefore is exempt from disclosure under Exemption 4. Determination Letter at 2. LGPO neither assessed the Appellant with search, review, and duplication fees, nor granted it a fee waiver.

In its Appeal, the Appellant contends that the responsive documents should be released to it, because "It appears from the DOE's response that it misunderstands our request. Since the documents and information we seek constitute neither § 6103 "return information" nor information "related to an applicant's tax account," we respectfully appeal DOE's denial of our request." Appeal at 2.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemptions 3 and 4 are at issue in the present case.

A. Exemption 3

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). It is well settled that 26 U.S.C. § 6103 meets these criteria. *Tax Analysts*

Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at http://www.oha.doe.gov/search.htm.

v. Internal Revenue Serv., 410 F.3d 715, 717 (D.C. Cir. 2005).

Federal law generally prohibits the disclosure of "return information." 26 U.S.C. § 6103, *et seq*. 26 U.S.C. § 6103(a) states in pertinent part: "Returns and return information shall be confidential, and . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise . . ." 26 U.S.C. § 6103(b) further defines return information as:

> [A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, *deficiencies*, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense ... "

26 U.S.C. § 6103(b) (emphasis supplied). Accordingly, an agency may invoke Exemption 3 to withhold information that is confidential under 26 U.S.C. § 6103(a). Therefore, the LGPO properly invoked Exemption 3 to withhold any information that would reveal a loan applicant's tax return information if released. We have conducted an *in camera* review of the documents identified as responsive by the LGPO and find that small portions of these documents contain information that, if released, would reveal loan applicants' return information.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."[2]

[2] In the present case, LGPO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, LGPO did not indicate whether the information it withheld was voluntarily submitted. The only basis supplied by LGPO for its withholding of the Application under Exemption 4 was its conclusory finding that release of the withheld information would cause substantial harm to loan applicants' competitive positions.

It is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, LGPO merely parroted the language of the FOIA statute by stating, in conclusory fashion, that disclosure of the redacted information would result in substantial competitive harm. Determination Letter at 2. Such a statement does not provide a sufficient basis for a determination withholding information under Exemption 4. *See e.g. Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter for a new determination explaining how Exemption 4 applies to withheld material). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999).

Therefore, we are remanding this portion of the Appeal to LGPO. On remand, LGPO should either release the information it has redacted from the responsive documents solely under Exemption 4, or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would be likely to result in substantial competitive harm.

C. Duty To Segregate

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). LGPO withheld the responsive documents in their entirety as tax return information. Our *in camera* review revealed that LGPO, by redacting the very small portion of each of these documents which identifies the loan applicant, could have released almost all of the withheld information without revealing any of the loan applicant's return information. Accordingly, we find that LGPO failed to comply with the FOIA's mandate that it release any reasonably segregable portions of the responsive document. On remand, LGPO should redact only identifying information from each responsive document, and then release the remaining portions of each responsive document or issue a new determination letter withholding such information under a different exemption.

III. CONCLUSION

We are remanding this matter to LGPO for further processing in accordance with the instructions set forth above. Accordingly, Cause of Action's Appeal will be granted in part and denied in part. LGPO should also rule upon Cause of Action's request for a fee waiver before assessing it any search, duplication or processing fees.

It Is Therefore Ordered That:

(1) The Appeal filed by Cause of Action on September 10, 2012, Case No. FIA-12-0050, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Loan Guarantee Program Office shall issue a new determination either releasing the responsive documents discussed above, after redacting any identifying information pursuant to Exemption 3 of the Freedom of Information Act, or withholding that information under another appropriately justified exemption.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 3, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of William Berger	)	
	)	
Filing Date: September 10, 2012	)	Case No. FIA-12-0051
	)	
	)	

Issued: October 9, 2012

Decision and Order

On September 10, 2012, William Berger (Appellant) filed an Appeal from a determination issued to him on August 10, 2012, by the Department of Energy's National Nuclear Security Administration (NNSA) (FOIA Request Number FOIA-2012-00160-K), in response to a request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. NNSA, in its August 10, 2012, Determination Letter, informed the Appellant, *inter alia*, that it neither confirmed nor denied the existence of any records described in the Appellant's request. This Appeal, if granted, would require NNSA to either release any discovered documents or issue a new Determination Letter justifying the withholding of those documents.

I. Background

In his March 22, 2012, FOIA request (Request), the Appellant asked for the following information:

1. "The internal investigation OST conducted between February 27, 2012 and March 9, 2012. The investigation was in reference to alleged violations, including criminal allegations, conducted by Michael Rossetti and Paul Greoly. The investigation was conducted at Fort Chaffee, AR by Jeff Beck (Security Branch of OST) and James Allen (Special Investigator for Mr. Harrell), directly for the ADA, Mr. Harrell."

2. "The executive summary provided to Mr. Harrell with the findings of the allegations."

See Determination Letter. In its August 10, 2012, Determination Letter, NNSA informed the Appellant that it neither confirmed nor denied the existence of any such records described in the request.[1] *Id*. Citing FOIA Exemption 6, 5 U.S.C. §552(b)(6)[2], the Authorizing Official stated in

[1] An agency response to a FOIA Request, which states that the agency "can neither confirm or deny" the existence of responsive records because the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information or constitute an unwarranted invasion of personal privacy is often called a *Glomar*

the Determination Letter that an official acknowledgement of an investigation or an acknowledgment of the existence of investigatory records about an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. In his Appeal, the Appellant challenges NNSA's determination.

II. Analysis

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records exist would jeopardize the privacy interests that FOIA exemptions are designed to protect and that a *Glomar* response neither confirming nor denying the existence of responsive records is appropriate in such situations. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983) (*Antonelli*). Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized there to be a significant privacy interest in the mere confirmation or denial that an individual's name or other personal information is contained in investigative documents. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual). This strong privacy interest must be balanced against any specific public interest that would be furthered by the confirmation or denial of the existence of the requested documents. If the potential privacy interest outweighs the public interest that would be furthered by confirming or denying the existence of such documents, courts have held that agencies are justified in issuing a *Glomar* response neither confirming nor denying the existence of any responsive records. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1492-94 (D.C. Cir. 1994); *McNamera v. Dep't of Justice*, 974 F. Supp. 956, 957-60 (W.D. Tex. 1997). Using this rationale, the courts have upheld the use of a *Glomar* response where a FOIA request might reveal Exemption 6 information disclosing the identity of individuals who are subjects of investigations or are mentioned in law enforcement records and who have not previously waived their privacy rights. *See, e.g., Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 775 (1989); *Antonelli*.

In reviewing the interests to be balanced to justify Exemption 6 protection, it is apparent that, if responsive documents were to exist, the request at issue might reveal the identities and personal information of individuals involved in an investigation. For this reason, the mere confirmation or denial of the existence of responsive documents could, in and of itself, reveal exempt information. The NNSA has not officially acknowledged the investigation cited by the Appellant ever occurred or that an executive summary of such an investigation was ever provided to Mr. Harrell. By confirming or denying the existence of responsive records, the NNSA would be confirming or denying the existence of the investigation, which would, in and of itself, reveal personal privacy information protected by FOIA Exemption 6. Furthermore, the Appellant has not referenced any specific public interest that would be furthered by the release of the requested documents, or by the NNSA's confirmation or denial of their existence.

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response. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). We will refer to NNSA's response as a *Glomar* response.

[2] Exemption 6 shields from disclosure "[p]ersonnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6).

After reviewing the subject matter of the Request, the method by which the Request was processed, the NNSA justification offered in the Determination Letter, and the interests to be balanced, we find that NNSA appropriately invoked its *Glomar* response, neither confirming nor denying the existence of the investigatory records sought by the Appellant. Thus, we agree that providing any other response to the FOIA Request would constitute a clearly unwarranted invasion of personal privacy, such as that protected by Exemption 6. Consequently, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 10, 2012, by William Berger, OHA Case No. FIA-12-0051, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia. The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 9, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of California Arizona Nevada District Organization	)	
Filing Date: September 17, 2012	)	Case No.: FIA-12-0053

Issued: October 11, 2012

Decision and Order

On September 17, 2012, the California Arizona Nevada District Organization (Appellant) filed an Appeal from a determination issued to it on August 16, 2012, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-00626-F). In that determination, LGPO released documents responsive to a request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO redacted portions of the released documents. This Appeal, if granted, would release the total hours worked and total pay received from the redacted documents.

I. Background

On January 13, 2012, the Appellant filed its request with DOE for a copy of all certified payroll reports, statements or compliance, fringe benefit statements, and statements of non-performance as submitted by the contractor who performed the erection of the collector assembly building on the Abengoa Solana project and by the contractor who performed the placement, tying and installation of the cooling tower basin foundation rebar only on the project. Request Letter dated January 13, 2012, from Michele Justice, Director, Appellant, to Alexander Morris, FOIA Officer, DOE. On August 16, 2012, LGPO responded releasing responsive documents that had been redacted pursuant to Exemptions 4 and 6 of the FOIA. Determination Letter dated August 16, 2012, from David G. Frantz, Acting Executive Director, LGPO, to Michele Justice, Appellant. The Appellant challenges the withholding of the total hours worked and total pay received in those documents. Appeal dated September 13, 2012, from Nina Fendel, Appellant's Attorney, to Director, Office of Hearings and Appeals (OHA), DOE.

In its Appeal, the Appellant makes a number of arguments:

1. LGPO failed to properly justify its withholdings.

2. The total hours worked and total wages received is segregable information and should be released.
3. Disclosure of the information is not likely to cause substantial harm to the competitive interest of the Employers.
4. Disclosure of the information is not likely to cause substantial harm to the interests of the DOE.
5. The information cannot be withheld under Exemption 6.[1]

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemptions 4 and 6 are at issue in this Appeal.

A. Exemption 4

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

The first requirement is that the withheld information be "commercial or financial." Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290. The information submitted by the contractors, *i.e.*, payroll reports, statements of compliance, fringe benefits statements and statements of non-performance, clearly satisfy the

[1] The Appellant also argues that "disclosure of the information . . . would not violate the Trade Secret Act." Appeal at 4. The Appellant continues that LGPO justified withholding the information under the Trade Secret Act. *Id.* At no time does LGPO rely on the Trade Secret Act. Therefore, we will not address this argument in the Appeal.

definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc., v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000).[2] The contractors satisfy that definition. Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." In this case, the contractors were required to submit the documents in question as part of its contract with LGPO. Accordingly, we find that the withheld information was "involuntarily submitted." In order for the application of Exemption 4 to be proper, the *National Parks* test must be applied. Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future; or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770.

The Appellant argues that LGPO misapplied Exemption 4 in redacting the total hours worked and total pay received because disclosure will not cause substantial harm to the interests of the DOE. However, LGPO did not claim that the release of the information would impair DOE's ability to obtain the information in the future. The standard set forth in *National Parks* is whether release of the information would impair the government's ability to obtain such information in the future or cause substantial competitive harm to the submitter. *National Parks*, 498 F.2d at 770.

We must address, however, whether release of the information would likely result in substantial competitive harm to the submitters of the information. LGPO determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information would give the contractors' competitors an undue advantage in bidding on future contracts. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received under Exemption 4.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant

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

privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. & Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

LGPO invoked FOIA Exemption 6 to redact the information from the documents released to the Appellant. The Appellant contends that the LGPO improperly withheld the total hours worked and total pay received under Exemption 6, contending, that "[w]here all personal identifiers have been redacted from documents and it is not possible to identify the individual in question, there is no privacy interest in the number of hours worked, and the total pay received." Appeal at 8. We agree.

It is well settled that the release of an individual's name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). The privacy interests protected by the exemptions to FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. Therefore, LGPO correctly concluded that the contractor employees whose names appear in the documents have a legitimate expectation of privacy under the FOIA. However, once the contractor employees' names and addresses and other identifying information have been removed from the documents, we do not find a privacy interest in the hours worked or pay received. Therefore, LGPO improperly relied on Exemption 6 to withhold this information.

III. Conclusion

After considering the Appellant's arguments, we are convinced that LGPO properly withheld the redacted information from the documents under Exemption 4. Although LGPO improperly used Exemption 6 to withhold the total hours worked and total pay received information, we will not remand the matter to that office for a new determination because the information was properly withheld under Exemption 4. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by California Arizona Nevada District Organization, Case No. FIA-12-0053, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 11, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of California-Arizona-Nevada District Organization Contract Compliance	)	Case No.: FIA-12-0054
Filing Date: September 14, 2012	)	

Issued: September 27, 2012

Decision and Order

On September 14, 2012, California-Arizona-Nevada District Organization Contract Compliance (CANDO) filed an appeal from a final determination issued by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE). In this determination, LGPO responded to a request for information (Request) filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Pursuant to the Request, LGPO released four documents. One of the documents provided to CANDO, the Tonopah Document, described below, consisted of seven pages, of which information had been withheld in four of the pages. LGPO withheld the information pursuant to Exemption 4 of the FOIA. This Appeal, if granted, would require LGPO to release to CANDO a portion of the information withheld in the four pages.

I. BACKGROUND

On August 17, 2011, CANDO submitted a FOIA request (Request) for ten categories of documents related to a loan guarantee contract regarding the Crescent Dunes Solar Energy Project (Crescent Dunes[1]). One of the categories of requested documents (Category 5) asked for:

> 5. A copy of the Technical Information Section C-Part II, 2. Engineering and construction Plans, a copy of the list of engineering and design contractors and the construction contractors selected to perform the construction of the project....

Request at 1.

On August 15, 2012, LGPO issued a response (Response) to CANDO's request for documents. In its Response regarding Category 5, LGPO released, among other documents, a redacted copy of seven pages from a document entitled "Solar Reserve – Project Tonopah U.S. DOE Title XVII

[1] This project is also known as the Tonopah Solar Energy Project.

Loan Guarantee Program – Part I Application" (Tonopah Document).[2] LGPO stated that information was withheld from these four pages pursuant to Exemption 4 of the FOIA.

On September 14, 2012, CANDO filed the present appeal contending that LGPO had improperly applied Exemption 4 to withhold "information concerning the engineering, design, and construction contractors and subcontractors", which CANDO alleged was withheld from the four redacted pages of the Tonopah document. CANDO argues that release of that information cannot be a trade secret or confidential commercial or financial information especially since construction has begun on the project.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4).

In its present appeal, CANDO quoted LGPO's description of the information that it withheld from the Tonopah document. CANDO then stated that it "has no quarrel with the assertion of the (b)(4) exemption as it applies to the specified information; the problem is that nowhere does DOE address the reasons for withholding engineering, design, and construction contractor and subcontractor information." Appeal at 3-4.

We have obtained unredacted copies of the four pages where information was withheld. The redacted information does not contain the information that CANDO requests in its present appeal: "engineering, design, and construction contractor and subcontractor information." In addition, the redacted information does not contain any "list of engineering and design contractors and the construction contractors selected to perform the construction of the project," as requested by CANDO in its Request quoted above. As a result, the challenge CANDO raised in its appeal of LGPO's determination regarding these four pages lacks a factual basis and will be denied. *See California-Arizona-Nevada District Organization Contract Compliance*, Case No. FIA-0004 (March 23, 2012).[3]

It Is Therefore Ordered That:

(1) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance, Case No. FIA-12-0054, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be

[2] Specifically, LGPO provided redacted versions of pages 45, 47, 49, and 51 of the Tonopah Document to CANDO.

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

sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 27, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Torres Consulting & Law Group, LLC	)	
	)	
Filing Date: September 25, 2012	)	Case No.: FIA-12-0056
	)	
	)	

Issued: October 19, 2012

Decision and Order

On September 25, 2012, Torres Consulting & Law Group, LLC, (Appellant) filed an Appeal from determinations issued to it on August 9, 2012, August 14, 2012 and August 21, 2012, by the Golden Field Office (Golden) of the Department of Energy (DOE) (Request Nos. GO-12-298, GO-12-299, and GO-12-300). In those determinations, Golden released documents responsive to the requests the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Golden withheld portions of the released documents under Exemptions 4 and 6 of the FOIA. This Appeal, if granted, would release the employee wage rates and total hours worked, both daily and weekly, from the documents at issue.

I. Background

On July 31, 2012, the Appellant filed three requests with Golden for certified payroll records pertaining to "MTech Mechanical," "Weifield Group," and "Diamond Fire Protection." Request E-mail dated July 31, 2012, from Ashley Walkup, Appellant, to Michele Altieri, Golden. On August 9, 2012, Golden released the Weifield Group payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 9, 2012, from Golden to Ashley Walkup, Appellant. On August 14, 2012, Golden released the MTech Mechanical payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 14, 2012, from Golden to Ashley Walkup, Appellant. On August 21, 2012, Golden released the Diamond Fire Protection payroll records, but again withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 21, 2012, from Golden to Ashley Walkup, Appellant.

On September 17, 2012, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging only the information withheld under Exemption 4, *i.e.*, the withholding of the employee wage rate and total hours worked both daily and weekly. Appeal Letter dated September 17, 2012, from Jim Barton, Appellant, to Director, OHA, DOE. The Appellant

argues that release of this information will not allow a competitor to gain a "substantial competitive advantage in pricing future bids, even on exactly similar projects." *Id.* at 3.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Exemption 4 is at issue in this Appeal.

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

The Appellant is not challenging whether the information withheld, employee wage rate and total hours worked both daily and weekly, is either commercial or financial or obtained from a person. Appeal Letter at 2. We therefore must determine whether the information is privileged or confidential. For the reasons set forth below, we find that the information is confidential and therefore exempt from release under Exemption 4.

In this case, the contractors were required to submit the documents in question as part of their contracts with Golden. Accordingly, we find that the withheld information was "involuntarily submitted." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770. In applying Exemption 4 to the documents at issue, Golden determined that release of the information would likely cause the contractors substantial competitive harm.

The Appellant states that the wage rate data from the certified payroll documents would not cause substantial competitive harm because all contractors are aware of the requirement to pay

the prevailing wage rate and benefits as it is stipulated and incorporated into the project contract. Appeal Letter at 2. In addition, disclosure of the hours worked on a project's jobsite should not be protected under Exemption 4 because this information is readily observable on most projects and is the primary way to establish if a contractor complies with apprenticeship guidelines mandated by federal law. *Id.* Finally, the number of hours worked, daily and weekly, for a given employee demonstrates that the worker is being paid for every hour worked and that the contractor is not simply using a required base wage rate to back into Davis-Bacon Act compliance. *Id.* In sum, the Appellant argues that the wage rate, fringe benefits, and apprenticeship guidelines cannot be considered confidential and the release of the information would not cause a competitive disadvantage to the submitter.

Golden determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information would give the contractors' competitors an undue advantage in bidding on future contracts. Therefore, we find that Golden properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received.

III. Conclusion

After considering the Appellant's arguments, we are convinced that Golden properly withheld the redacted information from the documents under Exemption 4. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-12-0056, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 19, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Tom Thielen	)	
		)	Case No.: FIA-12-0057
Filing Date:	September 25, 2012	)	
		)	

Issued: November 1, 2012

Decision and Order

On September 25, 2012, Tom Thielen filed an Appeal from a determination issued to him on August 22, 2012, by the Department of Energy (DOE) Richland Operations Office (Richland) (Request No. PA 2012-00274). That determination was issued in response to a request for information that Mr. Thielen submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require Richland to release additional responsive material.

I. Background

Mr. Thielen previously filed a request seeking documents regarding a safety concern that he raised with his employer, CH2M Hill Plateau Remediation Company (CHPRC). In a March 2012 determination, Richland released to Mr. Thielen a copy of his employee concern file, but withheld certain portions of the investigation summary included in the file pursuant to 5 U.S.C. § 552a(k)(5) (Exemption (k)(5) of the Privacy Act). *See* Letter from Richland to Mr. Thielen (March 9, 2012) (March Determination) at 1. According to Richland, the withheld information was obtained from sources that were promised confidentiality in exchange for their information. *Id*. In April 2012, Mr. Thielen filed an Appeal of the March Determination with the DOE Office of Hearings and Appeals (OHA), challenging Richland's withholding of information in the investigation summary. *See* Letter from Mr. Thielen to OHA (April 27, 2012) (April Appeal).

In a June 28, 2012 decision, OHA issued a decision regarding the April Appeal. *See Thomas R. Thielen*, OHA Case No. FIA-12-0023 (2012).[1] In that case, we determined that Richland improperly applied Privacy Act Exemption (k)(5) in withholding information from the investigation summary in Mr. Thielen's employee concern file. *Id*. Specifically, we noted that Exemption (k)(5) permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications of Federal civilian employment . . . or access to classified information, but only to the extent that the disclosure of such material

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

would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence . . . " *Id.* at 2 (*quoting* 5 U.S.C. § 552a(k)(5)). After reviewing the withheld material, we determined that it did not fall within the scope of information that is exempt from disclosure under Exemption (k)(5) and, therefore, "Richland's initial determination to withhold under Exemption (k)(5) was incorrect." *Id.* In a footnote in that decision, we further noted that Richland did not process Mr. Thielen's request separately under both the Privacy Act and the Freedom of Information Act (FOIA), as is required for first-party requests. *See* 5 U.S.C. §§552a(t)(1), (2); *see also Shapiro v. DEA*, 762 F.2d 611, 612 (7th Cir. 1985). In considering whether the information in question should have been released to Mr. Thielen under the FOIA, we concluded that FOIA Exemption 6 justifies withholding the information because the release of the information in question – names of witnesses, job titles, and other information which would reveal their identities – would constitute a clearly unwarranted invasion of personal privacy, and there is no overriding public interest in disclosure of such information. *Thomas R. Thielen*, OHA Case No. FIA-12-0023 at 2, n.*. Nonetheless, given our finding that Richland could not withhold the information under the Privacy Act under Exemption (k)(5), we remanded the matter back to Richland to either release the requested information in its entirety or justify the withholding of any portions under the Privacy Act. *Id.* at 3.

In accordance with our instructions in the June 28, 2012, decision, Richland issued a new determination to Mr. Thielen. *See* Letter from Richland to Mr. Thielen (August 22, 2012) (August Determination). In the August Determination, Richland again released to Mr. Thielen his employee concern file and withheld the same portions of the investigation summary that it withheld in the March Determination, but this time did so pursuant to FOIA Exemption 6 on the grounds that its release "would constitute a clearly unwarranted invasion of personal privacy by subjecting the third-party individuals to unwanted communications, harassment, intimidation, retaliation or other substantial privacy invasions by interested parties." *Id.* at 1. Richland further determined that there was no overriding public interest in disclosure. *Id.* at 2. Finally, Richland found that Mr. Thielen was not entitled to disclosure of the withheld information under the Privacy Act because the information in question "contains third party related information that is not about [Mr. Thielen]," or does not pertain to him. *Id.* at 1. According to Richland, the third party information is not responsive to Mr. Thielen's request because it "does not meet the Privacy's Act's definition of a 'record,' which includes 'any item, collection, or grouping of information *about* an individual' under 5 U.S.C.a(a)(4)." *Id.* (emphasis added).

Mr. Thielen filed the instant Appeal on September 25, 2012. Letter from Mr. Thielen to OHA (September 25, 2012) (September Appeal). In the September Appeal, Mr. Thielen challenges Richland's withholding of information under the Privacy Act.[2]

II. Analysis

[2] Mr. Thielen did not challenge Richland's withholding of the information in question pursuant to FOIA Exemption 6. Therefore, the issue of whether Richland properly applied FOIA Exemption 6 in withholding the information is outside of the scope of the instant Appeal and will not be considered.

The Privacy Act was enacted to prevent unnecessary dissemination of personal information compiled about individuals by federal agencies. Under the Privacy Act, an individual is entitled to "gain access to his record or to any information pertaining to him which is contained in the system [of records] . . . ." 5 U.S.C. § 552a(d)(1). Under the Privacy Act, the term "record" means "any item, collection, or grouping of information about an individual that is maintained by an agency . . . ." 5 U.S.C. § 552a(a)(4). Agencies may, however, provide that some systems of records are not subject to the Privacy Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(k).

At issue in this case is whether the withheld information included in the investigation summary in Mr. Thielen's employee concern file should be disclosed to Mr. Thielen under the Privacy Act's right of access provision, set forth at 5 U.S. C. § 552a(d)(1). The information in question includes the names and job titles of third-party witnesses, as well as statements by certain witnesses which, if disclosed, may reveal the witnesses' identities.

In considering requests for information under the Privacy Act, courts have consistently upheld the withholding of third-party personal information, including the identities of third parties, on the ground that such information is not "about" the requester and is, therefore, not the "record" of the requester, as defined in 5 U.S.C. § 552a(a)(4). For example, in *DePlanche v. Califano*, a father was denied access to the address of his minor children contained in his social security benefits file on the ground that the information was not "about" him, and therefore not his "record" as defined by the Privacy Act. *DePlanche v. Califano*, 549 F. Supp. 685, 695-96 (W.D. Mich. 1982). Similarly, other courts upheld the withholding of the identities of Federal Bureau of Investigation (FBI) agents included in requesters' records because those names did not constitute the requesters' "records" under the Privacy Act. *See, e.g.*, *Haddon v. Freeh*, 31 F. Supp. 2d 16 (D.D.C. 1998); *Nolan v. DOJ*, 1991 WL 36547, at *10 (D. Colo. Mar. 18, 1991). In this regard, in *Sussman v. U.S. Marshals Serv.*, the United States Court of Appeals for the District of Columbia, considering a first-party request for information under the Privacy Act, "interpret[ed] 5 U.S.C. § 552a(d)(1) to give parties access only to their own records, not to all information pertaining to them that happens to be contained in a system of records." *Sussman v. U.S. Marshals Serv*., 494 F.3d 1106, 1121 (D.C. Cir. 2007). The court explained that "[f]or an assemblage of data to qualify as one of [the requester's] records, it must not only contain his name or other identifying particulars but also be 'about' him." *Id*.

As noted above, on remand, Richland maintained that the withheld information was not "about" Mr. Thielen and, therefore, he was not entitled to its disclosure. We have carefully reviewed *in camera* the information in question. The withheld information appears in a document that Richland partially released to Mr. Thielen, titled "Referral Response Form," a summary of the investigation of Mr. Thielen's allegations in his employee concern complaint. The withheld names and job titles of third-party witnesses, as well as the withheld statements regarding the availability of certain witnesses for interviews, are very clearly not "about" Mr. Thielen, despite the fact that they are contained in his employee concern file. As such, that information does not constitute Mr. Thielen's "record" within the meaning of the Privacy Act. Therefore, Richland's withholding of that information was appropriate. We find, however, that the remaining withholdings are "about" Mr. Thielen because they are statements that specifically describe Mr.

Thielen and his work.[3] Moreover, the statements are maintained in a system of records, and are retrievable by Mr. Thielen's name. *See* E-mail from Dorothy Riehle, Richland, to Diane DeMoura, OHA (October 23, 2012) (confirming that the employee concerns file in question is retrievable by Mr. Thielen's name, but not the names or identifiers of witnesses or other interviewed parties). Therefore, we find that he is entitled to disclosure of that information under the Privacy Act's access provision, located at 5 U.S.C. § 552a(d)(1). Accordingly, we will remand this matter for further processing on this one narrow point. On remand, Richland should either release the withheld statements that we have identified as being "about" Mr. Thielen or issue a new determination justifying their withholding.

III. Conclusion

As discussed above, we have concluded that Richland appropriately withheld certain information from the responsive documents that it provided to Mr. Thielen on the ground that the information is not about Mr. Thielen and, therefore, not his record under the Privacy Act. We have further concluded, however, that two of the withheld statements are about Mr. Thielen and, as such, constitute his records under the Privacy Act. Consequently, we will grant the Appeal in part and remand this matter back to Richland for further processing regarding those two statements.

It Is Therefore Ordered That:

(1) The Appeal filed on September 25, 2012, by Tom Thielen, OHA Case No. FIA-12-0057, is hereby granted in part as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy Richland Operations Office for further processing in accordance with the instructions contained in the foregoing decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Web: ogis.archives.gov
E-mail: ogis@nara.gov

[3] The specific withheld statements in the "Referral Response Form" that we find to be "about" Mr. Thielen are the following: (1) page two, paragraph three, line two and (2) page three, last paragraph, lines three through five (excluding the withheld witness name).

Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 1, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of California Arizona Nevada District Organization	)	
Filing Date: October 2, 2012	)	Case No.: FIA-12-0059

Issued: October 31, 2012

Decision and Order

On October 2, 2012, the California Arizona Nevada District Organization (Appellant) filed an Appeal from a determination issued to it on September 10, 2012, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2011-01751-F). In that determination, LGPO released documents responsive to a request the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO, however, withheld portions of the released documents under FOIA Exemptions 4 and 6. This Appeal, if granted, would release the withheld information.

I. Background

On December 9, 2011, the Appellant filed its updated request with DOE for a copy of all certified payroll reports, statements or compliance, fringe benefit statements, and statements of non-performance as submitted by two contractors: Millennium Reinforcing (MR) and Largo Concrete (Largo). Appeal at 1. On September 10, 2012, LGPO responded releasing 161 pages of responsive documents. However, LGPO redacted portions of those documents pursuant to Exemptions 4 and 6 of the FOIA. LGPO withheld the names, social security numbers and other personally identifying information under Exemption 6. LGPO withheld the number of hours worked by each employee during each pay period and each employee's net and gross pay for each pay period under both Exemption 4 and Exemption 6. Determination Letter dated September 10, 2012, from David G. Frantz, Acting Executive Director, LGPO, to Appellant. The Appellant challenges the withholding of the total hours worked and total pay received in those documents.[1] Appeal at 1.

[1] The Appeal also claims that LGPO withheld: "fringe benefit payment statements." However, the 161 pages of responsive documents released to the Appellant appears to include a number of fringe benefit payment statements. *See e.g.*, Responsive Documents at 1, 3, 18, and 21.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. Only Exemptions 4 and 6 are at issue in this Appeal.

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*).

If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential." The first requirement is that the withheld information be "commercial or financial." Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290. The payroll reports, statements of compliance, fringe benefits statements and statements of non-performance, at issue in the present case, clearly satisfy the definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc., v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000).[2] The information at issue in the present case was obtained from Largo Concrete, an outside contractor, and therefore satisfies this definition. Finally, since the information at issue does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."[3]

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

[3] In the present case, LGPO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). In the present case, LGPO did not indicate whether the information it withheld was voluntarily submitted. However, Largo was required by contract to submit the documents in question, therefore the information was involuntarily submitted. Since the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. The LGPO appears to have misapplied the National Park's test, stating:

> Release of this type of information would cause substantial financial and competitive harm to this Project as competing sub-contractors would utilize this information to respond to the bid request which would result in a less competitive process now and in the future. Such financial information, if released, would cause harm to the Project by resulting in a substantial increase of the Project cost.

Determination Letter at 2. The standard set forth in *National Parks* is whether release of the information would be likely to impair the government's ability to obtain such information in the future or cause substantial competitive harm to the submitter. *National Parks*, 498 F.2d at 770. LGPO was attempting to protect its own financial interests and "the competitive process" rather than protecting the government's ability to obtain information in the future or to prevent the government's contactors from incurring substantial competitive harm.

However, our *de novo* review of the redacted information has convinced us that its release would likely result in substantial competitive harm to the submitter of the information. We believe that release of the information would give Largo's competitors an undue advantage when submitting proposals in the future. Armed with information about the submitter's labor costs and requirements, Largo's competitors could undercut it when bidding on future contracts. Therefore, we find that Exemption 4 could be properly applied to the withheld information in the released documents and the total hours worked and total pay received could be properly withheld under Exemption 4.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the information would further the public interest by shedding light on the operations and activities of the government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

LGPO invoked FOIA Exemption 6 to redact the information from the documents released to the Appellant. The Appellant contends that the LGPO improperly withheld the total hours worked and total pay received under Exemption 6, contending, that "[w]here all personal identifiers have been redacted from documents and it is not possible to identify the individual in question, there is no privacy interest in the number of hours worked, and the total pay received." Appeal at 8. We agree.

It is well settled that the release of an individual's name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). The privacy interests protected by the exemptions to FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. Therefore, LGPO correctly concluded that the contractor employees whose names appear in the documents have a legitimate expectation of privacy under the FOIA. However, once the contractor employees' names and addresses and other identifying information have been removed from the documents, we do not find a privacy interest in the hours worked or pay received. Therefore, LGPO improperly relied on Exemption 6 to withhold this information.

III. Conclusion

After considering the Appellant's arguments, we are convinced that LGPO properly withheld the redacted information from the documents under Exemption 4. Although LGPO improperly used Exemption 6 to withhold the total hours worked and total pay received information, we will not remand the matter to that office for a new determination because the information was properly withheld under Exemption 4. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by California Arizona Nevada District Organization, Case No. FIA-12-0059, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may

be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 31, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of California-Arizona-Nevada District Organization Contract Compliance	)	Case Nos. FIA-12-0060
Filing Date: October 4, 2012	)	

Issued: November 1, 2012

Decision and Order

On October 4, 2012, California-Arizona-Nevada District Organization Contract Compliance (CANDO) filed an appeal from a final determination issued by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE). In that determination, LGPO responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 (Request No. HQ-2011-01750-F). LGPO released substantial amounts of information responsive to the request, but withheld responsive information under FOIA Exemption 4. This Appeal, if granted, would require LGPO to release to CANDO some of the information it withheld previously.

I. BACKGROUND

CANDO filed a request for information with LGPO seeking copies of ten specified documents related to loan guarantee contracts for the Agua Caliente Solar Energy Project (Project).[1] On November 8, 2011, LGPO issued a determination letter releasing copies of the documents regarding the Project. However, LGPO withheld portions of the responsive documents under Exemption 4. On February 2, 2012, CANDO appealed LGPO's November 8 determination letter contending that LGPO had improperly applied Exemption 4 to withhold the names and other identifying information concerning contractors and sub-contractors listed in those documents. Following an initial OHA Decision denying CANDO's Appeal and a subsequent, successful Motion for Reconsideration filed by CANDO, LGPO issued another determination letter on September 5, 2012 (Determination Letter).[2] The Determination Letter stated that the names of the contractors and subcontractors contained in the Project's loan guarantee contract had been withheld pursuant to Exemption 4 of the FOIA. The Determination Letter stated that the firm names were involuntarily submitted to the LGPO and that the loan guarantee applicant, First

[1] The original FOIA Request submitted by CANDO also asked for similar documents regarding the Gila Bend Solar Energy Project.

2 The somewhat involved procedural history of this appeal is described in *California-Arizona-Nevada District Organization Contract Compliance*, Case No. FIA-12-0020 (April 27, 2012).

Solar, normally keeps such information in confidence. LGPO went on to state:

> Specifically, the following information is not customarily made available to the public: identification of First Solar's project partners, vendors and contractors and the process used for selecting them, preapproval and post selection requirements, procedures for determining performance capabilities and granting permissions to work on the project at various levels, standards for project completion, including certification requirements, subcontractor facility inspection or training requirements. Consequently, official release of this information would enable First Solar's competition to derive anticipated project contributions, insight into First Solar's selection processes and consideration in a marketplace where the same partners, vendors and contractors are selected, and would provide insight into project costs/schedule to their competitors causing First Solar substantial, competitive harm . . . .

Determination Letter at 2.

In its October 4 Appeal, CANDO argues that the names and identifying information of the contractors referenced in the documents were improperly withheld.[3] CANDO argues that the Determination does not allege sufficient competitive harm to withhold the names of the contractors and subcontractors pursuant to Exemption 4, especially since work has now begun on the Project.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug*

[3] CANDO does not challenge LGPO's withholding regarding the other information redacted in the documents at issue in this appeal.

Admin., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In the present case, both parties agree that the withheld information has been involuntarily submitted. *See* CANDO October 4, 2012 Appeal at 4 n.2 (stating that providing the names of contractors under the loan guarantee program is required); Determination Letter at 2 (names of contractors were involuntarily submitted to DOE as part of loan guarantee program). Because the application process for the Project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. *See Sierra Club*, Case No. FIA-11-0010 (December 29, 2011).[4] Consequently, the question, under *National Parks*, turns to whether release of the contractor and subcontractor information would likely result in substantial competitive harm to First Solar, the loan applicant.

Our review of the unredacted pages indicates that three firm names were withheld from the pages provided to CANDO. These firm names are contained in a section that lists the firms from which First Solar intended to select the Project's Engineering, Procurement and Construction (EPC) contractor.[5] In past cases, OHA has recognized the competitive harm that could result from the release of subcontractor names. *Larson Associates, Inc.*, Case No. VFA-0155 (June 18, 1996); *Consultec, Inc.*, 24 DOE ¶ 80,140 (1994) (*Consultec*). Release of the names of subcontractors, or in this case, firms to be the Project's EPC contractor, could provide a competitive edge to contractors soliciting future business by providing them instant access to firms capable of functioning as an EPC contractor without expending the time and energy that First Solar expended in determining the firms' qualifications. *Consultec*, 24 DOE at 80,604. Further, competitors could use this information to lure away key employees from these firms to gain expertise. *Id.* For the reasons stated above, we find that LGPO properly applied Exemption 4 to the names of the candidate EPC firms contained in the documents at issue in this case. Consequently, we find that CANDO's Appeal should be denied.

[4] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[5] In the present case, it is apparent that the EPC contractor essentially functions as a subcontractor to First Solar. None of the firms whose names were withheld were selected to be the EPC contractor for the Project. First Solar ultimately elected to be the EPC contractor for the Project. E-mail from Janelle Jordan, LGPO, to Richard Cronin, Attorney-Examiner, OHA (October 24, 2012).

It Is Therefore Ordered That:

(1) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance on October 4, 2012, Case No. FIA-12-0060, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 1, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of John P. Newton	)	
	)	
Filing Date: October 9, 2012	)	Case No.: FIA-12-0061
	)	
	)	

Issued: October 31, 2012

Decision and Order

On October 9, 2012, John P. Newton ("Appellant") filed an Appeal from determinations issued to him on September 6, 2012, and September 12, 2012, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (FOIA Request Numbers HQ-2012-01768-F & HQ-2012-01835-F). In those determinations, OIR responded to two requests for information filed by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Specifically, the Appellant appeals OIR's decisions not to grant expedited processing of his FOIA requests or to waive the fees associated with responding to the FOIA requests. Thus, this Appeal, if granted, would require OIR to expedite the processing of his FOIA requests and to grant the Appellant a fee waiver for all costs associated with his FOIA requests.

I. Background

On August 14, 2012, the Appellant submitted a FOIA request ("August 14 Request") to OIR seeking documents regarding DOE's investigation of his complaints about his supervisor at the Office of Inspector General (OIG) to support his worker's compensation claim with the United States Department of Labor (DOL). *See* Online Request from John P. Newton to FOIA Request Website (Aug. 14, 2012). Additionally, his FOIA request sought a waiver of all fees associated with processing the request. On September 2, 2012, the Appellant submitted another FOIA request ("September 2 Request"). In the September 2 Request, the Appellant requested copies of performance appraisals of criminal investigators and special agents within OIG, an expedited review of both his FOIA requests, and a fee waiver for processing the FOIA request.[1] *See* Online Request from John P. Newton to FOIA Request Website (Sept. 2, 2012).

[1] The Appellant styled the September 2 Request as an "Addendum" to his August 14 Request.

On September 6, 2012, OIR issued an interim response ("September 6 Response") to the Appellant's August 14 Request stating that, for fee determination purposes, it categorized the Appellant as "all other requesters" pursuant to 10 C.F.R. § 1004.9(b)(4) and that accordingly, the Appellant would be entitled to two hours of search time and 100 pages of documents at no cost. The September 6 Response also denied the Appellant's request for expedited processing of his FOIA request on the grounds that he failed to identify a "compelling need" that would justify expedited processing and failed to identify himself as a person who is primarily engaged in the dissemination of information. On September 12, 2012, OIR issued an interim response ("September 12 Response") to the Appellant's September 2 Request. In its September 12 Response, OIR denied the Appellant's fee waiver request on the ground that the Appellant failed to specifically address the criteria listed in 10 C.F.R. § 1004.9(a)(8) that would justify a fee waiver. OIR's September 12 Response also denied the Appellant's request for expedited processing for the September 2 Request for the same reasons outlined in its September 6 Response.

II. Analysis

A. Fee Waiver

FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. §1004.9(a)(8). In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i). While we agree with OIR that the Appellant did not address the four factors listed above in his two Requests, for the purposes of administrative efficiency, we will nevertheless review the Appellant's fee waiver request using information provided in his Appeal.

1. Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *Faye Vlieger*, Case No. TFA-0250 (2008). In the instant case, the requested information – DOE's investigation of the Appellant's complaints and performance appraisals of criminal investigators and agents – arguably concerns activities or operations of the government. Therefore, we find that the Appellant's August 14 and September 2 Requests satisfy Factor A.

2. Factor B

Factor B requires that disclosure of the requested information must likely contribute to the public's understanding of specifically identifiable government operations or activities, *i.e.*, the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, Case No. VFA-0288 (1997)[2]; *see also Vlieger*, Case No. TF-0250 (quoting *Seehuus Assoc.*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.")).

In the present case, the vast majority of the requested information does not appear to be publicly available. Specifically, the Appellant seeks documents concerning "internal and external OIG communications," "copies of travel authorizations and corresponding travel vouchers," for employees that he contends were involved with the investigation of his complaints, and performance appraisals for special agents and criminal investigators. Such information is not typically within the public domain or common knowledge among the general public, and accordingly, we find that the Appellant has satisfied Factor B.

3. Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the individual requester or of a narrow segment of interested persons. *Schrecker v. Dep't of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). In assessing this factor, courts have considered the requester's "ability and intention to effectively convey" or disseminate the requested information to the public. *Judicial Watch, Inc. v. Dep't of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002). Moreover, courts have also examined whether the requester has concrete plans for publishing or disseminating the requested information by reviewing the requester's identification of news media sources to release the information, purpose for seeking the information, and professional or personal contacts with any major news media companies. *See Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Thus, the

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

requester must have the intention and *ability* to disseminate the requested information to the public. *Ott*, Case No. VFA-0288; *see also Tod N. Rockefeller*, Case No. VFA-0468 (1999).

In his Appeal, the Appellant contends that he will disseminate his findings with the news media and government oversight groups, such as Project on Government Oversight and FOIA sharing websites, such as, www.archive-it.org and www.foiaarchive.org. Appeal at 4. Additionally, the Appellant states that he will make the documents available to the public at the University of Washington Law Library. *Id.* However, the Appellant still fails to explain his "ability and intention to effectively convey" that information to the public. *See Judicial Watch, Inc.*, 185 F. Supp. 2d at 62. The Appellant does not describe his expertise in the information requested such that he may effectively explain it to the public. Moreover, while he plans to provide his findings to various government oversight websites and one law library, those forums are not sufficient for reaching a broad audience of interested individuals, but rather appear to reach a narrow segment of interested persons. *See Schrecker*, 970 F. Supp. at 50; *see also Brown v. USPTO*, 445 F. Supp. 2d 1347, 1360 (M.D. Fla. 2006) ("Plaintiff does not, in his FOIA requests, discuss any plans to convey the information to the public beyond alluding to the website. Simply maintaining a website is not disseminating information to a broad audience of interested individuals."). The Appellant also fails to identify any personal or professional contacts with the government oversight groups, websites, or the law library, and accordingly, he cannot demonstrate how he would disseminate his findings in those forums. *See Larson*, 843 F.2d at 1483. Consequently, for the reasons stated above, we find that the Appellant has not satisfied Factor C.

4. Factor D

Factor D requires that the requested documents contribute significantly to the public's understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, Case No. VFA-0288 (quoting *1995 Justice Department Guide to the Freedom of Information Act at* 381 (1995)).

We are not convinced that the public's understanding will be enhanced by the disclosure of the requested information. Significantly, the Appellant has not demonstrated how such information would contribute to the public's understanding of government operations and activities. Indeed, the Appellant clearly expresses that his request for those documents is to inform his *own* understanding of OIG's investigations so that he could support his EEO complaint and DOL worker's compensation claim. In his August 14 Request, the Appellant states that "the requested information is needed in furtherance of an official Department of Labor worker's compensation claim I filed regarding work related aggravation of pre-existing medical conditions." Online Request from John P. Newton to FOIA Request Website (Aug. 14, 2012). Further, in his September 2 Request, the Appellant asserts that "this FOIA request is made in furtherance of both official U.S. Department of Energy Equal Opportunity Employment (EEO) Complaint and U.S. Department of Labor Workers' Compensation Claim." Online Request from John P. Newton to FOIA Request Website (Sept. 2, 2012). Finally, in his Appeal, the Appellant writes that the requested information "concerns official internal DOE Office of Inspector General (OIG) operations that will likely affect my claims and complaint." Appeal at 1. He fails to mention the

public in August 14 and September 2 Requests, and only barely does so in his Appeal to respond to OIR's denial of his fee waiver request. Further, the subject matter of the requests, documents relating to the Appellant's worker's compensation claim, and the performance appraisals of OIG investigators, do not, in themselves, suggest how the public's understanding of the government's operations and activities would be significantly enhanced.

Based on the foregoing, we find that the Appellant has not sufficiently demonstrated how the requested documents would contribute significantly to the public's understanding of the operations and activities of the government. Therefore, we find that OIR properly denied the Appellant a fee waiver for his failure to satisfy Factors C and D.[3]

B. Expedited Processing

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i).

"Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552 (a)(6)(E)(v). In order to determine whether a requester has demonstrated an "urgency to inform," and hence a "compelling need," courts have considered at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d.300, 310 (D.C. Cir. 2001).

In the present case, the Appellant concedes that there is no threat to anyone's life or physical safety. Appeal at 3. However, the Appellant contends that his FOIA request concerns a time-sensitive matter because the requested information is required to process his worker's compensation claim. Despite this argument, we find that neither of the Requests, which both center on the Appellant's worker's compensation claim, concern a matter of exigency to the American public to warrant expedited processing. *See Al-Fayed*, 254 F.3d. at 310. Given this, we find that OIR properly denied the Appellant's request for expedited processing of his FOIA request.

[3] Because we find that the Appellant has not met the "public interest" requirement for obtaining a fee waiver, we need not determine whether the Appellant's request for a fee waiver meets the "commercial interest" requirement. *See Robert M. Balick*, Case No. FIA-11-0018 (2012).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 9, 2012, OHA Case Number FIA-12-0061, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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E-mail: ogis@nara.gov
Telephone: 202-741-5770
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Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 31, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of the Native Hawaiian Legal Corporation.	)	
Filing Date: October 12, 2012	)	Case No.: FIA-12-0063

Issued: October 31, 2012

Decision and Order

On October 12, 2012, the Native Hawaiian Legal Corporation ("Appellant") filed an Appeal from a determination issued to it on September 11, 2012, by the Golden Field Office (GFO) of the United States Department of Energy (DOE) (FOIA Request Number GO-12-296). In its determination, the GFO responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Specifically, the Appellant contends that additional documents exist that are responsive to its FOIA request. Thus, this Appeal, if granted, would require the GFO to provide the requested additional documents to the Appellant.

I. Background

On June 29, 2012, the Appellant submitted a FOIA request to the FOIA Requester Service Center at DOE Headquarters, for documents related to the Energy Agreement between the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, and the Hawaiian Electric Companies ("Energy Agreement"), and specifically, the "Big Wind Projects" component of the Agreement. This request was forwarded to several DOE offices including the GFO. In its September 11, 2012, determination letter, the GFO provided the Appellant with 456 pages of documents, with some information redacted, pertaining to a wind grant awarded to the Hawaiian Electric Company (HECO) in 2009.[1]

The Appellant challenges the adequacy of the GFO's search and claims that, based on the information contained in HECO's wind grant application and related documents, additional

[1] The GFO also informed the Appellant that its FOIA request was also being processed by two other DOE offices – the DOE Office of Electricity Delivery and Energy Reliability and the DOE Office of Energy Efficiency and Renewable Energy.

documents should have been produced in response to its FOIA request. Specifically, the Appellant avers that the GFO should have provided the following documents: (1) status reports as required by DOE; (2) list of candidate monitoring locations, a monitoring and deployment plan, field campaign experience and recommendations report and a utility implementation plan; and (3) a transition assessment plan. Additionally, the Appellant believes that the following documents exist: (1) quarterly progress reports; (2) an annual special status report; (3) final scientific report; and (4) conference papers.

In its response to the Appeal, the GFO asserts that the documents it provided to Appellant, were, in fact, not responsive to its FOIA request, but were provided to the Appellant as an accommodation. *See* Response from Kimberly L. Graber, Legal Counsel, and Michele Altieri, FOIA Officer, to Shiwali Patel, Attorney-Examiner, OHA, Oct. 19, 2012 ("GFO Comment"). Specifically, the GFO states that the 456 pages of documents pertain to a HECO wind grant awarded in 2009 under a separate funding opportunity, Announcement DE-PS36-09GO9909, "20% Wind by 2030: Overcoming the Challenges," and is therefore, not related to the Energy Agreement that is the subject of the Appellant's FOIA request. [2] *Id.* at 2. As to the Appellant's FOIA Request, the GFO was unable to locate any responsive documents.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999), *quoting Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Project on Government Oversight*, Case No. TFA-0489 (2011).[3]

As an initial matter, we find the Appellant's argument unavailing. As explained above, the named documents are related to the 2009 HECO wind grant application, and not the Energy Agreement that is the subject of the Appellant's FOIA request.[4] As these documents are non-responsive to the Appellant's FOIA request for documents relating to the Energy Agreement, they provide no evidence that the GFO's search in response to the Appellant's FOIA Request

[2] In that same vein, the GFO argues that the Appellant's enumeration of additional documents in its FOIA Appeal is essentially a new FOIA request. *Id.* at 4-5.

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

[4] GFO advised the Appellant that if the Appellant wanted further information on the HECO wind grant, it would need to modify its FOIA request to specifically ask for documents related to that grant. *Id.* The Appellant declined to modify its FOIA request.

was inadequate.[5] Nevertheless, we conducted an examination of the GFO's search to determine the adequacy of its search in response to the Appellant's request for documents relating to the Energy Agreement.

In response to our inquiries, the GFO informed us that a project officer with the GFO's Wind and Water Program conducted the search electronically through the Energy Efficiency Renewable Energy (EERE) Project Management Center Database. *See* E-mail from Michele Altieri, GFO FOIA/PA Officer, to Shiwali Patel, Attorney-Examiner, OHA, Oct. 15, 2012. The following terms were used to electronically search the Database:

- "Energy Agreement among the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs and the Hawaiian Electric Companies."
- "Hawaiian Electric Company"
- "Hawaiian Electric"
- "Hawaiian"
- "Hawaii"
- "Big Wind"

Id.

Despite using these search terms, no responsive documents related to the Energy Agreement were found. *See* GFO Comment.

Based on the foregoing, we find that the GFO's search was reasonably calculated to uncover all relevant documents in response to the Appellant's FOIA request concerning the Energy Agreement, and was therefore, adequate. The GFO's search of the six terms on the EERE Project Management Center Database includes all of the most obvious search terms that would likely uncover the requested documents specifically pertaining to the Energy Agreement. Further, the GFO does not enter into energy agreements such as the subject of the Appellant FOIA Request. Given the information provided to us, we find that the GFO conducted an adequate search under the FOIA for responsive documents.[6] Consequently, we will deny the Appellant's Appeal.

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[5] Indeed, on August 13, 2012, the GFO sent an email informing the Appellant about the non-responsive documents. The email stated:

> As we discussed, using the above parameters, Golden has found 456 pages that while not directly related to the Energy Agreement, Hawaiian Big Wind projects or William Parks, do cover a wind project in Hawaii – "The 2009 grant application submitted for Funding Opportunity Number DE-PS36-09GO99009 – '20% Wind by 2030: Overcoming the Challenges' by the Hawaiian Electric Company entitled 'Hawaii Utility Integration initiatives (H.U.I.) to Enable Wind.'"

GFO Comment, Ex. E: E-mail from Michele Altieri, GFO FOIA/PA Officer, to Sharla Manley, Staff Attorney, Native Hawaiian Legal Corporation, Aug. 13, 2012.

[6] We note that the Appellant's FOIA Request is also being processed at the DOE Office of Electricity Delivery and Energy Reliability and the DOE Office of Energy Efficiency and Renewable Energy. When the Appellant receives determination from those offices it may appeal them to OHA.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 12, 2012, OHA Case Number FIA-12-0063, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 31, 2012

United States Department of Energy
Office of Hearings and Appeals

In the matter of Advanced Technology Corporation.	)	
Filing Date: October 15, 2012	)	Case No.: FIA-12-0065

Issued: October 31, 2012

Decision and Order

On October 15, 2012, the Advanced Technology Corporation ("Appellant") filed an Appeal from a determination issued to it on September 27, 2012, by the Oak Ridge Office (ORO) of the Department of Energy (DOE) (FOIA Request Number ORO-2012-01563-F). In its determination, ORO responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Specifically, the Appellant contends that there should be additional documents that are responsive to its FOIA request, which ORO has not produced. Thus, this Appeal, if granted, would require ORO to conduct another search for the documents that the Appellant requested.

I. Background

On June 27, 2012, the Appellant submitted a FOIA request to ORO requesting copies of

> email and fax correspondence between Roger Stoller, employee of ORNL [Oak Ridge National Laboratory], and members of ASTM International or others as a group or individually, including: Frontics, Kwang-ho Kim, Frontics [and] Dongil Kwon, Seoul National University specifically discussing Automated Ball Indentation (ABI), Instrumented Indentation Testing (IIT), Fahmy Haggag, or Advanced Technology Corporation (ATC) from 1997 to 2012.

On September 27, 2012, ORO issued a determination, informing the Appellant that after conducting a search, it found no records that responded to its request.

In the instant Appeal, the Appellant challenges the adequacy of ORO's search, stating that it possesses a copy of an email sent to Dr. Stoller from Kwang-ho Kim, dated April 26, 2010, which ORO should have produced in response to its June 27 FOIA request along with the

email's attachments. The Appellant further states that it received documents sent to both of Dr. Stoller's email addresses at ORNL through a previous FOIA request, suggesting that additional responsive documents should have been located by ORO in response to its June 27 FOIA request.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Project on Government Oversight*, Case No. TFA-0489 (2011).[1]

In response to our inquiries, ORO provided us with additional information to evaluate the reasonableness of its search. ORO informed us that it contacted Dr. Stoller, who stated that in May 2012, he produced all responsive documents – emails, email attachments, and faxes – to the Appellant pursuant to an earlier FOIA request (FOIA Request Number ORO-2012-00826). Email from Linda Chapman, Legal Assistant, FOIA/Privacy Act Office, to Shiwali Patel, OHR, Attorney-Examiner, Oct. 18, 2012. Dr. Stoller further asserted that in September 2012, upon receiving the June 27 FOIA request from the Appellant, he performed an electronic search of all of his emails using the names, firms, and institutions described in the June 27 FOIA request between the years 1997 and 2012. *Id.* However, he found no additional responsive records. After the Appellant filed the instant Appeal, Dr. Stoller conducted another search – this time of his email files in the UT-Battelle/ORNL servers – using the above-listed terms from the Appellant's June 27 FOIA request. Again, he did not find any new emails since the last production of documents to the Appellant in May 2012. *Id.* Dr. Stoller also informed ORO that he searched other possible locations that could have the requested documents, but he did not locate additional responsive documents.

In response to the Appellant's assertion that he had a copy of an email dated April 26, 2010, which was sent to Dr. Stoller from Mr. Kwang-ho Kim, Dr. Stoller avers that he did not retain that email and accordingly, he was not able to produce it in response to the Appellant's June 27 FOIA request.

Based on the foregoing, we are satisfied that ORO has conducted an adequate search for documents that are responsive to the Appellant's June 27 FOIA request. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384-85. Here, ORO has conducted a reasonable search as evidenced by the description of the search conducted by Dr. Stoller. Despite having already searched for and produced responsive documents based on the Appellant's previous

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

FOIA request in May 2012, Dr. Stoller conducted two additional searches of his email files from 1997 to 2012 in response to the Appellant's June 27 FOIA request and October 15 Appeal. Still, he found no additional responsive documents. As Dr. Stoller demonstrated that he conducted a thorough electronic search of his email files using the above-listed terms, we find that ORO conducted an adequate search in response to the Appellant's June 27 FOIA request. Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 15, 2012, OHA Case Number FIA-12-0065, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 31, 2012

Case No. KFA-0071, 25 DOE ¶ 80,108

April 14, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Resources Defense Council

Date of Filing: January 27, 1987

Case Number: KFA-0071

On January 27, 1987, the National Resources Defense Council (NRDC) filed an Appeal from a undated determination issued by the Program Support Division of the Office of Military Application (OMA) of the Department of Energy (DOE). In that determination, OMA denied, in part, three NRDC requests for information filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, NRDC requests that the Office of Hearings and Appeals (OHA) order the release of the information withheld by OMA in its determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Background

On September 4, 1985, NRDC filed a Request for Information with DOE Headquarters requesting unclassified computer-generated line graphs describing 11 types of information relating to the number, type and total warhead explosive yield of the United States' stockpile of nuclear weapons during the period Fiscal Year (FY) 1945 through FY 1985. <1> In this request,

NRDC suggested that responsive classified graphs might be made unclassified by the deletion of the vertical axis. Subsequently, NRDC filed two other FOIA Requests for Information each dated September 16, 1985. One of the Requests sought copies of three documents entitled "Nuclear Weapons Production and Planning Directive" (Directive), "DOD/DOE Annual Report to the President on Nuclear Weapons Surety" (Report) and "A History of the Nuclear Weapons Stockpile" (History). The other Request sought documents regarding the numerical fraction of offensive or defensive strategic nuclear warheads contained in the total U.S. nuclear stockpile at the end of each year from FY 1957 through FY 1984 (force structure data). Each of the three Requests were subsequently referred to OMA for a response.

In its undated determination, which was received by NRDC on January 7, 1987, OMA identified the three documents requested by NRDC in one of its September 16 Requests and stated that these documents had been reviewed by the DOE's Office of Classification (OC). <2> Based upon OC's review, OMA released redacted versions of the Directive and the Report. OMA stated that the information redacted from each of these documents was classified and withholdable pursuant to Exemption 1 or 3 of the FOIA, 5 U.S.C. §

552(b)(1), (3). Additionally, OMA withheld the History in its entirety also citing Exemptions 1 and 3. <3> OMA stated that some of the withheld classified information contained in the three documents pertained to military plans, weapons, operations and programs to safeguard nuclear materials and facilities and that this information was withheld pursuant to Exemption 1. Further, OMA stated that this information was authorized to be kept secret in the interest of national security pursuant to criteria established by Executive Order 12356 §§ 1.3(a)(1) and (a)(7) and was properly classified pursuant to that Order. The remainder of the withheld classified information contained in each of the three documents related to the numbers, types and explosive yield of nuclear weapons produced by the United States along with the quantity of special nuclear materials produced. OMA asserted that this information was exempt from disclosure under Sections 141 through 146 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011, 2161-2166, which prohibit the disclosure of information on the design and manufacture of nuclear weapons, and was consequently withheld pursuant to Exemption 3. With regard to NRDC's requests for force structure data and unclassified line graphs, OMA stated that this material was contained in the History which was being withheld in its entirety.

In its Appeal, NRDC argues that OMA improperly redacted portions of the Report and Directive. Specifically, NRDC asserts that various pages of the Directive and Report, which were withheld in their entirety, must contain segregable information which should have been released to it. Further, NRDC asserts that OMA failed to cite a proper reason under the FOIA for withholding the requested force structure data and unclassified line graphs, and argues that the mere statement that material responsive to these requests was found in a classified document does not permit OMA to withhold any other responsive documents or relieve OMA of its duty to search for other responsive documents in its possession. Additionally, NRDC argues that other responsive documents must exist with regard to its request for force structure data and unclassified line graphs. In support of its claim that unclassified line graphs must exist, NRDC submitted unclassified line graphs which had been released to the public, namely graphs relating to total explosive yield and numbers of nuclear weapons in the US nuclear stockpile which had been previously supplied to the Senate (Senate Graphs) and the House of Representatives (House Graphs). Additionally, NRDC states that similar graphs have been provided to a private individual, a Mr. Wohlstetter, who has published these graphs (Wohlstetter Graphs) in an article he wrote in the Fall 1974 issue of Foreign Policy. Additionally, NRDC submitted a graph, with the vertical axis redacted, showing the US stockpile explosive yield during FY 1955 through 1985 (NRDC Graph) which it had obtained from OMA through a prior FOIA Request.

Analysis

Exemption 3 provides for withholding material:

specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.

5 U.S.C. § 552(b)(3); See also 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq., is a statute to which Exemption 3 is applicable. See William R. Bowling II, 20 DOE ¶ 80,134 (1990).

The fact that a document contains material that is exempt from disclosure does not necessarily make the entire document exempt. The FOIA, as implemented, requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); See Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Government Accountability Project, 20 DOE ¶ 80,121 (1990). In the context of Exemption 3, this means that information not classified pursuant to an applicable Executive Order or required to be withheld by an Exemption 3 statute should ordinarily be released to the requester. See Founding Church of Scientology v. Bell, 603 F.2d. 945, 950-951 (D.C. Cir. 1979) (Exemption 1); Glen Milner, 20 DOE ¶ 80,122 (1990) (Exemption 1); San Jose Mercury News, 20 DOE ¶

80,119 (1990) (Exemption 3). However, the segregability provision does not require that unclassified portions of a document be released if a compilation of the individual unclassified items of information viewed together warrants classification of the whole document. See American Friends Service Committee v. Dep't of Defense, 831 F.2d. 441, 445-446 (3rd Cir. 1987).

The Director of Security Affairs (Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). <4> In his review of this Appeal, the Director instructed OD to reexamine the Report and Directive. Using the current classification guidance, OD determined that some of the information in the Directive that was previously withheld could now be released. With regard to the Report, OD determined, after obtaining the views of the Department of Defense (DOD), a co-originator of the Report, that additional information previously withheld could now also be released. The Director stated however that the bulk of the withheld material in the Report and Directive was still properly classified as restricted data, formerly restricted data or unclassified controlled nuclear information exempt from mandatory disclosure under Exemption 3 of the FOIA. The Director has provided us with newly redacted copies of the Report and Directive and these documents will be provided to NRDC under separate cover.

With regard to NRDC's request for force structure data, the Director agreed with NRDC that it had not been given an adequate reason for the denial of its request. The Director stated that all force structure data of the type requested by NRDC is information which is properly classified as Secret/Formerly Restricted Data and as such is exempt from disclosure under Exemption 3 of the FOIA. <5>

With regard to NRDC's request for unclassified line graphs, the Director stated that the DOE does not possess unclassified line graphs of the various types requested by NRDC other than the House Graphs and the NRDC Graph, each of which NRDC already possesses. <6> The Director noted however that while classified line graphs exist which might be responsive to NRDC's request, it is not possible to declassify them by segregating or deleting an element of the graph because the non-classified portions of the graphs are so inextricably intertwined with classified material that attempting to convert a classified graph to an unclassified graph risks the unauthorized disclosure of the classified information. Further, the Director stated that the only way to produce a publicly releasable version of the graph would be to prepare a completely new graph, a task which an agency is not required to do under the FOIA. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980). With regard to the graphs NRDC submitted, the Director stated that the Senate Graphs and most likely the Wohlstetter Graphs were created by the Department of Defense and that DOE does not possess these graphs. Further, the Director stated that the NRDC Graph was essentially identical to one of the House Graphs which had been previously released to the public.

Based on the Director's review we have determined that additional information may now be released to NRDC from the Directive and Report but that current classification guidelines require the continued withholding of the remainder of the material in these documents under Exemption 3 of the FOIA. With regard to NRDC's request for force structure data, we have determined, based upon the Director's review, that all force structure data possessed by the DOE is properly classified as Secret/Formerly Restricted Data and is thus exempt from disclosure by Exemption 3. Additionally, based upon the Director's review, we find that DOE possesses no responsive unclassified graphs other than the ones NRDC already possesses and that other potentially responsive line graphs are correctly classified under the current classification guidelines and are exempt under Exemption 3 of the FOIA. <7>

It Is Therefore Ordered That:

(1) The Appeal filed by the National Resources Defense Counsel on January 27, 1987, Case No. KFA-0071, is hereby granted as set forth in the foregoing Decision and is denied in all other respects.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial

review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 14, 1995

<1>Specifically, NRDC requested line graphs regarding the following topics: (1) total number of strategic offensive and defensive warheads, (2) total number of strategic warheads, (3) total number of strategic defensive warheads, (4) total number of tactical warheads; (5) total number of nuclear warheads stockpiled; (6) total strategic offensive plus defensive explosive

power yield (in megatonnage); (7) total yield of tactical nuclear weapons; (8) total strategic offensive weapon yield; (9) total strategic defensive yield; (10) strategic offensive equivalent yield; and (11) average strategic offensive weapon yield.

<2>Subsequently this office was renamed the Office of Declassification (OD).

<3>OMA stated that almost all of the material contained in the History was classified and that the few small portions of the History which were not classified were so "inextricably intertwined" with the classified information that release of the non-classified information would not result in the disclosure of meaningful information.

<4>The Appeal from NRDC was received by OHA on January 27, 1987. OHA sent the Appeal to the Assistant Secretary for Defense Programs, the individual then authorized to make the final determination regarding FOIA Appeals concerning classified materials, on February 5, 1987. The Director's review of the Appeal was received by OHA on February 2, 1995.

<5>The Director stated that DOE force structure data was not available prior to Fiscal Year 1961.

<6>OMA's determination stated that information responsive to NRDC's request for unclassified line graphs was contained in the History. This was incorrect because there are no unclassified graphs contained in the History.

<7>Because the Director's review found that all of the material, other than the portions of the Directive and Report to be released to NRDC, was properly withheld pursuant to Exemption 3 of the FOIA, we need not address the issue of whether Exemption 1 was properly applied to the withheld material.

Case No. LFA-0108, 26 DOE ¶ 80,110

August 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barton J. Bernstein

Case Number: LFA-0108

Date of Filing: April 5, 1991

On April 5, 1991, Barton Bernstein, a Professor of History at Stanford University, filed an Appeal from a January 30, 1991 determination issued by the Albuquerque Operations Office (Albuquerque Operations) of the Department of Energy (DOE). In that determination, Albuquerque Operations denied in part a request Professor Bernstein filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the requested information.

The FOIA requires that agency records that are held by federal agencies, and that have not been made public in an authorized fashion by a covered branch of the federal government, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9). These nine exemptions are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents that may be exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 19, 1988, Professor Bernstein submitted a request for records concerning the "Thermonuclear Program" and the development of the so-called "super" (also known as the "thermonuclear" or "hydrogen") bomb. In particular, Professor Bernstein seeks information related to the creation of the "second lab" (Lawrence-Livermore National Laboratory) and the allocation of resources to the Los Alamos laboratory for work on the "superproject." Albuquerque Operations responded in part to this request on July 7, 1988 by releasing responsive unclassified records related to this request. It referred classified documents to the DOE's Office of Classification and Technology Policy for review as to their possible release. 10 C.F.R. § 1004.6. By January 30, 1991, Albuquerque Operations had received a response from the Office of Classification and wrote to Professor Bernstein with the results of the review of classified documents. Professor Bernstein received portions of forty-seven documents. Many of these documents had various deletions made pursuant to Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). In these cases, the information was found to be "Restricted Data" which falls within the prohibitions against release confined in sections 141 through 146 of the Atomic Energy Act of 1954, as amended. 42 U.S.C. §§ 2161-66. Professor Bernstein appeals the withholdings in eight of these documents. He states that several publications contain information that, he claims, argues in favor of full declassification of these documents. He also asserts that declassification is essential to his scholarly work

analyzing the efforts to create the Lawrence-Livermore National Laboratory and that the documents involved are over forty years old.

II. Analysis

Exemption 3 of the FOIA allows the withholding of information if specifically authorized by another federal statute. However, the withholding statute must meet strict statutory guidelines. Exemption 3 is properly invoked only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the Exemption's coverage if it satisfies either of its standards. Richard Olin Berner, Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029, 1042 (1976). The D.C. Circuit has stated that an Exemption 3 analysis under the FOIA is not dependent on the factual content of the documents at issue. Instead, the """sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage."" Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755, 761 (D.C. Cir. 1990) (Fitzgibbon) (quoting Association of Retired Railroad Workers v. Railroad Retirement Bd., 830 F.2d 331, 336 (D.C. Cir. 1987) (quoting Goland v. Central Intelligence Agency, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980))). Thus, in Exemption 3 cases, the Supreme Court has established a two-prong standard of review for Exemption 3 cases. See Central Intelligence Agency v. Sims, 471 U.S. 159, 167 (1985) (Sims); see also Fitzgibbon, 911 F.2d at 761 (applying the Sims test). First, it must be determined whether the statute in question is a statute of exemption as contemplated by Exemption 3. Sims, 471 U.S. at 167. Second, the withheld material must satisfy the criteria of the particular exemption statute. Fitzgibbon, 911 F.2d at 761.

In this case, both criteria are satisfied. With regard to the first test, it is well established that the relevant portions of the Atomic Energy Act of 1954 constitute information withholding statutes that trigger the application of Exemption 3. When it last amended Exemption 3, Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976), Congress specifically listed these sections of the Atomic Energy Act of 1954 as falling within the scope of Exemption 3. See H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23 (1976), reprinted in 1976 U.S.C.A.A.N. 2183, 2205. In compliance with the determination of Congress, we have frequently held that these sections are Exemption 3 withholding statutes. See, e.g., Esther Samra, 25 DOE ¶ 80,182 at 80,703 (1996); Natural Resources Defense Council, 23 DOE ¶ 80,153 at 80,630 (1993); Barton J. Bernstein, 22 DOE ¶ 80,165 at 80,643 (1992).

For the application of the second test, we referred this matter to the Director of Security Affairs (Director). The Director is the agency official designated to make the final DOE determination involving the release of classified information. DOE Order No. 1700.1, ¶ III.2.b. (Aug. 21, 1992); DOE Delegation Order No. 0204-139, § 1.l (Dec. 20, 1991). The Director reviewed the eight documents Professor Bernstein appealed and considered Professor Bernstein's arguments. He determined that all of the withheld data in two of the documents are still properly classified. Of the remaining six documents, the Director concluded that two can now be declassified in their entirety and the remaining four documents contain other information which can now be properly declassified.

In explaining the continued withholding of responsive material in this case, the Director states that, in accord with the spirit and language of the FOIA, he has made every effort to segregate and release to Professor Bernstein all unclassified material. See, e.g., National Resources Defense Council, 25 DOE ¶ 80,108 at 80,517 (1995). However, he notes that the remaining withheld portions contain nuclear weapon design and stockpile information. Such material, he states, is still properly classified as either "Restricted Data," which consists, in relevant part, of "all data concerning (1) design, manufacture, or utilization of atomic weapons," 42 U.S.C. § 2014(y), or "Formerly Restricted Data" which is information primarily related "to the military utilization of atomic weapons" or concerns "the atomic energy programs of other nations" and that has been officially removed from the "Restricted Data" classification. 42 U.S.C. § 2162(d), (e). Under these circumstances, the Director explains, there is no discretion under the Atomic

Energy Act of 1954 to release this material. William R. Bowling, II, 20 DOE ¶ 80,134 at 80,596 (1990).

The Director rejected Professor Bernstein's argument that previously published material exists which warrants approval of his Appeal. He points out that, even if Professor Bernstein's contention that similar material was published elsewhere is true (a statement, the Director notes, that Professor Bernstein has provided no evidence to support, Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421 (2d Cir. 1989)), standing alone it would not provide a basis for declassifying properly classified information. Cf. Fitzgibbon, 911 F.2d at 765 (only the existence of public information "officially acknowledged" by agency under specific criteria will defeat otherwise proper withholding of material under Exemption 3). In addition, he states, if some published material is identical to classified material, it is DOE policy not to comment on its accuracy or similarity.

Professor Bernstein also asserted that the information is necessary for his scholarly research into the creation of a "second lab." In most cases the purpose for which information is sought is not relevant to the consideration of a FOIA request. As the courts have stated, "'Congress granted the scholar and the scoundrel equal rights of access to agency records.'" Aronson v. Department of Housing and Urban Dev., 822 F.2d 182, 186 (1st Cir. 1987) (quoting Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986). The Director also notes that this claim has nothing to do with whether the withheld information was properly classified. In addition, he states that the deletions are minimal (usually no more than several words) and should present no impediment to Professor Bernstein's research.

Finally, the Director rejected the contention that the age of the withheld information mitigates in favor of declassification and release. The Director states that nuclear weapons and stockpile information classified as "Restricted Data" or "Formerly Restricted Data" under the Atomic Energy Act of 1954 does not become less sensitive simply with age, but must undergo specific analysis as to its continued classification. Cf. Fitzgibbon, 911 F.2d at 764 (unlike Exemption 1 material, Exemption 3 information not necessarily affected by passage of time). In this case, the Director undertook that specific analysis and found that some withheld material continues to be properly classified and has made more precise deletions as appropriate.

In conclusion, the Director found that two documents of the six documents Professor Bernstein appealed now can be declassified and released in full. However, the six remaining documents still contain properly classified information that must be withheld. The Director found that four of the documents have information that now can be segregated, declassified, and released to Professor Bernstein. The Director also has determined that all of the deletions made in two of the documents are proper. Accordingly, Professor Bernstein's Appeal is denied in part and granted in part. Copies of the relevant documents, bearing all releasable information, will be provided to Professor Bernstein by this Office as attachments to the letter transmitting this Decision and Order.

It Is Therefore Ordered That:

(1) The Appeal of Barton J. Bernstein. OHA Case No. LFA-0108, is hereby granted in part and denied in part as specified in the foregoing Decision.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principle place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 23, 1996

Case No. LFA-0159, 26 DOE ¶ 80,176

April 4, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Glen Milner

Date of Filing: October 7, 1991

Case Number: LFA-0159

On October 7, 1991, Glen Milner filed an Appeal from a determination issued to him on September 19, 1991, by the Department of Energy's Albuquerque Operations Office (Albuquerque). In that determination, Albuquerque denied in part a request for information that Mr. Milner had filed on August 16, 1987, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Appeal, if granted, would require Albuquerque to release the information that it withheld in the September 19, 1991 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 16, 1987, Mr. Milner submitted a request under the FOIA to the Naval Sea Systems Command of the Department of Defense (DOD) for "all documents on record concerning required or recommended safety precautions for the shipment of explosive and/or nuclear missile components, [i]n particular, . . . a series of documents titled NAVSEA SWOP [Special Weapons Ordnance Publication] 45-51." NAVSEA SWOP 45- 51 and its six supplements A through F comprise a technical manual published by the Joint Nuclear Weapons Publication System under the authority of the Secretaries of the Navy, Army and Air Force, the Director of the Defense Special Weapons Agency

(DSWA, formerly the Defense Nuclear Agency), and the DOE. The request for the document and supplements B through F was ultimately referred to the Albuquerque Operations Office of the DOE, and on September 19, 1991, Albuquerque issued a determination to Mr. Milner in which it released only the title and signature pages of each of the documents.(1) Most of the information withheld was determined to be Unclassified Controlled Nuclear Information (UCNI) under the Atomic Energy Act of 1954, as amended, and therefore exempt from mandatory disclosure under Exemption 3 of the FOIA. The remaining withheld information was found to be exempt from mandatory disclosure under Exemption 2 of the FOIA.

On October 7, 1991, Mr. Milner appealed Albuquerque's determination to the Office of Hearings and Appeals. The present Appeal seeks the disclosure of the withheld portions of the requested document. In

his appeal, Mr. Milner contends that Albuquerque is "too protective of information regarding the shipment of nuclear weapons" and that the national security does not require such protection. He argues that citizens, particularly those living near the shipment routes, "have a right to know more about these shipments."

II. Analysis

Exemption 2 of the FOIA permits an agency to withhold from public disclosure material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). Following the Supreme Court's decision in Department of Air Force v. Rose, 425 U.S. 352 (1976), the courts have interpreted Exemption 2 to include two distinct categories of information. The first category, known as "low 2," includes information relating to internal matters of an agency in which the public could not reasonably be expected to have an interest, for example, information concerning lunch hours or parking regulations. Rose, 425 U.S. at 369-370. The second category, "high 2," encompasses information the disclosure of which "may risk circumvention of agency regulation." Id. at 369. Information may be withheld pursuant to "high 2" if (i) it is used for predominantly internal purposes, and (ii) its disclosure significantly risks circumvention of agency regulations or statutes. Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981).

Exemption 3 provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). Among the types of information of which dissemination is prohibited under the Atomic Energy Act is UCNI. 42 U.S.C. § 2168 (section 148 of the Atomic Energy Act). The portions that Albuquerque deleted from the requested documents under Exemption 3 were withheld on the grounds that they contain UCNI concerning the design, protection, handling, maintenance, and transportation of nuclear weapons.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested documents that the DOE withheld under Exemption 3, and confirmed Albuquerque's determination that the withheld information is properly considered UCNI and must continue to be withheld under Exemption 3.(2)

However, because the technical manual and its supplements are joint publications of the Department of Defense and the DOE, the Director of SA referred them to the DOD for supplementary review. The DOD, in turn, referred them to the DSWA for review on behalf of all DOD components. The DSWA reviewed the manual and all its supplements, including Supplement A. It concluded that each of them contained information on internal matters the disclosure of which could result in the circumvention of a regulation that would impede the agencies' abilities to perform their assigned roles and functions. The DSWA therefore maintains that this information should be withheld under Exemption 2 of the FOIA. In addition, it concluded that the same documents also contain information that should be protected from disclosure under 10 U.S.C. § 128, which protects the DOD equivalent of UCNI, and therefore withheld under Exemption 3.(3)

Although the specific exemptions and corresponding deletions differ from those that Albuquerque and the Office of Security Affairs previously identified, the DSWA concluded that only the following pages should be released to the public: the title pages; pages containing "List of Effective Pages," which reflect the latest changes; signature and authentication pages; "Certificate of Destruction of Publication" pages;

and "Distribution Statement" pages. The denying official for the Department of Defense is Dr. George W. Ullrich, Deputy Director, DSWA. Because we only have jurisdiction to review FOIA determinations made by DOE officials, we cannot review the determination made by DSWA in this case. Therefore, even if we were to complete our review and overrule the initial DOE determination, we would be unable to release any of the information that the DOD now withholds.

Based on the DSWA's review we have determined that, except for the pages containing the administrative information described above, NAVSEA SWOP 45-51 and its supplements B through F must continue to be withheld. Although Mr. Milner has raised a number of arguments in his appeal to the general effect that the public interest requires the release of the documents he has requested, consideration of these arguments is fruitless under the circumstances of this case. Accordingly, Mr. Milner's Appeal will be granted in part and denied in part. Copies of the administrative pages of the requested documents that contain the information now determined to be releasable will be delivered to Mr. Milner.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen Milner on October 7, 1991, Case No. LFA-0159, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The title pages, pages containing "List of Effective Pages," "Certificate of Destruction of Publication" pages, and "Distribution Statement" pages of the technical manual entitled NAVSEA SWOP 45-51 and its supplements B through F will be provided to Mr. Milner.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 4, 1997

(1)Supplement A was initially identified as the only document responsive to Mr. Milner's request. The DOE reached a separate initial determination concerning that document, which was appealed in 1988. The final agency determination with respect to that document appears in Glen Milner, 22 DOE ¶ 80,177 (1993). Albuquerque did not review Supplement A in its September 19, 1991 determination because it had recently performed such a review and no significant change to the applicable classification guidance had occurred since that review.

(2)Those portions withheld under Exemption 2 were not sent to the Director of SA but, as explained below, we need not consider them on appeal.

(3)The DSWA also concluded that Supplement A contained, in addition, information currently and properly classified in the interest of national defense under Executive Order 12958 and therefore exempt from mandatory disclosure under Exemption 1, and information currently and properly classified under the Atomic Energy Act and therefore exempt from mandatory disclosure under Exemption 3.

Case No. LFA-0182, 25 DOE ¶ 80,122

July 11, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Albuquerque Journal

Date of Filing: January 29, 1992

Case Number: LFA-0182

John Fleck, a journalist employed by the Albuquerque Journal, filed an Appeal from a determination issued to him on January 8, 1992, by the Director of the Office of Arms Control and Nonproliferation Technology Support of the Department of Energy's Office of Defense Programs (now the Office of Arms Control and Nonproliferation of the DOE's Office of Nonproliferation and National Security). In that determination, the Director responded to a request for information that Mr. Fleck filed on November 20, 1991, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Appeal, if granted, would require the DOE to review and release additional information that was not provided in the January 8, 1992 determination.

I. Background

In his November 20, 1991 request Mr. Fleck asked for a "report prepared for Congress to meet the requirements of Section 3151 of the National Defense Authorization Act of 1991 regarding verification of dismantlement of nuclear weapons." In his January 8, 1992 response to this request, the Director explained to Mr. Fleck that the National Defense Authorization Act required the President to appoint a Technical Advisory Committee on Fissile Materials and Nuclear Warhead Controls for the purpose of preparing the required Report. The Director stated in his letter that the President delegated the authority and responsibility for this Committee to the Secretary of Energy. Although the statute called for the Report to be unclassified, with classified appendices as necessary, the Director further explained that it was not feasible to produce the Report in this manner; instead, the Report was classified. An unclassified executive summary was produced in anticipation of public interest in the Report, and it was this executive summary, which was made a part of the July 1991 Report, that was provided to Mr. Fleck in response to his request. In his Appeal, Mr. Fleck points out that the determination letter did not indicate that any attempt was made to segregate and release any portions of the classified Report. As a result, he contends, he was denied some of the information responsive to his request because he was given only the executive summary of the Report, rather than an expurgated version of the full Report.

II. Analysis

The Freedom of Information Act provides that agencies make reasonably described records available to a requester, provided the request is made in accordance with published rules. 5 U.S.C. § 552(a)(3). In this case, Mr. Fleck 's request was described in such a manner that there is no doubt regarding what document was responsive to his request: the specified Report to Congress. The Director responded to the request by providing instead the executive summary of that Report, while implying that the Report itself was

classified. His determination letter does not reflect why the Director addressed himself only to the executive summary. Under these circumstances, we find that the full Report, even if classified, is responsive to the request. Therefore, the Director should have made a determination regarding the disclosure of the full Report.

Before a response to a request for classified records is issued, the DOE regulations require the concurrence of the Director of Declassification. 10 C.F.R. § 1004.6. Because the Director did not consider the disclosure of the full Report, he did not seek the necessary review of that document by the Office of Declato Mr. Fleck's request for information. It is also evident that the Director did not attempt to provide any portion of the Report itself, but rather believed he had satisfied the request by releasing the executive summary alone. Because the classified Report is responsive to Mr. Fleck's request but has not yet been reviewed for possible release, we will remand this request to the Director of the Office of Arms Control and Nonproliferation for a new determination. We understand that the classified Report is being reviewed at this time by the Office of Declassification for a determination as to whether any portions may be declassified and released to the public. When the review has been completed, the Director of the Office of Arms Control and Nonproliferation shall issue a new determination to Mr. Fleck on the basis of that review. Accordingly, the Albuquerque Journal's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by the Albuquerque Journal on January 29, 1992, Case No. LFA-0182, is hereby granted as set forth in Paragraph 2 below.

(2) This matter is hereby remanded to the Director of the Office of Arms Control and Nonproliferation, who shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 11, 1995

<1> Mr. Fleck correctly points out in his Appeal that the fact that a document contains material that is exempt from disclosure does not make the entire document exempt. However, in this case, no attempt had yet been made to determine whether it was possible to segregate releasable material from the full Report, because the Director appears not to have considered the full Report for release. When reviewing the Report on remand, the Office of Declassification will consider this issue of segregability.

Case No. LFA-0254, 25 DOE ¶ 80,117

June 22, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Ferenc M. Szasz

Date of Filing: January 19, 1993

Case Number: LFA-0254

Ferenc M. Szasz filed an Appeal from a determination issued to him on November 24, 1992, by the Assistant Archivist for the National Archives of the National Archives and Records Admininstration (NARA). In that determination, the Assistant Archivist denied a request for information that Professor Szasz filed on February 17, 1988, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NARA withheld the documents it found to be responsive to Professor Szasz's request pursuant to a review of those documents by the predecessor of the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to direct the Assistant Archivist to release the information that was withheld in the November 24, 1992 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his February 17, 1988 request Professor Szasz asked NARA for "the reports contained in the Manhattan Project files 201 Peierls, R.W. Record Group 77 (MED) [Manhattan Engineering District], Entry 5." These reports, which NARA identified as four documents in its determination, are in fact six letters, all of which originated with the United Kingdom mission to the MED during the period 1943-1945. Mr. Peierls was a member of that UK mission. NARA referred the six letters to the DOE's Office of Classification, now the Office of Declassification, which sent the letters to the Chief, Joint Atomic Information Exchange Group (JAIEG), requesting that they be forwarded to the British Embassy for review.

On May 13, 1992, the British Embassy informed the JAIEG that "the UK decision . . . is to deny the release of all documents in their entirety." The JAIEG then returned the documents to the Office of Declassification with the UK recommendation. The Office of Declassification then informed NARA that the documents contained classified information that the DOE claimed to be exempt from mandatory disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). In addition, it informed NARA that, in light of the UK's recommendation to withhold the documents in their entirety, the DOE regarded the contents of the documents as foreign government information classified under section 1.3(a)(3) of Executive Order 12356 and exempt from mandatory disclosure under Exemption 1 of the FOIA, 5 U.S.C.

§ 552(b)(1). On November 24, 1992, NARA informed Professor Szasz that his request had been denied under Exemptions 1 and 3 of the FOIA. In that determination, NARA also instructed him to appeal the Exemption 1 denial to the DOE before appealing any Exemption 3 denials to NARA.

Professor Szasz completed the filing of his Appeal with the DOE on January 14, 1993. In his Appeal, he does not present any specific arguments for the release of the letters in their entirety, but states that he would accept excerpted copies of these documents, with the sensitive information deleted.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see also 10 C.F.R. § 1004.10(b)(1). Executive Order 12356, 3 C.F.R. 1982 Comp., p. 166, is the current Executive Order that provides for the classification of information concerning "foreign government information." Executive Order 12356, § 1.3(a)(3). Information properly classified under this Executive Order is exempt from mandatory disclosure by Exemption 1. See Peter Almquist, 21 DOE ¶ 80,144 (1991); Glen Milner, 20 DOE ¶ 80,166 (1990); Government Accountability Project, 20 DOE ¶ 80,121 (1990).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The Office of Declassification determined that significant portions of the six letters should be withheld under Exemption 3 because they contained information about the design and manufacture of nuclear weapons that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure. "Restricted Data" is defined in part as "all data concerning (1) design, manufacture, or utilization of atomic weapons." 42 U.S.C. § 2014(y).

The Director of Security Affairs (Director of SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of National Security Information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of the Appeal from the Office of Hearings and Appeals, the Director of SA reviewed the six letters and concluded that they should continue to be withheld from Professor Szasz in their entirety, because they are currently and properly classified under § 1.3(a)(3) of Executive Order 12356 and are therefore exempt from mandatory disclosure under Exemption 1 of the FOIA. In addition, the Director of SA has concluded that those portions of the letters initially identified as Restricted Data under the Atomic Energy Act are properly classified as such and therefore should still be withheld from Professor Szasz under Exemption 3 of the FOIA.

III. Conclusion

Based on the review performed by the Director of SA, we have determined that Executive Order 12356, which currently governs the protection of foreign government information, requires the continued withholding of the entire contents of the six letters responsive to Professor Szasz's request under the FOIA. Based on that same review, we have also determined that the Atomic Energy Act requires the continued withholding of those portions of the letters that have been identified and properly classified as Restricted Data, as that term has been defined in the Atomic Energy Act. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of

Exemptions 1 and 3, the non-disclosure is required by statute or Executive Order. Accordingly, Professor Szasz's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ferenc M. Szasz on January 19, 1993, Case No. LFA-0254, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 22, 1995

Case No. LFA-0297, 25 DOE ¶ 80,103

March 24, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:National Security Archive

Date of Filing: May 14, 1993

Case Number: LFA-0297

The National Security Archive filed an Appeal from a determination issued to it on April 13, 1993, by the Director of Freedom of Information and Security Review, Office of the Assistant Secretary of Defense. In that determination, the Director denied in part a request for information that the National Security Archive filed on May 6, 1988, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Some of the information deleted from the document released to the National Security Archive in that determination was withheld pursuant to a review of the documents by the predecessor of the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to instruct the Director to release the information that was withheld in the April 13, 1993 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On May 6, 1988, Craig Keller of the National Security Archive submitted a request under the FOIA to the Department of Defense (DOD) for a document entitled "Positions and Statements on Disarmament, January 1961 - November 1969." On September 2, 1988, the Director, Freedom of Information and Security Review, DOD, sent the document to the DOE for classification review. In response to that request, the DOE advised the DOD on May 19, 1989, that the document contained classified information that it considered exempt from mandatory disclosure under Exemptions 1 and 3 of the FOIA, 5 U.S.C. § 552(b)(1), (3). On April 13, 1993, the DOD released to Mr. Keller a copy of the document he requested from which was withheld the information that the DOE claimed was exempt from disclosure under the FOIA as well as other information that the DOD claimed was exempt from disclosure.

In its Appeal to the DOE, the National Security Archive seeks the disclosure of those portions of the requested document that the DOD withheld at the request of the DOE. The National Security Archive contends that at least some of those portions have already been declassified and released, and that other withheld portions should now be declassified.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be dept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12356, 3 C.F.R. 1982 Comp., p. 166, is the current Executive Order that provides for the classification of information concerning military plans and intelligence activities. Executive Order 12356, § 1.3(a)(1), (4). Information properly classified under this Executive Order is exempt from mandatory disclosure by Exemption 1. See Paul G. Richards, 22 DOE ¶ 80,159 (1992); Peter Almquist, 21 DOE ¶ 80,144 (1991).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The portions that the DOE deleted from the requested document under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

Upon referral of the Appeal from the Office of Hearings and Appeals, the Office of Declassification again reviewed those portions of the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA. That Office has now concluded that the document no longer contains any information that needs to remain classified by the DOE. It has advised the DOD of its determination and, pursuant to that advice, the DOD has released that information to the Appellant. See Letter from Clifford H. Bernath, Principal Deputy Assistant to the Secretary of Defense for Public Affairs, to William Burr, National Security Archive, February 27, 1995. Accordingly, the National Security Archive's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on May 14, 1993, Case No. LFA-0297, is hereby granted.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 24, 1995

Case No. LFA-0387, 25 DOE ¶ 80,166

February 7, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: A. Victorian

Date of Filing: May 31, 1994

Case Number: LFA-0387

On May 31, 1994, Dr. A. Victorian filed an Appeal from a determination issued on April 6, 1994 by the Deputy Assistant Secretary for Military Application and Stockpile Support of the Department of Energy (DOE/MA). The determination concerned a request submitted by Dr. Victorian under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Dr. Victorian requests that the Office of Hearings and Appeals (OHA) order the release of the information withheld by DOE/MA.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). Department of Energy (DOE) regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a July 2, 1992 FOIA request, Dr. Victorian sought information and records from the DOE pertaining to the DOE's FALCON program. <1> In its April 6, 1994 determination letter, DOE/MA provided Dr. Victorian with copies of two documents entitled "FALCON Reactor-Driven Laser Experiments Show Potential," (Experiments Document) and "DOE Reactor-Pumped Laser Research Program" (Laser Document). A copy of the Experiments Document was provided to Dr. Victorian in its entirety but portions of the Laser Document were deleted. In its determination letter, DOE/MA stated that the deleted portions of the Laser Document were withheld pursuant to Exemptions 1 and 3 of the FOIA. DOE/MA asserted that the portions of the Laser Document withheld pursuant to

Exemption 1 consisted of information classified under section 1.3(a)(1) of Executive Order 12356 because release of the information could reasonably be expected to cause damage to the national security. DOE/MA went on to state that the remaining portions, which were withheld under Exemption 3 of the FOIA, consisted of information relating to nuclear energy-pumped laser weapons which was classified as restricted data under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, 2161-2166.

In his Appeal, Dr. Victorian argues that the Laser Document was inappropriately classified. Dr. Victorian alleges that Secretary of Energy Hazel O'Leary promised in December 1993 to declassify documents regarding inertial confinement fusion (ICF) programs such as the DOE's FALCON program. Dr. Victorian also argues that the budget information contained in the Laser Document was inappropriately withheld

under Exemption 1 of the FOIA because Secretary O'Leary had given assurances that budget information regarding ICF programs would be disclosed and that "laws" require most governmental agencies to be accountable for their use of tax-payer monies. Such withholding of budget information, Dr. Victorian asserts, leads the public to believe that such projects are so-called "Black" or secret projects.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see also 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, 60 Fed. Reg. 19825 (April 20, 1995), is the current Executive Order that provides for the classification of information concerning military plans and intelligence activities. Executive Order 12958, § 1.5(a), (c). Consequently, information properly classified under this Executive Order is exempt from mandatory disclosure under Exemption 1.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The portions that the DOE deleted from the Laser Document under Exemption 3 were withheld on the grounds that they contain information classified as Restricted Data under the Atomic Energy Act and therefore exempt from mandatory disclosure.

The fact that a document contains material that is exempt from disclosure does not necessarily make the entire document exempt. The FOIA, as implemented, requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); See Mead Data Central v. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Government Accountability Project, 20 DOE ¶ 80,121 (1990). In the context of Exemptions 1 and 3, this means information not classified pursuant an applicable Executive Order or required to be withheld by an Exemption 3 statute should ordinarily be released to the requestor. See Founding Church of Scientology v. Bell, 603 F.2d 945, 950-51 (D.C. Cir. 1979) (Exemption 1); Glen Milner, 20 DOE ¶ 80,122 (1990) (Exemption 1); San Jose Mercury News, 20 DOE ¶ 80,119 (1990) (Exemption 3).

The Director of Security Affairs (Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA Appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.1 (December 20, 1991). In his review of this Appeal, the Director instructed the Office of Declassification (OD) to reexamine the Laser Document. After the OD's examination, the Director determined that almost all of the Laser Document was properly withheld under Exemption 1 or 3 of the FOIA but that a small portion of the Laser Document which had been previously withheld could now be declassified and released to Dr. Victorian in order to assist him to understand the nature of the deleted portions of the Laser Document. Additionally, the Director stated that OD found that the Idaho National Engineering Laboratory budget information previously withheld in the Laser Document is now unclassified and should also provided to Dr. Victorian.

With regard to the remaining deleted portions of the Laser Document, the Director rejected the specific arguments put forth by Dr. Victorian. The Director states that Secretary O'Leary, in her December 1993 press conference, made no promise to declassify specific documents or any document containing ICF information. The Director notes that Secretary O'Leary stated that, with respect to the ICF program, the DOE had declassified certain facts such as information concerning laboratory ICF targets, calculations regarding experimental data on hydrodynamic instabilities on unclassified ICF targets, information relevant

to energy applications of ICF and ICF equipment fabrication techniques. Further, the Director asserts that Secretary O'Leary has stated that some ICF information relating to weapons research would remain classified. The Director also rejects Dr. Victorian's argument that by withholding budget information, the DOE is attempting to hide the existence of the FALCON program, making it a so-called "Black" project. The Director states that the existence, purpose and goals of the FALCON program are unclassified and publicly known. <2>

In conclusion, the Director, upon review by OD, found that almost all of the withheld material was properly classified and withheld pursuant to Exemption 1 or 3 of the FOIA. However, a small portion of information in the Laser Document can now be declassified and released to Dr. Victorian. A newly redacted copy of the Laser Document will be sent to Dr. Victorian under separate cover.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dr. A. Victorian on May 31, 1994, Case Number LFA-0387, is hereby granted as set forth in the foregoing Decision and denied in all other respects.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 7, 1996

<1>The FALCON program is a DOE project to investigate nuclear energy-pumped laser weapon technology.

<2>While Dr. Victorian has argued that "laws" mandate the release of all budget information regarding federal government projects, we note that he has not brought to our attention any specific statute or regulation which mandates disclosure of classified budget information; nor are we aware of the existence of any such statute or regulation.

Case No. TFA-0001

December 19, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Barbara Schwarz

Date of Filing: November 25, 2002

Case Number: TFA-0001

Barbara Schwarz filed Appeals from three letters issued by the various elements of the Department of Energy (DOE). Two of these letters responded to a request for information that Schwarz filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The third letter informed Ms. Schwarz that the DOE would no longer process FOIA requests that she filed until she paid processing fees that she owes to various federal government entities. As explained below, we will deny the first two Appeals and dismiss the third.

I. Response from the Golden Field Office

Background

Ms. Schwarz sent an e-mail to Richard Truly, Director of the DOE's National Renewable Energy Laboratory, in which she requested the following information:

[Whether] you or members of your staff have knowledge of Mark C. Rathbun (de Rothschild), or his family, or his attorneys, or Scientologists, or an Independent or Special Counsel, or other members of Congress asking you to investigate a secret German Nazi infiltration of the U.S. government, all Departments, numerous federal agencies and even courts, or State governments, or asked you to sponsor a new Committee, or Subcommittee, or federal agency, or office, to investigate this illegal infiltration. Inform me if they contacted you to find me as witness to their investigation and asked you to mail your FOIA/PA or other records on me to them.

Please mail me also under FOIA/PA records, that you Department, any office has on me, Barbara Schwarz, or misspelled version Schwartz from 1997 till present time, that you have not yet mailed to me. Search in all your office and agencies. Clarify

the status of my "urgent request for information assistance and investigation,"(including FOIA/PA request) dated May 20, 2002, and mailed with USPS on May 20, 2002 to Secretary Spencer Abraham. What is the file number of this request? When do you process this request?

The Manager of the DOE's Golden Field Office responded to this request in a letter dated September 11, 2002. With respect to the first portion of her request, the Manager stated that Ms. Schwarz had requested knowledge rather than documents, and that the FOIA requires the production only of documents. Therefore, no documents could be provided that responded to her request. As for the second part of her request, the Manager stated that Golden had performed a thorough search for records on Ms. Schwarz, and had located none. Finally, he advised Ms. Schwarz to contact the DOE headquarters Freedom of Information and Privacy Group regarding the request she filed with Secretary Abraham.

In her appeal, Ms. Schwarz raises the following issues. First, she challenges Golden's determination that it had no records regarding her. Second, she believes that Golden must have some documents that demonstrate that Mr. Rathbun or members of his family, or their attorneys, or other individuals "requested [her] records from NREL or DOE Golden Field Office," because "the above named attorneys likely requested them in official letters and subpoenas." Third, because Golden "sent absolutely no evidence of any search," Ms. Schwarz requests records of the search it conducted in response to her request. Finally, Ms. Schwarz wants "to know why DOE, NREL does not want to investigate the matters of National Security, which I raised in [my request] and which concern DOE directly. I still insist on the investigation."

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted for records concerning Ms. Schwarz was adequate, we contacted the Golden office. The Freedom of Information Officer for Golden informed us that he had searched its human resources, procurement and legal counsel offices, and that no documents were found that were responsive to this portion of the request. He also informed us that these three offices were the locations at Golden where information on Ms. Schwarz might reasonably be found, if any existed. We find that the search for information responsive to this portion of Ms. Schwarz's request was adequate and we will deny this portion of the appeal.

Concerning Ms. Schwarz's request for "knowledge" that certain individuals had asked Golden to investigate Nazi infiltration or to sponsor such an investigation, Golden informed us that it had not conducted a search at all, because "knowledge" would not be contained in documents, which are the proper subject of a request under the FOIA. Although we agree that Golden was technically correct in not undertaking a search for "knowledge," we reinterpreted Ms. Schwarz's request to include any documents that demonstrated that the named individuals had asked Golden to investigate Nazi infiltration or to sponsor such an investigation. We then requested that Golden conduct a search for documents responsive to that restatement of Ms. Schwarz's request. Golden performed a search and notified us that no responsive documents were found. It explained the manner of its search, which included posing this request to three high-level, long-term employees, each of whom had a broad knowledge and memory of Golden's operations, and who would reasonably know about any responsive documents if any existed at Golden. We find that the search for information responsive to this portion of Ms. Schwarz's request was adequate and we will deny this portion of the appeal.

Ms. Schwarz now requests "the search records that were generated during this search by NREL and Golden Field Office, e.g. work sheets, e-mail notes, computer printouts, logs, etc., any form of records that belong to me and that request. I also want to know in what offices was searched, who searched in what offices exactly, what records systems, to what names of mine, to what time period, and I want a search declaration/certificate by the searchers as to how the search was conducted." This request is for information that is beyond the scope of the original request and we will not address it in this appeal. If Ms. Schwarz wishes to request "the search records that were generated during this search by NREL and Golden Field Office," she must do so by filing a request for information with Golden directly. We note, however, that

neither the FOIA nor the relevant DOE regulations requires the agency to supply a "search certificate" or a detailed description of the search that was conducted. *Barbara Schwarz,* [Case No. VFA-0536, 27 DOE ¶ 80,245 (1999)]. Furthermore, we believe that requiring a "search declaration" at the administrative stage of review is unnecessary and unproductive.

Barbara Schwarz, Case No. VFA-0641, 28 DOE ¶ 80,140 (2001). Moreover, it is well settled that documents need not be created in response to a request for information under the FOIA. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). We will therefore deny this portion of the appeal.

Finally, we must dismiss Ms. Schwarz's concern that the Golden Field Office has ignored her demand for an investigation of matters of national security that she specified in her communications with that office. Her request for such action, and Golden's lack of response to that request, are beyond the scope of the FOIA and, consequently, our powers to review under the FOIA and the DOE's regulations that implement that law.

II. Response from the NNSA

The DOE's National Nuclear Security Administration (NNSA) received the same request for information as Mr. Truly of NREL. The NNSA's Freedom of Information Act Officer responded to this request in a letter dated September 9, 2002, stating that the NNSA "is not allowed to maintain any records on United States citizens that have no affiliation with the National Nuclear Security Administration," and that the NNSA does not conduct investigations. On September 15, 2002, Ms. Schwarz attempted to appeal that determination directly to the NNSA, and we will consider her appeal at this time. In her appeal, Ms. Schwarz raised the following issues. She contends that the NNSA conducted no search for records about her and failed to conduct an adequate search for subpoenas that Mr. Rathbun, his family, their attorneys, or other counsel had allegedly filed with the NNSA to obtain records about her. In addition, as she did in her appeal of the NREL determination discussed above, Ms. Schwarz now requests "the search records that you or your office generated to retrieve those records, and a search declaration/certificate as to how the search was conducted."

In order to determine whether the search conducted for records responsive to Ms. Schwarz's request was adequate, we contacted the NNSA. We learned that the Freedom of Information Act Officer did not conduct a search for responsive documents in this case, because he believes the NNSA does not maintain information of the type Ms. Schwarz requested. At our request, however, the NNSA performed a formal search for such records and located none. The FOIA Officer reported that his search of NNSA's FOIA case files located only documents related to the request currently under appeal: Ms. Schwarz's e-mail request for information, NNSA's September 9, 2002 response, and Ms. Schwarz's September 15, 2002 reply. The FOIA Officer also reported that he requested NNSA's Office of General Counsel search for subpoenas regarding information about Ms. Schwarz, and was informed that none exist. In addition, the NNSA's Office of General Counsel reported to us directly that it has no litigation files concerning Ms. Schwarz. Despite the fact that this search uncovered no documents responsive to Ms. Schwarz's request, we find that the search that the NNSA conducted was adequate and will deny this portion of the appeal.

As stated above, Ms. Schwarz now requests any records the NNSA generated in the course of retrieving records responsive to her request, and a "search declaration/certificate" regarding that search. For the same reasons set forth in the above section concerning Golden's response, we will deny this portion of her appeal.

III. Response from FOI/PA

Ms. Schwarz also appeals a letter she received from the Director of the Headquarters FOIA/Privacy Act Group. In that letter, dated October 2, 2002, the Director stated that the DOE would not begin to process several requests for information that Ms. Schwarz had filed with the DOE, because other agencies have informed the DOE that she has not paid fees assessed for processing FOIA requests at those agencies. In a

letter dated October 20, 2002, Ms. Schwarz objects to the DOE's refusal to process her requests for information, declaring it to "completely unlawful and even unconstitutional."

We will not consider the arguments raised by the DOE or Ms. Schwarz regarding this impasse. The DOE's refusal to process Ms. Schwarz's requests for information does not fall within the type of determinations that we have jurisdiction to review on appeal. *See* 10 C.F.R. § 1004.8(a) (appeal authority when the DOE withholds a document in part or in full, or states there are no responsive documents, or denies a request for waiver of fees). Accordingly, we will dismiss the portion of the appeal that concerns the DOE's refusal to process requests for information. Under these circumstances, Ms. Schwarz has the right to file a complaint with the appropriate federal district court. *See* 5 U.S.C. § 552(a)(4)(B), (6)(C).

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, Case No. TFA-0001, is hereby denied in part and dismissed in part.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 2002

Case No. TFA-0003

December 19, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Steven C. Vigg

Date of Filing: November 26, 2002

Case Number: TFA-0003

On November 26, 2002, Mr. Steven C. Vigg filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Bonneville Power Administration (BPA). The BPA issued this determination in response to a request that Mr. Vigg filed with the Department of Justice. In this determination, the Bonneville Power Administration released some responsive documents to Mr. Vigg but withheld others from him. The Appeal, if granted, would require that the information that the BPA withheld be released in full.

I. Background

Mr. Vigg filed a request in which he sought access to all information concerning allegations of misconduct against him by the BPA, allegations that were later determined by the Department of Justice (DOJ) to "lack prosecutive merit." Mr. Vigg filed his Freedom of Information Request with the Department of Justice. The DOJ located responsive documents and referred them to the DOE for its review. The DOE Headquarters FOIA/Privacy Act Group in turn forwarded the documents to the BPA. On October 8, 2002, the BPA issued a determination which provided Mr. Vigg with copies of some of the documents the DOJ provided. The BPA withheld a number of documents, finding that the information it was withholding was encompassed by Exemptions 5 and 7 of the FOIA.

In addition to the documents it received from the DOJ, the BPA also reviewed Mr. Vigg's Official Personnel File, and informed him that no additional documents responsive to his request were found in it.

II. Analysis

A. Adequacy of the Determination

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id*.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an

administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.,* 26 DOE ¶ 80, 139 (1996); *Burlin McKinney,* 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

In our review, we note that the October 8 Determination Letter failed to identify each responsive document that the BPA withheld. As discussed above, the BPA has an obligation to describe each document or portion of document withheld and the grounds for withholding it in a manner sufficient to allow the requester, and the reviewing authority, to understand the rationale for withholding the information. Because this was not done, Mr. Vigg cannot formulate an appeal concerning the documents withheld under Exemptions 5 and 7(C), nor can the OHA rule on the appropriateness of application of those exemptions to the withheld documents.

We also note that the BPA apparently did not attempt to segregate and release portions of the withheld documents that do not contain information of the types protected under the claimed exemptions. The FOIA requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See 5 U.S.C. § 552(b). See also FAS Engineering Inc., 27 DOE ¶ 80,131 (1998),* quoting *Soucie v. David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). The determination letter did not identify any segregable, non-exempt factual material, or state that no such information existed.

Consequently, we will remand this matter to the BPA. On remand, the BPA should attempt to segregate and release any portions of the relevant documents to which the claimed exemptions may not be applied. If any information is withheld, it must be described and its withholding must be justified as discussed above.

B. Adequacy of Search

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-95 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency,* 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at BPA to ascertain the extent of the search that had been performed and to determine whether any additional documents existed that were responsive to Mr. Vigg's request. We were informed of the following. Upon receiving Mr. Vigg's request for information, Mr. Michael R. Sparks, Manager of Internal Audit at BPA, contacted the BPA's Office of

General Counsel. Upon reviewing the documents submitted by the DOJ, Mr. Sparks determined that the only BPA Internal Audit Staff member who had worked on a 1996 investigation concerning the allegations Mr. Vigg named in his request was David Mattson.

The BPA then contacted Mr. Mattson, a BPA Auditor, who reported that he no longer had any files related to this FOIA request because he had disposed of them long ago. Mr. Mattson confirmed that everything he had developed during his 1996 investigation was contained in the Department of Justice package that was forwarded to the BPA office. Mr. Mattson also informed the BPA that no other files existed within the Internal Audit Office that related to this FOIA request.

Mr. Sparks then had the BPA's Office of General Counsel (OGC) review Mr. Vigg's OPF file. The OGC staff determined that the OPF file contained no responsive documents.

Based on this explanation of the search performed, we conclude that the BPA's search for documents responsive to Mr. Vigg's request met the "standard of reasonableness" established in the case law. Accordingly, we will deny the portion of Mr. Vigg's appeal that challenges the adequacy of the BPA's search.

It Is Therefore Ordered That:

(1) The Appeal filed on November 26, 2002 by Steven C. Vigg, OHA Case No. TFA-0003, is hereby granted except as set forth in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the BPA for segregation and release of any portions of those responsive documents that the BPA withheld in its October 8, 2002 determination. If the BPA determines that any information must continue to be withheld, it must provide adequate descriptions of all such information in accordance with the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester reside or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 2002

January 29, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: November 21, 2002

Case Number: TFA-0004

On November 21, 2002, Government Accountability Project (GAP) filed an Appeal from a determination issued to it in response to a request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on October 24, 2002, by the DOE Oakland Operations Office (Oakland). This Appeal, if granted, would require that Oakland grant GAP a fee waiver.

I. Background

This Appeal concerns a FOIA request GAP originally filed with Oakland on August 27, 2002. GAP requested information reflecting the payment or reimbursement of money paid by DOE to any contractor in regard to any legal claims of two former employees of the contractor, Matthew Zipoli and Charles Quiñones. Request Letter dated August 27, 2002, from Thomas Carpenter, Director, Seattle Office, GAP, to Oakland. As authorized by the DOE FOIA Regulations, the request asked for a waiver of any fees associated with fulfilling the request. On September 10, 2002, Oakland sent GAP a letter asking for additional information to support the fee waiver request. Letter dated September 10, 2002, from RoseAnn Pelzner, FOIA Officer, Oakland, to Thomas Carpenter, GAP. GAP responded on October 10, 2002, providing arguments why it was entitled to a fee waiver for the information it was requesting. Letter dated October 10, 2002, from Clare Gilbert, Program Associate, GAP, to RoseAnn Pelzner. In response, Oakland denied GAP's fee waiver request but released eight responsive documents found in its two hour search allowed to "other requesters."[*/] Determination Letter dated October 24, 2002, from James S. Hirahara, Acting Deputy Manager, FOIA Authorizing Official, Oakland, to Clare Gilbert.

[*/] Other requesters are those requesters that are not commercial use requesters, educational and noncommercial scientific institutions, and representatives of the news media. 10 C.F.R. § 1004.9 (b). All "other requesters" are required to pay the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time are furnished without charge. *Id.* at § 1004.9 (b)(4).

GAP filed this Appeal on November 21, 2002, claiming that it was entitled to a fee waiver for this request and any future FOIA requests. Appeal Letter dated November 21, 2002, Clare Gilbert to Director, Office of Hearings and Appeals (OHA) (Appeal Letter).

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in considering whether to waive fees. The two prongs can be summarized as the "public interest prong" and the "commercial interest" prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of government. 5 U.S.C. § 552(a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. If it is, fees will not be waived. *Id.* The requester bears the burden of satisfying the two-pronged test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997).

As an initial matter, we note that decisions on fee waiver requests are made on a case by case basis. A requester cannot be granted a blanket fee waiver, even if it believes it will be requesting the same type of information in all requests. Consequently, we reject the GAP argument that because it has been granted fee waivers in the past, it should be granted a waiver in this case. GAP's past success in receiving fee waivers is not necessarily indicative of success in this case.

In order to determine whether the requester meets the public interest prong (*i.e.*, whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities), the DOE considers four factors:

> (A) The subject of the request: whether the subject of the requested records concerns the operations or activities of the government;
>
> (B) The informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of government operations or activities;
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure;

> (D) The significance of the contribution to public understanding: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997).

In its Determination, Oakland found that although GAP did satisfy Factor A, it did not satisfy Factors B, C, or D of the public interest prong. Determination Letter at 2, 3. In its request, GAP asks for records reflecting the DOE reimbursement of its contractors's legal fees associated with the dismissal of two employees of the contractor. Oakland found that the request satisfied Factor A, in that it concerned an identifiable government operation. However, Oakland found that it did not satisfy Factor B because GAP did not show that the requested information contain a significant potential for benefitting the general public. Determination Letter at 2.

GAP argues in its Appeal it has satisfied all four Factors. In regard to Factor B, GAP contends that it has requested similar information in the past and been granted a fee waiver in those cases. It argues that the information it has gathered through the FOIA in the past has been used by national magazines and local newspapers in articles about the DOE whistleblower program, and claims that the information sought in this case would again shed light on that program. Appeal Letter at 3, 4. In regard to Factor C, GAP states that OHA has found in the past that GAP is able to disseminate the information publicly and Oakland's argument that there has been no showing of relevant whistleblower activities is irrelevant. Finally, GAP contests Oakland's finding that it does not satisfy Factor D. GAP states that the information it is requesting would reflect on DOE's claim that it is committed to zero tolerance for retaliation against whistleblowers. Appeal Letter at 6.

Factor B

GAP argues that it should be granted a fee waiver because the information it is requesting will contribute to an understanding of government operations or activities, specifically, that the information requested will show the extent of the support that DOE is giving its contractors in whistleblower cases and will show that DOE does tolerate reprisals against whistleblowers. GAP's argument fails because it lacks a factual basis; there is no evidence in the record that the information GAP seeks relates in any way to whistleblower activity. In its determination, Oakland stated that no retaliation by the employer was established in this case. In its response to GAP's Appeal, Oakland stated that an arbitrator found that

the contractor had cause to dismiss one of the employees and reprimand the other employee. No mention was made of the employees' status as whistleblowers. Response Letter from Jack Hug, Oakland, to Janet R. H. Fishman, Attorney-Examiner, OHA, citing *In Re Security Police Officers Association v. Lawrence Livermore National Laboratory*, report of arbitrator, December 13, 2002.

We agree with Oakland. There is nothing in the record to indicate that this case involves whistleblowers, other than an allegation by GAP that these employees were terminated because of whistleblower activities. No Part 708 complaint has been filed and as far as we know, none is contemplated. Therefore, release of the information would not shed any light on the reimbursement by DOE of a contractor's legal fee in a whistleblower situation. We agree with Oakland that GAP does not satisfy Factor B for this request.

GAP's argument regarding Factor B and public understanding is so remote and unlikely that even were we to find that GAP satisfied both Factors C and D, we would not grant it a fee waiver. Therefore, we will not address Factors C and D. We note however, that GAP does have a history of being able to disseminate the information it requests under the FOIA. However, as noted above, each request must be handled individually.

III. Conclusion

Oakland properly denied GAP's request for a fee waiver because GAP did not satisfy Factor B. Accordingly, the GAP Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Government Accountability Project on November 21, 2002, OHA Case Number TFA-0004, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 29, 2003

May 19, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Carole L. Norris
Date of Filing:	December 2, 2002
Case Number:	TFA-0005

On December 2, 2002, Carole L. Norris (Norris) filed an Appeal from a determination issued to her on October 18, 2002, by the Richland Operations Office (Richland) of the Department of Energy. In her Appeal, Norris asserts that Richland failed to perform an adequate search for responsive documents in its possession regarding a Freedom of Information Act (FOIA) Request she submitted on September 24, 2002.

Background

On September 24, 2002, Norris filed a FOIA Request with Richland requesting copies of all "employment, occupational health and radiation exposure records of my deceased father, Thomas E. Fleming" (Fleming). Freedom of Information Request submitted by Carole L. Norris to Richland (September 24, 2002). Fleming had worked with a number of contractors at the DOE's Hanford, Washington site (Hanford). In its response to her FOIA Request, Richland sent Norris copies of a number of health records pertaining to her father.

In her Appeal, Norris asserts that while Richland provided her with some records, it did not provide records pertaining to each of her father's employers at the site and that consequently, Richland must have performed an inadequate search. *See* Memorandum of Telephone Conversation between Warren Gray, OHA Staff Attorney, and Carole L. Norris (April 18, 2003).

Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ashok K. Kaushal*, 27 DOE ¶ 80,189 (1999); *Hobart T. Bolin, Jr.*, 27 DOE ¶ 80,124 (1998).

We contacted an official at Richland's Office of Communications, FOIA and Privacy Act Programs to ascertain the extent of the search that was conducted for responsive documents. When Richand received Norris's FOIA request it was forwarded, along with the enclosed death certificate, to the Hanford Environmental Health Foundation (HEHF). HEHF maintains the occupational health and medical records for employees at the Hanford site. HEHF found 44 pages of medical records all of which were provided to Norris. The request was also sent to Pacific Northwest Laboratory's (PNNL) radiation exposure records group and legal department. The radiation exposure records group maintains the Hanford Radiological Exposure Reporting System, which is the comprehensive database for radiation exposure records at DOE's Hanford site. 1/ The radiation exposure records group ultimately found records for Fleming while he was an employee of Atkinson Jones, a subcontractor at Hanford. The PNNL legal department contacted PNNL's human resources department in order to determine if Fleming was an employee of Battelle (the current prime contractor at Hanford) at PNNL. 2/ PNNL's search indicated that Fleming had not been an employee of Battelle.

The Richland official also forwarded Norris's request to two other Hanford employees who maintained the available Hanford employment records for trade employees, i.e., welders, pipe fitters, etc., and employees of former Hanford prime contractors and major subcontractors. These records are indexed by file cards listing employees' names. Records on Fleming were found in the employee records files of Kaiser Engineers (a Hanford subcontractor) and were provided to Norris. No records were found among the available DuPont records. 3/ The Richland official knew of no other location where responsive documents might exist.

Given this factual background, we find that Richland performed an adequate search in response to Norris's FOIA request. Richland undertook a search using the indexes and databases which were most likely to produce responsive records. The request was forwarded to organizations that were most likely to possess responsive documents and all such documents were forwarded to Norris. We find that Richland's search was reasonably calculated to discover all responsive documents and consequently we will deny Norris's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Carole L. Norris on December 2, 2002, Case No. TFA-0005 is denied.

1/ The database contains records of employees who were monitored for radiation exposure at Hanford. It does not contain a listing for all employees who may have worked at Hanford.

2/ Battelle became the prime contractor at Hanford beginning in 1965.

3/ Richland earlier discovered that DuPont had removed all its personnel records from the Hanford site and these records were subsequently destroyed. *See* Memorandum of telephone conversation between Sarah Prein, Richland, and Richard Cronin, OHA (May 14, 2003).

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2003

March 5, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Las Vegas Review-Journal
Dates of Filing:	December 11, 2002 December 30, 2002
Case Numbers	TFA-0007 TFA-0014

This Decision concerns two Appeals that were filed by The Las Vegas Review-Journal, a newspaper, from determinations that were issued to it by the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (Yucca Mountain) (Case No. TFA-0007) and by the Office of Inspector General (OIG) (Case No. TFA-0014). These determinations were issued in response to a request for information that the newspaper submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that documents that these offices withheld in whole or in part be released, and that a new search for responsive documents be performed.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, The Review-Journal sought access to copies of all documents pertaining to (i) a settlement between Science Applications International Corporation (SAIC) and Mactec Inc., including the settlement agreement, (ii) the terms of the settlement agreement in *Mitchell v. Mactec* and the billing, payment and reimbursement of litigation fees in that case, (iii) the contracting of the Morgan, Lewis & Bockius law firm to conduct the Safety Conscious Work Environment (SCWE) Investigation and the firm's final report, and (iv) how two specified employee concerns were addressed. The newspaper also requested a copy of a May 18, 2001 letter from James Mattimoe to Lake Barrett and related documents concerning

allegations of corruption in investigations conducted by the Yucca Mountain Concerns Program, six pieces of correspondence sent by Kristi Hodges to the OIG between October 2001 and January 2002, and Department of Labor communications pertaining to an investigation into an allegedly wrongful termination.

In its determination (Case No. TFA-0007), Yucca Mountain released a number of responsive documents to the newspaper. However, Yucca Mountain withheld other documents, in whole or in part, under Exemptions 4, 5, and 6 of the FOIA, 5 U.S.C. § 552(b)(4), (b)(5) and (b)(6), respectively. Yucca Mountain further determined that no documents pertaining to any settlement between SAIC and Mactec or correspondence between Kristi Hodges and OIG could be located in Yucca Mountain's records. Yucca Mountain referred the request for correspondence between Hodges and the OIG to that Office. As a result of this referral, OIG issued a Glomar response to the newspaper (Case No. TFA-0014). [1]

In its Appeals, The Review-Journal contests the withholding of documents pertaining to the settlement reached in the *Mitchell v. Mactec* litigation. The newspaper has also submitted releases signed by Hodges and two other individuals authorizing OIG to release the Hodges correspondence and Yucca Mountain to release information pertaining to the others that it withheld pursuant to Exemption 6. The Review-Journal further contends that the search for documents pertaining to any settlement between SAIC and Mactec was inadequate, and that the Yucca Mountain authorizing official who issued the determination in Case No. TFA-0007 should have recused himself because many of the documents requested involve him.

II. Analysis

A. Applicability of Exemptions 4 and 5

In its determination, Yucca Mountain withheld in their entirety legal bills in the *Mitchell v. Mactec* litigation that were submitted to the DOE for reimbursement and the settlement agreement in that litigation under Exemption 4. That Exemption shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Yucca Mountain found that the withheld documents are commercial in nature and consist of privileged attorney-client communications and attorney work product.

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[1] In a Glomar response, the responding office neither confirms nor denies the existence of the documents sought, on the grounds that the mere acknowledgment of the existence of the documents could itself reveal information that the FOIA permits an agency to protect. The term "Glomar" refers to the first instance in which a federal court upheld the adequacy of such a response. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (responding to a request for documents pertaining to a submarine retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of such documents).

Yucca Mountain also withheld Attachment 3 of the SCWE Final Report in its entirety, and portions of the main body of that Report and of Attachment 2, along with the portions of its contract with Morgan, Lewis & Bockius that would reveal the hourly rates paid to the firm for producing the Report. Yucca Mountain concluded that this information consists of privileged attorney-client communications and attorney work product "that is not 'routinely' or 'normally' available to parties in litigation and, therefore, is exempt in its entirety under Exemption 5." Determination letter at 5.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Exemption is generally recognized as encompassing the attorney-client, attorney work product and governmental deliberative process privileges. *See*, *e.g.*, *Coastal States Gas Corp. v. DOE*, 617 F.2d 854 (D.C. Cir. 1980) (*Coastal States*). As previously stated, Yucca Mountain relied upon the attorney-client and attorney work product privileges encompassed by both Exemptions 4 and 5.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039 (11th Cir. 1990). Not all communications between attorney and client are privileged, however. The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Accordingly, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The attorney work product privilege protects from disclosure documents which reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). This privilege is applicable to documents that were prepared by an attorney "in contemplation of litigation." *Coastal States* at 864.

It is well settled that attorney fee information is generally not privileged. *See, e.g., Clark v. American Commerce National Bank*, 974 F.2d 1039 (9th Cir. 1992) (*Clark*); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *Indian Law Resource Center*, 477 F. Supp. 144, 147 (D.D.C. 1979). However, in those cases where a party has been able to show that the attorney billing statements at issue reveal litigation strategy, substantive communications or the specific nature of the services provided by the attorneys, such as research into particular areas of the law, courts have found them to be privileged. *Clark*, 974 F.2d at 129. Accordingly, we have held that information in expense records pertaining to the total amount charged by a law firm in a particular litigation, the attorneys' identities, their hourly rates, and the costs of travel, reporting services and document reproduction are generally not exempt from disclosure pursuant to the attorney-client or attorney work product privileges. *See, e.g., William H. Payne*, 26 DOE ¶ 80,161 (1997); *C.D. Varnadore*, 24 DOE ¶ 80,123 (1994). Information that could reveal the litigation strategy, thoughts or impressions of the attorneys, however, such as dates and descriptions of the specific services provided and the monthly and daily totals of hours billed by each attorney, is protected from mandatory disclosure under these privileges. Id.

Applying these principles to the present case, we find that some of the withheld material is not subject to the attorney-client or attorney work product privileges. This non-exempt material includes information pertaining to the legal expenses charged in the *Mitchell v. Mactec* litigation, and pertaining to the attorneys' identities and hourly rates in documents concerning the contracting of the Morgan Lewis Bockius law firm to conduct the SCWE investigation. Based on the record before us, we cannot conclude that release of this information would reveal litigation strategy or the mental impressions, conclusions, or legal theories of the attorneys involved.

However, we find that Yucca Mountain correctly concluded that the settlement agreement in *Mitchell v. Mactec* and information reflecting the settlement amount or other terms of the agreement are attorney work product, and therefore exempt from mandatory disclosure. The federal courts have held that information prepared by attorneys "in contemplation of litigation," *Coastal States* at 864, includes documents relating to possible settlements of litigation. *See, e.g., United States v. Metropolitan St. Louis Sewer District,* 952 F.2d 1040, 1045 (8th Cir. 1992). The courts have also recognized a separate civil discovery privilege for information relating to settlement negotiations. *See, e.g., Olin Corp. v. Insurance Co. of North America,* 603 F. Supp. 445, 449 (S.D.N.Y. 1985). The OHA has also determined that settlement documents are privileged and therefore exempt from mandatory disclosure. *Information Focus on Energy,* 26 DOE ¶ 80,192 (1997) (*IFOE*); *Peter T. Torell*, 15 DOE ¶ 80,127 (1987). In reaching these determinations, we have concluded that the privilege exists, in large part, to encourage full disclosure between the parties involved in order to promote settlements rather than continued litigation. *IFOE.* We therefore conclude that Yucca Mountain properly withheld information relating to the settlement in *Mitchell v. Mactec.* Consequently, we will remand this matter to Yucca Mountain. On remand, Yucca Mountain should either release information pertaining to the legal expenses charged in the *Mitchell v. Mactec* litigation, and pertaining to the attorneys' identities and hourly rates in documents concerning the contracting of the Morgan Lewis Bockius law firm to conduct the SCWE investigation, or adequately justify withholding the information under another provision of the FOIA.

B. Exemption 6

In its determination, Yucca Mountain also withheld information pursuant to Exemption 6 of the FOIA. Specifically, Yucca Mountain withheld portions of: (i) Attachment 2 of the SCWE Final Report; (ii) a May 18th, 2001 letter and attachments from James Mattimoe to Lake Barrett; (iii) three memoranda from "L.H. Barrett," dated January 10, March 22, and April 30, 2002; (iv) a fourth memorandum, undated, from "L.H. Barrett" to N.A. Voltura; (v) a memorandum from A. K. Walter to "Director OCRWM" dated November 17, 1999; and (vi) an enclosure dated March 3, 2000, to a letter from R.L. Toft to I. Itkin dated March 14, 2002.

Exemption 6 shields from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*). Furthermore, the term

"similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602. Accordingly, Yucca Mountain withheld portions of the documents described above because it concluded that release of the information "would constitute a clearly unwarranted invasion of personal privacy interests." Determination letter at 4. Similarly, OIG neither confirmed nor denied the existence of the Kristi Hodges correspondence because "[l]acking an individual's consent . . ., even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy." OIG determination letter at 1.

As previously mentioned, The Review-Journal's Appeal in Case No. TFA-0007 included releases signed by James Mattimoe, the former Quality Assurance Manager for a DOE contractor, and Robert Clark, DOE's Quality Assurance manager for the Yucca Mountain Project. Each release authorizes Yucca Mountain to "disclose all quality assurance documents pertaining to [the subject's] correspondences . . . from 1999 to 2002 whether or not protected by the Privacy Act, the Freedom of Information Act, or any Department of Energy regulations or instructions," to the newspaper. Mattimoe and Clark releases at 1. Similarly, The Review-Journal has submitted, in conjunction with its Appeal in Case No. TFA-0014, a release signed by Kristi Hodges, which authorizes OIG "to disclose all six correspondences that were sent to that Office by [Hodges] between October 2001 and January 2002, whether or not protected by the Privacy Act, Freedom of Information Act, or any Department of Energy regulations or instructions," to the newspaper. Hodges release at 1.

Although these releases appear to adequately address Yucca Mountain's and OIG's privacy concerns, we will remand these matters to those Offices so that they may consider the releases for the first time. On remand, Yucca Mountain and OIG should review the releases and determine what effect those documents have on those Office's initial determinations. [2]

C. Adequacy of the Search

The Review-Journal further alleges that a document obtained from "other sources" indicates "that there were several corrective action reports that Yucca Mountain should have provided in response to the original request for 'all records, notes, letters, invoices and memorandums . . . pertaining to a settlement between the Department of Energy's Yucca Mountain project coordinator, SAIC, and subcontractor Mactec, Inc. of Golden, Colorado.'" Review-Journal Appeal at 1. According to the newspaper, these reports are LVMO-98-C-002, -005, -006, -010 and -101.

[2] In view of our decision to remand this matter to OIG, we need not determine whether their issuance of a Glomar determination was appropriate in this case. However, we note that not all correspondence to that Office raises the types of privacy interests that such a determination is designed to protect.

Yucca Mountain has informed us that it did not consider these documents to be responsive to The Review-Journal's request, and therefore did not process them under the FOIA. However, Yucca Mountain has agreed that, on remand, it will review these documents for possible release to the newspaper. *See* memorandum of February 7, 2003 telephone conversation between Robert Palmer, OHA Staff Attorney, and Diane Quenell, Yucca Mountain. We therefore need not address The Review-Journal's contention that the documents should have been provided in response to the newspaper's original request. The newspaper may request our review of the Yucca Mountain action in the event any portion of those documents are withheld.

D. Recusal of the Authorizing Official

The Review-Journal's final contention is that the authorizing official who issued the determination letter in Case No. TFA-0007 should have recused himself because many of the documents sought by the newspaper involve that official. However, the Review-Journal does not cite any part of the FOIA or of the DOE regulations, or any decision of a federal court or of this Office, requiring such a result. As a practical matter, a recusal requirement of the DOE would often prove unworkable, since documents requested under the FOIA often involve, in one way or another, most if not all of the employees of the office from which the documents are sought. We therefore reject The Review-Journal's contention that the authorizing official should have recused himself.

E. Conclusion

For the reasons set forth above, we will remand Case Nos. TFA-0007 and TFA-0014 to Yucca Mountain and OIG, respectively. On remand, Yucca Mountain shall review the material that it withheld under Exemptions 4 and 5 (with the exception of the settlement agreement in *Mitchell v. Mactec*) under the guidelines set forth in section II.A of this Decision. Furthermore, Yucca Mountain should review corrective action reports LVMO-98-C-002, -005, -006, -010 and -101 for possible release to The Review-Journal under the FOIA. Finally, Yucca Mountain and OIG should review the releases submitted by the newspaper, make findings as to the effects of those releases on their original determinations, and issue revised determinations to The Review-Journal. Each new determination by Yucca Mountain and OIG is subject to being reviewed on appeal to this Office.

It Is Therefore Ordered That:

(1) The Appeals filed by The Las Vegas Review-Journal on December 4, 2002 (TFA-0007) and December 30, 2002 (TFA-0014) are hereby granted as set forth in paragraph (2) below.

(2) These cases are hereby remanded to the Office of Civilian Radioactive Waste Management and the Office of Inspector General, respectively, for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 5, 2003

February 13, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Burkhalter, Rayson & Associates

Date of Filing: December 17, 2002

Case Number: TFA-0008

On December 17, 2002, Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released several responsive documents in their entirety. However, OR withheld one responsive document under FOIA Exemption 3. This Appeal, if granted, would require OR to release that document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. Determination Letter at 1. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal) in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant submitted the present Appeal challenging OR's withholding determination.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 3 is at issue in the present case. Exemption 3 of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute [other than the FOIA

itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As articulated by the Supreme Court in *CIA v. Sims*, 471 U.S. 159, 167 (1985), application of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. *Id. See also Kelly, Anderson & Associates, Inc.,* Case No. VFA-0638, 28 DOE ¶ 80,137 (2001).

In its determination, OR relied upon the National Defense Authorization Act for Fiscal Year 1997. Public Law 104-201, Section 821. Section 821 prohibits the release of a proposal submitted in response to a competitive solicitation. *Id.* However, this requirement "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the [DOE] and the contractor that submitted the proposal." 10 U.S.C.A. § 2305. The Appellant correctly notes that the Proposal was in fact incorporated by reference into the contract between DOE and UT-Battelle. Contract No. DE-AC05-00OR22725 at Section H-15, Page 11 of 27 and Section I-71, Page 91 of 236. Accordingly, we find that the Proposal is not exempted from mandatory disclosure under the FOIA by the National Defense Authorization Act for Fiscal Year 1997.

Accordingly, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must either release the Proposal to the Appellant or provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof).

It Is Therefore Ordered That:

(1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0008, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 13, 2003

March 10, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Thomas G. Boyes

Date of Filing: December 20, 2002

Case Number: TFA-0010

Thomas G. Boyes filed this Appeal from a determination issued to him by the Golden Field Office (GFO) of the Department of Energy (DOE). The determination responded to a request for information Boyes filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In his Appeal, Boyes challenges GFO's decision to withhold portions of documents responsive to his request.

BACKGROUND

Boyes submitted a request for "a copy of the grant awarded to the General Electric Company ... [and] all relevant materials related to this contract in its entirety." GFO responded by releasing some responsive documents and withholding others. Among the withheld documents were:

- a 30-page technical application, Volume I, entitled "The Design and Development of a 100 MVA HTS Generator for Commercial Entry," dated May 15, 2001;

- a 22-page business application, Volume II of the same title and date; and

- a five-page DOE analysis of General Electric Company's cost and rate structure under this cooperative agreement. 1/

GFO withheld the requested document pursuant to Exemption 4 of the FOIA. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). 2/

ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions. 3/ 5 U.S.C. § 552(a)(3); 10 C.F.R. § 1004. These nine exemptions must be narrowly construed. *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). Thus, "an agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987).

As noted above, GFO withheld material under Exemption 4 of the FOIA. In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). GFO withheld some portions of the requested documents under the trade secrets prong of the Exemption, and the remaining portions

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1/ GFO did release the title pages of the technical application and business application.

2/ GFO also withheld a one-page draft letter from DOE to the General Electric Company pursuant to Exemption 5 of the FOIA. Exemption 5 includes within its scope intra-agency documents that contain predecisonal information. Boyes' Appeal does not challenge the withholding of the draft letter, so we will not consider in this Decision whether it is protected by Exemption 5.

3/ The FOIA also provides for three special law enforcement record exclusions, which are not relevant to this case.

under the confidential commercial or financial information prong. We will therefore consider GFO's determination under both prongs.

Trade Secrets

In the Determination Letter, GFO stated that portions of the requested material, apparently including the document entitled "The Design and Development of a 100 MVA HTS Generator for Commercial Entry," contained trade secrets. If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). Therefore, in order to ascertain whether this portion of the requested materials qualifies for protection under Exemption 4, we need only determine whether this portion contains one or more trade secrets.

In *Public Citizen*, the court defined a trade secret for Exemption 4 purposes as a "secret, commercially valuable plan, formula, process or device." *Public Citizen,* 704 F.2d at 1288. Clearly, a trade secret must be held in secrecy, *i.e.* kept from general knowledge. In his Appeal, however, Boyes contends that General Electric holds a patent for a device resembling the one described in the withheld documents. 4/ Boyes states that "the underlying patent contains a design for a ... superconducting generator ... which, based on what documents I have received and press releases I have read bears a very strong similarity to that of the funded prototype" in the withheld documents.

A patented device is not a secret, since any member of the public can obtain a copy of a patent, including technical details, from the Patent and Trademark Office. If, as Boyes claims, the withheld material is revealed in General Electric's patent documents, it cannot qualify for protection under the trade secret prong. We will therefore remand this matter to GFO for a determination on whether some or all of the material withheld under the trade secret prong qualifies for protection in light of the additional information submitted by Boyes. If

4/ Boyes references General Electric's patent for a superconducting generator, Patent No. 5,841,211, issued in October 2000.

any of the withheld material is contained in General Electric's patents, the material may not be deemed a trade secret and may not be withheld under the trade secret prong of Exemption 4.

Confidential Commercial and Financial Information

In addition to invoking the trade secret prong of Exemption 4, GFO also withheld some material under the confidential commercial and financial information prong. GFO states in the determination letter that the requested documents "contain protected commercial and financial information, including fringe benefit rates; indirect cost rates; labor, subcontract and material costs; proprietary technical information; and the bank account number used by the General Electric company for deposit of funds.... Information that could cause competitive harm, if released, includes data which reveal a company's labor costs ... and cost and equipment information.... The competitive harm rationale of the release of this type of data is directly applicable to the above-redacted data."

When an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This requirement allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that disclosure of commercial or financial information is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291;

Kleppe, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, GFO's conclusory statements do not meet the requirements set forth above. In order to meet the requirements, GFO must provide an explanation of the reasoning underlying its conclusion that release of this information could reasonably be expected to cause General Electric substantial competitive harm.

CONCLUSION

We will remand this Appeal to GFO for a more thorough examination and justification of its withholdings under both prongs of Exemption 4. On remand, GFO must either release the information it has withheld or issue a new determination letter providing a detailed justification showing that it has applied the Exemption 4 analysis set forth above and the results of this analysis.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas G. Boyes, Case No. TFA-0010, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Golden Field Office, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 2003

February 5, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Dr. Friedwardt Winterberg
Date of Filing:	December 23, 2002
Case Number:	TFA-0011

On December 23, 2002, Dr. Friedwardt Winterberg ("Winterberg" or "Dr. Winterberg") filed an Appeal from a determination issued to him on November 18, 2002, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Winterberg submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ perform an additional search.

I. Background

Dr. Winterberg is a professor of physics at the University of Nevada in Reno, Nevada. According to Dr. Winterberg, he earned his Ph.D. in Germany in 1955, and later moved to the United States at the invitation of the United States government, where he pursued a career in academia. Letter from Winterberg to Director, OHA (December 23, 2002) (Appeal). He responded to a solicitation from the National Nuclear Security Administration (NNSA) for pre-applications in the Office of Defense Programs' Stewardship Science Academic Alliances Program. NNSA evaluated each pre-application by determining its degree of responsiveness to the technical scope defined in the solicitation–this evaluation was not, however, a review of the merits of the application. Letter from Director, Office of Defense Science, NNSA to Winterberg (February 20, 2002). The Executive Committee responsible for the evaluation process considered Winterberg's pre-application and found that it did not fall within the technical scope of the solicitation. Consequently, the committee did not encourage Winterberg to submit a full application. The committee did, however, explain that its decision was not a determination on the merits of the final application and that Dr. Winterberg was free to submit a full application if he so desired. *Id.*

Winterberg then sent a FOIA request to DOE asking for " [a] copy of a report . . . made by a committee of three individuals from Livermore, Los Alamos, and Sandia. . . . I tried to get a copy of that report

through Senator Ensign . . . so far without success." 1/ Letter from Winterberg to DOE/HQ (August 19, 2002) (Request). NNSA's Office of Defense Science searched unsuccessfully for responsive documents. Letter from DOE/HQ to Winterberg (November 18, 2002) (Determination). In his Appeal, Dr. Winterberg argued that it was possible that the committee members rejected his application because he was a German scientist who came to this country after World War II. Appeal at 2. According to Winterberg, in 1985, Elie Wiesel, then Chairman of the President's Commission on the Holocaust, made a public statement that it was immoral for the federal government to hire Nazi scientists. Exhibit 1 to Appeal. Therefore, Winterberg argues, because Wiesel made the statement while he was an official of the United States government, Wiesel's statement became a government policy binding on the DOE. *Id.* In his Appeal, Winterberg asks OHA to direct NNSA to release the report and names of the committee members to him so that he can determine if they acted on Wiesel's "order." 2/ Appeal at 2.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

This office has analyzed the search conducted by NNSA, and we find that the search was adequate. We contacted DOE/HQ regarding the search, and they responded with an explanation, written by NNSA, of the pre-application process. Memorandum from Director, Office of Defense Science, NNSA, to DOE/HQ (September 18, 2002). The solicitation employed a two-part evaluation process for the selection of applications: (1) a pre-application evaluation stage and (2) a full application evaluation stage. During the pre-application evaluation stage, the Executive Committee did not complete reports on any evaluations. Instead, a copy of each pre-application was provided to a member of the committee. Each reviewer was tasked to review the technical scope of the pre-application and place it into one of three categories: "Yes"

1/ The Executive Committee was composed of employees of the Lawrence Livermore National Laboratory, the Los Alamos National Laboratory, and the Sandia National Laboratory.

2/ Winterberg did not request the names of each committee member in his FOIA request. We do not generally allow a requester to expand the scope of his or her request on appeal. *See Los Alamos Study Group*, 26 DOE ¶ 80,196 (1997); *National Security Archive,* 24 DOE ¶ 80,162 (1995). Dr. Winterberg may, however, request the names through a new FOIA request.

(responsive to the technical scope), "No" (not responsive), or "Uncertain." The reviewers did not use a formal response document, but instead advised their laboratory representatives of their decisions by any method convenient to them at the time (e.g., telephone, face-to-face conversation). Electronic Mail Message from Dr. James Van Fleet, NNSA to Brenda Washington, DOE/HQ (January 28, 2003). The laboratory representatives then reported to NNSA by electronic mail or telephone conversation. NNSA did not monitor this phase, but only recorded the categorization of each application. *Id*. Based on the results of this preliminary review, each applicant was sent a letter discouraging or encouraging them to submit a full application. Despite the results of the review, however, no applicant was prevented from submitting a full application. Dr. Winterberg's pre-application received two Nos and one Uncertain, and NNSA sent him a letter of discouragement. The letter of discouragement did contain a statement that the decision at this stage related to the pre-application only, and did not guarantee acceptance or rejection of a final application. Letter from NNSA to Winterberg (February 20, 2002). The letter also advised the applicant how to submit a full application.

We find NNSA's argument (that the committee did not complete written evaluation reports at the pre-application stage) to be reasonable. As described above, the pre-application evaluation phase was intended to be a fast, preliminary review and screening of the pre-applications. It was designed to provide pre-applicants some idea of how their pre-application matched the defined technical scope of the project, and was not intended to be a detailed review of the entire application. Given the informal nature of the process, we find it reasonable that no documents were created. Thus, we find that NNSA has conducted an adequate search for responsive material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dr. Friedwardt Winterberg on December 23, 2002, OHA Case Number TFA-0011, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the
District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 5, 2003

January 24, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Benjamin D. Grove

Date of Filing: December 24, 2002

Case Number: TFA-0012

On December 24, 2002, Benjamin D. Grove (the Appellant) filed an Appeal from a final determination issued on November 26, 2002, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on October 30, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination withheld a responsive document requested by the Appellant. This Appeal, if granted, would require ORD to release additional information to the Appellant.

I. BACKGROUND

On October 30, 2002 the Appellant filed a request for information with ORD seeking a 112 page document entitled "Identification of Aircraft Hazards" (the Report). Determination Letter at 1. On November 26, 2002, ORD issued a determination letter (the Determination Letter) withholding the Report in its entirety under FOIA Exemption 2. Determination Letter at 1. On December 24, 2002, the Appellant submitted the present Appeal in which he challenges ORD's withholding determination.

II. ANALYSIS

A. Applicability of Exemption 2

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 2 is at issue in the present case. Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency."

5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that: (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Report is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*). The Report at issue here is an analysis of the potential hazards posed by aircraft to a proposed nuclear waste repository at DOE's Yucca Mountain Site. The Report itself states that its intended use "is to provide inputs for further screening and analysis of the identified aircraft hazards." Identification of Aircraft Hazards at 1. Thus the Report addresses safety hazards which might affect DOE siting decisions. At this stage, this is an internal matter.

The Report meets the second prong of the *Crooker* test as well. The Appellant correctly notes that ORD has not cited a specific statute or regulation that would be circumvented if the Identification of Aircraft Hazards report were to be disclosed. Appeal at 1. However, it is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

The Report is a preliminary roadmap for assessment of the potential threats posed by aircraft to a proposed high level nuclear waste facility. Disclosure of the report has the potential to educate terrorists (and other individuals or entities seeking to harm the national security) about the proposed repository's vulnerabilities. Therefore, releasing the report could allow terrorists to circumvent DOE's efforts to comply with its mandate to provide a secure and safe repository for high level nuclear waste. Accordingly, we find that any information contained in the report that would educate individuals or other entities with interests adverse to the common defense and national security may be properly withheld under the "high two" prong of Exemption 2.

B. Duty to Segregate

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, ORD should have also reviewed the withheld material under the standard set forth in 5 U.S.C. § 552(b). However, there is no indication in the record that ORD has done so. Accordingly, we are remanding this portion of the Appeal to ORD. On remand, ORD must review the Identification of Aircraft Hazards report in order to determine whether any portions of it could be released without harming the interests protected by Exemption 2 (or any other applicable FOIA exemption). It must then issue a new determination letter describing this review and explaining its results.

C. Questions Directed to DOE

The Appeal contains ten questions which the Appellant would like the DOE to answer. This portion of the Appeal shall be denied. It is well settled that the FOIA does not require an agency to respond to questions posed as FOIA requests. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *DiViaio v. Kelly*, 571 F.2d 538, 542-43 (10th Cir. 1978); *Matthew Cherney, M.D.*, 27 DOE ¶ 80,239 (1999). Moreover, these ten questions were not part of the Appellant's request for information. It is well settled that an appellant may not use the appeal process to expand the scope of a FOIA request. *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991).

It Is Therefore Ordered That:

(1) The Appeal filed by Benjamin D. Grove, Case No. TFA-0012, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Repository Development to conduct a segregablity review in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 24, 2003

March 24, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alliance for Nuclear Accountability

Date of Filing: December 30, 2002

Case Number: TFA-0013

On December 30, 2002, the Government Accountability Project on behalf of the Alliance for Nuclear Accountability (Alliance) filed an Appeal from a determination issued to it on November 21, 2002, by the FOIA and Privacy Act Division (FOIA Division) of the Department of Energy (DOE). That determination concerned a request for information that Alliance submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the information withheld and to search for additional responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Alliance filed a FOIA request seeking "all documents produced as part of the 'top-to-bottom assessment of the Environmental Management program' initiated by Secretary Spencer Abraham as detailed in a memorandum dated May 14, 2001." *See* Appeal Letter at 1. On April 30, 2002, the FOIA Division issued a determination which stated that it conducted a search for responsive documents in the files of the Office of Environmental Management (EM) and identified various responsive documents, which were provided in an enclosed listing to Alliance. The FOIA Division provided Alliance with these responsive documents in their entirety. In addition, in its April 30, 2002 determination, the FOIA Division stated that it had located eight additional responsive documents, but that these documents were being reviewed by DOE to determine their releasability. The FOIA Division further stated that it would provide a response to Alliance when this review was completed.

On November 21, 2002, the FOIA Division issued a second determination, which stated that it had completed a review of the eight additional responsive documents and determined that they contain

information that is protected from disclosure under Exemption 5 of the FOIA. The FOIA Division provided these documents to Alliance with deletions. It stated that the withheld material is "pre-decisional" and "deliberative." *See* November 21, 2002 Determination Letter at 1.

On December 30, 2002, Alliance filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Alliance challenges the FOIA Division's determination, and asserts that material was improperly withheld under Exemption 5 and that DOE failed to perform an adequate search. *See* Appeal Letter at 3-5. For these reasons, Alliance requests that OHA direct the FOIA Division to release the requested information.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In withholding portions of documents from Alliance, the FOIA Division relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested documents at issue, we have concluded that the determination made by the FOIA Division in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Alliance consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use. The information requested in this case properly falls within the definition of "intra-agency memoranda" in the FOIA.

In addition, the comments, recommendations and opinions contained in the documents are clearly predecisional and deliberative. They were created by a subordinate of the Assistant Secretary of Environmental Management for consideration and do not represent a final agency position. Accordingly, we hold that the comments, recommendations and opinions withheld from the memorandum meet all the requirements for withholding material under the Exemption 5 deliberative process privilege. */

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Adequacy of Search

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Circ. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler*,

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*/ Alliance also asserts that the FOIA Division failed to include an adequate Vaughn index in its Determination Letter. *See* Appeal at 2. A Vaughn index is recognized in the context of FOIA as an index identifying each responsive document, the exemption under which it is being withheld and an explanation why that exemption is applicable, or in the alternative a similar document describing each withholding. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. *See, e.g., Missouri River Energy Services*, 27 DOE ¶ 80,165 (1998). At the administrative levels, agency determinations to deny release of documents need only provide a general description of the withheld material and a statement of the reason for withholding each document. The FOIA Division's Determination Letter provides a general description for withholding portions of documents pursuant to Exemption 5. It permits the appellant to formulate the basis for its appeal, and permits the appellate authority to understand the FOIA Division's assertion of the exemption. Therefore, we reject Alliance's request for a complete Vaughn Index.

Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995).

In the present case, Alliance asserts that "one document produced by DOE indicates that Idaho National Environmental and Engineering Laboratory (INEEL) staff contributed significantly to the Top-to-Bottom Review (TTBR) process, yet no additional documents were produced that pertain to the INEEL." Appeal at 5. Alliance further argues that "given the reference to INEEL in responsive documents, the fact that the INEEL is a major nuclear weapons and environment management site, and coupled with the fact the DOE also failed to produce any documents pertaining to the Paducah site - GAP and ANA assert that DOE has failed to perform an adequate search." *Id.* In response to Alliance's Appeal, we contacted the FOIA Division to determine the scope of the search. The FOIA Division referred us to an official in EM because EM conducted the initial search and is the office most likely to contain responsive material. *See* Record of Telephone Conversation Between Bill Levitan, EM and Kimberly Jenkins-Chapman, OHA (March 7, 2003). That official informed us that it conducted a search of EM's files and provided all the responsive documents that were located. EM informed us that the documents provided to Alliance were almost all briefing packages, including a briefing package produced by INEEL. It further asserts that INEEL staff were not part of the TTBR team, but mainly gave tours of the site. EM maintains that it located no additional responsive documents that pertain to INEEL. In addition, EM states that there were no documents located from Paducah because the TTBR team did not visit that site as part of their review.

Given the facts presented to us, we find that the FOIA Division and EM conducted an adequate search which was reasonably calculated to uncover documents responsive to Alliance's request. Accordingly, Alliance's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Alliance for Nuclear Accountability, OHA Case No. TFA-0013, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 24, 2003

April 8, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ms. Doris M. Harthun
Date of Filing:	January 7, 2003
Case Number:	TFA-0015

On January 7, 2003, Doris M. Harthun (Harthun) filed an Appeal from a determination issued to her in response to a request for documents concerning her husband, Earl W. Thurk, that Harthun submitted under the Freedom of Information Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on December 13, 2002, by the Richland Operations Office (Richland). This Appeal, if granted, would require that Richland perform an additional search.

I. Background

Ms. Harthun requested information regarding the employment, medical and radiation exposure records for her deceased husband, Earl W. Thurk. In her request, Ms. Harthun indicated that her husband worked for E.I. duPont de Nemours Company in the 1940's. Richland conducted a search by name and Social Security number for responsive material, but was unable to locate any employment or medical records for Earl W. Thurk. As a result, Richland denied the request, and Ms. Harthun filed this Appeal.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Richland to ascertain the scope of the search. When Richland received Ms. Harthun's request, it faxed the request, along with Mr. Thurk's death certificate, to the Hanford Environmental Health Foundation (HEHF), which maintains all occupational health records for the Hanford Site, including pre-employment physicals, exit exams, and first aid treatments. HEHF searched but found no responsive material. Richland informed Ms. Harthun that employment, medical and radiation exposure records of individuals whose employment terminated during the Hanford-DuPont contracting period (1943-1946) or who left Hanford and continued their employment with DuPont at the end of the contracting period were archived with DuPont and have subsequently been destroyed. *See* Determination Letter. Richland referred Ms. Harthun to the organization that maintains DuPont's historical records to obtain more detailed information. In addition, Richland indicated that it conducted a search of its own radiation exposure records by name and Social Security number, but located no responsive material. Based on the information above, we find that Richland has conducted a search reasonably calculated to uncover any records relating to Earl W. Thurk. Accordingly, this Appeal should de denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Doris M. Harthun on January 7, 2003, OHA Case No. TFA-0015, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 8, 2003

April 1, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citizen Action
Date of Filing:	January 15, 2003
Case Number:	TFA-0016

On January 15, 2003, Citizen Action filed an Appeal from a determination issued to it by the Department of Energy's Albuquerque Operations Office (AO) on December 5, 2002. In that determination, AO denied a request for a waiver of fees in connection with a FOIA request filed by Citizen Action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Instead, AO determined that Citizen Action qualified for a reduction in fees. In its Appeal, Citizen Action asks that we modify AO's determination and waive in full the fees associated with its request.

I. *Background*

In a submission dated August 29, 2002, Citizen Action filed a Request for Information under the Freedom of Information Act requesting from AO "documents with information regarding oxide nuclear reactor fuels shipped to Sandia National Laboratories." Letter from Carolyn Becknell, Freedom of Information Officer, AO, to Sue Dayton, Citizen Action (December 5, 2002) (Determination Letter) at 1. The organization believes that these documents would shed light on the nature of the known inventory of the Mixed Waste Landfill (MWL) located near Albuquerque, New Mexico, which was established in 1959 as a disposal area for radioactive and mixed wastes generated at research facilities of the DOE's Sandia National Laboratories. Letter from Sue Dayton, Citizen Action, to Steve Goering, Office of Hearings and Appeals (OHA) (February 25, 2003).

In its FOIA Request, Citizen Action also requested a fee waiver for the costs associated with processing its FOIA Request. In its December 5, 2002 determination letter, AO did not grant a fee waiver, but rather determined that Citizen Action "qualifies for a reduction of fees." Determination Letter at 2.

In its Appeal, Citizen Action states, "Previous requests for fee waivers regarding numerous FOIA requests filed by Citizen Action in 2001 have been granted by DOE. This is the first time we have been denied a fee waiver." Appeal at 1. The appellant contends that the "determination of a discounted fee waiver is both capricious and arbitrary, and inconsistent with the law regarding DOE's definition for a fee waiver granted to a special interest organization." *Id.* at 2.

II. *Analysis*

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(I); *see also* 10 C.F.R. § 1004.9(a). However, the Act provides:

> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test is on the requester. *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (*Larson*). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations.

> This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First, it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted.

10 C.F.R. § 1004.9(a)(8).

There is no dispute in the present case that the second requirement has been satisfied, i.e. that disclosure of the information requested would not be primarily in the commercial interest of Citizen Action. Regarding the first requirement, AO's determination letter states:

> Your organization has demonstrated and established a record of providing documents and information to the public, as well as being able to interpret and effectively convey same, concerning the department's stewardship and environmental compliance issues involving the Mixed Waste Landfill that SNL maintains. Therefore, I have determined that your organization qualifies for a reduction of fees.

Determination Letter at 2. Thus, there is no dispute that Citizen Action met the two requirements set forth above, and are thereby entitled to a "waiver or reduction of a FOIA fee . . ." 10 C.F.R. § 1004.9(a)(8). The question before us is whether the circumstances of the present case warrant a full waiver or merely a reduction in fees. First, we note that there is nothing in AO's determination letter that explains why AO opted to reduce fees to Citizen Action rather than completely waive fees. We

therefore contacted AO, which described the following factors it took into account in reaching its decision:

(1) the intent of Congress to recoup costs of processing FOIA requests;

(2) the total estimated cost of processing the request ($4,716.80);

(3) "the taxpayers have already substantially funded a review of this issue, by virtue of the DOE grant to this organization of $50,000 to review the waste issues at this same landfill;"

(4) "the DOE has previously provided substantial documentation to this organization free of charge;"

(5) "Citizen Action had not provided us with enough justification to show heightened public interest in the subject of the requested records. To give them the benefit of the doubt, however, we were aware of some media interest in the last year in the Mixed Waste Landfill, which we took into consideration as an indication of public interest in some aspects of this subject;"

(6) "We had no independent indication of public interest in this subject other than the limited press releases provided to the local newspaper. For example, our own Public Affairs Office as well as SNL Public Affairs had not received any telephone calls or other indications of interest from the public concerning this issue or as a result of the articles;"

(7) "Despite the fact that there is a great deal of material currently publicly available on this subject, no member of the public has ever gone to our Reading Room to request to see the substantial volume of publicly-available documents concerning the Mixed Waste Landfill;"

(8) "no additional FOIA requests have been received on the subject;"

(9) "the DOE has set up a public reading room with information concerning the landfill;"

(10) "Citizen Action had not provided enough justification to show that members of that organization had sufficient expertise in the subject matter to demonstrate that they could synthesize the data requested into something that an interested public would benefit from;"

(11) "Although we have provided free of charge a substantial number of documents to this group in the past concerning the Mixed Waste Landfill, nothing has actually

> been actively presented to the public in the way of education on this subject. Citizen Action has only 'referred' to documents on their website, www.radfreenm.com, saying that whoever wants a copy of the document should go to the Reading Room."

Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003); Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 16, 2003).

First, we reiterate that the DOE FOIA regulations set forth only two requirements that a requester must meet in order to qualify for a waiver or reduction of fees. The requester must establish that disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the Government, and that disclosure is not primarily in the commercial interest of the requester.

With that in mind, we note that the first eight reasons cited by AO do not address either of the two relevant requirements, and therefore do not provide a legitimate basis for granting or denying any form of relief from fees.[1] The last three reasons (numbers 9 through 11) appear to address the likelihood that the requested information is likely to contribute significantly to public understanding of the operations or activities of the Government, an issue that we address in more detail below.

Whether the Requested Information is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government

The regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., whether disclosure of the requested information is in the public interest[2] because it is likely to contribute significantly to public understanding of government operations or activities:

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[1] With reference to the first reason cited by AO, we agree that Congress generally intended for agencies to recoup the costs of processing FOIA requests. Nonetheless, Congress also expressly provided for the waiver or reduction of fees where the requester can meet the two requirements discussed above. Thus, citing Congress' intent merely begs the ultimate question, i.e., has the requester shown that it is entitled to an exception to the general requirement that requesters bear the costs associated with a request? Moreover, taking Congress' intent into account in no way helps us answer that question in a given case, since it provides no basis for distinguishing the merits of one fee waiver request from another.

[2] Several of the reasons cited by AO (specifically 5 through 8) refer to a lack of "public interest" in the subject matter of the request. However, this use of the term "public interest," i.e. a desire by the public to know more about a given subject, is not helpful in applying the different meaning of "public interest" in the DOE FOIA regulations, which ask whether release of the information would be "in the public interest," i.e. of benefit to the public. *Compare* Cambridge International Dictionary of English (Online Edition 2003) (definition of interest as "the feeling of having your attention held and your mind excited by something or of wanting to be involved with and to discover more about something") *with* Cambridge International Dictionary of English (Online Edition 2003) (definition of interest as "an advantage; something that will provide you with something or help you in some way"); *see* Freedom of Information Act Guide, http://www.usdoj.gov/oip/fees.htm#waiver (U.S. Department of Justice 2002) ("proper focus must be on the benefit to be derived by the public").

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Factor A

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is only appropriate where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-83 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994) (*Local 36*). In the present case, there appears to be no dispute that the subject of requested records, "oxide nuclear reactor fuels shipped to Sandia National Laboratories," a government-owned contractor-operated facility, concerns operations or activities of the government.

Factor B

The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) (*Seehuus*). As we stated in *Seehuus*, "[i]f the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate." AO has informed us (as noted in the ninth of AO's reasons listed above) that "the DOE has set up a public reading room with information concerning the [mixed waste] landfill." However, AO does not indicate that documents responsive to the specific request in this case (i.e., those concerning shipment of oxide nuclear reactor fuels to SNL) have been placed in a DOE public reading room. We therefore find that Citizen Action's request satisfies Factor B.

Factor C

This test requires us to consider whether the requested documents would contribute to the understanding of the subject by the public. *Ott*, 26 DOE at 80,780. To satisfy this factor, the

requester must have the ability and intention to disseminate this information to the public. *Id.; see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

In the present case, as set forth in the last two of AO's reasons listed above, AO appears to question both the ability and intention of Citizen Action to disseminate to the public the information it obtains. "Citizen Action had not provided enough justification to show that members of that organization had sufficient expertise in the subject matter to demonstrate that they could synthesize the data requested into something that an interested public would benefit from; . . ." Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003). "Although we have provided free of charge a substantial number of documents to this group in the past concerning the Mixed Waste Landfill, nothing has actually been actively presented to the public in the way of education on this subject. Citizen Action has only 'referred' to documents on their website, www.radfreenm.com, saying that whoever wants a copy of the document should go to the Reading Room." Id.

Regarding whether members of Citizen Action has sufficient expertise to synthesize information it receives, the director of the organization states, "Citizen Action has worked hard to convey technical information to the public regarding documents obtained under the FOIA. Our members are respected members of the community and include physicians, university professors, attorneys, [Albuquerque Public School] teachers, health care workers, and many others who support our activities." Letter from Sue Dayton, Citizen Action, to Steve Goering, OHA (February 25, 2003) at 1. Citizen Action also submitted to our office several letters in support of its fee waiver request. One of them states,

> I am one of the Technical Advisors to Citizen Action. I review and synthesize the data Citizen Action obtains. I have a PhD in high energy theoretical physics from the University of Michigan and have worked on radioactive waste issues since 1974. I probably have more experience on these issues than almost anyone presently working at Sandia.

Letter from Marvin Resnikoff, Radioactive Waste Management Associates, to Steve Goering, OHA (February 24, 2003) at 1. Another letter notes, "Citizen Action has among its active members several MDs (including a radiologist) as well as a professor of nuclear and chemical engineering. It has also demonstrated a willingness to hire outside experts to analyze data when needed." Letter from Steve Pilon, MD, to Steven Goering, OHA (February 24, 2003). To the extent AO has argued that Citizen Action lacks ability or expertise in the relevant subject matter, we reject that contention. We find the information submitted by Citizen Action and on its behalf sufficient to demonstrate that the organization has the expertise required to synthesize the information it receives in response to its FOIA request.

As far as the organization's intention to disseminate information to the public, Citizen Action disputes AO's contention that the group has only 'referred' to documents on its website. It directs our attention to a page on the site entitled "Freedom of Information Act Documents." This page (http://www.radfreenm.org/pages/whatwhen.htm) does not merely refer to documents obtained from

DOE, but marshals numerous quotations from those documents in support of its contention that there is a great deal of uncertainty regarding the inventory of the Mixed Waste Landfill. Certainly, Citizen Action does not have to demonstrate an ability or intention to disseminate raw documents in their entirety to the public in order to qualify for a fee waiver. Indeed, if the organization did only that, without distilling the information contained in the documents, we would question the group's ability to synthesize the information in a way that increases public understanding.

Moreover, in its submissions to our office, Citizen Action has demonstrated that it works to educate the public in many forums. According to its Director, the group's web site, which contains extensive information on the Mixed Waste Landfill, receives from 3,000 to 7,000 hits per month. Letter from Sue Dayton, Citizen Action, to Steve Goering, OHA (February 25, 2003) at 5. In addition,

> [l]ocal groups that have contacted Citizen Action requesting a presentation on the Mixed Waste Landfill include: Albuquerque Humanist Society; Forest Guardians; Green Party of New Mexico; Albuquerque Chapter/Sierra Club; South Valley Coalition of Neighborhood Associations; Highland High School; South Valley Charter School; Robert F. Kennedy Charter School; Gray Panthers; Veterans for Peace; and others.

Id. at 6. The letters of support submitted on behalf of Citizen Action confirm the group's public education efforts. *E.g.*, Letter from Arjun Makhijani, Ph.D., President, Institute for Energy and Environmental Research, to Steve Goering, OHA (February 21, 2003) at 1 ("Citizen Action has done an extraordinary job in bringing awareness to legacy waste issues such as the Mixed Waste Landfill"); Letter from Steve Pilon, MD, to Steve Goering, OHA (February 24, 2003) at 1 ("Citizen Action has held many well attended public meetings"); Letter from Professor H. Eric Nuttall, Ph.D., to Steve Goering, OHA ("Citizen Action has hosted a number of public meetings in conjunction with the state and disseminated information about this waste site to the citizens of New Mexico").

Also submitted by Citizen Action were copies of articles, from a number of local newspapers, either authored by the organization's leaders or in which one of them is quoted. Some of the articles submitted appear to be from smaller or alternative publications that may or may not reach a wide audience. But two of these newspapers, the Albuquerque Journal and Albuquerque Tribune, are the two newspapers with the largest circulation in the state of New Mexico. One demonstration of Citizen Action's ability to get its message in the major media comes in the form of an Albuquerque Journal editorial of December 29, 2002. This editorial argues in favor of granting Citizen Action a full fee waiver in the present case, and among other things states, "Whether you agree with Citizen Action or not - the Journal often has not - the group, which focuses on Sandia National Laboratories' Mixed Waste Landfill, makes a contribution to the public discourse." *Free Information Should Be Cheaper*, Albuquerque Journal, December 29, 2002, at B2.

Based on the above, we have no doubt that Citizen Action has the ability and intention to disseminate the information it obtains to the public, and therefore its request satisfies Factor C.

Factor D

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)); *see also Seehuus*.

One of the letters in support of Citizen Action's appeal states, "The public's understanding would be significantly improved with the requested information. [Citizen Action] is trying to better determine what is in the Mixed Waste Landfill (MWL), so that they can make informed judgments and proffer informed opinions before State agencies regarding the management and decommissioning of the MWL." Letter from Marvin Resnikoff, Radioactive Waste Management Associates, to Steve Goering, OHA (February 24, 2003) at 1-2. We agree. Whatever may ultimately be found in the documents requested, the likely effect of the disclosure to Citizen Action would be to enhance public understanding by determining with greater certainty the inventory of the MWL. See Letter from Carleton S. White, Ph.D., to Steve Goering, OHA (undated) ("Knowing that the questioned values are NOT in the MWL will definitely increase public understanding and evaluation of the potential threat, in any, posed by the MWL."). We therefore find that Citizen Action's fee waiver request meets Factor D.

III. *Conclusion*

After considering the bases cited by AO for not granting Citizen Action a full fee waiver, we find that a number of them (the first eight listed above) do not provide a legitimate basis for granting or denying either a waiver or reduction in fees. Although the remaining three reasons consider the appropriate issues, we do not believe that an analysis of those issues supports only a fee reduction, particularly in light of the information submitted on appeal by Citizen Action and on its behalf. We therefore conclude that Citizen Action should be granted a full fee waiver in this case. This does not mean that fee reduction, rather than waiver, is never appropriate. For example, we have approved a 75 percent reduction in fees where the disclosure of information requested was in the commercial interest of the requester, but where such disclosure would "primarily benefit the general public." *U.A. Plumbers and Pipefitter Local 36*, 24 DOE ¶ 80,148 at 80,622-23 (1994). However, this is not such a case.[3] Accordingly, we will grant the present appeal.

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[3] AO states that "Department of Justice attorneys we dealt with in [a prior case] suggested we use this approach for cases where we could not make a clear determination and referred us to the court case of McClellan Ecological Seepage Situation v. Carlucci." Electronic mail from Terry Apodaca, AO, to Steve Goering, OHA (January 24, 2003). In that case, a federal appeals court approved a 25% reduction "on a record consisting of conclusory statements of public interest, . . . and circumstances suggesting at least a partial motive of obtaining information to advance private lawsuits." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). This case is vastly different. We have much more than mere conclusory statements in

(continued...)

It Is Therefore Ordered That:

(1) The Appeal filed by the Citizen Action on January 15, 2003, is hereby granted as set forth in Paragraph (2) below.

(2) The fees assessed for complying with the August 29, 2002 Citizen Action FOIA Request shall be waived in full.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 1, 2003

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[3] (...continued)
support of the fee waiver request, and there is no contention that disclosure of the information in question would benefit any commercial interest of the requester.

April 4, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Lola Jean Poulston-Walthall
Date of Filing:	February 25, 2003
Case Number:	TFA-0017

On February 25, 2003, Lola Jean Poulston-Walthall (Walthall) filed an Appeal from a determination issued to her on February 3, 2003, by the Oak Ridge Operations Office of the Department of Energy (DOE/OR) in response to a request for documents that Walthall submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/OR perform an additional search for responsive material.

I. Background

On November 12, 2001, Walthall filed a FOIA request with DOE/OR for a copy of medical records, personnel security file, personnel records, OPM Background Investigation and radiation exposure records pertaining to her father, Estes Elmo Poulston, who died in 1968. *See* FOIA Request (November 21, 2001). According to Walthall, Mr. Poulston was employed at DOE/OR from 1944 to 1946 as an electrician. Letter from Walthall to Director, OHA (Appeal) (February 25, 2003). DOE/OR searched its files and located a copy of Mr. Poulston's employment card, which it sent to Walthall in a letter dated June 7, 2002. On February 3, 2003, DOE/OR informed Walthall that it could find no additional responsive information. As a result, Walthall filed this Appeal. In the Appeal, Walthall stated that during an accident that occurred while Mr. Poulston was employed at Oak Ridge, he and his co-workers had to wade into waist deep water, and shortly thereafter became ill. Appeal at 1. According to Walthall, her father spent several months in the hospital and never regained his health. *Id.* In her Appeal, Walthall asks OHA to direct DOE/OR to search again for additional information regarding her father.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

This office contacted DOE/OR for information regarding the search conducted in response to Walthall's request. DOE/OR informed us that the Oak Ridge facilities did not begin to retain and maintain dosimetry records (a measure of the amount of radiation absorbed by the body) and medical records on individuals until the early 1950's, well after Mr. Poulston had stopped working at Oak Ridge. Electronic Mail Message from Amy Rothrock, DOE/OR to Valerie Vance Adeyeye, OHA (February 28, 2003). Nonetheless, using identifiers for Mr. Poulston, DOE/OR conducted a search of the Oak Ridge Associated Universities (ORAU) Privacy Systems of Records DOE-71, DOE-72, and DOE-73 for recorded radiation accidents. 1/ DOE/OR also searched for any record of Mr. Poulston in the Radiation Registry or DTPA Registry. 2/ No responsive records were found in any of the systems of records. 3/ In addition, there were no medical records related to Mr. Poulston at any DOE/OR site. Electronic mail message from Amy Rothrock, DOE/OR to Valerie Vance Adeyeye, OHA (February 28, 2003).

1/ ORAU operated the Oak Ridge Institute for Nuclear Studies (ORINS) hospital for cancer treatment experiments on humans in the 1950's and possesses all medical and radiation exposure records relating to those patients. Electronic mail message from DOE/OR to Valerie Vance Adeyeye, OHA (March 31, 2003). ORAU is now called the Oak Ridge Institute for Science and Education, and holds the largest epidemiology records collections at the DOE for retrieving personnel, medical and radiation exposure data on current and former employees. *Id.*

2/ DTPA was a chelation agent used to medically treat radiation accident victims. Electronic mail message from DOE/OR to Valerie Vance Adeyeye, OHA (February 28, 2003).

3/ DOE/OR stated that if Walthall had provided information about the alleged accident in her original request, they could have expanded the search to include locations that could contain "general documents not retrievable by identifier but about the accident or similar accidents in the location [Poulston] worked in the timeframe [Poulston] worked . . . ." Electronic mail message from DOE/OR to Valerie Vance Adeyeye, OHA (February 28, 2003). We do not generally allow a requester to expand the scope of his or her request on appeal. *See Los Alamos Study Group*, 26 DOE ¶ 80,196 (1997); *National Security Archive*, 24 DOE ¶ 80,162 (1995). Walthall may, however, file a new FOIA request for information about the alleged accident, and provide DOE/OR with any information she may have.

Based on our analysis of the search as explained above, we find that DOE/OR has conducted an adequate search for responsive material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Lola Jean Poulston-Walthall on February 25, 2003, OHA Case Number TFA-0017, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 4, 2003

April 1, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Gladys L. Swann
Date of Filing:	February 26, 2003
Case Number:	TFA-0018

Gladys L. Swann (Swann) filed this Appeal from a determination issued to her by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE). The determination responded to a request for information Swann filed under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. In her Appeal, Swann challenges the adequacy of OR's search for documents responsive to her request.

I. Background

Swann submitted a FOIA request to OR for the medical records, chest x-rays, radiation exposure records and personnel security file of her deceased father, John A. Rowe. Rowe formerly worked for International Nickel Company (INCO) at an Ohio site that is not under OR's jurisdiction. OR responded with a Determination Letter stating that it had conducted a search of its files and found only one record that is responsive to Swann's request. Swann appealed this determination.

II. Analysis

The FOIA generally requires federal agencies to release material to the public upon request. Following an appropriate request, agencies must search their records for responsive documents. We have often stated that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where we believe the search conducted was inadequate. *E.g., Ashok K. Kaushal*, 27 DOE ¶ 80,189 (1999); *Hobart T. Bolin, Jr.*, 27 DOE ¶ 80,124 (1998).

In a case involving the adequacy of the agency's search, "the issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982). To determine whether an agency's search was adequate, we therefore examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In our review of Swann's Appeal, we contacted OR's FOIA Officer and reviewed the administrative record of Swann's request maintained by OR. The FOIA Officer provided the following description of the actions taken by OR in order to locate the information Swann requested:

> We conducted a search of the locations at Oak Ridge facilities and contractor sites where the records on INCO employees were likely to exist based on our experience in processing multiple requests for records on individuals who were employed at any Atomic Weapons Employer sites outside of Oak Ridge from the 1940's to the present. All Privacy Systems of Records were searched at the DOE Oak Ridge Records Holding Area, which contains records transferred from the Oak Ridge Associated Universities Centers for Epidemiology Research that were originally compiled for use in DOE-wide health studies on former workers and consist of records in the following systems: DOE Privacy Systems of Records DOE-5 personnel records of former contractor employees, DOE-33 Personnel Medical Records, DOE-35 Personnel Radiation Exposure Records, and DOE-43 Personnel Security Clearance Files. The Oak Ridge Office of Safeguards and Security was also searched for any personnel security file held separately in that office on Mr. Rowe.
>
> The only record we could locate on Mr. Rowe was a copy of his Personnel Security Clearance Assurance Index Card or "employment card" as we call it, since these cards list employment histories along with security clearance status information for the individual. Although we have these cards at Oak Ridge, we do not have additional personnel, medical or similar files on employees who did not work at facilities under Oak Ridge jurisdiction with the exception of copies of film badge reports for about 25 of the Atomic Weapons Employers that were generated by the New York Operations Office in the late 1940's through the mid 1950's and retained at Oak Ridge for a NIOSH health study. We conducted a search of those film badge files but did not find a file listing film badge readings on INCO employees. If such a file was in our possession, we would have done a page-by-page search for his name or other identifier and provided the relevant information if it existed.

March 20, 2003 E-mail from Amy Rothrock, FOIA Officer, Oak Ridge Operations Office to Steven L. Fine, OHA Staff Attorney.

III. Conclusion

After reviewing the description of the search conducted by OR and the administrative record, it is clear that OR conducted a search that was reasonably calculated to find the information requested by Swann. Moreover, we have no reason to believe that a further search would locate responsive records. We will therefore deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Gladys L. Swann, Case No. TFA-0018, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 1, 2003

April 4, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Newhouse News Service

Date of Filing: March 7, 2003

Case Number: TFA-0019

On March 7, 2003, Newhouse News Service (the Appellant) filed an Appeal from two final determinations that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on February 19, 2003, and March 2, 2003. In its determinations, BPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated January 2, 2003, the Appellant submitted a FOIA request to BPA for documents including "copies of any BPA audits, internal or external, that examine energy trading practices, including the agency's use of options or other derivatives." Request Letter dated January 2, 2003, from Tom Detzel, The Oregonian, Newhouse News Service, to Joseph Bennett, Office of General Counsel, BPA (Request Letter). On February 19, 2003, BPA responded that it had identified as responsive to the Appellant's request two internal audit reports, two external consultant reports, and sections of recent annual reports. Determination Letter dated February 19, 2003, from Annie A. Eissler, Freedom of Information Officer, BPA, to Tom Detzel (February 19, 2003 Determination Letter). The February 19, 2003 Determination Letter released the relevant portions of the annual reports and stated that a review of the external reports was not completed. *Id.* The Determination Letter withheld the internal audit reports under the deliberative process privilege pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). In the March 3, 2003 Determination Letter,

BPA released redacted portions of the external reports and withheld portions under Exemption 5. March 3, 2002 [sic] Determination Letter from Annie Eissler to Tom Detzel (March 3, 2003 Determination Letter).

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues that the internal audit reports could not be predecisional because no final decision could be pending given the dates of these audits, 1998 and 2002. Appeal Letter dated February 28, 2003, from Tom Detzel to Director, Office of Hearings and Appeals (OHA), DOE. In addition, the Appellant asserts that, even if the reports can be withheld under Exemption 5, the factual portions of the internal reports should have been segregated and released. *Id.* Further, the Appellant claims that the external consulting reports are factual in nature and should be released. *Id.*

II. ANALYSIS

Deliberative Process and Predecisional Documents

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both

predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications. Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Internal Reports

BPA has listed two documents–the internal reports--that it has withheld in their entirety because they contain information that is predecisional and part of the deliberative process. We have been provided with copies of these documents. We have reviewed these documents and believe that they were properly withheld under Exemption 5. They are almost entirely deliberative in nature. The factual information which is contained in these documents is so intertwined as to make segregation virtually impossible. Further, the factual information contained in these two documents was selected from a larger quantity of factual information so that the selection is part of the deliberative process. There reports were prepared by auditors who reviewed many facts but relied on only selected facts for their report. Also, in the two internal reports, there is only a limited amount of factual information because the authors of the reports assumed the recipient had a working knowledge of the programs audited. Further, release of the factual information would point to the policies that management was reviewing and would reveal the auditors' thought processes.

The External Reports

BPA further listed two documents where the deliberative portions were redacted and the factual information released to the Appellant. We have reviewed these two external reports as well and believe that the redaction was proper and all segregable factual information was released.

III. THE PUBLIC INTEREST

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records

available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. The Appellant argues that discretionary release would be in the public interest. Appeal Letter at 2. We disagree. In this case, no public interest would be served by release of the comments and opinions contained in the reports, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987); *Newhouse News Service*, 28 DOE ¶ 80,241 (2002).

IV. CONCLUSION

The information that BPA withheld was properly found to be exempt under the Exemption 5 deliberative process privilege. Therefore, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Newhouse News Service on March 7, 2003, Case No. TFA-0019, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 4, 2003

August 19, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	KCBS-TV
Date of Filing:	March 14, 2003
Case Number:	TFA-0021

On March 14, 2003, KCBS-TV (KCBS) filed an Appeal from a determination issued to them on February 13, 2003, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that KCBS submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ perform an additional search for responsive material.

I. Background

On June 10, 2002, KCBS filed a FOIA request with DOE/HQ for a copy of all documents regarding missing, unaccounted for, and/or stolen radioactive material, special nuclear material, irradiated material and/or spent fuel. Letter from KCBS to Director, Office of Hearings and Appeals (OHA) (March 26, 2003) (Appeal). KCBS requested a fee waiver because the material was not for commercial use, but rather for use in its mission of gathering and reporting the news. *Id*. DOE/HQ informed KCBS that it had forwarded its request to the Office of Security Affairs and that office had advised DOE/HQ that other DOE organizations were more reasonably expected to possess responsive material. Letter from DOE/HQ to KCBS-TV (February 13, 2003). DOE/HQ then re-assigned the request to those offices. *Id.* The Office of Health, Environment and Safety (DOE/EH) located responsive material, and sent that information to KCBS in its entirety and at no cost. *Id.* The National Nuclear Security Administration (NNSA) also searched its files, but found no responsive material. *Id.* In this Appeal, KCBS asks OHA to direct DOE/HQ to search again for additional information regarding missing radioactive material.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

This office first contacted KCBS to determine why they felt that the search conducted by NNSA was inadequate. KCBS admitted that they did not have any information indicating that other records existed. Memorandum of Telephone Conversation between Warren M. Gray, OHA, and Nicole Ullerich, KCBS (March 27, 2003). We then contacted DOE/HQ for information regarding the search conducted in response to KCBS' request. *See* Electronic Mail Message from Valerie Vance Adeyeye, OHA, to Joan Ogbazghi, DOE/HQ (May 30, 2003). DOE/HQ informed us that they had made inquiries to NNSA, DOE/EH, DOE's Oakland Operations Office (Oakland), DOE's Albuquerque Operations Office (DOE/AL) and the Office of Plutonium, Uranium and Special Materials Inventory (DOE/SO). *Id.*

DOE/HQ first assigned the request to DOE/SO. Electronic mail message from Joan Ogbazghi, DOE/HQ to Valerie Vance Adeyeye, OHA (June 16, 2003). DOE/SO asked that the requester provide a clear description of the subject matter of the request. *Id.* Upon receipt of an email from the requester, DOE/SO notified DOE/HQ that DOE/SO had no responsive records. *Id.* DOE/SO suggested that responsive material might be found at Stanford University, Los Alamos National Laboratory, NNSA, or DOE/EH. *Id.* NNSA conducted a search and on September 30, 2002, verified that no responsive records were located. *Id.* Oakland stated that, based on the description of the information sought, its office did not have any responsive documents and that there was no database of responsive material at Stanford or Lawrence Livermore National Laboratory (LLNL). *Id;* Electronic mail message from Roseann Pelzner, Oakland to Valerie Vance Adeyeye, OHA (July 2, 2003). DOE/EH located responsive material and forwarded the documents to DOE/HQ on November 20, 2002. Electronic mail message from Joan Ogbazghi, DOE/HQ to Valerie Vance Adeyeye, OHA (June 16, 2003). DOE/HQ sent the responsive material to the requester. DOE/AL reported that there was no database of responsive material at Los Alamos, but mentioned that "Mr. Newton" at DOE/HQ may have some responsive records. Electronic mail message from Terry Apodaca, DOE/AL to Valerie Vance Adeyeye, OHA (July 2, 2003). John Newton of NNSA found no responsive records. Electronic mail message from Joan Ogbazghi, DOE/HQ, to Valerie Vance Adeyeye, OHA (June 16, 2003).

Based on our analysis of the search as explained above, we find that DOE/HQ has conducted an adequate search for responsive material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by KCBS-TV on March 14, 2003, OHA Case Number TFA-0021, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 19, 2003

May 2, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Caroline C. Roberts
Date of Filing:	March 17, 2003
Case Number:	TFA-0022

On March 17, 2003, Caroline C. Roberts (Roberts) filed an Appeal from a determination issued to her on February 24, 2003, by the Office of Inspector General (IG) of the Department of Energy (DOE). That determination responded to a request for information she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 8, 2003, Roberts wrote to the FOIA/Privacy Act Division at DOE headquarters and requested various documents including copies of IG documents related to Computer One, Inc., Caroline C. Roberts, or contracts numbered 60-8024, AB-2485, AB-2486, and BD-0962 from 1995 through 2002. The FOIA/Privacy Act Division forwarded the request to the IG. The IG conducted a search of its files and located 19 responsive documents. On February 5, 2003, the IG notified Roberts in a determination letter that it was releasing one document in its entirety and making partial disclosure of the other documents. Material in the partially disclosed documents was withheld pursuant to FOIA Exemptions 6 and 7(C). In this Appeal, Roberts challenges the IG's withholding of the partially disclosed documents and the determination that a public interest outweighs the privacy interests at issue. */

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*/ In her Appeal, Roberts also contends that numerous documents requested in Paragraphs 1, 2, 3, and 5 (continued...)

II. Analysis

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We find that the withheld documents meet the threshold test of Exemption 6 as they are "similar files," the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. App. §§ 2(1)-(2), 4(a)(1), (3)-(4), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). *See Burlin McKinney*, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C)

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*/ (...continued)
of her request were not identified in DOE's determination Letter. The IG has informed us that the documents requested in Paragraphs 1, 2, 3 and 5 of Roberts' request were not IG documents but rather documents possessed by Sandia National Laboratory (SNL). *See* Record of Telephone Conversation between Ruby Isla, Attorney, IG and Kimberly Jenkins-Chapman, Attorney, Office of Hearings and Appeals (April 23, 2003). Those portions of Appellant's request were referred to SNL for response.

standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3 (Exemption 6); *Stone v. FBI*, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., David Ridenour*, 27 DOE ¶ 80,143 (1998); *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *K.D. Moseley*, 22 DOE ¶ 80,124 (1992). Since, as discussed below, the responsive documents that were withheld pursuant to Exemptions 6 and 7 (C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

1. Privacy Interest

In its determination, the IG stated that the partially withheld documents contain names and information that would tend to disclose the identity of certain individuals involved in IG enforcement matters, which in this case include subjects, witnesses, sources of information, and other individuals. According to the IG, these individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 1.

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *See Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"); *Safecard Services, Inc., v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*); *Blumberg, Seng, Ikeda & Albers*, 25 DOE ¶ 80,124 at 80,563 (1995); *James Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991). Therefore, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." *See, e.g., Safecard*, 926 F.2d at 1205. In her Appeal, Roberts did not offer any explanation of why she believes release of the material would be in the public interest. In fact, she did not address this issue at all other than stating

that the public interest determination made by the IG is "erroneous." Appeal at 1. Therefore, we find that there is no public interest in the disclosure of the documents at issue.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard*, 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Roberts has not provided any information about the existence of a public interest in the disclosure of the withheld information. After a thorough examination, we found no public interest in the withheld material. In the absence of any public interest to weigh against the real and identifiable privacy interest, the privacy interest must prevail.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Our review of the documents found that the IG properly withheld portions of the documents at issue in this case.

It Is Therefore Ordered That:

(1) The Appeal filed by Caroline C. Roberts on March 17, 2003, OHA Case No. TFA-0022, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 2, 2003

April 25, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Caroline C. Roberts
Date of Filing:	March 17, 2003
Case Number:	TFA-0023

On March 17, 2003 the Office of Hearings and Appeals (OHA) received an Appeal that Caroline C. Roberts filed from a determination issued to her by the Office of Public Affairs at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "Albuquerque"). Albuquerque issued its determination in response to a request for information under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of certain documents to Ms. Roberts.

I. Background

In her request, Ms. Roberts sought access to all documents relating to Computer One, Inc., to the requester herself, or to any one of five specified contracts. In its response to this request, Albuquerque stated that no responsive documents could be located in DOE files, but that many of the records requested "are in the possession and control of the Sandia Corporation, and are therefore not 'agency records' subject to the provisions of the FOIA." Determination Letter at 1. In its Appeal, Ms. Roberts contests Albuquerque's finding that the documents in question are not subject to the FOIA. Specifically, she contends that the documents "were in the possession of the Department of Energy and for that reason, they must be produced." Appeal at 1.

II. Analysis

The FOIA generally provides public access to federal agency records, except to the extent that such records, or portions of them, are protected from disclosure by one or more of the Act's exemptions. The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (i) were created or obtained by an agency, and (ii) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or

other establishment in the executive branch..., or any independent regulatory agency." 5 U.S.C. § 552(f).

Under these criteria, the documents sought by Ms. Roberts clearly are not agency records. They are procurement and legal records maintained by Sandia Corporation (Sandia), and were generated by that company or its contractors. On a number of occasions, we have addressed the issue of whether Sandia is an "agency" for purposes of the FOIA. We have consistently held that it is not. *See, e.g., Helen Ruth Sutton-Pank,* 25 DOE ¶ 80,178 (1996). Ms. Roberts has not convinced us that this holding is in error. Sandia is a privately owned and operated entity, and is not an "agency" for FOIA purposes.

Moreover, contrary to Ms. Roberts' assertion, we have been informed that the records in question are not now, and were not at the time of the request, in the possession of the DOE. *See* memorandum of April 15, 2003 telephone conversation between Robert Palmer, OHA staff attorney, and Carolyn Becknell, Albuquerque. Simply put, the record in this matter indicates that the requested documents were neither created nor obtained by a government agency, and therefore do not satisfy the first prong of the *Tax Analysts* test. Albuquerque correctly concluded that the documents are not agency records subject to the FOIA.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). The contract between Sandia and the DOE describes as contractor-owned records

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> (3) Records relating to any procurement action by the contractor, except for records that under 48 C.F.R. (DEAR) 970.5204-9 . . . are described as the property of the government; [*] and
>
> (4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges . . . .

We conclude that under this agreement, Sandia's legal and procurement files are the property of Sandia, and are not subject to release under either the FOIA or the agency records regulation.

Ms. Roberts contends, however, that the agreement between the DOE and Sandia "cannot be used as a defense to the production of the documents simply because the agreement defines those records as belonging to Sandia." Appeal at 1. We believe that this argument reflects a misunderstanding of

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[*] We have also examined 48 C.F.R. 970.5204-9, and we conclude that the documents requested by Ms. Roberts are not described as government property in that regulatory provision.

the effect of 10 C.F.R. § 1004.3(e)(1). Contrary to Ms. Roberts' argument, this regulatory provision expands the scope of documents that are subject to disclosure. Under the *Tax Analysts* test, "agency records" must (i) have been originated or obtained by an agency, and (ii) be under an agency's control at the time of the FOIA request. However, pursuant to 10 C.F.R. § 1004.3(e)(1), contractor records that do not meet these criteria are still subject to disclosure as long as the contract between the contractor and the DOE provides that the records are government property. We therefore reject Ms. Roberts' argument concerning Albuquerque's application of that regulation.

III. Conclusion

Albuquerque correctly determined that the documents at issue are not agency records, and are not subject to disclosure under the FOIA or under 10 C.F.R. § 1004.3(e)(1). We will therefore deny Ms. Roberts' Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Caroline C. Roberts on March 17, 2003 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2003

May 9, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: March 18, 2003

Case Number: TFA-0024

On March 18, 2003, the Government Accountability Project (GAP) filed an Appeal from a determination issued to it by the Department of Energy's Richland Operations Office (DOE/RL). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

GAP filed a request for information related to vapor exposures at the Hanford Site tank farms since 1992. Letter from DOE/RL to GAP (February 14, 2003) (Determination Letter). 1/ As part of that request, GAP asked for all employee medical records maintained by the Hanford Environmental Health Foundation (HEHF), dated from January 1992 to the present, related to vapor exposures. *Id.* DOE/RL located medical records for that time period, but withheld the documents in their entirety pursuant to Exemption 6, stating that "any nonexempt material contained in the medical records are so inextricably intertwined with the exempt material that disclosure of it would render the documents meaningless." 2/ *Id.* DOE/RL also determined that the public interest in the documents did not outweigh the privacy interest of the

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1/ The tank farms contain waste from the Hanford site.

2/ The Determination was a partial response to GAP's request. DOE/RL continues to review ten boxes of documents in order to determine if the documents are exempt from disclosure under the FOIA. Determination at 1-2.

individuals whose records would be disclosed. *Id.* On March 18, 2003, GAP filed this Appeal, arguing that DOE/RL should have redacted any identifiable information. Letter from GAP to Director, OHA (March 18, 2003). GAP asks that OHA order DOE/RL to either release the withheld material or, in the alternative, (1) to explain in "reasonably specific detail" how release of the documents could violate a privacy interest if all identifying information is redacted; and (2) to explain why the responsive material is so inextricably intertwined with non-exempt material that it cannot be segregated. *Id.*

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We find that the withheld material passes the threshold test because it is contained in medical files. However, in order to determine whether disclosure of the material would constitute a clearly unwarranted invasion of personal privacy, we must balance the public interest in disclosure against any privacy interest. *Citizens for Environmental Quality v. Department of Agriculture*, 602 F. Supp. 534, 538 (D.D.C. 1984) (*Citizens*).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

DOE/RL determined that "[i]f the information . . . were released, it could lead to an invasion of privacy by subjecting the individuals to unwanted communications, or other substantial privacy invasions by interested parties." Determination at 1. DOE/RL further stated that "the public interest in the documents does not outweigh the individual's privacy interests." *Id.* DOE/RL made no attempt to redact any identifying information. Instead, it withheld the documents in their entirety, alleging that (1) the material, if released, could be linked to a particular individual; (2) the non-exempt material in the documents is

inextricably intertwined with the exempt material; and (3) disclosure of the responsive material would have a negative impact on the operations of the government because of the large volume of potentially responsive material. Determination Letter; Electronic Mail Message from Dorothy Riehle, DOE/RL, to Valerie Vance Adeyeye, OHA (April 1, 2003).

B. Privacy Interest

In order to establish the existence of an invasion of privacy caused by the disclosure of the withheld material, DOE/RL must demonstrate that the public could link the medical records requested to specific individuals. In order to support its arguments, DOE/RL alleges that "not many" employees have reported medical problems due to vapor exposures. Electronic Mail Message from Dorothy Riehle, DOE/RL to Valerie Vance Adeyeye, OHA (April 22, 2003). This statement implies that because of the limited number of employees who have reported medical conditions resulting from vapor exposure, the general public can accurately associate the identity of an individual with a particular medical record.

We find that DOE/RL's argument falls short of the standard of proof needed to establish an invasion of privacy. "An increased likelihood of speculation as to the subject . . . is insufficient to invoke the exception. Only the likelihood of *actual identification* justifies withholding the requested documents under exemption 6." *Citizens*, 602 F. Supp. at 538 (citing *Arieff v. Department of the Navy*, 712, F.2d 1462, 1468 (D.C. Cir. 1983) (*Arieff*)) (*emphasis added*). *Accord Cruscino v. Federal Bureau of Prisons*, 1995 WL 444406 (D.D.C.) (stating that the information requested must be identifiable to a specific individual); *Janice Curry*, 27 DOE ¶ 80,116 (1998) (stating that information that identifies a specific individual can be protected under Exemption 6). In *Citizens*, the agency withheld the medical records of one Forest Service employee who had been sprayed with herbicide, explaining that some residents of the surrounding small town "could logically deduce the individual's identity." *Citizens*, 602 F. Supp. at 539. However the Court rejected this argument, even though only one employee (out of a small workforce) had been tested. *Id.* at 536. The Court found that the responsive material was not exempt under Exemption 6 because the agency was unable to prove that the public could link the responsive material to a particular individual. *Id.* at 538. *See also Arieff*, 712 F.2d at 1468. DOE/RL has not demonstrated how, if it were to redact all identifying information, the public could match an employee to his or her medical record. As a result, we find that the release of the responsive material, *with all identifying information removed*, does not constitute a clearly unwarranted invasion of personal privacy under Exemption 6. 3/

3/ We will not address the issue of the public interest in disclosure (the second and third steps of the three-step analysis) because we have determined that a significant privacy interest would not be invaded by the disclosure of the properly redacted responsive material (i.e., after removal of all identifying information).

C. Segregable Information

We have previously stated that "the fact that some material in a record meets the criteria for withholding . . . does not necessarily mean that the record may be withheld in its entirety." *Mitchell G. Brodsk*, 28 DOE ¶ 80,217 (2002). The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). This office reviewed a sample of the responsive material, and we conclude that the records contain non-exempt information that can be segregated. We further find that this material is not so inextricably intertwined with the non-exempt material as to make a redacted document meaningless. Accordingly, we find that DOE/RL should release the segregable, non-exempt portions of the responsive material to GAP.

It Is Therefore Ordered That:

(1) The Appeal filed by Government Accountability Project on March 18, 2003, OHA Case No. TFA-0024, is hereby granted as stated in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Richland Operations Office, which shall issue a new determination in accordance with the guidance set forth above in the Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2003

April 29, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Judicial Watch, Inc.

Date of Filing: March 18, 2003

Case Number: TFA-0025

On March 18, 2003, Judicial Watch, Inc. (the Appellant), filed an Appeal from a final determination that the Freedom of Information / Privacy Act Group (FOI / PA) of the Department of Energy (DOE) issued on February 5, 2003. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, FOI / PA would be required to conduct a further search for responsive documents.

Background

On August 1, 2000, the Appellant submitted a FOIA request for all documents that refer to

> Agreements(s), contracts(s), concession(s), compensation(s), loan(s), guarantee(s), assistance, cooperation, consideration, lease(s), transfer(s), sale(s), aid, support, inducement(s), influence, reward(s), stimulus(i), solicitation(s), benefit(s), gift(s), gratuity(ies), remuneration, and / or promise(s), made or entered into since September 11, 2001, with the governments of:

Egypt	Israel	Saudi Arabia	Jordan
Qatar	Bahrain	Yemen	Oman
Iran	Turkey	Lebanon	Libya
Sudan	Djibouti	Somalia	Ethiopia
UAE	Kuwait	Cyprus	North Korea
South Korea			

> in exchange for support, cooperation and / or consideration for the "War on Terror," to include but not be limited to the liberation of Afghanistan and the hunt for Taliban and Al Qaeda, and / or the Bush administration's stated policy goal of the disarmament of Iraq in accordance with the United Nations resolutions.

Request Letter dated January 6, 2003, to Abel Lopez, FOIA / PA Division, DOE, from Christopher J. Farrell, Judicial Watch, Inc. On February 5, 2003, FOI / PA responded that the search of the files of the Office of Energy Assurance, the Office of Policy and International Affairs, and the National Nuclear Security Administration (NNSA) yielded no responsive documents. Determination Letter dated February 5, 2003, from Abel Lopez, FOI / PA, DOE, to Christopher Farrell, Judicial Watch, Inc. A search of the files of the Office of the Secretary had not been completed at the time of the determination. *Id.*

On March 18, 2003, the Appellant appealed that determination to our Office. Appeal Letter dated March 17, 2003, from Christopher J. Farrell, Judicial Watch, Inc., to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant argues that because DOE is at the center of national and international energy policies used by the federal government, it is likely that documents responsive to the request exist. *Id.* The Appellant cites an article in the *New York Times* which stated that "The United States, seeking to ensure Turkish military cooperation in any war against Iraq, is offering at least $4 billion to compensate Turkey for economic damage it might suffer as a result of playing an active role in an American-led coalition." *Id.* at 1-2.

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We have contacted FOI / PA and the respective offices searched in response to the Appellant's request to determine what type of search was conducted. Both the Office of Energy Assurance and NNSA indicated that they primarily performed a hand search of the files which would contain possibly responsive documents. Neither office was able to find anything responsive. The Office of Energy Assurance indicated that the files searched contained a small amount of documents, therefore, it would not be possible to overlook something responsive to the request. NNSA indicated that a majority of the files were searched by hand, but a computerized search of electronic mail message files was also conducted. No responsive documents were found by either office. Based on the search that the Office of Energy Assurance and NNSA performed, we are convinced that both

these offices followed procedures which were reasonably calculated to uncover the material sought by the Appellant in its request. Accordingly, the Appeal should be denied in respect to these two offices.

The Office of Policy and International Affairs indicated "the subject matter and information requested does not have no [sic] Office of Policy and International Affairs (PI) involvement. A file search was not conducted due to no PI involvement or concern so, therefore, there are no files to be searched for the information requested." Electronic Mail Message dated April 23, 2003, from Edith Horne, Office of Policy and International Affairs, DOE, to Janet R. H. Fishman, Attorney-Examiner, OHA, DOE. Therefore, it is apparent the Office of Policy and International Affairs did not conduct a search. It is difficult for OHA to understand how this office could claim it has nothing responsive without conducting a search when the request asks for documents relating to contacts between the federal government and a number of other countries. It seems to us that the Office of Policy and *International* Affairs would have at least some peripheral involvement with countries listed in the request and, therefore, could have responsive documents. To make the statement that it has nothing responsive without actually checking its files or databases is insufficient to satisfy the FOIA in the absence of a more complete explanation. Therefore, the Appeal will be remanded to FOI/PA to direct the Office of Policy and International Affairs either to search its files for responsive documents or to provide a detailed explanation why the Office could not possibly have any responsive documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Judicial Watch, Inc., on March 18, 2003, Case No. TFA-0025, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information and Privacy Act Group of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2003

April 30, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Bryan Cave
Date of Filing:	March 18, 2003
Case Number:	TFA-0026

On August 18, 2003, the law firm of Bryan Cave LLP (Bryan Cave), on behalf of itself and four of its clients, filed Appeals from a determination that the Office of the Inspector General (OIG) of the Department of Energy (DOE) issued to them. 1/ The determinations responded to essentially identical requests for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determinations, OIG released redacted versions of three documents to Bryan Cave and its clients. This Appeal, if granted, would require the DOE to release the remainder of the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request, Bryan Cave wrote the Department of Energy and requested "a copy of the Inspector General report I02-IG001 dated September 13, 2002, regarding the Couriers." *See* Letter from Herbert Richardson, Principal Inspector General, to Daniel C. Schwartz, Bryan Cave LLP (February 12, 2003) (Determination Letter). In its Determination Letter, OIG identified four responsive documents relevant to Bryan Cave's request. One document (Document 3) was forwarded to the National Nuclear Security Agency (NNSA) in order that it issue a determination to Bryan Cave

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1/ Because the FOIA requests and determinations were essentially the same for Bryan Cave, FOIA Request No. FY2002-00511, and its clients, Thomas Worthington, FOIA Request No. FY2003-00063, Steven Gray, FOIA Request No. FY2003-00062, Marvin Middlestat, FOIA Request No. FY2003-00048, and John Watts, FOIA Request No. FY2003-00003, we have consolidated the Appeals into one Appeal for consideration.

concerning that document. 2/ OIG released redacted versions of the other documents: A three-page September 13, 2002 Memorandum from Gregory H. Freidman, DOE Inspector General, to the Deputy Administrator for Defense Programs, NNSA (Document 1); a 20-page Special Inquiry Report, No. 102IG001 (Document 2); and a one page document entitled "List of Key Personnel" (Document 4). 3/ OIG withheld portions of Document 1 pursuant to Exemption 2 of the FOIA. Portions of Documents 2 and 4 were withheld pursuant to Exemptions 2, 6 and 7(C). Bryan Cave appeals the OIG's withholding of portions of Documents 1 and 2. 4/

II. Analysis

A. Document 1

Document 1 is a memorandum from the DOE Inspector General to the Deputy Administrator for Defense Programs, NNSA, transmitting OIG's Special Inquiry Report No. 102IG001 (Document 2). This three page memo generally describes Document 2. Document 2 is an OIG inquiry concerning certain alleged supervisory actions taken against DOE employees who raised issues and concerns regarding a DOE security function. All of the redacted information in Document 1 was withheld pursuant to Exemption 2, although the determination does not contain an explanation of how Exemption 2 applies to the withheld material.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (*en banc*) (*Crooker*).

The issue before us regarding Document 1 is whether the "high two" exemption applies. We have been informed by OIG that Documents 1 and 2 were created for DOE internal use only. *See* Memorandum of Conversation between Jacqueline Becker, OIG, and Richard Cronin, OHA (March

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2/ This document is Appendix A to Document 2.

3/ This document is Appendix B to Document 2.

4/ Bryan Cave does not seek to appeal the OIG determination regarding Document 4 nor does it seek the specific names of individuals listed in Documents 1 and 2.

17, 2003). Additionally, Document 1 references the fact that Document 2 was created so that NNSA officials could consider the need for administrative action concerning the incident described in Document 2. *See* Document 1 at 2. Consequently we find that the first prong of the *Crooker* test for "high two" protection has been met. With regard to the second prong, it appears the portion of information that specifically details potential issues raised by DOE employees concerning security functions is of a type that, if released, could materially assist an adversary who sought to obtain special nuclear materials. We find that release of this information would significantly risk circumvention of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, which restricts the possession of special nuclear materials. A second category of information that was withheld consists mainly of general DOE job position titles, generic DOE security functions, and DOE organizations that are connected with certain DOE protective functions. It is unclear to us how release of this information would *significantly risk* circumvention of an agency regulation or statute. We will therefore remand this matter to OIG. On remand, OIG should issue another determination letter that (i) explains in more detail how release of the second category of information would significantly risk circumvention of an agency regulation or statute, (ii) withholds the information pursuant to another FOIA exemption, or (iii) releases the information.

B. Document 2

Document 2 is the OIG's Special Inquiry Report No. 102IG001. Portions of Document 2 were withheld pursuant to Exemptions, 2, 6 and 7(C).

With regard to the material in Document 2 that was withheld pursuant to Exemption 2, this material consists essentially of the same material that was withheld in Document 1. For the reasons stated above we find that some of the information, which describes the DOE employees' issues and concerns, was properly withheld pursuant to Exemption 2. The remainder of the material withheld (almost identical to the second category of material described above) does not appear to be of a type that, if released, would significantly risk circumvention of an agency regulation or statute. On remand, OIG shall explain in more detail how release of the remaining information would significantly risk circumvention of an agency regulation or statute, withhold the information pursuant to another FOIA exemption, or release the information.

The remainder of the information, such as names of individuals, specific job titles and the DOE organizations where the employees were employed, was withheld pursuant to Exemptions 6 and 7(C). Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976) (for Exemption 6 purposes threat to privacy must be real and not speculative); *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 2-3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3; *Stone v. FBI*, 727 F. Supp. 662, 663-64 (D.D.C. 1990) .

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., K.D. Moseley*, 22 DOE ¶ 80,124 (1992). A document compiled for law enforcement purposes may be protected from disclosure if it satisfies Exemption 7(C)'s "reasonableness" standard. Conversely, a document not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that release constitute a clearly unwarranted invasion of personal privacy. 5/

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. *See, e.g., Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 80 (D.C. Cir. 1974) (*Rural Housing Alliance*). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Housing Alliance*, 498 F.2d at 81 & n.46 (D.C. Cir. 1974). We have consistently found that the OIG compiles information for law enforcement purposes within the meaning of Exemption 7. *See Richard Levernier*, 26 DOE ¶ 80,182 (1997). The OIG informed us that it accumulated the information contained in Document 2 as part of an investigation as to whether potential criminal activity had occurred concerning an incident involving the supervision of a DOE national security function. Bryan Cave argues that Document 2 itself was not written until after the Department of Justice declined to conduct criminal proceedings. Thus, it maintains Document 2 could not have been created for law enforcement purposes. We must however reject Bryan Cave's argument. Assuming arguendo that the *document* was not created for law enforcement purposes it is clear from Document 1 that the *information* contained in Document 2 was compiled to determine if criminal violations had occurred. Consequently, the information meets the threshold law enforcement test for

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5/ Because we will analyze OIG's withholdings pursuant to Exemption 7(C), we need not consider Bryan Cave's specific Exemption 6 arguments.

application of Exemption 7(C). *See* Document 1 at 1; Memorandum of telephone conversation between Jacqueline Becker, OIG, and Richard Cronin, OHA (April 7, 2003). *See Abramson v. FBI*, 456 U.S. 615, 631-32 (1982) ("[w]e hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirement for Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law enforcement purpose.")

Next we must determine if the release of the information withheld under Exemption 7(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is widely recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990). Thus, there is a very strong privacy interest with regard to the identity of individuals named in Document 2. This privacy interest must be balanced with the public interest in release of the information. Bryan Cave argues that Documents 1 and 2 are of great public interest given the subject matter concerning an important DOE security function. Further, Bryan Cave contends that release of the identifying information referenced in Documents 1 and 2 is vital to evaluate DOE's response to issues raised by its employees and to substantiate allegations of wrongdoing. Despite these arguments, we believe that there is only a limited public interest in releasing information concerning identities of the individuals concerned. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (public interest to be considered is that which "shed[s] light on an agency's performance of its statutory duty"). Given the strong privacy interest present here, balanced against a limited public interest, we find that release of almost all the information withheld pursuant to Exemption 7(C) would reasonably be expected to constitute an unwarranted invasion of personal privacy.

While we find that the vast majority of information in Document 2 was properly withheld pursuant to Exemptions 6 and 7(C), some of the material can be segregated and released. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Several portions of material withheld from Document 2 pursuant to Exemptions 2, 6 and 7(C) contain segregable material. Specifically, on page 10, the second sentence of the first full paragraph should be released except for the portions of the sentence that identifies the identity of the author of certain written notes. The text block below this paragraph (a portion of the notes that were originally withheld in its entirety) should also be released except for the portions that identify specific names and the portion of the second sentence of the first paragraph of the text block that identifies specific potential issues that were raised by DOE employees. On page 12 of Document 2 the text of the two emails should be segregated and released except for the names of individuals. Footnote 5 should also be released except for the types of information described above. In addition, throughout the document, some of the withheld material consists of pronouns. These pronouns are located on pages 4, 5, 8-12, 14-16. These do not appear to be withholdable under Exceptions 2, 6 and 7(C). On remand OIG should release this segregable material or withhold it pursuant to another exemption.

Bryan Cave argues that, Exemption 7(C) notwithstanding, all material referring to its clients must be released. We believe that Bryan Cave is partially correct in that Exemption 7(C)'s focus is to

protect third parties from an invasion of their privacy. There does not appear to be an invasion of privacy if the requester is provided the portion of an identified document that references the name of the requestor. Consequently, to the extent that any of the appellants' names (listed in footnote 1) are contained in Document 1 or 2, the name should be released but only to that particular requester. This may entail providing separate redacted versions of Documents 1 and 2 to each of the appellants.

Bryan Cave's other arguments concerning the inapplicability of Exemption 2, 6 and 7(C) are unavailing. With regard to the material withheld pursuant to Exemption 2, Bryan Cave argues that the material is not classified and alleges that it has already been made public. Neither allegation, if true, would be sufficient to defeat OIG's Exemption 2 claim for Documents 1 and 2. There is no requirement that information be classified for an agency to protect that information under Exemption 2. Further, Bryan Cave's generalized claim that the withheld information has been made "public" is insufficient to conclude that OIG has waived its privilege to assert Exemption 2. *See Steinberg v. United States Department of Justice*, 179 F.R.D. 357, 361 (D.D.C. 1998) (finding no waiver where requester did not produce evidence that specific withheld material is public, even though general subject matter appeared to be in public domain).

III. Conclusion

We find that OIG properly withheld a significant portion of the redacted information in Documents 1 and 2. However, we will remand this matter to OIG so that it can issue another determination or release the information described in the previous section above. Consequently, Bryan Cave's appeal should be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Bryan Cave LLP on March 18, 2003, OHA Case No. TFA-0026, is hereby granted in part as set forth in paragraph (2) and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 30, 2003

May 22, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Egan & Associates

Date of Filing: April 4, 2003

Case Number: TFA-0027

On April 4, 2003, Egan & Associates (Egan) filed an Appeal from a determination that the Acting Assistant General Counsel for General Law of the Department of Energy (DOE/GC) issued in response to a request for documents that Egan submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. DOE/GC issued the determination on March 5, 2003. This Appeal, if granted, would require that DOE/GC release additional responsive information to Egan or provide a detailed explanation of its reasons for withholding such material.

I. Background

On August 6, 2002, Egan requested from DOE "copies of documents and videotape recordings in the possession of DOE pertaining to the United States Office of Government Ethics ('OGE') opinion letter dated July 31, 2002, addressed to DOE and the United States Nuclear Regulatory Commission ('NRC') concerning the application of 18 U.S.C. 207 to personnel who have worked on the Yucca Mountain project." Appeal at 1. DOE/GC responded to Egan's request on March 5, 2003, stating that it had located 127 pages of material that was responsive to Egan's request. With its determination, DOE/GC released 36 of the 127 pages in their entirety to Egan (pages #1-36). However, the remaining 91 pages were withheld either in part (pages #37-118) or in their entirety (pages #119-127), pursuant to FOIA Exemptions 5 and 6. Letter from Susan F. Beard, Acting Assistant General Counsel for General Law, to Charles Fitzpatrick, Egan & Associates (March 5, 2002) ("Determination Letter").

Egan filed its appeal with the OHA on April 4, 2003. In the appeal, Egan states,

> I have no quarrel with DOE's withholding of a *de minimus* amount of information (including personal telephone numbers) from disclosure by DOE under Exemption 6 (5 U.S.C. § 552(b)(6)). The basis upon which this appeal is brought is DOE's failure to follow its own regulations and the pertinent provisions of the [FOIA] by withholding from disclosure part or all of some 91 pages of the 127 pages of documents responsive to my FOIA request. The relief I seek is the requirement that DOE release in full the remaining 91 pages withheld in whole or in part by DOE,

purportedly pursuant to Exemption 5 (5 U.S.C. § 552(b)(5); 10 C.F.R. 1004.10(b)(5)).

Appeal at 1-2.[1]

First, we note that of the 91 pages from which information was withheld, 32 originated in either NRC (24 pages) or OGE (8 pages). With regard to the pages originating at other agencies, DOE/GC informed Egan that it could appeal the withholding from those pages to the respective agencies, and provided Egan with addresses and instructions for doing so. Thus, the present decision will address only the withholdings under FOIA Exemption 5 from the 58 pages (those considered "DOE records"[2]), found in 17 documents (numbered 16-25, 33, 34, 36, 38-41 in the documents index provided to the requester).

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). In addition, DOE regulations provide that the agency should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and if disclosure is in the public interest. 10 C.F.R. § 1004.1. Accordingly, even if a document can properly be withheld under an exemption, we must also consider whether the public interest demands disclosure pursuant to DOE regulations.

A. Application of Exemption 5

Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Exemption is generally recognized as encompassing the attorney-client, attorney work product and governmental deliberative process privileges. See, e.g.,

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[1] In its appeal, Egan also contends that DOE/GC did not comply with various requirements of the DOE FOIA regulations at 10 C.F.R. § 1004.5(d), "Time for processing requests." Because DOE/GC has now issued its determination, we consider the issues raised by these arguments to be moot. We also note that the relief sought by Egan is not related to these issues, but rather to DOE/GC's withholding of information, which shall be the focus of this decision.

[2] *See* 10 C.F.R. 1004.4(f)(2) ("Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records . . ."). Though these documents are designated "DOE records" for purposes of this appeal, many of these records are documents that were received from either OGE or NRC and then edited (either electronically or by hand) by DOE officials.

Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980). In the present case, DOE/GC relied upon the deliberative process and attorney-client privileges of Exemption 5.

The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead*); *California Edison*, 28 DOE ¶ 80,173 (2001) (*California Edison*). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254 n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id.* at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S.Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665. "Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication." *Mead*, 566 F.2d at 253 n.24.

The Appellant raises objections to the application of each privilege. First,

> DOE's rationale for withholding documents for the purpose of 'shielding governmental deliberations' is arbitrary and capricious and unsubstantiated by the facts. The facts are that DOE solicited an ethics opinion from the Office of Government Ethics with respect to a particular set of circumstances. OGE is assigned the responsibility for just such assessments. DOE is **not** deciding, or "deliberating" the issue which it presented to OGE for its assessment. OGE is. Any DOE "deliberations" are irrelevant. DOE points out that a purpose of the deliberative process is to encourage open discussions on matters of policy "between subordinates and superiors." That rationale might apply to communications between subordinates and superiors within OGE (the agency doing the deliberating), but not

> communications by DOE lobbying OGE for a favorable decision on the very issue presented to OGE by DOE.

Appeal at 3-4. We disagree. As DOE/GC stated in its determination letter, "'Pre-decisional' documents are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority." Determination Letter at 2. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 ("By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."). Egan further implies that advice and opinions expressed by one agency to another should be disclosed based upon what motive a requester may impute to such advice or opinions (e.g., "DOE lobbying OGE for a favorable decision"). Egan offers no legal basis for making determinations that the release of documents turn upon such a distinction, however.

With regard to the application of the attorney-client privilege, Egan argues,

> It is not all attorney communications which are privileged, but only those in which legal advice is rendered by an attorney or where confidential communications by a client to the attorney must be protected. Where, as here, differing federal agencies with different interests communicate with one another, and where one agency lobbies another to adopt a position favorable to its wishes, the rational for attorney-client privilege is hardly present despite the facade of having lawyers author the secreted communications. DOE was scarcely providing legal advice to OGE on a matter which DOE presented to OGE for consideration in OGE's sphere of responsibility.

Appeal at 4. Again, Egan proposes that a particular privilege, in this case as to communications between agency clients, such as DOE and NRC, and their attorneys, should not apply "where one agency lobbies another to adopt a position favorable to its wishes, . . ." Egan offers no support in the law for such a narrowing of the privilege, and we find none. Moreover, whether DOE was providing OGE with legal advice is beside the point. As clients, the DOE and NRC were clearly seeking legal advice regarding the application of government ethics laws. Thus, facts provided by these clients to their attorneys in order to obtain such advice are clearly protected by the attorney-client privilege.

As discussed in more detail below, we find that the specific documents at issue are protected by both the deliberative process and attorney-client privileges. As the court in *Mead* notes,

> With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component. The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion

> or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.

Id. at 254 n.28.

1. Electronic Mail Messages

Of the 58 pages at issue here, 12 (pages # 37-48) are printouts of electronic mail, each of which was withheld in part from Egan. All of them concern drafts of the OGE opinion letter. These mail messages are clearly pre-decisional in that they predate the issuance of the OGE opinion on July 31, 2002. Each of the messages also reflects the give-and-take of the consultative process, in which opinions were expressed and issues raised regarding portions of the OGE opinion while it was being drafted. Thus, at least portions of these documents are protected by the deliberative process privilege. These messages also contain facts supplied by the client for the purpose of seeking legal advice, as well as opinions of attorneys that are reflective of those facts, and are therefore protected by the attorney-client privilege as well.

Nonetheless, we find that the following small amounts of segregable material in some of these pages, in addition to the portions of the documents already released, are not protected by either the deliberative process or attorney-client privilege, and should therefore be released to the requester.

page # 37 "We reviewed your suggested language."

page # 39 "Following is draft language Susan and I developed for your review."

page # 41 "Following is draft language Susan and I developed for your review."

page # 43 "Following is draft language Susan and I developed for your review."

page # 44 "Following is draft language Susan and I developed for your review."

page # 46 "and let me know what you think." (identical phrase already released on page # 47)

page # 48 "and let me know what you think."

2. Draft Versions of the OGE Opinion Letter

Also withheld in part from the requester were five draft versions of the OGE opinion letter (documents numbered 33, 34, 36, 38, and 39 in the documents index provided to the requester). In the case of each document, the body of the draft letter was withheld. These drafts obviously contain specific opinions and issues raised by the author(s) of the drafts. Moreover, releasing various draft

versions of this document, one that has been released in final form, would essentially provide a "roadmap" of the government's deliberative process. *See Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials."); *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988) ("To the extent that National Wildlife seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft Forest Plans and draft EISs prepared by lower-level Forest Service personnel and those actually adopted in the final Forest Plan and EIS published by the Forest Service, it is attempting to probe the editorial and policy judgment of the decisionmakers. Materials that allow the public to reconstruct the predecisional judgments of the administrator are no less inimical to exemption 5's goal of encouraging uninhibited decisionmaking than materials explicitly revealing his or her mental processes."); *Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 19 (D.D.C. Oct. 1, 1996) ("Comparing the draft with the final version ultimately adopted by the agency would provide the requester with a picture window view into the agency's deliberations, the precise danger that Exemption 5 was crafted to avoid."). The withheld portions of these drafts are therefore protected by the deliberative process privilege of Exemption 5.

3. Handwritten Notes by DOE Attorneys

DOE/GC withheld, in their entirety, 9 pages of handwritten notes by two DOE attorneys. We agree with DOE/GC that these notes contain privileged material. The notes are protected by the deliberative process privilege to the extent that they contain descriptions of conversations between personnel discussing the subject matter of the OGE draft opinion, prior to the issuance of OGE's opinion on July 31, 2002. The notes also contain facts supplied by clients and discussions of issues that reflect those facts, and therefore the notes are also protected by the attorney-client privilege.

However, upon review of the document, we find that the following small portions of segregable material within these documents are not protected by either the deliberative process or attorney-client privilege, and should therefore be released to the requester.

page # 120[3] "OGE/YM Ethics"

page # 121 "3-15-02 Amy Comstock - OGE"

page # 123 "Marilyn - OGE Head . ."

page # 124 "@ OGE w/ Marilyn Glynn, Rick Thomas, & Allison George. NRC - John Szabo & Tripp Rothschild. Yucca - Susan Rives. DOE - Susan, Gregg, & me." "Rick:" "Trent:" "Trent:" "Susan:"

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[3] This page also contains handwritten notations (the bottom 4-5 lines of handwritten text on the page) that are clearly personal in nature and in no way concern the OGE opinion letter. This portion of the page is therefore not responsive to the Appellant's request.

C. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). In the present case, of the 58 pages at issue, DOE/GC withheld only 9 pages in their entirety, and released segregable portions of the remaining documents. In addition, as discussed above, we find that a small amount of additional non-exempt material may be released. Beyond this, we find that any exempt material is so inextricably intertwined that disclosure of it would reveal "only essentially meaningless words and phrases," and therefore need not be released. *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

D. Public Interest

DOE regulations direct the agency to release responsive, exempt material if the DOE determines such release to be in the public interest. 10 C.F.R. § 1004.1. In its appeal, Egan contends that

> DOE recites this requirement in its initial determination letter and then wholly fails to adhere to it. DOE merely states that it balanced the public interest in disclosure against the adverse effect of disclosure and concluded that the public interest in disclosure did not outweigh the adverse impact of disclosure. The only further rationale provided (to wit, that public disclosure inhibits free and candid discussion) would apply to any and all federal agency deliberative documents, and would effectively eliminate the mandate to make available even exempt documents, when it is in the public interest to do so.

Appeal at 2-3. First, we note that 10 C.F.R. § 1004.1 does not create a presumption that information exempt under the FOIA should be released. Rather, the regulations direct release of otherwise exempt material only upon a determination that such a release would affirmatively be in the public interest. DOE/GC clearly did not find that discretionary release of additional material would be in the public interest. Determination Letter at 2-3. Egan attempts in its appeal to make a case for the public interest in such a discretionary release.

> Because the Yucca Mountain candidate repository would be a unique, first-of-its-kind dumping ground for the most dangerous high-level waste from over 100 nuclear plants throughout the United States, it is axiomatic that the public has an enormous interest in all significant decisions relating to that proposed dumping ground and its licensing. Where, as here, the documents (determined by DOE to be unworthy of public interest) focus on the issue of whether former federal employees who worked on that very project may be precluded from testifying at an NRC licensing hearing for interested stakeholders, the compelling need for discretionary disclosure under 10 C.F.R. 1004.1 is apparent. Where, as here, the anticipated applicant for a license to operate such a facility is in the position of lobbying the [OGE] (successfully) for a determination that precludes stakeholders from using former DOE employees as witnesses, the public interest in starkly evident. Such a determination silences the

> voices of those most familiar with the project and the issues in the licensing proceeding - all federal employees whose efforts were paid for with tax dollars. For DOE under these circumstances to reject its mandate of discretionary disclosure in the public interest, is arbitrary and capricious and calculated to protect the agency from open disclosure of information which is true, but may be embarrassing to, or inconsistent with the position of, DOE.

Appeal at 3. We agree with Egan that there is a strong public interest in the siting of a national nuclear waste repository. We also agree that there is a public interest in the decision by OGE as set forth in its July 31, 2002 opinion letter. This should not be confused, however, with the public interest in the release of the exempt material in the present case. The stated basis for OGE's opinion is set forth in its July 31, 2002 letter, which has already been released. The question, therefore, is the extent to which the public interest would be served by disclosing the details of the deliberative process by which OGE's decision was reached.

In the very short term, making an agency's deliberative process completely transparent might indeed serve the public interest and be consistent with the philosophy underlying the FOIA statute. The impact on future deliberations would be severe, however. Even assuming, *arguendo*, that the information in question might be "true, but may be embarrassing to" DOE, does not tilt the balance of public interest in favor of disclosure. The frank and independent discussion that is vital both to governmental deliberations and to the attorney-client relationship depends upon the assurance that participants in the privileged communications need not censor themselves for fear that those communications be made public. This is clearly no less true (and perhaps more so) of communications containing the kind of unpleasant truths that attorneys need to hear from their clients and decision-makers need to hear from their subordinates. Not respecting these privileges would therefore run counter to the public interest, not only because of the direct damage done to the attorney-client relationship and the quality of governmental deliberations, but also because the chilling effect would in the long run make government decision-making less transparent.

III. Conclusion

We will remand this matter to DOE/GC for a new determination releasing additional non-exempt information to the requester, as set forth in detail above. In all other respects, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Egan & Associates on April 4, 2003, OHA Case Number TFA-0027, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Acting Assistant General Counsel for General Law of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 22, 2003

July 22, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wayne Knox

Date of Filing: April 22, 2003

Case Number: TFA-0028

On April 22, 2003, Wayne Knox appealed a determination issued by the Savannah River Operations Office (SR) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his appeal, Mr. Knox contends that SR had failed to conduct an adequate search for documents that were responsive to a FOIA request he had filed. For the reasons detailed below, we find that SR conducted an adequate search for responsive documents and will deny the appeal filed by Mr. Knox.

I. Background

Mr. Knox filed a request in which he sought a copy of all internal and external Westinghouse Savannah River Company/Bechtel Savannah River Incorporated documents concerning the final resolution of claims and disputes under Subcontract No. AB94198P with Advanced Systems Technology. He also sought information concerning the final resolution of claims and disputes of the Inspector General investigation of allegations he made relative to his work on the Ford Building Seepage Basin Retention Tank. *See* Determination Letter at 1. On March 16, 2003, SR issued a determination which stated that the SR site searched their files and found no documents responsive to the final resolution of claims and disputes under Subcontract No. AB94198P with the Advanced Systems Technology portion of Mr. Knox's request. SR further informed Mr. Knox that the Headquarters Office of Inspector General would respond directly to the portion of his request regarding the Inspector General investigation. *Id.* In his Appeal, Mr. Knox challenges the adequacy of the search conducted by SR.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *E.g. Todd J. Lemire*, 28 DOE ¶ 80,239 (2002); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require

absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted officials at SR to ascertain the extent of the search that had been performed. Upon receiving Mr. Knox's Request for Information, SR contacted individuals in the Environmental Restoration Division as well as pertinent individuals at Westinghouse Savannah River Company. These individuals manually as well as electronically searched their files using key words, including computer files containing E-mail communications, letters and other documents. In addition, Mr. Knox provided SR with the names of individuals who may have responsive documents and SR contacted them as well. According to SR, these searches yielded no documents responsive to Mr. Knox's request. *See* Record of Telephone Conversation between Pauline Connor, SR and Kimberly Jenkins-Chapman, OHA (June 17, 2003); Record of Telephone Conversation between Adriane Smith, WSRC and Kimberly Jenkins-Chapman, OHA (July 10, 2003).

Given the facts presented to us, we are convinced that SR conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Knox's request. Accordingly, Mr. Knox's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Wayne Knox, OHA Case No. TFA-0028, on April 22, 2003, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 22, 2003

June 25, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Fauvre

Date of Filing: May 29, 2003

Case Number: TFA-0031

On May 29, 2003, Richard Fauvre (the Appellant), filed an Appeal from a final determination that the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE) issued on May 12, 2003. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Oak Ridge would be required to conduct a further search for responsive documents.

Background

On April 2, 2003, the Appellant submitted a FOIA request for all documents on Rubie Gladys Steakley, his mother, who worked for Clinton Engineering at Oak Ridge during World War II. He provided her maiden name and Social Security Number to aid the search. On May 12, 2003, Oak Ridge responded that the search of the files of Oak Ridge and its contractor and facility site did not locate any records on Ms Steakley. Determination Letter dated May 12, 2003, from Amy Rothrock, Authorizing Official, Oak Ridge, to Richard Fauvre. On May 29, 2003, the Appellant appealed that determination to our Office. Appeal Letter dated May 15, 2003, from Richard Fauvre, to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant argues that no effort was made to locate Ms Steakley's records. He alleged that Oak Ridge did not check the Federal Records Center in Atlanta, Georgia, or various other DOE records. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the

search conducted was in fact inadequate. *See, e.g., Ashok K. Kaushal*, 27 DOE ¶ 80,189 (1999); *Hobart T. Bolin, Jr.*, 27 DOE ¶ 80,124 (1998).

We have contacted Oak Ridge in response to the Appellant's request to determine what type of search was conducted. All the systems of records referenced in the Appeal Letter were, in fact, searched and no responsive documents were discovered. The DOE vault, which contains classified records as well as historical records dating back to 1942 such as personnel or medical files, was searched also. No records from the time period that Ms Steakley would have worked at Oak Ridge have been sent to the Federal Records Repository in Atlanta because the records are still used on a daily basis for FOIA requests and other various studies.

Oak Ridge also conducted a computerized search at seven or eight locations using Ms Steakley's name or social security number. All the Oak Ridge plants and repositories were searched. Furthermore, Oak Ridge indicated that no medical records were maintained until 1950 unless the person was involved in an accident. Apparently, Ms Steakley was not. Oak Ridge also informed us that it often it does not have records of employees during World War II. Sometimes, but usually only if the person was an employee of the prime contractor, a five by seven index card containing personnel information can be located. No such card was located for Ms Steakley, who was not an employee of the prime contractor. Based on the search that Oak Ridge performed, we are convinced that it followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Richard Fauvre, on May 29, 2003, Case No. TFA-0031, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 25, 2003

July 28, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Friedwardt Winterberg
Date of Filing:	June 2, 2003
Case Number:	TFA-0032

On June 2, 2003, Friedwardt Winterberg filed an Appeal from a determination the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) issued on May 8, 2003. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

Dr. Winterberg is a professor of physics at the University of Nevada in Reno, Nevada. He responded to a solicitation from the National Nuclear Security Administration (NNSA) for pre-applications in the Office of Defense Programs' Stewardship Science Academic Alliances Program. An NNSA Executive Committee evaluated each pre-application by seeking the opinion of one "reviewer" at each of three DOE laboratories, Lawrence Livermore National Laboratory (LLNL), Los Alamos National Laboratory (LANL), and Sandia National Laboratories (SNL). The reviewers were asked to determine the degree of responsiveness of the pre-application to the technical scope defined in the solicitation–this evaluation was not, however, a review of the merits of the application. *Dr. Friedwardt Winterberg*, 28 DOE ¶ 80,267 at 80,852, Case No. TFA-0011, slip op. at 1 (2003). Based on the opinions of the reviewers, the Executive Committee found that Dr. Winterberg's pre-application did not fall within the technical scope of the solicitation. Consequently, the committee did not encourage Dr. Winterberg to submit a full application. The committee did, however, explain that its decision was not a determination on the merits of the *final* application and that Dr. Winterberg was free to submit a full application if he so desired. *Id.*

Dr. Winterberg filed two FOIA requests for information regarding NNSA's decision, the second of which is the subject of the present Appeal. In his first request, Dr. Winterberg asked for " [a] copy of a report . . . made by a committee of three individuals from Livermore, Los Alamos, and Sandia . . . . I tried to get a copy of that report through Senator Ensign . . . so far without success." *Id.*, slip op. at 1-2 (quoting Letter from Winterberg to DOE/HQ (August 19, 2002)). NNSA's Office of Defense Science searched unsuccessfully for responsive documents. *Id.*, slip

op. at 2. The DOE issued a determination informing Dr. Winterberg of the results of NNSA's search, and on December 23, 2002, Dr. Winterberg filed an appeal of that determination with the Office of Hearings and Appeals (OHA). In that Appeal, he argued that it was possible that NNSA rejected his application because he was a German scientist who came to this country after World War II. According to Dr. Winterberg, in 1985, Elie Wiesel, then Chairman of the President's Commission on the Holocaust, made a public statement that it was immoral for the federal government to hire Nazi scientists. Therefore, Dr. Winterberg argued, because Mr. Wiesel made the statement while he was an official of the United States government, his statement became a government policy binding on the DOE. *Id.* In his first Appeal, Dr. Winterberg asked OHA to direct NNSA to release the report and names of the committee members to him so that he can determine if they acted on Mr. Wiesel's "order." *Id.* (quoting Appeal at 2.)

In reviewing Dr. Winterberg's first Appeal, we contacted DOE/HQ regarding the search, and they responded with an explanation, written by NNSA, of the pre-application process. Memorandum from Director, Office of Defense Science, NNSA, to DOE/HQ (September 18, 2002). The solicitation employed a two-part evaluation process for the selection of applications: (1) a pre-application evaluation stage and (2) a full application evaluation stage. In considering pre-applications, the Executive Committee did not complete reports on any evaluations. Instead, a copy of each pre-application was provided to a representative at each respective laboratory. The lab representative then provided a copy of each pre-application to a reviewer, who was tasked to review the technical scope of the pre-application and place it into one of three categories: "Yes" (responsive to the technical scope), "No" (not responsive), or "Uncertain." The reviewers did not use a formal response document, but instead advised their laboratory representatives of their decisions by any method convenient to them at the time (e.g., telephone, face-to-face conversation). Electronic Mail Message from Dr. James Van Fleet, NNSA to Brenda Washington, DOE/HQ (January 28, 2003). The laboratory representatives then reported to NNSA by electronic mail or telephone conversation. NNSA did not monitor this phase, but only recorded the categorization of each application. *Id*. Based on the results of this preliminary review, each applicant was sent a letter discouraging or encouraging them to submit a full application. Despite the results of the review, however, no applicant was prevented from submitting a full application. Dr. Winterberg's pre-application received two Nos and one Uncertain, and NNSA sent him a letter of discouragement. The letter of discouragement did contain a statement that the decision at this stage related to the pre-application only, and did not guarantee acceptance or rejection of a final application. Letter from NNSA to Winterberg (February 20, 2002). The letter also advised the applicant how to submit a full application.

In our decision on Dr. Winterberg's first Appeal, we found NNSA's argument (that the committee did not complete written evaluation reports at the pre-application stage) to be reasonable. As described above, the pre-application evaluation phase was intended to be a fast, preliminary review and screening of the pre-applications. It was designed to provide pre-applicants some idea of how their pre-application matched the defined technical scope of the project, and was not intended to be a detailed review of the entire application. Given the informal

nature of the process, we found it reasonable that no documents were created. Thus, our decision found that NNSA has conducted an adequate search for responsive material. We also noted in that decision that Dr. Winterberg had indicated in his Appeal that he wanted to know the names of the reviewers at the DOE labs who reviewed his pre-application, and stated that he could file a new FOIA request for those names.

On February 13, 2003, Dr. Winterberg filed a new FOIA request "to obtain the names of the three individuals . . . from [LLNL, LANL, and SNL] . . . who allegedly had downgraded my proposal." DOE/HQ responded to the request on May 8, 2003, informing Dr. Winterberg that the NNSA Office of Defense Programs had "completed its search for documents responsive to the request. The search did not locate any responsive documents." Letter from Abel Lopez, DOE/HQ, to F. Winterberg (May 8, 2003). The present Appeal considers the adequacy of this most recent search for documents.

II. *Analysis*

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted NNSA and found out the following regarding its search. After receiving Dr. Winterberg's most recent request, NNSA sent an electronic mail message to each of the laboratory representatives to whom it had provided pre-applications. This message stated, in pertinent part,

> NNSA has received a Freedom of Information (FOIA) request from Dr. Friedwardt Winterberg, . . . The FOIA request seeks the names of the laboratory scientists who reviewed Dr. Winterberg's pre-application.
>
> . . . .
>
> Please search your records to determine whether you have any relevant document(s), including e-mail messages, which provide information from your laboratory reviewer's categorization of Dr. Winterberg's pre-application. We are only looking for documents that pertain to the labs review of Dr. Winterberg's

> pre-application. Thus, please do not send us your records about reviews of other pre-applications.

The response to this message from each of the three laboratories reported that no documents were found. NNSA explained to us that two contacts at each of the three laboratories were responsible for distributing the pre-applications to reviewers at the lab. Many reviewers were used at each laboratory, but Dr. Winterberg's pre-application (as was the case with each of the other pre-applications) was seen by only one reviewer at each laboratory. The search for documents in the present case included each of the laboratory contacts. Memorandum of telephone conversation between Andrea Kasarsky and Sherri Bingert, NNSA, and Steven Goering, OHA (June 25, 2003). Subsequent to the filing of the present Appeal, we asked NNSA to confirm that the search also extended to the reviewer at each laboratory who reviewed Dr. Winterberg's proposal. NNSA did so, and reported back to us that only one of the laboratory contacts remembered the reviewer to whom he provided Dr. Winterberg's pre-application. That contact checked with the reviewer, who also did not locate any documents responsive to Dr. Winterberg's request. Memorandum of telephone conversation between Andrea Kasarsky and Sherri Bingert, NNSA, and Steven Goering, OHA (July 15, 2003).

Based on the above descriptions, it appears clear to us that NNSA performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Dr. Winterberg seeks. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Friedwardt Winterberg, Case Number TFA-0032, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 28, 2003

August 13, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Nancy Denlinger
Date of Filing:	June 10, 2003
Case Number:	TFA-0033

On June 10, 2003, Nancy Denlinger filed an Appeal from a determination issued to her on May 6, 2003, by the Department of Energy's Ohio Field Office (Ohio). That determination was issued in response to a request for information that Ms. Denlinger submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Denlinger asks that Ohio conduct an additional search for documents responsive to her request.

I. Background

On April 14, 2003, Ms. Denlinger filed a request for information in which she sought the medical and radiation exposure records of her deceased father, John A. Schumacher. *See* May 6, 2003 Determination Letter at 1. On May 6, 2003, Ohio issued a determination which stated it conducted a thorough search for all records responsive to Ms. Denlinger's request and no responsive records were located. *Id.* In its determination, Ohio stated that records may be in possession of the numerous companies for which Mr. Schumacher worked as a subcontractor, as indicated by Ms. Denlinger in her request. On June 10, 2003, Ms. Denlinger filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Denlinger challenges the adequacy of the search conducted by Ohio. *See* Appeal Letter. She asserts that Mr. Schumacher was "an employee of electrical contractors who did sub-contracting for the DOE at the Mound Plant in Miamisburg, Ohio in the late 60's or 70's." *Id.* Ms. Delinger further asserts that during this time Mr. Schumacher was tested for radiation exposure and was required to wear protective clothing at work. *Id.* She asks that the OHA direct Ohio to conduct a new search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as

these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Ohio to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Denlinger's request might reasonably be located. Upon receiving Ms. Denlinger's request for information, Ohio contacted the contractor, CH2M Hill, at the Mound Site in Miamisburg, Ohio. The contractor searched its records by name and Social Security Number and found no documents responsive to Ms. Denlinger's request. *See* Record of Telephone Conversation between Marian Wilcox, Ohio Field Office and Kimberly Jenkins-Chapman, OHA (August 6, 2003). In addition, Ohio contacted officials in the Office of Occupational Radiation Exposure at the Mound site. Officials in that office searched their database by name and Social Security Number and located no responsive records. *Id.* Also at the Mound site, officials searched the Radiation Exposure Intervention Reporting System, which contains radiation exposure records for all DOE facilities, as well as other paper files by name and Social Security Number. Again, no records regarding Mr. Schumacher were found. *Id.* Given the facts presented to us, we find that Ohio conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Denlinger's request. The information Ms. Denlinger seeks may nevertheless be in the possession of Mr. Schumacher's employers, as Ohio has pointed out, and therefore beyond the reach of the FOIA. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Nancy Denlinger, OHA Case No. TFA-0033, on June 10, 2003, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2003

July 25, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	State of Nevada
Date of Filing:	June 27, 2003
Case Number:	TFA-0035

On June 27, 2003, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on May 29, 2003, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on April 28, 2003, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination withheld portions of a responsive document requested by the Appellant. This Appeal, if granted, would require ORD to release additional information to the Appellant.

I. BACKGROUND

On April 28, 2003, the Appellant filed a request for information with ORD seeking "all documents relevant to aircraft crash assessments, analyses, etc., which would impact the proposed Yucca Mountain repository." On May 29, 2003, ORD issued a determination letter (the Determination Letter) releasing three responsive documents in their entirety. Determination Letter at 1. The ORD also released portions of a fourth responsive document, a 101 page document entitled "Consequence Analysis of Aircraft Crash into Transportation Cask" (the Report). However, the ORD withheld 78 pages of the Report under FOIA Exemptions 2, 4 and 5. Determination Letter at 1-2. On June 27, 2003, the Appellant submitted the present Appeal, which challenges ORD's withholding

determinations with regard to the Report. The Appeal challenges only those withholdings made under Exemption 2.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

A. Adequacy of Determination

Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

In the present case, neither the redacted version of the Report that was released to the Appellant nor the Determination Letter shows which particular information was withheld under each exemption. Accordingly, neither the Appellant nor this appeal authority can discern whether the exemptions used to withhold information were appropriately applied.

B. Exemption 2

The Appeal claims that ORD's withholdings under Exemption 2 were in error. In support of this assertion, the Appeal cites the text of Exemption 2, which exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). Specifically, the Appeal contends that the Report cannot be withheld under Exemption 2 because the Report has nothing to do with the agency's personnel policies and practices. Appeal at 2. However, the courts have broadly interpreted this exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature

("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this particular test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that: (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Report is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*). The Report at issue here is an analysis of the potential hazards posed by aircraft to casks designed to transport high level nuclear waste and does not set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public .

The Report meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31. The Report is an assessment of the potential threats posed by aircraft to a proposed high level nuclear waste facility. Disclosure of the report has the potential to educate terrorists (and other individuals or entities seeking to harm the national security) about vulnerabilities. Therefore, releasing the report could allow terrorists to circumvent DOE's efforts to comply with its mandate to provide a secure and safe repository for high level nuclear waste. It is well settled that information that would disclose potential security vulnerabilities can be withheld under Exemption 2. *See, e.g., Schwartz v. United States Department of Treasury*, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding Secret Service protective measures protected under Exemption 2); *Voinche v. Federal Bureau of Investigation*, 940 F. Supp. 323, 329 (D.D.C. 1996) (withholding information relating to the security of the U.S. Supreme Court building and the security procedures for Supreme Court Justices under Exemption 2); *Institute for Policy Studies v. Department of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987) (withholding classification guide under Exemption 2). Accordingly, we find that any information contained in the report that would educate individuals or other entities with interests adverse to the common defense and national security may be properly withheld under the "high two" prong of Exemption 2. As stated above, however, we cannot determine whether ORD properly relied on Exemption 2 in withholding information in this instance without knowing specifically which information was actually withheld under this exemption.

III. CONCLUSION

We are therefore remanding this portion of the Appeal to ORD. On remand, ORD must issue a new determination letter specifically describing the types of information it is withholding under each claimed exemption and specifically indicating that information which is being withheld under each exemption.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0035, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Repository Development for further clarification in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 25, 2003

August 8, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	William D. Hooker
Date of Filing:	July 10, 2003
Case Number:	TFA-0036

This Decision and Order concerns an Appeal that William D. Hooker filed from a determination issued to him by the Savannah River Operations Office (Savannah River). In this determination, Savannah River responded to Mr. Hooker's request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public on request. This Appeal, if granted, would require Savannah River to conduct another search for responsive documents.

In his request, Mr. Hooker sought a copy of documents identifying the amount of Antimony, Antimony 125 and Antimony 145 released into any of 17 bodies of water during the period from January 1, 1992 through December 31, 1999. In its response, Savannah River informed Mr. Hooker that it was unable to locate any documents that are responsive to Mr. Hooker's request. In his Appeal, Mr. Hooker challenges the adequacy of the search that was performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted was adequate, we contacted Savannah River and Westinghouse Savannah River Corporation (WSRC), the DOE's Management and Operations contractor for the Savannah River site. We were informed that Savannah River searched its records and located no

information responsive to Mr. Hooker's request. It then referred the request to WSRC, whose search of all of its business units was similarly unproductive. *See* memoranda of telephone conversations between Robert Palmer, OHA Staff Attorney, and Pauline Connor, Savannah River and Adrian Smith, WSRC, on July 15 and August 6, 2003, respectively. Based on the foregoing, we conclude that remanding this matter for an additional search would not produce any responsive documents, and that Savannah River's search was adequate. We will therefore deny his Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William D. Hooker in Case No. TFA-0036 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 8, 2003

September 12, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Burkhalter, Rayson & Associates
Date of Filing:	July 25, 2003
Case Number:	TFA-0037

On July 25, 2003, Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released portions of a responsive document. The Appeal claims that an additional portion of this document exists but was not located by OR. This Appeal, if granted, would require OR to locate and release that portion of the document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal) in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant filed an appeal of that Determination challenging OR's withholding determination under Exemption 3. On February 13, 2003, we issued a decision and order granting the Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates, Case Number TFA-0008*, 28,006 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). In *Burkhalter I*, we stated

> In its determination, OR relied upon the National Defense Authorization Act for Fiscal Year 1997 [the NDAA]. Public Law 104-201, Section 821. Section 821 prohibits the release of a proposal submitted in response to a competitive solicitation. *Id.* However, this requirement "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the [DOE] and the contractor that submitted the proposal." 10 U.S.C.A. § 2305. The Appellant correctly notes that the Proposal was in fact incorporated by reference into the contract between DOE and UT-Battelle. Contract No. DE-AC05-00OR22725 at Section H-15, Page 11 of 27 and Section I-71, Page 91 of 236. Accordingly, we find that **the Proposal** is not exempted from mandatory disclosure under the FOIA by the National Defense Authorization Act for Fiscal Year 1997.

Burkhalter I at 2 (emphasis supplied). Accordingly, we remanded the matter to OR with instructions to "promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof)." *Id.*

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). The July 3, 2003 Determination Letter stated:

> We have completed our review of the subject Award Proposal set forth or incorporated into the subject contract by reference. Enclosed in their entirety are copies of Volume II Technical and Business Management Proposal Part A - Technical Summary and Presentation Visuals and Part B - Past Performance, Resumes and Organization Chart.
>
> Volume I of the subject Award Proposal is enclosed with deletions of social security number[s] of individuals listed in Volume I, Section K- Representations, Certifications and Other Statements of Offeror in accordance with 5 U.S.C. § 552(b)(6).

July 3, 2003 Determination Letter at 1. The present Appeal was filed on July 25, 2003. The Appeal contends

> On or about July 5, 2003, we received, by letter dated July 3, 2003, what purports to be the Proposal. (A copy of the letter and "Proposal" is attached as Exhibit III). However, the "proposal" received is incomplete. Attached in a excerpt from the Final Report to the Office of Science, dated March 31, 2001, which indicates on page 46 that the proposal was a "five-volume proposal." (See attached Exhibit IV). <u>We received only two (2) volumes of the proposal.</u>

Appeal at 1. (Emphasis in the original).

II. ANALYSIS

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

OR indicates that only four volumes exist: Volume I, Volume IIA, Volume IIB and Volume III. July 31, 2003 Email from Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney. The

Appellant cites a publication by an outside source, the Research Value Mapping Program (RVMP), in support of its contention that the Proposal consisted of five volumes. However, an assertion by an outside entity, such as the RVMP, does not establish that a particular document exists in the Government's files.

The July 3, 2003 Determination Letter only identifies three of the four responsive volumes, specifically Volumes I, IIA and IIB. The Determination Letter further indicates that OR released Volumes IIA and IIB in their entirety and a redacted version of Volume I. The only information that the Determination Letter indicates is being withheld is social security numbers which it redacted from Volume I under Exemption 6. The July 3, 2003 Determination Letter fails to identify Volume III as a responsive document, even though it was part of the Proposal which, in *Burkhalter I*, we ordered OR to either release or withhold under a different exemption. When we contacted OR about this discrepancy, OR indicated it had determined that part of the Proposal was not incorporated into the contract and could therefore still be withheld under Exemption 3. July 31, 2003 Email from Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney. In other words, OR continued to withhold a portion of the Proposal (Volume III) under Exemption 3, even though we had previously found (in *Burkhalter I*) that the entire Proposal could not be withheld under Exemption 3. If OR was convinced that our holding in *Burkhalter I* was too broad, it should have filed a Motion for Reconsideration with this office instead of effectively withholding Volume III by improperly failing to identify it as responsive.

Moreover, OR issued a Determination Letter which made no mention of the fact that it was continuing to withhold a portion of the Proposal under Exemption 3. OR attempts to justify this omission by contending (1) "the intent of the NDAA (b)(3) exemption was to reduce the agency burden of reviewing portions of entire proposals line by line if they were not incorporated by reference into the follow on contract," and (2) "because the proposal was subject to our earlier determination to withhold it in its entirety under (b)(3) NDAA, I did not think that the language for withholding of the remaining portions of the proposal (Volume III) under (b)(3) after completing this second review required repeating in the second determination letter." July 31, 2003 Email form Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney.

These contentions are without merit. It is well settled that if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's reviewing of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). While the NDAA prevents disclosure of information contained in certain bids submitted to the Government (unless that information is incorporated by reference in the contract), the NDAA does not relieve agencies from these statutory and regulatory obligations.

By failing to (1) fully comply with our holding in *Burkhalter I* and (2) provide any justification of its continued withholding of Volume III, OR has deprived the Appellant of an opportunity for meaningful review of OR's response to its FOIA request. Moreover, we are concerned that OR might be depriving the Appellant access to information granted to it by the FOIA. Accordingly, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must provide a meaningful description of the contents of Volume III and then must either release it to the Appellant or withhold it (or portions thereof) under an appropriately justified FOIA exemption.

It Is Therefore Ordered That:

(1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0037, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 12, 2003

October 30, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Judicial Watch, Inc.

Date of Filing: September 24, 2003

Case Number: TFA-0039

On September 24, 2003, Judicial Watch, Inc. (the Appellant), filed an Appeal from a final determination that the Freedom of Information/Privacy Act Group (FOI/PA) of the Department of Energy (DOE) issued on August 19, 2003. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, FOI/PA would be required to conduct a further search for responsive documents.

Background

On August 1, 2000, the Appellant submitted a FOIA request for all documents that refer to

> Agreements(s), contracts(s), concession(s), compensation(s), loan(s), guarantee(s), assistance, cooperation, consideration, lease(s), transfer(s), sale(s), aid, support, inducement(s), influence, reward(s), stimulus(i), solicitation(s), benefit(s), gift(s), gratuity(ies), remuneration, and/or promise(s), made or entered into since September 11, 2001, with the governments of:

Egypt	Israel	Saudi Arabia	Jordan
Qatar	Bahrain	Yemen	Oman
Iran	Turkey	Lebanon	Libya
Sudan	Djibouti	Somalia	Ethiopia
UAE	Kuwait	Cyprus	North Korea
South Korea			

> in exchange for support, cooperation and/or consideration for the "War on Terror," to include but not be limited to the liberation of Afghanistan and the hunt for Taliban and Al Qaeda, and/or the Bush administration's stated policy goal of the disarmament of Iraq in accordance with the United Nations resolutions.

Request Letter dated January 6, 2003, to Abel Lopez, FOIA/PA Division, DOE, from Christopher J. Farrell, Judicial Watch, Inc. On February 5, 2003, FOI/PA responded that the search of the files of the Office of Energy Assurance, the Office of Policy and International Affairs, and the National Nuclear Security Administration (NNSA) yielded no responsive documents. Determination Letter dated February 5, 2003, from Abel Lopez, FOI/PA, DOE, to Christopher Farrell, Judicial Watch, Inc. A search of the files of the Office of the Secretary had not been completed at the time of the determination. *Id.* This Appeal concerns the determination made regarding the search of the Office of the Secretary's files. Determination Letter dated August 19, 2003, from Abel Lopez, FOI/PA, DOE, to Christopher Farrell, Judicial Watch, Inc.

On September 24, 2003, the Appellant appealed the August 19, 2003 determination to our Office. Appeal Letter dated September 16, 2003, from Christopher J. Farrell, Judicial Watch, Inc., to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant argues that because DOE is at the center of national and international energy policies used by the federal government, it is likely that documents responsive to the request exist. *Id.* The Appellant cites an article in the *New York Times* which stated that "The United States, seeking to ensure Turkish military cooperation in any war against Iraq, is offering at least $4 billion to compensate Turkey for economic damage it might suffer as a result of playing an active role in an American-led coalition." *Id.* at 1-2.

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We have contacted FOI/PA and the Office of the Secretary to determine what type of search was conducted. The Office of the Executive Secretariat indicated that it completed a "string search" of all documents both to and from the Secretary, Deputy Secretary, and Under Secretary. Electronic Mail Message sent October 20, 2003, from Sheila Brooks, Office of the Secretary, to Janet R. H. Fishman, OHA. A string search is a computerized search using key words to conduct the search. The search utilized the names of the countries for which the Appellant was requesting information and also the types of

documents the Appellant was seeking. Voice Mail Message from Sheila Brooks to Janet R. H. Fishman, October 21, 2003. *Id.* All documents both to and from the Office of the Secretary reside in the computerized database which was searched. The Office was unable to find anything responsive. Based on the search that the Office of the Secretary performed, we are convinced that this Office followed procedures which were reasonably calculated to uncover the material sought by the Appellant in its request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Judicial Watch, Inc., on September 24, 2003, Case No. TFA-0039, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 30, 2003

November 7, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Evelyn Self
Date of Filing:	September 29, 2003
Case Number:	TFA-0040

On September 29, 2003, Evelyn Self filed an Appeal from a determination the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) issued on September 15, 2003. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

In a March 26, 2003 FOIA request, Ms. Self requested the following documents pertaining to a series of incidents concerning an employee of the DOE's Office of Security:

(1) All statements from any witnesses employed by the agency;

(2) All statements by any employee of a contractor;

(3) All written correspondence, such as memorandums or letters, and emails between any and all agency personnel concerning:

a. How the investigation would be conducted;

b. The status of the investigation;

c. The findings of the investigation;

d. Discussions of the merits of any findings; and

e. Discussions of what discipline, if any, should be imposed.

Appeal at 1.

On August 22, 2003, DOE/HQ issued a determination to Ms. Self, in which it released 26 documents responsive to her request. DOE/HQ withheld information from six of the documents, citing FOIA Exemption 6. In her appeal, Ms. Self states that she is

> aware of email messages and other documents that are responsive but were not included in the initial FOIA response. I request the Department initiate a more thorough search for these responsive documents. Additionally, I believe that an excessive amount of information in the interview documents have been deleted and withheld under [FOIA Exemption 6]. I request another review of the withheld portions.

II. *Analysis*

A. *Adequacy of Search for Responsive Documents*

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

DOE's Office of Security (SO) provided us with the following information regarding its search:

> SO believed responsive documents were located with individuals involved with the incidents cited in the original FOIA request. . . . Each person reviewed their files and produced any and all documents responsive to the FOIA request, to include email messages. . . . Even after an additional review was completed by all parties . . . , our office sent out an additional request to the original responders to please check their files and emails for one last time, to ensure that no stone was left uncovered.

Electronic mail from Kelly Kabiri, SO, to Steven Goering, OHA (October 16, 2003). SO named six individuals within SO to whom its search was directed. The appellant has named fifteen additional individuals who she believes possess documents responsive to her request. Electronic mail from Evie Self to Steven Goering, OHA (October 30, 2003). We believe that a reasonable search should extend to at least some of these individuals, for example, those involved with the incidents cited in the original FOIA request, but to whom the initial search was not directed. We will therefore remand this matter to DOE/HQ for an additional search. We are providing, under separate cover, a copy of the electronic mail from the appellant in which she names these additional individuals. On remand, a further search for responsive documents should extend to the individuals named by the appellant, or

an explanation should be provided as to why those individuals would not possess documents responsive to the request.[1]

B. *Application of Exemption 6 to Information Withheld from the Requester*

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Fin. Management Serv.*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in disclosure in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-70.

In its August 22 determination, DOE/HQ states,

> The names, home telephone numbers and other information of individuals in documents 1, 2, 8, 9, 11, and 13 who provided information as part of an inquiry of the Department have been deleted pursuant to Exemption 6. Release of the identity of these individuals could subject them to harassment, intimidation and other personal intrusions. Moreover, release of the information would not reveal any aspect of the operations or activities of the Government.

Letter from Abel Lopez, DOE/HQ, to Requester (August 22, 2003).

We agree that the individuals whose identities were protected have a strong privacy interest in remaining anonymous. The inquiry in question was conducted in response to allegations that a DOE employee had made racially insensitive remarks in the workplace. Those providing information were co-workers of the accused employee; some were DOE employees, and others were employees of

[1] We are aware that a number of these individuals are contractor employees who work at DOE/HQ. This, however, does not mean that these individuals would not have access to or be able to identify records to which the appellant is entitled under the FOIA and DOE regulations. If a new search identifies documents that are determined to be contractor records not available to the requester under the FOIA or DOE regulations, this determination should be explained to the requester. *See Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); 10 C.F.R. § 1004.3(e) (provision of the DOE FOIA regulations under which certain contractor records are made available to FOIA requesters).

DOE contractors. Given the sensitive nature of the investigation and the potential for harassment, intimidation, or other personal intrusions, we find that significant privacy interests exists in the identities of those individuals. *See Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Accordingly, we find that the individuals whose identities were withheld have a significant privacy interest in maintaining their confidentiality.[2]

Having found a significant privacy interest in the identities of these individuals, we must determine whether release of this information would further the public interest by shedding light on the operations and activities of the Government. The information already released to the appellant clearly sheds light on the operation and activities of the Government in conducting an internal inquiry into alleged employee misconduct. By contrast, the names of the individuals who provided information in the inquiry and other information that could identify them reveals little if anything about the activities of the Government. Weighing the significant privacy interests at stake on one hand, and the slight public interest on the other, we conclude that Exemption 6 was properly applied to protect the identities of the persons who provided information in the inquiry.

However, based on our review of the specific information withheld in this case, it is not apparent that all of the information withheld from the requester would identify the employees in question, and the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b).

For example, it appears that all pronouns (e.g., "he" and "she"), possessive adjectives (e.g., "his" and "her"), and titles (e.g., "Mr." and "Ms.") used to refer to the individuals in question were redacted from the documents at issue. We have previously stated that a pronoun that grammatically takes the place of the name of a person, but that does not itself name the person, is not personal information even when the name itself may be withheld. Such words, in unusual and limited situations, might describe with a degree of certainty some individual (for example, if there was only one woman in an office). In those instances, we have found that pronouns may be withheld. *Eugene Maples*, 26 DOE ¶ 80,159 (1997). In the present case, however, it appears that these words were withheld categorically throughout documents 1, 2, and 13.

Redacted in a similarly categorical fashion were nearly all references to the respective employers of the individuals in question (e.g., whether the individual was employed by a DOE contractor or was "a DOE employee"). There may, in fact, be individual instances where such a description would identify a particular employee. However, these redactions do not seem to have been applied on a case-by-case basis.

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[2] It should be noted that scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996) (*Armstrong*). For example, civilian federal employees normally have no expectation of privacy concerning their names, titles and similar information. See 5 C.F.R. § 293.311. However, the name of a federal employee involved in a workplace situation of a sensitive nature might be withheld pursuant to Exemption 6. *See Armstrong*, 97 F.3d at 582 (dicta indicating that FBI might be entitled in certain factual contexts to use a categorical rule protecting the names of FBI agents pursuant to Exemption 6).

Also withheld were the dates of many events, for example, when particular interviews took place. Again, while there may be specific circumstances where such information would reveal the identity of an individual, we do not find a basis for withholding such information as a rule.

In addition, in a number of instances, conjunctions (such as "and") between personal identifiers were withheld (e.g., document 2, pages 9, 10, 11; document 13, pages 7, 11). Non-protected segregable words may be withheld when they are so inextricably intertwined with protected material that their release would reveal "only essentially meaningless words and phrases." *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981). However, the release of conjunctions in this case would convey a particular meaning (e.g., whether a passage is referring to one or two individuals). We see no reason such informative words should be withheld.

We also find the following specific information withheld from the requester does not appear to identify particular individuals:

(1) Document 2, page 1, five lines at top of page following text "Record By:" Some of this information withheld is too general to identify a specific individual. Moreover, it appears that the identity of the individual is revealed elsewhere in the same document.

(2) Document 2, page 3, ninth line from bottom of page. This individual is identified elsewhere in the same document.

(3) Document 2, page 5, last four lines. It appears that the identity of the individual is revealed elsewhere in the same document.

(4) Document 2, page 8, lines 4 through 11. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.

(5) Document 2, page 9, 13th line from bottom of page. This individual is identified elsewhere in the same document.

(6) Document 2, page 10, first line. The third listed individual is identified elsewhere in the same document.

(7) Document 2, page 10, second line from bottom of page. This individual is identified elsewhere in the same document.

(8) Document 2, page 11, 15th (first person listed) and 22nd (second person listed) line. This individual is identified elsewhere in the same document.

(9) Document 2, page 14, fifth line from bottom. It is not clear how release of this line would compromise the identity of any individual.

(10) Document 2, page 14, last three lines, and page 15, first 11 lines. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not

be released without compromising the identity of any individual. Moreover, it appears that the identity of the individual referred to in this passage is revealed elsewhere in the same document.

(11) Document 2, page 15, lines 12 and 14. This individual is identified elsewhere in the same document.

(12) Document 11, 11 lines at bottom of document. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.

(13) Document 13, page 3, line 17, fourth through sixth words. It is not clear how release of these words would compromise the identity of any individual.

(14) Document 13, page 6, first line of third paragraph. Revealing the number of interviews conducted would not compromise the identity of any individual.

(15) Document 13, page 9, sixth line from bottom. It is not clear how release of these words would compromise the identity of any individual.

(16) Document 13, page 11, end of first line, entire second line. It is not clear how release of these words would compromise the identity of any individual.

(17) Document 13, page 15, line 9. This individual is identified elsewhere in the same document.

(18) Document 13, page 16, lines 1 (after first two words) and 2. It is not clear how release of these words would compromise the identity of any individual.

(19) Document 13, page 25, second bullet, lines 2, 3 and 4. It is not clear how release of these words would compromise the identity of any individual.

(20) Document 13, page 25, end of last line before "Summary of Allegations and Determination of Credibility." It is not clear how release of these words would compromise the identity of any individual.

(21) Document 13, page 26, lines 4 (last five words) and 5. It is not clear how release of these words would compromise the identity of any individual.

(22) Document 13, page 26, last four lines, and page 27, first two lines. This portion of the document was redacted in its entirety, though it is not clear why segregable portions could not be released without compromising the identity of any individual.

III. *Conclusion*

For the above stated reasons, we will remand this matter to DOE/HQ, which shall issue a new determination to the appellant either releasing the information described above, or explaining with greater specificity why it should remain withheld under FOIA Exemption 6 (or any other applicable FOIA exemption).[3] On remand, DOE/HQ shall also conduct a further search for documents responsive to the appellant's request, as described above. In all other respects, the appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Evelyn Self on September 29, 2003, OHA Case Number TFA-0040, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the FOIA/Privacy Act Group of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2003

[3] In addition, two pages at the beginning of document 13 (a title page and an index page) were not released to requester. On remand, these two pages should be released.

November 25, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jo Ann Estevez

Date of Filing: October 3, 2003

Case Number: TFA-0041

On October 3, 2003, Jo Ann Estevez (Estevez) filed an Appeal from a determination issued to her on September 12, 2003, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Estevez submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ perform an additional search for responsive material.

I. Background

On April 16, 2003, Estevez filed a FOIA request with DOE/HQ for information that pertains to air emissions records and cloud, soot and stack records from the Sylvania Nuclear Facility that was located at Cantiague Rock Road, Hicksville, New York, from 1952 to 1967. This site was also known as the Sylvania Electric Products Inc. Facility. *See* FOIA Request (November 21, 2001). DOE/HQ assigned the request to the Office of Environment, Safety and Health (EH) and also to the Office of Site Closure in the Office of Environmental Management (EM). Letter from DOE/HQ to Estevez (September 12, 2003) (Determination). On September 12, 2003, DOE/HQ informed Estevez that DOE/EM and DOE/EH were unable to locate any responsive information. Estevez then filed this Appeal. In the Appeal, Estevez challenged the adequacy of the searches and asks OHA to direct DOE/HQ to search again for additional information regarding the Sylvania Nuclear Facility.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85

(8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

DOE/HQ informed us that after assigning the request to EH, EH stated that it had no responsive material, and suggested that the program belonged to EM. Memorandum of Telephone Message from Carolyn Lawson, DOE/HQ (October 24, 2003). EM searched but found no responsive records regarding the Hicksville location. *See* Memorandum from Don Mackenzie, DOE Ohio Office, to J. Boone, EM (September 2, 2003). This office asked EM if any other DOE facility might have responsive records. Electronic Mail Message from Valerie Vance Adeyeye, OHA to Joni Boone, EM (November 3, 2003). EM's Office of Site Closure in Ohio stated that there was a very slight possibility that the Savannah River Office may have some responsive information because Sylvania Corning worked for Savannah River during the 1950s and 1960s. Electronic Mail Message from Don Mackenzie, DOE Ohio Office, to Joni Boone, EM (November 4, 2003). In addition, a contractor discovered three additional documents related to the Sylvania Corning facility in Hicksville, New York, that were not included in the "site specific file" for that facility that had been searched previously. Electronic Mail Message from Charles Young, ASE Inc., to Don Mackenzie, DOE/EM (October 30, 2003). The contractor also found a file with two documents relating to the Hicksville site in a collection of "working papers" from the 1960s and 1970s. *Id.* The contractor suggested that these additional documents "may be of particular significance to those who submitted previous requests for information pertaining to the Hicksville operation." *Id.* EM asked that we determine if any of the new documents were responsive to Estevez's request. We discussed the discovery with the requester, who determined that three documents would be responsive to her request, and we forwarded this information to EM. 1/ *See* Electronic Mail Message from Valerie Vance Adeyeye, OHA, to Joni Boone, EM (November 4, 2003).

Accordingly, this Appeal is granted in part and this matter is remanded to DOE/HQ to release any additional responsive material to Estevez or to issue a new determination letter justifying the withholding of any information that it redacted from any responsive material it provides to the requester.

1/ Estevez concluded that the following documents were responsive to her request: (1) the AEC Annual Report for FY 1953; (2) Decontamination of SYLCOR 293 Area; and (3) May 2, 1973 AEC Letter re: Radiological Cleanup and Site Disposal Actions". Memorandum of Telephone Conversation between Valerie Vance Adeyeye, OHA, and Estevez (November 4, 2003).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Jo Ann Estevez on October 3, 2003, OHA Case Number TFA-0041, is hereby granted as set forth in paragraph (2) and denied in all other respects.

(2) This matter is remanded to the FOIA/Privacy Act Group for processing in accordance with the guidance in the Decision above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 25, 2003

January 15, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William Hooker

Date of Filing: October 28, 2003

Case Number: TFA-0042

On October 28, 2003, William Hooker appealed a determination issued by the Savannah River Operations Office (SR) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his appeal, Mr. Hooker contends that SR had failed to conduct an adequate search for documents that were responsive to a FOIA request he had filed. For the reasons detailed below, we find that SR conducted an adequate search for responsive documents and will deny the appeal filed by Mr. Hooker.

I. Background

Mr. Hooker filed a request in which he sought a copy of the Certificate of Analysis performed by General Engineering Laboratories (GEL) for the Westinghouse Savannah River Company (WSRC) EPD-Building 773-58A in 1995. *See* Determination Letter at 1. In this request, Mr. Hooker stated that this work was done under Project Description Analytical Services for Environmental Characterization WSRC00193. He later requested copies of all Certificates of Analysis completed by GEL in 1995. *Id.* On October 10, 2003, SR issued a determination which stated that SR contacted WSRC which in turn contacted GEL to search its files. *Id.* WSRC found no responsive documents. In his Appeal, Mr. Hooker challenges the adequacy of the search conducted by SR. *Id.*

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *See, e.g. Todd J. Lemire*, 28 DOE ¶ 80,239 (2002); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted officials at SR to ascertain the extent of the search that had been performed. Upon receiving Mr. Hooker's Request for Information, SR contacted WSRC which then contacted GEL to conduct a search for responsive documents. As stated in SR's determination letter, GEL informed WSRC that it does not and is not required to maintain records longer than five years. It further stated that in 1995, lab results were received electronically and placed into the site database, GIMS. Copies of all data and any Certificates of Analysis were sent to a data handling subcontractor. Copies were not routinely sent to a central site repository. GEL also stated that the data handling subcontractor does not maintain records for longer than five years after downloading the information. Thus, they do not have any information from 1995. In addition, WSRC has informed us that the Appellant has not identified the specific projects which generated the Certificates of Analysis he is interested in obtaining. Without knowing this information, WSRC has stated that it would have to conduct a manual search of tens of thousands of pages of information, a task not required by FOIA. *See* Record of Telephone Conversation between Pauline Conner, SR and Kimberly Jenkins-Chapman, OHA (January 7, 2004); Record of Telephone Conversation between Adrian Smith, WSRC and Kimberly Jenkins-Chapman, OHA (January 13, 2004).

Given the facts presented to us, we are convinced that SR conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Hooker's request. Accordingly, Mr. Hooker's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by William Hooker, OH Case No. TFA-0042, on October 28, 2003, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 15, 2004

December 3, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Sajit Gandhi
Date of Filing:	October 24, 2003
Case Number:	TFA-0043

This Decision concerns an Appeal that was filed by Sajit Gandhi from a determination made by the Director, Policy and Internal Controls Management, National Nuclear Security Administration (hereinafter referred to as "the Director"). This determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Gandhi requests that we review the Director's determination that certain documents are exempt in their entirety from mandatory disclosure.

I. Background

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

In his FOIA request, Mr. Gandhi sought access to documents relating to the Khmelnitsky 2 and Rovno 4 (K2R4) Nuclear Power Project of the Ukraine. In his determination, the Director identified seven documents as responsive to the request. Documents One and Two were provided to Mr. Gandhi and documents Three through Seven were withheld in their entirety under 5 U.S.C. § 552(b)(5) (Exemption 5). Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The determination issued to Mr. Gandhi points out that Exemption 5 incorporates the deliberative process privilege, which protects from mandatory disclosure advice and opinions that are part of the process by which agency decisions are made. It adds that the withheld documents are draft documents, which by their nature are pre-decisional and deliberative and reflect only the tentative view of their authors, and not final agency policy on matters they discuss. In his Appeal, Mr. Gandhi requests that we review this determination.

II. Analysis

A. Applicability of Exemption 5

As indicated in the determination letter, Exemption 5 encompasses the governmental deliberative process privilege, as well as the attorney-client and attorney work-product privileges. *See, e.g., Coastal States Gas Corp. v. DOE*, 617 F.2d 854 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege shields from mandatory disclosure documents that are "predecisional" and "deliberative," *i.e.*, that were created during agency consideration of a proposed action and that were part of a decision making process. *Darci L. Rock*, 13 DOE ¶ 80,102 (1985); *Texaco, Inc.*, 1 DOE ¶ 80,242 (1978). The privilege thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Coastal States*, 617 F.2d at 866.

Consequently, the privilege does not generally protect purely factual material. There are, however, exceptions to this rule. The first exception is for factual material that was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual material that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. Department of Health and Human Services*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5. *Coastal States*, 617 F.2d at 866.

In order to determine whether this Exemption was properly applied, we have reviewed the five withheld documents. We find that Documents Three and Five through Seven were properly withheld. They are clearly drafts, and consist primarily of opinions and recommendations concerning United States policy as it relates to the K2R4 Project and other Chernobyl-related issues. Although these documents do contain some factual material, it is inextricably intertwined with deliberative material, such that release of the factual material would compromise the deliberative process involved. However, Document Four consists primarily of factual material concerning the April 26, 1986 nuclear accident at the Chernobyl plant and its aftermath. It is not inextricably intertwined with exempt, deliberative material. However, based on the information before us, we are unable to determine whether the first exception applies, *i.e.*, whether the factual material was selected from a larger collection of facts as part of the agency's deliberative process, and release of either the collection of facts or the selected facts would reveal that deliberative process.

We will therefore remand this matter to the Headquarters FOI and Privacy Acts Group for transmittal to the Director. On remand, the Director should review Document Four, determine whether release of the factual material in the document would reveal the deliberative process involved, and issue a new determination to Mr. Gandhi. If, after further review, the Director continues to believe that the document should be withheld in whole or in part, he should specify the deliberative process of which the document

is a part and describe the manner in which release of any withheld information would compromise that process.

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of Documents Three, Five, Six and Seven would not be in the public interest. Although the public does have a general interest in learning about the subject matter of the documents, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by Sajit Gandhi on October 24, 2003 is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the DOE's FOI and Privacy Acts Group for transmittal to the Director, Policy and Internal Controls Management, National Nuclear Security Administration for further proceedings consistent with the guidelines set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 3, 2003

November 18, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Heart of America Northwest

Date of Filing: October 24, 2003

Case Number: TFA-0044

On October 24, 2003, Heart of America Northwest (the Appellant) filed an Appeal from a final determination issued on September 26, 2003, by the Department of Energy's (DOE) Ohio Field Office (OFO). In that determination, OFO responded to a Request for Information filed on November 21, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OFO's determination released several responsive documents to the Appellant. However, OFO redacted information from these documents under FOIA Exemptions 2 and 6. This Appeal, if granted, would require OFO to release that information withheld under Exemption 2 to the Appellant.

I. BACKGROUND

On November 21, 2002, the Appellant filed a twelve-part request for information with OFO. FOIA Request No. OH 03-015 at 1. On November 26, 2003, OFO issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant. OFO withheld some information under FOIA Exemption 6 from several of these documents. The Appeal does not contest these withholdings under Exemption 6. OFO did, however, withhold a portion of one document, entitled "Battelle Columbus Laboratory (BCL) Remote-Handled Transuranic Waste Shipments to Hanford Site" under Exemption 2. Specifically, OFO withheld, under Exemption 2, that portion of the document (the "Routing Section") which describes the route to be used to transport nuclear materials from BCL to the DOE's Hanford Site. On October 24, 2003, the Appellant submitted the present Appeal which challenges OFO's withholding determinations under Exemption 2.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the

agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 2 is at issue in the present case. Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that: (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Routing Section is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The Routing Section neither regulates activities among members of the public nor sets standards to be followed by agency personnel.

The Routing Section meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Disclosure of the Routing Section risks allowing terrorists to circumvent DOE's efforts to comply with its mandate to provide secure and safe transportation for nuclear materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public that requested it. Accordingly, we find that the Routing Section can be properly withheld under the "high two" prong of Exemption 2.

It Is Therefore Ordered That:

(1) The Appeal filed by Heart of America Northwest, Case No. TFA-0044, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 18, 2003

February 3, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ivan Rolig

Date of Filing: November 24, 2003

Case Number: TFA-0046

Ivan Rolig filed an Appeal from a determination that the Nevada Site Office of the National Nuclear Security Administration (NNSA) issued on November 14, 2003. In that determination, the Nevada Site Office denied a request for information that the Appellant had submitted on October 27, 2003, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. That information was withheld after the Nevada Site Office determined that the document contained unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release the information that the NNSA withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On October 27, 2003, Mr. Rolig requested, among other documents, a copy of the *Safety Analysis Report for the Device Assembly Facility at the Nevada Test Site, Las Vegas, Nevada*, DAF SAR-001-193-5394C, dated March 1995. The Nevada Site Office, which had control over that document, responded to the request by withholding the entire 229-page document from Mr. Rolig. In his November 14, 2003 determination letter, the director of the Nevada Site Office's Office of Public Affairs stated that the document contained UCNI, the disclosure of which is restricted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the report described above. In his Appeal, Mr. Rolig contends that "[t]he report is an unclassified document and should be made available

to [him] in the best interest of the public." He also states that the Atomic Energy Act itself provides for the release of information to "'insure the continued conduct of research and development and training . . . and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge."

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g.*, *National Security Archive*, 29 DOE ¶ 80,171 (2004); *National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the document that Mr. Rolig requested.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, the requested document contains UCNI. The information that the DOE identified as UCNI concerns the security details, floor plans and design specifications of a building that is used in atomic energy defense programs. The DOE also determined, however, that the majority of the document's content is not UCNI. The Director has provided this Office with a copy of the document from which the UCNI has been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is Marshall O. Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has now determined to be properly classified must be withheld from disclosure.

Nevertheless, the Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Director's findings, and at his suggestion, we have remanded this document to the Nevada Site Office for a new review, in which it must consider whether the FOIA dictates that other, previously withheld portions of the document should not be released to Mr. Rolig. After completing its review, the Nevada Site Office should either release the currently redacted version of the requested document or issue a new determination that provides adequate justification for the withholding of any additional information from the document it provides to Mr. Rolig. Mr. Rolig will have the opportunity to appeal that determination, if he so desires. Accordingly, Mr. Rolig's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Ivan Rolig on November 24, 2003, Case No. TFA-0046, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Nevada Site Office of the National Nuclear Security Administration shall review the redacted version of the document entitled *Safety Analysis Report for the Device Assembly Facility at the Nevada Test Site, Las Vegas, Nevada*, DAF SAR-001-193-5394C, dated March 1995, bearing markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted. Upon completing its review, the Nevada Site Office shall either release that redacted version in its entirety or issue a new determination that provides adequate justification for the withholding of any additional information from the copy it provides to Mr. Rolig.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 3, 2005

January 12, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citadel Energy Products, LCC

Date of Filing: November 26, 2003

Case Number: TFA-0048

On November 26, 2003, Citadel Energy Products, LCC (CEP), filed an Appeal from a final determination that the Energy Information Administration (EIA) of the Department of Energy (DOE) issued on October 24, 2003. In its determination, EIA denied CEP's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EIA to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that is required to be withheld or may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated August 27, 2003, CEP submitted a FOIA request to EIA for "(i) the actual sum total of working gas in each geographical region reported in Form 912s on a weekly basis and (ii) the actual sum total of working gas in each region reported in Form 191s on a monthly basis by those parties required by the EIA to submit Form 912s." Request Letter dated August 27, 2003, from Jeffrey W. Mayes, Attorney for CEP, to Abel Lopez, Director, FOIA / Privacy Act Office, DOE. No individual firm's data was sought. CEP sought aggregated data by regions, for the period from the time EIA began gathering the data until the present. If the information CEP requested was not available on any existing document, alternatively, CEP requested redacted copies of the Forms 191 and 912.

On October 24, 2003, EIA denied the request. EIA withheld the information, both aggregate data and individual form data, claiming it was exempt from disclosure under Exemption 4. EIA claimed that the information CEP was seeking is protected because it was "commercial

or financial information obtained from a person [which is] privileged or confidential." In its Appeal, CEP disputes the withholding of information under Exemption 4. First, CEP asserts that EIA did not explain its withholding of the aggregated data. Appeal dated November 26, 2003, from Jeffrey W. Mayes, Attorney for CEP, to George B. Breznay, Director, OHA, at 8 (Appeal). Secondly, CEP argues that EIA failed to show that its ability to obtain the information in the future would be impaired. *Id.* at 6.

II. ANALYSIS

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) *(Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879. Because the two forms involved here are mandatory filings under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was involuntarily submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

Finally, to qualify for Exemption 4 protection under *National Parks*, information must also be "confidential." Withheld information is "confidential" if it meets the test set out in *National Parks*. In this case, the withheld information would be considered "confidential" if release would either (a) cause substantial harm to the competitive position of submitters or (b)

impair EIA's ability to obtain the necessary information in the future. Analyzing whether release would cause substantial competitive harm involves two elements: 1) whether the submitters face actual competition and 2) whether disclosure would likely cause substantial competitive injury. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*). Pertinent to this case, the determination to withhold information under Exemption 4 must adequately justify the withholding by explaining briefly how the claimed exemption applies to the document. *R.E.V. Eng Services,* Case No. VFA-0626, 28 DOE ¶ 80,131 (2000); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984).

In the present case, the Determination Letter provides only one statement implying that the aggregate data CEP requested are exempt from disclosure under Exemption 4, because their release would negatively impact the quality of the data contained in EIA's Weekly Natural Gas Storage Report. We have previously found this type of conclusory explanation insufficient. *Id.* at 80,528. *Arnold & Porter* requires that an explanation be set forth showing how the exemption applied to the specific document. That explanation must show that serious thought was given to the reasons justifying the withholding of each document. *Id.* at 80,529. In addition, EIA neither affirmed or denied that a document existed containing the aggregate information CEP seeks. Further, it failed to specifically provide any explanation of how Exemption 4 applied to the aggregate information, if it exists. We will remand the matter to EIA for a description of the relevant document or documents and an explanation of how the exemption applies.

III. CONCLUSION

We are remanding the matter to EIA for identification of any document that contains the requested aggregate data, and for an adequate justification stating how Exemption 4 applies to any such documents. We have not made a determination on whether copies of the Forms 191 and 912 filed with EIA since it began gathering such forms can be withheld under Exemption 4. If a document containing the aggregate information exists, EIA should issue a new determination releasing the document or properly justifying withholding the requested information. If no such document exists, EIA should issue a determination stating that no document exists. CEP shall have 30 days from that date to appeal EIA's October 24, 2003 determination withholding the forms based on Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by Citadel Energy Products, LCC, on November 26, 2003, Case No. TFA-0048, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Energy Information Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 12, 2004

January 12, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	State of Nevada
Date of Filing:	December 9, 2003
Case Number:	TFA-0050

On December 9, 2003, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on November 14, 2003, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on August 14, 2003, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination released several responsive documents to the Appellant. However, ORD withheld eight documents under FOIA Exemption 5. This Appeal, if granted, would require ORD to release that information to the Appellant.

I. BACKGROUND

On August 14, 2003, the Appellant filed a request for information with ORD seeking a document entitled "Criticality Potential Curve Draft Report" (the Draft Report). In addition, the Request sought "all supporting documents, calculations, or analyses prepared in connection with this report." Determination Letter at 1. On October 6, 2003, ORD issued its initial response to the Request (the Response). Accompanying the Response was a copy of the Draft Report. The Response further explained that ORD had not completed its review of the supporting documents, calculations and analyses.

On November 14, 2003, ORD issued a determination letter (the Determination Letter) releasing five responsive documents to the Appellant. The Determination letter also withheld eight documents under FOIA Exemption 5's deliberative process privilege. On December 9, 2003, the Appellant submitted the present Appeal which challenges ORD's withholding determinations under Exemption 5.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold

information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 5 is at issue in the present case.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). In order to qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter-agency or intra-agency document, i.e., its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. *Department of the Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001).

A. Whether the Eight Documents Withheld by ORD are "Inter-agency or Intra-agency Memorandums"

The eight documents withheld by ORD were apparently prepared by outside consultants. Generally, documents received from outside the government are not inter-agency or intra-agency memorandums. In some circumstances, however, documents received from outside the agency are considered to be inter-agency or intra-agency memorandums. In *Klamath*, the Supreme Court noted that in some cases courts have found that communications between the government and outside consultants hired by them are, in effect, inter-agency or intra-agency documents and therefore protected by Exemption 5. Noting further that "in such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," the Court noted:

> [T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id., at 1066-67. In contrast, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective consultant are clearly not inter-agency or intra-agency documents. *Id.*, at 1067-69. Turning to the present case, it is clear that the eight documents withheld by ORD are "inter-agency or intra-agency" communications pursuant to Exemption 5. The information conveyed in these cases is scientific and logistical in nature and clearly was not meant to represent the consultant's interest, but rather discusses the subject matter for which the DOE procured the consultant's services. Therefore, the eight documents withheld by ORD are inter-agency or intra-agency memorandums.

B. Whether the Eight Documents Withheld by ORD Can be Withheld Under the Deliberative Process Privilege

Even if the information that ORD withheld under Exemption 5 is part of the agency's inter-agency or intra-agency communications, it still cannot be properly withheld under Exemption 5 unless it falls within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.

Among the privileges incorporated by the courts under Exemption 5 is the deliberative process privilege. It is this privilege upon which ORD bases its Exemption 5 claim in this case. The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974) (*Sears*). It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). The privilege protects not only documents, but the integrity of the deliberative process itself. *See, e.g., National Wildlife Federation v. United States Forest Service*, 861 F.2d 114, 1119 (9th Cir. 1988); *Schell v. HHS*, 843 F.2d 933, 940 (6th Cir. 1988); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980) (*Coastal States*). The predecisional nature of a document is not altered by the fact that the agency made a subsequent final decision or even if no decision was made at all. *See, e.g., Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 (1979); *May v. Department of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985); *Cuccaro v. Secretary of Labor*, 770 F. 2d 355, 357 (3d Cir.1985). The Supreme Court stated in *Sears*,

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 868.

Each of the documents withheld by ORD under the deliberative process privilege is both predecional and deliberative. Since the request sought "all supporting documents, calculations, or analyses prepared in connection with the [Draft Report]," by definition, all responsive documents are clearly predecisional and part of the deliberative process which led to the issuance of the Draft Report. Moreover, our review of the withheld documents confirms their deliberative and predecisional nature.

The first document is a one page printed copy of a memo dated March 29, 1998. The first sentence of this document states "Here is a draft of a presentation on . . . that I'd like to see added to the next meeting's agenda." Since it is a essentially a discussion of a draft document, it is clearly predecisional and deliberative in nature. The second document is an eight page printed copy of the draft Powerpoint presentation itself. For similar reasons, it too is clearly predecisional and deliberative.

The third document is a one page printed copy of another memo dated March 30, 1998. This document contains a theoretical discussion of engineering issues. It is also clearly predecisional and deliberative. The fourth document is a one page printed copy of a memo also dated March 30, 1998. This memo is a discussion of logistical issues concerning the above-mentioned presentation. It too, is clearly predecisional and deliberative. The fifth document is a one page printed copy of a memo dated March 9, 1998. It communicates the author's opinion of several options for analyzing a particular engineering issue. It is clearly predecisional and deliberative.

The sixth document is a one page printed copy of a memo dated March 9, 1998. This document articulates an engineer's opinion of potential results of a particular event. As an opinion speculating upon a hypothetical event, most of this document is clearly predecisional and deliberative. However, the second to last sentence of this email contains factual information. Such information cannot generally be withheld under the deliberative process privilege. *See, e.g., Coastal States*, 617 F.2d at 867. However, there are two circumstances under which the courts allow agencies to withhold factual material in an otherwise "deliberative" document. The first such circumstance occurs when the author of a document selects specific facts out of a larger set of facts and the selection of the facts is itself part of the deliberative process. *See, e.g., Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). The second of these circumstances occurs when factual information is inextricably intertwined with deliberative information that its release would reveal the agency's deliberations. *See, e.g., Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774-77 (D.C. Cir. 1988). The release of this factual information would reveal both the substance of the agency's deliberations as well as the opinions of the document's author.

The seventh document is a one page table setting forth a series of estimates of the values of certain measurements in five hypothetical cases. It too, is clearly predecisional and deliberative. The eighth document is a one page memo dated February 26, 1998. This document expresses the opinion of the author concerning the process by which a specific engineering issue is to be analyzed. It is clearly predecisional and deliberative.

Several of the withheld documents contain names of individuals. The names of these individuals are factual in nature and therefore cannot properly be withheld under the deliberative process privilege. However, the identities of individuals can often be withheld under FOIA Exemption 6. Accordingly, we are remanding this portion of the present Appeal to the ORD. On remand, ORD shall either segregate and release the names of these individuals or issue a new determination letter withholding them under any other applicable exemptions to the FOIA.

Conclusion

Most of the information withheld by the ORD is predecisional and deliberative and was therefore properly withheld under Exemption 5. However, the information revealing the names of individuals is not predecisional or deliberative. Accordingly, we are remanding that portion to the ORD for further consideration.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada , Case No. TFA-0050, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Repository Development for further processing under the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 12, 2004

February 9, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Valiant Detective and Security Agency

Date of Filing: December 10, 2003

Case Number: TFA-0051

On December 10, 2003, Valiant Detective and Security Agency (Valiant) filed an Appeal from a determination issued to it on November 7, 2003, by the National Energy Technology Laboratory (NETL) of the Department of Energy (DOE). That determination concerned a request for information that Valiant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, NETL would be ordered to release the requested information or to issue a new determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Valiant filed a FOIA request seeking contract information regarding K-Ray Security, Inc., Contract No. DE-AC2600NT40780. In its November 7, 2003 determination letter, NETL identified a number of documents responsive to Valiant's request. However, NETL withheld portions of this information pursuant to Exemptions 2 and 4 of the FOIA. *See* November 7, 2003 Determination Letter.

On December 10, 2003, Valiant filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Valiant challenges NETL's withholding of information it believes is non-proprietary. Specifically, Valiant asserts that "once awarded, a contract file and all of its contents fall into the public domain." *See* Appeal Letter at 1. Valiant asks that the OHA direct NETL to release the withheld information.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search, and if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." *Id*.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper, and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of the searches, (2) clearly indicate which information was withheld, and (3) specify any exemption under which information was withheld. *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,797 (1996). It is well established that a FOIA determination must contain a reasonably specific justification for withholding material that is responsive to a FOIA request. *See Deborah L. Abrahamson*, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to permit the requesting party to prepare a reasoned appeal and to allow this Office to perform an effective review of the initial agency determination. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. *Id*. In addition, the FOIA requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. See 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material).

In the present case, NETL withheld responsive information under Exemptions 2 and 4 of the FOIA. In its determination letters, NETL provided Valiant with overly vague explanations regarding how Exemptions 2 and 4 apply to the responsive information. Instead of providing specific justification for applying Exemptions 2 and 4 to the material withheld in this case, NETL has merely restated the language of Exemptions 2 and 4, without adequately explaining the reasons why NETL concluded that the responsive information is exempt from disclosure under the provisions of the FOIA. We find these explanations to be insufficiently informative and short of what is legally required.

Accordingly, we shall remand this matter to NETL either to release to Valiant all of the information responsive to its request or to issue a new determination adequately supporting the withholdings of the information. If a new determination is issued, NETL should include, for each portion of withheld

information, a statement of the reason for denial, a specific explanation of how any applicable exemption applies to the information withheld and a statement why discretionary release is not appropriate. *See* 10 C.F.R. § 1004.7(b)(1). NETL should further review each document for the possible segregation and release of additional non-exempt material. *See* 10 C.F.R. § 1004.7(b)(3).

It Is Therefore Ordered That:

(1) The Appeal filed by Valiant Detective and Security Agency, OHA Case No. TFA-0051, on December 10, 2003, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory of the Department of Energy, which shall either release the responsive information withheld in its November 7, 2003 determination or issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 9, 2004

January 29, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Jeanna L. Gann
Date of Filing:	December 29, 2003
Case Number:	TFA-0052

On December 29, 2003, Jeanna L. Gann filed an Appeal from a determination the DOE's Oak Ridge Operations Office (DOE/OR) issued on November 24, 2003. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

Ms. Gann requested from DOE/OR records pertaining to her deceased father, Herschel Leo Lovvorn, who worked for the Atomic Energy Commission (AEC), a predecessor agency to the DOE, at Oak Ridge, Tennessee. In its response, DOE/OR informed Ms. Gann that "a search of [DOE/OR] was conducted. However, the only information that could be located is Mr. Lovvorn's employment card. A copy of this file is enclosed." Letter from Amy L. Rothrock, DOE/OR, to Jeanna L. Gann (November 24, 2003). In the present appeal, Ms. Gann challenges "the adequacy of the search for my father's employment records." Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might

conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Thus, upon receiving the present Appeal, we contacted DOE/OR to inquire as to the search it conducted in response to Ms. Gann's request. DOE/OR provided the following description of its search:

> For FOIA Request 02-082, Herschel L. Lovvorn, we sent a request for records to the East Tennessee Technology Park (formerly the Oak Ridge K-25 Plant), the Oak Ridge Y-12 Plant, the Oak Ridge National Laboratory, our DOE Office of Safeguards and Security and our Records Holding area where the archived records are kept. As a result of this search, an employment card was located, and some additional information was provided to us from our DOE Worker's Advocacy Office.
>
> For each office that we send a request to, we ask that they respond with a "no records" response if no information is found, which we keep as a record for our files. The searches are generally done on computer data bases and some manual searches are done as well. The information the requestor provides on the Freedom of Information Act request forms, the name, social security number, dates of employment, etc., is used to conduct the searches.

Electronic mail from Leah Ann Schmidlin, DOE/OR, to Steven Goering, OHA (January 7, 2004).[*] DOE/OR has confirmed that those search procedures were followed in the present case. Electronic mail from Leah Ann Schmidlin, DOE/OR, to Steven Goering, OHA (January 22, 2004).

Based on the above descriptions, it appears clear to us that DOE/OR performed a diligent search of locations under its jurisdiction where responsive documents were most likely to exist. Thus, we conclude that the search was reasonably calculated to uncover the records Ms. Moore sought.

However, in her appeal, Ms. Gann indicated that her father also worked for the AEC at Fernald (Ohio), Los Alamos (New Mexico), and Germantown (Maryland) during his tenure with the AEC. DOE/OR has therefore forwarded Ms. Gann's request to the DOE offices (Fernald, Albuquerque, and DOE Headquarters, respectively) that would have responsibility for any other records within the DOE complex that pertain to Mr. Lovvorn. Those offices will provide separate responses to Ms. Gann upon completion of their searches. Ms. Gann will have the opportunity to file an appeal to this office from each of those responses.

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[*] The "additional information" from the worker advocacy office to which this email refers are claim records compiled for the Energy Employees Occupational Illness Compensation Program. Electronic mail from Amy Rothrock, DOE/OR, to Steven Goering, OHA (December 31, 2003). These records were not provided to Ms. Gann in DOE/OR November 24, 2003 response, but have since been provided in a supplemental response from DOE/OR.

Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Jeanna L. Gann, Case Number TFA-0052, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 29, 2004

March 25, 2004
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Beverly Ann Thacker

Date of Filing: February 12, 2004

Case Number: TFA-0053

On February 12, 2004, Beverly Ann Thacker (Thacker) filed an Appeal from a determination issued to her on February 3, 2004, by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE) in response to a request for documents that Thacker submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Oak Ridge perform an additional search for responsive material.

I. Background

On January 8, 2004, Thacker made a FOIA request via telephone to Oak Ridge for a copy of the following records pertaining to her deceased father, Billy D. Jones: medical, personnel, radiation exposure, chest x-rays, industrial hygiene, and personnel security file. Telephone Request (January 7, 2004). Thacker requests verification of her father's records for use in the DOE Employee's Worker Compensation Program. According to Thacker, between April 1944 and October 1945, Mr. Jones was employed at the K-25 location of the Oak Ridge site by the following subcontractors: (1) Ford, Bacon & Davis; (2) J.A. Jones; and (3) L. K. Comstock Co. Inc. & Bryant Electric Co. Inc. On February 3, 2004, Oak Ridge sent Thacker a letter explaining that it had conducted a search but found no responsive material. Thacker appealed that determination on February 12, 2004, arguing that her father's military discharge papers indicated that he had worked at Oak Ridge prior to entering the Army Air Corps in October 1945. Letter from Thacker to Director, Office of Hearings and Appeals (OHA) (February 12, 2004) (Appeal). This led Thacker to conclude that there should be records relating to her father's work at K-25 because everyone residing on or working on the Oak Ridge Reservation at that time required identification. *Id*. In the Appeal, Thacker challenged the adequacy of the search and asks OHA to direct Oak Ridge to search again for responsive material regarding her father's alleged employment at the Oak Ridge site.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Oak Ridge regarding the search for responsive material. Oak Ridge informed us that they searched all sites and record repositories (DOE Records Holding Area, Oak Ridge Associated Universities, K-25, X-10 and Y-12) and all Privacy Systems of Records (DOE-5, DOE-33, DOE-35, DOE-43, DOE-71, DOE-72, DOE-73). The DOE Records Holding Area repository and the Oak Ridge Associated Universities Centers for Epidemiological Research have paper and electronic data search capabilities for employees of major and prime contractor companies from the 1940s. Both databases can be searched by name, Social Security number, and company name. Oak Ridge searched on those identifiers but found no record in those files of Mr. Jones or of any employees of the companies mentioned in Thacker's request. Electronic mail message from Amy Rothrock, Oak Ridge FOIA Officer, to Valerie Vance Adeyeye, OHA (February 23, 2004). Oak Ridge also searched the personnel security clearance assurance index card files. These files did contain records on J. A. Jones employees from the 1940s, stating their clearance level and other information. *Id*. However, the files did not contain any information related to Mr. Jones. *Id.* Oak Ridge thus concluded that Thacker's father was not an employee of J. A. Jones, and that the other companies named in the request may have been subcontractors to J.A. Jones. *Id.*

Oak Ridge emphasized that they have conducted hundreds of FOIA requests for records of subcontractor employees in the last three years. *Id.* According to Oak Ridge, contractors did not retain records on subcontractor employees and the companies took their records with them at the end of the war. Oak Ridge stated that Thacker did not mention in her original request that her father entered the Army in 1945. Considering this new information, Oak Ridge suggests that Thacker submit a request to the Army FOIA office, since the Army may have had contracts with the subcontractors named in the request. *Id.* at 2.

Based on our analysis of the search as explained above, we find that Oak Ridge has conducted an adequate search for responsive material. Thacker indicated that her father worked for a subcontractor, and Oak Ridge has offered a credible explanation for the absence of subcontractor records in its files. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Beverly Ann Thacker on February 12, 2004, OHA Case Number TFA-0053, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 25, 2004

March 17, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Burkhalter, Rayson & Associates

Date of Filing: February 18, 2004

Case Number: TFA-0054

On February 18, 2004 , Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released portions of a responsive document, but continued to withhold other portions of that Document under FOIA Exemptions 4 and 6. This Appeal, if granted, would require OR to release those portions of the document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal), in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant filed an appeal of that Determination challenging OR's withholding of the Proposal. On February 13, 2003, we issued a decision and order holding that OR had improperly withheld the Proposal under Exemption 3. *Burkhalter, Rayson & Associates*, *Case No. TFA-0008*, 28 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). Accordingly, we remanded the matter to OR with instructions to "promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof)." *Id.*

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). On July 25, 2003, the Appellant filed an appeal of the July 3, 2003 Determination Letter, contending that OR had failed to identify three responsive documents, Volumes III, IV and V of the Proposal. On September 12, 2003, we issued a decision and order granting the July 3, 2003 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates*, *Case No. TFA-0037*, 28 DOE ¶ 80,302 (September 12, 2003) (*Burkhalter II*). In *Burkhalter II*, we found that OR had failed to fully comply with our order in *Burkhalter I*. *Id.* Specifically, we found that OR had effectively withheld Volume III of the Proposal by improperly failing to identify it as responsive. *Id.* Accordingly, we remanded the matter to OR instructing it to promptly issue a new determination letter which "must either release to the Appellant the contents of Volume III or provide *a meaningful*

description of any portion of the contents of Volume III it determines to withhold under an appropriately justified FOIA exception." *Id.* (emphasis supplied). On January 21, 2004, OR issued a determination letter releasing a redacted copy of Volume III to the Appellant. However, OR deleted portions of this document under Exemptions 4 and 6. On February 18, 2004, the Appellant filed the present appeal. The Appellant contends that OR has improperly withheld information under Exemptions 4 and 6. Appeal at 1.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemptions 4 and 6 are at issue in the present case.

A. Exemption 4

In its January 21, 2004 Determination Letter, OR withholds portions of Volume III under Exemption 4. It indicates that the information it is withholding under Exemption 4 consists of "business-sensitive commercial information that is proprietary to [a DOE contractor and its business partners]." Determination Letter at 1. Specifically, OR claims

> Two withheld audit reports contained in Volume III, if released, would provide competitors with insight into the strengths and weaknesses of [a DOE Contractor] and its partners and reveal internal accounting practices that are proprietary to these entities. Providing a competitor with percentages, labor rates, overhead, fringe benefits, compensation data, transition cost calculation methods, and similar commercial and financial data contained throughout Volume III would cause substantial competitive harm to the competitive position of [a DOE Contractor] and its partners and reveal the strategies and methodologies employed by these entities in preparing the costing portions of proposals submitted for future government procurements.

Determination Letter at 2.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and

"privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is"privileged or confidential." 1/

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

It is well settled that if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

The Determination Letter cites two grounds for concluding that release of two audit reports contained in Volume III would cause the submitters competitive harm. Specifically, the Determination Letter contends that release of the audit reports "would provide competitors with insight into the strengths

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1/ In the present case, OR does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

and weaknesses of [the DOE Contractor] and its partners and reveal internal accounting practices that are proprietary to these entities." Determination Letter at 2. These descriptions of withheld information are vague and unenlightening. Moreover, the Determination Letter fails to explain how such insights could be obtained and how such insights could be expected to cause the DOE Contractor and its partners substantial competitive harm. The Determination Letter's description of the remaining information it has withheld under Exemption 4 is also unduly vague in some instances. For example, some of the withheld information is described merely as "percentages" or "similar commercial and financial data." Determination Letter at 2.

The Determination Letter also indicates that it is withholding some information because its release would cause substantial competitive harm to the DOE Contractor and its partners, supposedly because its release would "reveal the strategies and methodologies employed by those entities in preparing the costing portions of proposals submitted for future government procurements." Determination Letter at 2. However, OR neither specifically indicates the nature of the information it claims would reveal its bidding strategy nor explains how such information could assist competitors to predict future bidding strategy. It is well settled that the mere fact that the contents of a document might be useful to competitors in future bids does not, by itself, constitute sufficient grounds to withhold the document. *Baker, Donelson, Bearman & Caldwell*, 27 DOE ¶ 80,164 at 80,655(1998) (citing *Morgan, Lewis & Bockius*, 20 DOE ¶ 80,165 at 80,688 (1990)). "A competitive injury is too remote for purposes of Exemption 4 if it can occur only in the occasional renegotiation of long term contracts." *Niagara Mohawk Power Corp. v. Department of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Moreover, the courts clearly mandate that in order to receive protection under Exemption 4, the expected harm must be substantial in nature. *See, e.g., National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Accordingly, Courts have not upheld protection under Exemption 4's competitive harm prong when agencies have been unable to convincingly show that release of information would be of substantial assistance to competitors attempting to estimate and undercut the submitter's future bids. *See, e.g., GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994); *Acumenics Research and Technology v. United States Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988). While the law does not require OR to engage in a highly sophisticated economic analysis of the possible harm to the submitters that might result from disclosure, *see Public Citizen Health Research Group v. FDA* , 704 F.2d 1280 (D.C. Cir. 1983), in order to prevail, OR must meet its burden of showing substantial competitive harm to the bidders. OR has not met this burden.

Accordingly, we are remanding this portion of the appeal to OR for further processing. On remand, OR should either release the information it is currently withholding under Exemption 4 or provide a more thorough explanation of its basis for withholding that information. A sufficiently thorough explanation would provide a clear and specific description of the information being withheld and a specific explanation of why the release of the withheld information could reasonably be expected to result in substantial competitive harm to the person from which it was obtained. 2/

2/ Before releasing any of the information it is withholding, OR must, of course, notify the submitter of that information and provide it with an opportunity to explain how release of that information could cause it substantial competitive harm. Exec. Order No. 12,600, § 1.

B. Exemption 6

OR withheld information it describes as "salaries and similar personal financial information of contractor employees" under Exemption 6. Determination Letter at 1. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

The only justification OR provided for these withholdings states:

> We find that the release of salaries and similar personal financial information of contractor employees contained in Volume III is a serious invasion of personal privacy of those individuals and is not in the public interest.

Determination Letter at 1. As an initial matter, we note that "similar personal financial information" is much too vague a description to allow for meaningful review. 3/ Also, the justification given is much too conclusory and vague to allow for meaningful review. Accordingly, we are remanding this portion of the Appeal to OR for further processing. On remand, OR should either promptly release that information it is currently withholding under Exemption 6 or issue a new, more detailed and specific Determination Letter which fully describes the information it withholds, specifically identifies any privacy interests its release would violate and any public interests that might be served by its release, and specifically compares the importance of these interests to determine whether release would constitute a clearly unwarranted invasion of personal privacy.

3/ Moreover, OR must take care to ensure that the salary and financial information it is withholding under Exemption 6 can be attributed to particular individuals if released. If it cannot, it may not be withheld under Exemption 6.

III. CONCLUSION

Because OR has not met its burden of showing that it properly withheld information under Exemptions 4 and 6, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must either release to the Appellant the contents of Volume III it is currently withholding or provide a meaningful description of any portion of the contents of Volume III it determines to withhold under an appropriately justified FOIA exemption, in accordance with the instructions set forth above.

This is the third appeal which the Appellant has filed concerning the same FOIA request. In essence, the Appellant has had to file three appeals and has had to wait at least an additional 15 months for an appropriate resolution of its request. This result has been attributable to OR's inability or unwillingness to apply the established law. The Appellant's rights under the FOIA have been poorly served.

It Is Therefore Ordered That:

(1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0054, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 17, 2004

May 27, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: B & F Repair & Maintenance Inc.

Date of Filing: April 14, 2004

Case Number: TFA-0056

On April 14, 2004 , B & F Repair & Maintenance Inc. (the Appellant) filed an Appeal from a second and final determination issued by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) Service Center (Service Center). In that determination, the Service Center responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. The Service Center released portions of a responsive document, but withheld other portions of that Document under FOIA Exemption 4. This Appeal, if granted, would require the Service Center to release the withheld portions of the document to the Appellant.

I. Background

On December 23, 2003, the Appellant filed a request for information with the Service Center seeking a number of documents. Request Letter dated December 23, 2003, from C. Brian Meadors, attorney for Appellant, to Terry Apodaca, DOE, NNSA.[1/] On January 21, 2004, the Service Center issued a determination letter in response to this request. Determination Letter dated January 21, 2004, from Carolyn A. Becknell, FOIA Officer, DOE, NNSA, to Brian Meadors.[2/] On March 19, 2004, the Service Center issued a second

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[1/] The Appellant originally filed its request letter on October 19, 2003, with the Small Business Program Manager. Request Letter dated October 19, 2003, from Brian Meadors to Greg Gonzales. On December 22, 2003, the Appellant requested the status of the FOIA request and was told that the request needed to be made directly to the FOIA office. Electronic Mail Message dated December 22, 2003, from Brian Meadors to Greg Gonzales.

[2/] The Appellant filed suit in the United States District Court for the Western District of Arkansas, Fort Smith Division, after the January 21, 2004 final determination was issued by the Service Center.

and final Determination Letter, releasing one of the requested documents with portions redacted. Determination Letter dated March 19, 2004, from Carolyn Becknell to Brian Meadors (March 19, 2004 Determination Letter). On April 14, 2004, an Appeal was filed responding to the Service Center's second and final determination. Appeal Letter dated April 8, 2004, from Brian Meadors to Director, Office of Hearings and Appeals, DOE.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 4 is at issue in the present case.

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial

harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In its March 19, 2004 Determination Letter, the Service Center withheld portions of the contract between the Service Center and Chugach McKinley, Inc. (Contractor), under Exemption 4, on the grounds that release of the withheld information would cause the submitter competitive harm. The Service Center withheld individual dollar amounts and General and Administrative (G&A) percentages for cost elements in the Contract and the names and titles of key personnel who are dedicated full-time to the Contract. March 19, 2004 Determination Letter at 2. The Service Center indicated that the information it withheld under Exemption 4 is held in the strictest confidence by the Contractor. *Id.* at 1. Specifically, the Service Center claims that the

> disclosure of the deleted dollar amounts . . . would disclose the contractor's plan for remuneration of its employees, its methods of allocating costs, its indirect rate structures, its allocation of resources, both personnel and corporate, and insight into its approach to the work contracted for. Such information would provide competitors with a clear advantage in anticipating the contractor's responses in future competitions and would aid in attempting to hire away the contractor's employees.

March 19, 2004 Determination Letter at 3.

Further, in regard to the names and titles of key personnel, the Service Center claims that

> the release of the identity of key Contract personnel would provide competitors with a significant opportunity to pirate away personnel who are vital to the firm's competitive position in the marketplace. Employee raiding would have the effect of depriving the company of the talent of key persons dedicated full-time to the Contract and providing a source of corporate intelligence about company plans, methods, structure, clients, and other proprietary information and disrupting performance of this and other business commitments. The information would also indicate method of allocation and commitment of its corporate personnel resources, and the company's technical approach to this and other competitions.

Id. The Service Center concludes that release of any of the withheld information would likely cause substantial competitive harm *Id.*

We will analyze this case under the *National Parks* test described above because the Contractor submitted the information in the proposals on a non-voluntary basis, as this information is required by the DOE's Acquisition Regulations. *See* 48 C.F.R. § 970.5204-22

(1992). For the information to be found to be "confidential," it must meet one of two tests: its release would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. *National Parks*, 498 F.2d at 770. Release of this information is not at all likely to impair the government's ability to obtain necessary information of this type in the future because, as stated above, it is required to be submitted under the DOE Acquisition Regulations. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release will substantially harm the submitter's competitive position.

Using the "competitive harm" prong of the *National Parks* test, the Service Center withheld from the Appellant the dollar amounts, G&A percentages, and names and titles of key personnel. March 19, 2004 Determination Letter at 2. The Service Center alleges that release of the withheld information is likely to cause substantial competitive harm to the Contractor. *Id.* at 3. The Service Center goes on to state that a competitor with knowledge of the withheld information would have a clear advantage in anticipating the Contractor's responses in future competitions and would aid in hiring away the Contractor's employees. *Id.* We agree. Release of the information withheld by the Service Center would result in competitive harm to the Contractor from whom it was obtained. We have previously held that names of employees can be withheld, because release could allow competitors to offer employment to those personnel. *Glen M. Jameson*, 26 DOE ¶ 80,191 at 80,731 (1996). Likewise, we have held that release of similar financial information would cause competitive harm to a similarly situated Contractor. *IBEW Local 125, Case No. TVA-0695,* 28 DOE ¶ 80,197 (October 24, 2001).

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Martin Becker, Case No. VFA-0710,* 28 DOE ¶ 80,222 (May 2, 2002). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

III. Conclusion

Because the Service Center has met its burden of showing that it properly withheld the information under Exemption 4, we shall deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by B & F Repair & Maintenance Inc., Case No. TFA-0056, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 27, 2004

June 7, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: April 21, 2004

Case Number: TFA-0058

On April 21, 2004, National Security Archive appealed a determination issued by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In its appeal, National Security Archive contends that NNSA had failed to conduct an adequate search for documents that were responsive to a FOIA request it had filed. For the reasons detailed below, we find that NNSA conducted an adequate search for responsive documents and will deny the appeal filed by National Security Archive.

I. Background

National Security Archive filed a request in which it sought any reports, transcripts, memoranda, or summaries relating in whole or in part to 1) the RAND Corporations's Nu-Opts (nuclear options) studies during the late 1960s and early 1970s and 2) a conference held at Los Alamos Laboratory in early September 1969 on tactical nuclear weapons, which included a presentation on the RAND Corporation Nu-Opts study. *See* Determination Letter at 1. On April 1, 2004, NNSA issued a determination which stated that the Los Alamos Site Office and the Los Alamos National Laboratory searched their files and found no documents responsive to National Security Archive's request. *Id.* In its Appeal, National Security Archive challenges the adequacy of the search conducted by NNSA.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *E.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (2002); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted an official at NNSA to ascertain the extent of the search that had been performed. Upon receiving National Security Archive's Request for Information, NNSA contacted the Los Alamos Site Office, specifically the Office of Business Administration, to conduct a search for responsive documents. We were informed that the Office of Business Administration conducted a search of the Central Files guide and could not locate any responsive records. *See* Record of Telephone Conversation between Carolyn A. Becknell, NNSA and Kimberly Jenkins-Chapman, OHA (May 18, 2004). In addition to this search, the Los Alamos Site Office asked the Los Alamos National Laboratory to search its files for responsive records. The Information Practices Office within the Los Alamos National Laboratory searched numerous databases (all of the databases available that could possibly possess responsive records) using the key words "RAND Corporation," "nuclear options," and "conference." No responsive records were located as a result of this search. *Id.* NNSA stated that National Security Archive did not provide any other information in its request that would have directed NNSA to search anywhere else for responsive records. In its Appeal, National Security Archive enclosed the first two pages of a speech given by an Air Force general at the conference referred to in its request. NNSA has suggested that the Appellant contact the Air Force for possible responsive records.

Given the facts presented to us, we are convinced that NNSA conducted an adequate search which was reasonably calculated to uncover documents responsive to National Security Archive's request. Accordingly, National Security Archive's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive, OHA Case No. TFA-0058, on April 21, 2004, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 7, 2004

October 18, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: May 6, 2004

Case Number: TFA-0060

The National Security Archive (the Appellant) filed an Appeal from a determination that the Department of the Air Force (the Air Force) issued on April 15, 2004. In that determination, the Air Force denied in part a request for information that the Appellant submitted on March 1, 2001, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Air Force released portions of the document the Appellant requested, but also withheld portions of the document. That information was withheld as the result of reviews of the documents by the Department of Energy (DOE)'s Office of Classification and Information Control and the Air Force's Headquarters Air Combat Command, after which they determined that the document contained classified information. This Appeal, if granted, would require the DOE to release the information that the DOE withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 1, 2001, the Appellant requested a copy of the January-June 1964 Strategic Air Command History, Chapters I, II, III, IV and VII. The Air Force responded to the request by providing portions of that document to the Appellant. However, the Air Force withheld from release portions of the document pursuant to (1) the Air Force's determination that some of the withheld information was properly classified in accordance with Executive Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA and (2) the DOE's determination that some of the withheld information was classified in accordance with the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, and therefore

warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the withheld information described above. In its Appeal, the Appellant contends that "information on the aggregate nuclear yield of [Strategic Air Command] bombers and missiles during 1964 is already declassified and has been in the public domain since the 1970s." In addition, it contends that any information that has not already been declassified should now be released as well:

> There are no good public policy reasons why they must remain classified. The numbers have long been overtaken by events. . . . Releasing the numbers would disclose gross nuclear capabilities that are now decades old. The yield numbers have no relevance to the current situation and certainly will be of no use to terrorists or hostile states who wish to acquire nuclear weapons today. . . . Historians, social scientists, and the interested public, however, do need this information. By making such information available, the Energy Department will contribute to better understanding of the Cold War and the nuclear era.

Appeal at 1.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold concerns the military utilization of nuclear weapons including exact numbers of weapons and yields of weapons. This information is currently classified as Formerly Restricted Data (FRD) and is identified

as "DOE (b)(3)" in the margin of a newly redacted version of five pages of the document, which will be provided to the Appellant under separate cover. FRD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3. The denying official for the DOE's withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

The Air Force also reviewed the document, and determined that it will continue to withhold one item of information on the fifth page of the newly revised version concurrently with the DOE. That item is the first deletion on the page, and is marked in the margin as "D2NP." The Air Force is withholding that information pursuant to Exemption 1 of the FOIA. Exemption 1 provides that an agency may exempt from disclosure matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." The Air Force identified the information described above as National Security Information properly classified in accordance with Executive Order 12958. The denying official for the Air Force's withholdings is Jeffrey M. Coleman, Colonel, USAF Chief, Nuclear Operations, C2 and Arms Control Division.

Based on the Director's review, we have determined that the Atomic Energy Act requires DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Director has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Therefore, the DOE will release a newly redacted version of a portion of the document reviewed in this Appeal to the Appellant under separate cover. Accordingly, the Appellant's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on May 6, 2004, Case No. TFA-0060, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of a portion of the document in which additional information is released will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in

the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 18, 2004

June 23, 2004
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mildred Clark
Date of Filing:	May 10, 2004
Case Number:	TFA-0061

On May 10, 2004, Mildred Clark (Clark) filed an Appeal from a determination issued to her on April 6, 2004, by the Richland Operations Office (Richland) of the Department of Energy (DOE) in response to a request for documents that Clark submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland perform an additional search for responsive material.

I. Background

On March 1, 2004, Clark made a FOIA request to Richland for a copy of the employment, medical, dosimetry and personnel security records pertaining to her deceased husband, Charlie Clark. FOIA Request Form 2004-0064 (March 1, 2004). According to Clark, between 1953 and 1963, her husband was employed as a construction worker at the Hanford site by the following contractors: Guy F. Atkinson & Jones, Blaw Know, and Morrison Knudson. *Id.* Clark also provided her husband's social security number and death certificate. Richland searched their database and found Mr. Clark's radiation exposure record and medical file. Richland informed Clark that the Hanford Environmental Health Foundation would forward her husband's medical records to her. However, Richland was unable to find any employment or security records related to Mr. Clark. Letter from Dorothy Riehle, Richland Operations Office, to Clark (April 6, 2004). Clark's attorney, Allen Counts, appealed that determination on May 10, 2004. Letter from Allen Counts, Esq. to Director, Office of Hearings and Appeals (OHA) (May 10, 2004) (Appeal). In the Appeal, Clark challenges the adequacy of the search and asks OHA to direct Richland to search again for responsive material regarding her husband's employment at Hanford.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of*

State, 897 F.2d 540, 542 (D.C. Cir. 1990) (*Truitt*). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Richland regarding the search for responsive material. Richland informed us that they searched their database on last name, first name, and social security number and found medical and dosimetry records. Telephone conversation between Dorothy Riehle, Richland, and Valerie Vance Adeyeye, OHA (June 8, 2004). The absence of employment records, however, was not uncommon according to Richland. Individuals who worked at the Hanford site but did not hold a security clearance would customarily have had medical and radiation records at the site, but no employment records. Mr. Clark was not a DOE employee, and his employer was not required to submit its records to the DOE. Most contractors, according to Richland, took their records with them at the conclusion of their work on the site. Richland also searched Mr. Clark's medical and dosimetry records to see if they contained any information that pointed to a certain employer, but found nothing. Richland thus concluded that Mr. Clark's employer had taken Mr. Clark's records with them when they left the site, if such records existed at all.

Based on our analysis of the search as explained above, we find that Richland has conducted an adequate search for responsive material. Clark indicated that her husband worked for a contractor, and Richland has offered a credible explanation for the absence of contractor records in its files. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Mildred Clark on May 10, 2004, OHA Case Number TFA-0061, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 23, 2004

July 9, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Alice McMillan
Date of Filing:	June 10, 2004
Case Number:	TFA-0062

On June 10, 2004, Alice McMillan filed an Appeal from a determination the DOE's Richland Operations Office (Richland) issued on April 12, 2004. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

On March 26, 2004, Ms. McMillan wrote Richland requesting records pertaining to her deceased brother, Carl Lester Vaughn, who apparently worked at the Hanford Nuclear Reservation during World War II. On April 12, 2004, Richland issued a determination letter (the determination letter) in response to Ms. McMillan's request. The determination letter states that Richland had performed "a thorough search by name and Social Security number for employment records related to your brother and were unable to locate any." Determination Letter. In the present appeal, Ms. McMillan challenges the adequacy of Richland's search.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Thus, upon receiving the present Appeal, we contacted Richland to inquire as to the search it conducted in response to Ms. McMillan's request. Richland informed us that it had searched the DOE's database of individuals who had been employed at the Hanford Reservation using both her

brother's name and his social security number. Richland also informed us that, based on its experiences, its records do not contain information regarding every person who worked at Hanford, particularly those employed there before the administration of Hanford passed into civilian hands. Records of individuals employed at Hanford when it was administered by the Manhattan Engineering District may be held by the Department of Defense or the actual employers of those workers or may simply no longer exist.

Based on the above descriptions, it appears clear to us that Richland performed a diligent search of locations under its jurisdiction where responsive documents were most likely to exist. Thus, we conclude that the search was reasonably calculated to uncover the records Ms. McMillan sought.

Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Alice McMillan, Case Number TFA-0062, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 9, 2004

July 21, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	James F. Ray
Date of Filing:	June 9, 2004
Case Number:	TFA-0063

On June 9, 2004, James F. Ray filed an Appeal from a determination the Office of Security of the Department of Energy (SO) issued on May 4, 2004. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

In a December 2, 2003 FOIA request, Mr. Ray sought from SO all documents related to the delegation of classification and declassification authority to a particular contractor employee who works in the DOE's Germantown, Maryland headquarters.

On May 4, 2004, SO issued a determination to Mr. Ray, in which it released 14 documents responsive to his request. SO withheld information from two of the documents, citing FOIA Exemption 6. Letter from Marshall O. Combs, Director, SO, to James F. Ray (May 4, 2004) (Determination Letter). In his appeal, Mr. Ray states that he is

> aware of email messages and other documents that are responsive but were not included in the initial FOIA response. I request the Department initiate a more thorough search for these responsive documents. I also believe that Exemption 6 of the FOIA . . . was incorrectly applied to the deletion and withholding of information in the documentation received . . . .

Appeal at 1.[1]

[1]Mr. Ray also proposed "that all correspondence relating to the initial FOIA request should be included as responsive documentation to the FOIA." First, Mr. Ray may not expand the scope of his request on appeal to this office. Second, the FOIA requires agencies to provide responsive documents that existed at the time of the agency's receipt of the request. It does not require an agency to create documents, nor to provide to the requester whatever documents it does create in the process of responding to the request. Mr. Ray may file a new FOIA request for the documentation he

II. *Analysis*

A. *Adequacy of Search for Responsive Documents*

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

SO provided us with the following information regarding its search. SO's point of contact forwarded Mr. Ray's request to ten individuals with whom documents responsive to the request might be found. Each was asked to provide responsive documents and was advised that "a negative reply is required" from individuals who did not locate responsive documents. All the recipients of the request either provided responsive documents to the point of contact or gave a negative reply. The point of contact also searched for responsive documents. Electronic Mail from Cecelia Rogers, SO, to Steven Goering, OHA (June 17, 2004).

In reviewing Mr. Ray's appeal, we asked him if he could provide more details regarding "email messages and other documents that are responsive but were not included in the initial FOIA response." Mr. Ray responded by referring to portions of the documents released to him, claiming that they refer to other documents that were not provided to him. In addition, he refers to representations made to him by certain people that certain documents exist. Finally, he refers to documents that should exist if "standard procedure" were followed, noting, "I am intimately familiar with the procedures that result in the granting of authorities. If they didn't follow these procedures they should explain why."[2] Electronic mail from James Ray to Steven Goering, OHA (July 7, 2004).

Mr. Ray helpfully names a number of specific individuals who would have created or received the documents that he believes should exist but were not provided to him. However, with only one exception, each individual identified by Mr. Ray was a recipient of his FOIA request, as forwarded by the SO point of contact. Each provided responsive documents to the point of contact, or indicated that no responsive documents were found. Regarding the one person mentioned by Mr. Ray, but who was not a recipient of the request, we asked if SO would be willing to forward the request to this person during the pendancy of this appeal. SO did so, and received a negative response. Electronic Mail from Cecelia Rogers, SO, to Steven Goering, OHA (June 17, 2004).

The appellant notes a number of reasons why additional responsive documents *should* exist. However, in cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684

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seeks. *See Barbara Schwarz*, 28 DOE ¶ 80,199 at 80,715 (2001) .

[2] The FOIA does not require an agency to "explain" why it did or did not follow particular procedures related to the subject of a request.

F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). We note that the SO point of contact directed Mr. Ray's request to each person who it was reasonably believed might have responsive documents (and, more recently, to an additional person named by Mr. Ray), and that the names of these individuals matched exactly those identified by Mr. Ray as those who would have created or received documents responsive to his request. Based on the above, we find that SO's search was reasonably calculated to uncover the records Mr. Ray requested.

B. *Application of Exemption 6 to Information Withheld from the Requester*

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Fin. Management Serv.*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in disclosure in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-70.

In its August 22 determination, DOE/HQ withheld information from two documents, which it described as

> 'Person Detail' print-outs concerning [the contractor employee] from the Authorities and Training Tracking System (ATTS). The deleted information is test scores . . .
>
> . . . .
>
> We have determined that disclosure of the test scores for [the contractor employee] could subject him to unwanted communications or other personal intrusions. We have also determined that disclosure of the test scores will not reveal any aspect of the operations and activities of government.

Determination Letter at 1.

Mr. Ray takes issue with the finding of SO as to both the public interest and privacy concerns.

> I believe it is clearly in the public interest that anyone charged with protecting National Security Information verify their competency. . . , this is a question of National Security.
>
> These scores contain no personal information, in the generally accepted meaning of the term (i.e. there is no social security number, medical information, home address, race, religion, national origin, etc.). [The contractor employee] was granted full classification/declassification authority by the memo: J. Hawthorne to F. Willingham, dated September 29, 2003. The directions in the Request For Authority state that he must have demonstrated competence in the subject area(s), and have successfully completed a training program and passed an examination. The scores merely verify what the Agency and [the contractor employee] claim to be true, what is left to exempt?

Electronic mail from James Ray to Steven Goering, OHA (July 7, 2004).

First of all, we agree with SO that there are legitimate privacy concerns that would be raised by release of the test scores in question. Regardless of whether the individual's scores in this case were low or high, the release of such scores still touches upon a privacy interest of the individual--either based on embarassment or stigma resulting from the release, to the extent the scores are low, or because the scores "may well embarrass an individual or incite jealousy" among co-workers, to the extent the scores are high. *Ripskis v. HUD*, 746 F.2d at 3.

Regarding how release would further the public interest, Mr. Ray states that "it is clearly in the public interest that anyone charged with protecting National Security Information verify their competency." We generally agree with this point. However, in the present case, information already released to the requester *does* verify the qualifications of the contractor employee in question for the classification and declassification authorities granted to him. As Mr. Ray himself notes, the individual was granted classification and declassification authorities by a September 29, 2003 memo from the SO's Director of Information Classification and Control Policy Security, Security Policy Staff, which memo was among the documents released in their entirety to Mr. Ray. This memo clearly states that the individual in question "has satisfied the requirements of Department of Energy Manual 475.1-1A, 'Identifying Classified Information,' and is hereby granted the authorities specified in the attached descriptions."

Mr. Ray does not appear to be convinced by the statements in the memo, arguing that release of the individual's actual test scores would "merely verify what the Agency and [the contractor employee] claim to be true." However, Mr. Ray offers no reason why the plain text of the September 29 memo is not to be believed.[3] The information already available to Mr. Ray and the public is more than sufficient to verify that the individual passed the tests required to undertake the authorities granted to him.

[3]Moreover, SO has informed us that a passing score on the required tests in question was 80%. And without revealing the individual's actual test scores, we can confirm that the scores withheld from the requester do verify that the individual scored 80% or higher on each required test. One of the test scores withheld was, according to the document containing the scores, for a "[c]ourse taken for information only." Release of this score would not advance any public interest, since it would reveal nothing regarding whether the individual met the requirements for the authorities he was granted.

Weighing the privacy interests at stake on one hand, and the negligible public interest on the other, we conclude that Exemption 6 was properly applied in withholding test scores from the requester.

III. *Conclusion*

For the above stated reasons, we find that SO's search for documents in response to Mr. Ray's request was adequate for purposes of the FOIA, and that SO properly withheld information from the requester under FOIA Exemption 6. Thus, the present appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James F. Ray on June 9, 2004, OHA Case Number TFA-0063, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 21, 2004

August 13, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Appellant: UT-Battelle, LLC

Date of Filing: July 7, 2004

Case Number: TFA-0064

On July 7, 2004, UT-Battelle, LLC filed a Motion for Reconsideration of a determination issued by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) on February 13, 2003. In that determination, OHA granted an Appeal filed by Burkhalter, Rayson & Associates (Burkhalter) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Motion, if granted, would reverse OHA's February 13, 2003 determination.

I. BACKGROUND

On April 27, 2002, Burkhalter filed a request for information with DOE's Oak Ridge Operations Office (OR) seeking a number of documents. On November 22, 2002, OR issued a determination letter (the November 22, 2002 Determination Letter) releasing a number of responsive documents to Burkhalter and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal), in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, Burkhalter filed an appeal of that determination challenging OR's withholding of the Proposal. On February 13, 2003, we issued a Decision and Order holding that OR had improperly withheld the Proposal under Exemption 3. *Burkhalter, Rayson & Associates*, *Case No. TFA-0008*, 28 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). Accordingly, we remanded the matter to OR with instructions to "promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof)." *Id.* Our holding in *Burkhalter I* is the subject of the present motion.

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). On July 25, 2003, Burkhalter filed an appeal of the July 3, 2003 Determination Letter, contending that OR had failed to identify three volumes (Volumes III, IV and V) of the Proposal. On September 12, 2003, we issued a decision and order granting the July 3, 2003 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates*, *Case No. TFA-0037*, 28 DOE ¶ 80,302 (September 12, 2003) (*Burkhalter II*). In *Burkhalter II*, we found that OR had failed to fully comply with our order in *Burkhalter I*. *Id.* Specifically, we found that OR had effectively withheld Volume III of the Proposal by improperly failing to identify it as responsive. *Id.* Accordingly, we remanded the matter to OR instructing it to promptly issue a new determination letter which "must either release to the Appellant the contents of Volume III or provide *a meaningful description* of any portion of the contents of

Volume III it determines to withhold under an appropriately justified FOIA exception." *Id.* (emphasis supplied). On January 21, 2004, OR issued a determination letter (the January 21, 2004 Determination Letter) releasing a redacted copy of Volume III to Burkhalter. However, OR deleted portions of Volume III under Exemptions 4 and 6. On February 18, 2004, Burkhalter filed an appeal of OR's January 21, 2004 Determination, contending that OR improperly withheld information under Exemptions 4 and 6. On, March 17, 2004, we issued a Decision and Order granting the February 18, 2004 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates, Case No. TFA-0054*, 28 DOE ¶ 80,332 (March 17, 2004) (*Burkhalter III*). In *Burkhalter III*, we found that OR's January 21, 2004 Determination had failed to provide sufficient justification for its withholdings under Exemptions 4 and 6. Accordingly, we remanded the appeal to OR for further processing instructing OR to "either release the information it is currently withholding under Exemption[s] 4 [and 6] or provide a more thorough explanation of its basis for withholding that information." Moreover, we cautioned OR that "[b]efore releasing any of the information it is withholding, OR must, of course, notify the submitter of that information and provide it with an opportunity to explain how release of that information could cause it substantial competitive harm. Exec. Order No. 12,600, § 1."

On July 8, 2004, UT-Battelle submitted the present motion for reconsideration. In this motion, UT-Battelle claims that OR failed to provide it with notice (as required by Executive Order 12,600 § 1) before releasing portions of the proposal in its July 3, 2003 and January 21, 2004 Determinations. UT-Battelle contends that had it been provided with the required notice of OR's plans to release portions of the Proposal submitted by UT-Battelle, it could have provided both OR and OHA with information and explanation that would have convinced OR and OHA that the entire Proposal is exempt from the FOIA's mandatory disclosure mandate under FOIA Exemption 3. UT-Battelle requests that we issue a new decision withholding those portions of the Proposal that have not already been released to Burkhalter and requiring the withholding of the Proposal in response to any future FOIA requests.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Exemption 3 allows the withholding of information under other statutes, but only if they meet specific criteria. *See, e.g., Essential Information, Inc. v. USIA*, 134 F.3d 1165, 1168 (D.C. Cir. 1998). Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for

withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The D.C. Circuit has expressly held that "a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure." *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). An agency must also establish that the records in question fall within the withholding provision of the non-disclosure statute. *See A. Michael's Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983); *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 868 (D.C. Cir. 1981); *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).

UT-Battelle contends, as did OR's November 22, 2002 Determination, that Section 821 of the National Defense Authorization Act of 1997 (NDAA) exempts the Proposal from disclosure. It is well settled that the NDAA is a withholding statute within the meaning of Exemption 3. *See, e.g., Kelly, Anderson & Associates*, 28 DOE ¶ 80,137 (2001); *Center for Public Integrity*, 28 DOE ¶ 89,129 (2000); *Chemical Weapons Working Group, Inc.*, 26 DOE ¶ 80,170 (1997) (*Chemical Weapons*); *Patricia McCracken*, 26 DOE ¶ 80,227 (1997). Section 821(b)(1) of the NDAA, entitled "Prohibition On Release of Contractor Proposals, Civilian Agency Acquisitions," provides that "a proposal in the possession or control of an executive agency *may not be made available* to any person under [the FOIA]," unless such proposal is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal. (Emphasis added). The plain language of Section 821(b)(1) allows no discretion in withholding contractor proposals that are not set forth or incorporated by reference in a contract. The section therefore satisfies Subpart A of Exemption 3. *See Chemical Weapons, supra*.

Moreover, there is no argument that the information at issue in the present case is anything but a "proposal" for purposes of Section 821(b)(1). Section 821(b)(3) of the NDAA defines "proposal" to mean "any proposal including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal."

However, Section 821(b)(1)'s requirement "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the [DOE] and the contractor that submitted the proposal." 10 U.S.C.A. § 2305. In *Burkhalter I*, Burkhalter contended that the Proposal was in fact incorporated by reference. In support of this contention, Burkhalter cited language in the contract between UT-Battelle and OR (the Contract). Specifically, Burkhalter cited Section H-15, Page 11 of 27 of the Contract (entitled, "Representations, Certifications and Other Statements of the Offeror") which states, in pertinent part: "The Representations, Certifications and Other Statements of the **Offeror, dated August 2, 1999, for this contract are hereby incorporated by reference, and made a part of this contract."** December 6, 2002 Freedom of Information Act Appeal at 2 (emphasis supplied by Burkhalter). Burkhalter also cited Section I-71 of the Contract, which contains language indicating that the Proposal was submitted on August 2, 1999 and therefore was among the "representations and certifications and other statements" incorporated by reference by Section H-15. Reasoning that the Proposal fit within the plain language definition of "Other Statements of the Offeror dated August 2, 1999," we found this contention persuasive. To this end, *Burkhalter I* states:

> The Appellant correctly notes that the Proposal was in fact incorporated by reference into the contract between DOE and UT-Battelle. Contract No. DE-AC05-00OR22725 at Section H-15, Page 11 of 27 and Section I-71, Page 91 of 236. Accordingly, we find that the Proposal is not exempted from mandatory disclosure under the FOIA by the National Defense Authorization Act for Fiscal Year 1997.

Burkhalter I, 28 DOE at 80,860. After *Burkhalter I*, OR has issued two additional determination letters concerning the Proposal, releasing some portions of the Proposal to Burkhalter and attempting to withhold portions of it under Exemptions 4 and 6.

On July 7, 2004, UT-Battelle filed the present Motion for Reconsideration. In its Motion, UT-Battelle asserts that OR did not solicit UT-Battelle's views concerning the appropriateness of releasing the Proposal until January 2004. Motion for Reconsideration at 2. UT-Battelle further contends that had it been given notice of OR's intentions to release portions of the Proposal prior to the July 3, 2003 Determination, it would have provided information that would have shown that the Proposal was not incorporated by reference in the Contract. UT-Battelle correctly notes that DOE's FOIA Regulations required that it be notified before any portion of the Proposal was released.

In reviewing UT-Battelle's Motion, additional information has come to light which has made us realize that our holding, in *Burkhalter I*, that the entire Proposal was incorporated by reference by Section H-15 of the Contract is not based upon an accurate reading of the Contract. Our holding in *Burkhalter I* was based upon our interpretation of the plain language meaning of the term "Representations, Certification and Other Statements of the Offeror."

It has come to our attention that the Proposal, like others made under the Federal Acquisition Regulations, consists of three volumes: one entitled Representations, Certifications and Other Statements of the Offeror, another entitled Technical Proposal and a third entitled Cost Proposal. With this information in mind, it is clear that the parties to the Contract intended to incorporate only the "Representations, Certifications and Other Statements of the Offeror" volume of the Proposal, rather than the entire Proposal, into the Contract.

III. CONCLUSION

Accordingly, we are reversing, in part, our holding in *Burkhalter I*. We now hold that only that portion of the Proposal entitled Representations, Certifications and Other Statements of the Offeror was incorporated by reference in the Contract. The rest of the Contract was not incorporated by reference. Section 821(b)(3) of the NDAA prohibits disclosure of those portions of the Proposal not incorporated by reference. Since, we have found that disclosure of those portions of the Proposal is prohibited, OR should cease its previously mandated consideration of the applicability of Exemptions 4 and 6 to those portions of the Proposal. OR should continue to withhold those portions of the Proposal under Exemption 3.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by UT-Battelle, LLC, Case No. TFA-0064, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 13, 2004

October 14, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Joseph M. Santos
Date of Filing:	July 9, 2004
Case Number:	TFA-0065

On July 9, 2004, Joseph M. Santos filed an Appeal from a determination that the Department of Energy (DOE) issued to him. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, DOE released some responsive information to Santos. This Appeal, if granted, would require DOE to release the remainder of the responsive information.

I. Background

Mr. Santos filed a request in which he sought a copy of his Official Personnel File as well as copies of all e-mails, records and documents that pertain to him written between January 1, 1999, and the present, from DOE employees Stephen Durbin, Barbara Hall, Ray Madden, Al Knight, Dave Schoeberlein, Kyle McSlarrow, Guy Caruso, Howard Grenspecht and Mary Hutzler.

On June 30, 2004, DOE issued a determination letter regarding Mr. Santos' request. DOE's determination letter stated that Mr. Santos' request had been assigned to six offices at the DOE Headquarters to conduct a search of their files for responsive documents. Those offices were the offices to which the individuals Mr. Santos named in his request were assigned. They included the Office of Congressional, Public and Intergovernmental Affairs, the Office of the Deputy Secretary, the Energy Information Administration, the Office of Human Resources Management, the Office of Inspector General and the Office of Policy and International Affairs. See Determination Letter.

The Office of Human Resources Management completed its search for responsive documents and identified Mr. Santos' Official Personnel File, which the office provided to Mr. Santos in its entirety. With respect to the other portion of Mr. Santos' request, in its response the Office of Congressional, Public and Intergovernmental Affairs (CI) informed DOE that "any records in the possession of Mr. Al Knight [a CI employee] are not agency records" and further that "any

records maintained by Mr. Knight that may be related to the subject of your request were generated or obtained in his capacity as an union official." CI concluded that the Al Knight records are not in the possession or control of the DOE and, therefore, are not agency records subject to the provisions of the FOIA. Id.

On July 9, 2004, Mr. Santos filed his Appeal with the Office of Hearings and Appeals. In his Appeal, Mr. Santos challenges the adequacy of the search conducted by DOE. He alleges that his Official Personnel File did not include any SF-50 notices of personnel action or other related documents. In addition, Mr. Santos challenges DOE's determination that records maintained by Al Knight and other NTEU (union) officers are not agency records. *See* Appeal Letter. *

II. Analysis

A. Agency Records

Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *Department of Justice v. Tax Analysts,* 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and when it was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of Nat'l Affairs, Inc. v. Department of Justice* 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*); *J. Eileen Price*, 25 DOE ¶ 80,114 (1995) (*Price).* In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. *See BNA*, 742 F.2d at 1492-93*; Price.*

With regard to the potentially responsive documents in possession of Al Knight and other NTEU officers, DOE has stated that any records maintained by Mr. Knight that may be related to the subject of Mr. Santos' request were generated or obtained in Mr. Knight's capacity as an union official and were not in the possession or control of DOE. DOE has further informed us that union officials segregate their records from official DOE business. Our understanding of the circumstances surrounding the records in Mr. Knight's possession responsive to Mr. Santos' request is that those records were created or obtained by DOE employees on DOE premises. However, those DOE employees were not acting in their capacities as DOE employees but rather as union officials, performing functions distinct from their DOE position descriptions and maintaining such records separately from any DOE records. *See* Memorandum of telephone conversation between Abel Lopez, Director, DOE Headquarters FOI and Privacy Branch, and Kimberly Jenkins-Chapman, OHA (September 2, 2004). Further, it is our understanding that the DOE has no power to create, alter, or destroy any records generated by the union officials.

* At the time of Mr. Santos' appeal, the Office of the Deputy Secretary, the Energy Information Administration, the Office of the Inspector General and the Office of Policy and International Affairs had not yet responded to his request for information. Mr. Santos' appeal is limited to the determinations of the two offices that did respond.

Applying the *Tax Analysts* standard described above to any relevant records generated in the course of union operations, those records were not "created or obtained" by the DOE, nor have they ever been under DOE control. Consequently, we find that any responsive documents in the possession of Al Knight and other union officials that were generated in their capacities as union officials and were used for exclusively union operations are not agency records and therefore are not subject to disclosure under the FOIA.

B. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Alice McMillan,* 28 DOE ¶ 80,118 (2004). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA,* 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing,* 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State,* 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. NSA,* 610 F.2d 824, 834 (D.C. Cir. 1979).

We contacted the relevant DOE office to determine the extent of the search that had been conducted for responsive documents. *See* Memorandum of telephone conversation between Adrienne Martin, DOE, and Kimberly Jenkins-Chapman, OHA (July 7, 2004). DOE informed us that upon receipt of the request it contacted six offices at the DOE Headquarters to conduct a search of their files for responsive documents. The Office of Human Resources Management completed its search for responsive documents and located the Official Personnel File of Mr. Santos. DOE has informed us that the personnel documents referred to in Mr. Santos' appeal would be located in his Official Personnel File if they existed. According to DOE, this file was provided to Mr. Santos in its entirety. Given the facts presented to us, we believe that those DOE offices that have completed their searches have conducted adequate searches for documents responsive to Mr. Santos' request.

III. Conclusion

In sum, we find that, to date, DOE has conducted an adequate search for documents responsive to Mr. Santos' FOIA appeal. Further, any responsive union documents used exclusively for union purposes are not agency records for the purposes of the FOIA. Thus, Mr. Santos' appeal will be denied.

It is Therefore Ordered That:

(1) The Appeal filed by Joseph M. Santos on July 9, 2004, OHA Case No. TFA-0065, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004

November 17, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citadel Energy Products, LCC
Date of Filing:	July 9, 2004
Case Number:	TFA-0066

On July 9, 2004, Citadel Energy Products, LCC (Citadel) filed an Appeal from a determination issued by the Energy Information Administration (EIA) of the Department of Energy (DOE) on June 7, 2004. In its determination, EIA denied Citadel's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EIA to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that is required to be withheld or may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. *Background*

In a letter dated August 27, 2003, Citadel submitted a FOIA request to EIA for "(i) the actual sum total of working gas in each geographical region reported in Form 912s on a weekly basis and (ii) the actual sum total of working gas in each region reported in Form 191s on a monthly basis by those parties required by the EIA to submit Form 912s." Request Letter dated August 27, 2003, from Jeffrey W. Mayes, Attorney for Citadel, to Abel Lopez, Director, FOIA/Privacy Act Office, DOE. Citadel sought aggregated data (the "aggregated data") by regions, for the period from the time EIA began gathering the data until the present and into the future. Data regarding individual firms were not sought; however, if the information Citadel requested was not available on any existing document, Citadel requested, in the alternative, redacted copies of the Forms 191 and 912. The

information contained in these two forms is monthly and weekly natural gas inventories in underground storage facilities.

On October 24, 2003, EIA denied the request. EIA withheld the information, claiming it was exempt from disclosure under Exemption 4. EIA claimed that the information Citadel was seeking is protected because it was "commercial or financial information obtained from a person [which is] privileged or confidential." Citadel filed an Appeal, in which it disputed the withholding of information under Exemption 4. First, Citadel asserted that EIA did not explain its withholding of the aggregated data. Appeal dated November 26, 2003, at 8 from Jeffrey W. Mayes, Attorney for Citadel, to George B. Breznay, Director, OHA. Secondly, Citadel argued that EIA failed to show that its ability to obtain the information in the future would be impaired. *Id.* at 6. On January 12, 2004, this Office granted Citadel's Appeal and remanded the matter to EIA, stating that EIA had failed to indicate whether a document with the aggregated figures existed and, therefore, had inadequately justified its withholding of any such document. *Citadel Energy Products, LCC*, Case No. TFA-0048, 28 DOE ¶ 80,316 (2004).

Responding to the remand, in a June 7, 2004 determination, EIA indicated that it did have some of the requested aggregated information, but it withheld the information on the basis of Exemption 4. Citadel then filed this Appeal claiming that EIA failed to meet the applicable standard for withholding under Exemption 4.[*/]

II. *Analysis*

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

[*/] In a letter dated November 5, 2004, EIA informed this Office and Citadel that EIA had conducted an additional review for the purpose of identifying documents responsive to Citadel's FOIA request. EIA found that, at the time of Citadel's FOIA request, EIA had the requested aggregated data from the weekly Form EIA-912 in the form of only two documents created for the weeks of August 8 and August 15, 2004. EIA also found that it did not have any documents containing the requested aggregated data from the monthly Form EIA-191. With that letter, EIA released to Citadel, and to OHA, redacted copies of those two documents. EIA withheld from those two documents, pursuant to Exemption 4, the aggregated data, the names of individual companies, and the individual company data, for the reasons explained in EIA's determinations dated October 24, 2003, and June 7, 2004. Letter dated November 5, 2004, at 1-3 from Kenneth A. Vagts, Director, Office of Oil and Gas, EIA to Janet R. H. Fishman, Attorney-Examiner, OHA, with a copy to Jeffrey W. Mayes, Attorney for Citadel. The release of the redacted documents does not affect our analysis in this Decision.

5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (I) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) *(Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879. Because the two forms involved here are mandatory filings under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was involuntarily submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

Finally, to qualify for Exemption 4 protection under *National Parks*, information must also be "confidential." Withheld information is "confidential" if it meets the test set out in *National Parks*. In this case, the withheld information is considered "confidential" if release would either (a) cause substantial harm to the competitive position of submitters or (b) impair EIA's ability to obtain the necessary information in the future. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

B. Application of Exemption 4 to the withheld information

1. "Commercial or Financial" information requirement

As stated earlier, the first requirement under the *National Parks* test is that the withheld information must be "commercial or financial." In *Public Citizen*, the court held that these

terms should be given their ordinary meaning and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290. We find, as shown in section 3, that the underlying information that would be revealed if the aggregated data were released is commercial information.

2. "Obtained from a person" requirement

The second requirement under *National Parks* is that the information must be "obtained from a person," with "person" referring to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank* 464 F. Supp. 804, 806 (D.D.C. 1979). EIA has convinced us, as demonstrated in next section, that even though the aggregated data are not directly "obtained from a person," the information that can be derived from those figures are equivalent in practical terms to the information obtained from the firms themselves. *See, e.g.*, *Gulf and Western Industries v. United States*, 615 F. 2d 527, 529-30 (D.C. Cir. 1979) (Exemption 4 held to protect government report which contained information supplied by an outside party or from which information supplied by an outside party could be extrapolated). The reach of Exemption 4 is sufficiently broad to protect the commercial information of third parties, here, the reporting firms. *See, e.g., Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980). Since release of the aggregated data would be tantamount to release of the underlying information, we believe that the information was effectively "obtained from a person," *i.e.*, the reporting firms.

3. "Confidentiality"/"Competitive Harm" requirement

As described above, the withheld information may be considered "confidential" if release would either (a) cause substantial harm to the competitive position of submitters or (b) impair EIA's ability to obtain the necessary information in the future. EIA has concluded that release of the withheld information would cause substantial harm to the competitive position of the firms whose natural gas holdings are included in the aggregated data contained in the withheld information.

Analyzing whether release would cause substantial competitive harm involves two elements: 1) whether the submitters face actual competition and 2) whether disclosure would likely cause substantial competitive injury. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

In the present case, it seems beyond dispute that the submitters face actual competition from other natural gas marketing firms. Consequently, the remaining element to be evaluated in the determination of substantial competitive harm is whether disclosure of the data would likely cause substantial competitive injury. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

In demonstrating the possible competitive injury that could result from release of the information, EIA indicated in its June 7, 2004 determination, as background, that the United States is divided into three reporting regions for the purposes of these forms. EIA does not require every firm in each region to report. Rather, the reporting requirement is periodically rotated among the firms, except for the largest of the firms which must always report. In each of these regions, there are a limited number of large firms that always report because of their size. EIA argues because there are only three reporting regions for Form 912 and only 119 total firms that can be selected for reporting, it would be easy to identify the value of the holdings of the largest firms. EIA gave an example from one of the reporting regions to support its contention. The example stated

> EIA staff identified the report *Natural Gas Week* (*NGW*) [as a private publication] that publishes individual company-level underground gas storage information. EIA chose one *NGW* issue issued during the period covered by the FOIA request. That issue included company-level data reported by 13 companies that choose to participate in the *NGW* survey.
>
> Using the information from that issue of the *NGW*, EIA analyzed the EIA-912 survey responses consistent with the *NGW* report period. First EIA considered the *NGW* information as publicly known. Then EIA examined the individual EIA-912 survey data and removed those companies whose underground gas storage data were available from the *NGW*. The data for the remaining companies were then analyzed to determine if the release would result in providing information that could be used to develop reasonable estimates of what those companies reported to EIA.
>
> In the West Consuming Region, EIA identified the EIA-912 sample companies for which *NGW* did not publish information on working gas in underground storage. If EIA were to release the aggregated data requested under the FOIA, the public would be able to subtract the known *NGW* information from the aggregated data and calculate the total for the remaining companies that choose to keep their information confidential. Using the information for those companies, the total gas held in storage was 108 billion cubic feet (Bcf). The largest company was responsible for 84 Bcf (77.78%), the second largest for 10 Bcf (9.26%), and the remaining companies for 14 Bcf (12.96%). The two largest companies were responsible for more than 87% of the total for those companies. Releasing the unweighted aggregate total with one large company responsible for such a large percentage of the number and two companies responsible for more than 87% would violate EIA's standards for data protection and generally accepted statistical practices for protection of confidential information.

> To further explain the pq rule [a rule developed to determine whether a given value could reveal individual respondent information, and explained earlier in EIA's June 7, 2004 determination] with respect to the above illustration, we can assume that there is enough publicly available information about the industry available for a knowledgeable user to estimate the amounts held by one company to within plus or minus 50%.
>
> Assuming that the second largest company wants to estimate the working gas held in storage by the largest company, the second largest subtracts its reported value (10) from the total (108) for the companies. Conservatively assuming the second largest company can estimate the aggregate of the smaller companies within 50%, their aggregate would be in the range of 7 to 21 Bcf (14+/-7). Thus, the second largest company is able to estimate that the largest company's working gas in storage is between 91 (108-10-7) and 77 (108-10-21) Bcf. Given that the largest company's reported value is 84 Bcf, the range allows the second largest company to make a close approximation of the data for the largest company.

Determination Letter dated June 7, 2004, at 4-5, from Kenneth A. Vagts, Director, Office of Oil and Gas, EIA, to Jeffrey W. Mayes, Attorney for Citadel.

Citadel disagrees with EIA's contention. Citadel does not believe EIA's argument to be valid and attempts to use figures similar to EIA's example to reach a different conclusion. Citadel states

> An analysis of the application of the EIA's theory of disclosure to a scenario based on this information reveals that in fact disclosure of Aggregate Data would not allow the informed observer to estimate with reasonable accuracy the holdings of individual storage operators who had not already disclosed those holdings.
>
> In the West Consuming Region, the region with storage concentrated under the control of the fewest entities . . . [with] eight operators accounting for 95 percent of the total storage (similar to the proportion accounted for by the EIA's regional sample group). The largest three operators account for 32-, 21-, and 20-percent shares. Should Questar, the fourth largest operator, attempt to derive from the EIA's Aggregate Data the confidential amounts held by other respondents applying the EIA's method for deriving confidential information, it would not discover anything. Questar starts knowing its own total, 59 Bcf, and the regional total of 598 Bcf . . .. It could then closely estimate the holdings of the three larger storage operators for publicly available sources, even if it could not obtain the specific figure

> reported on these entities' Form 191s. This leaves four smaller operators that have stored amounts of, respectively 28, 23, 19 and 8 Bcf, and an aggregate total of 78 Bcf. If Questar sought to determine the market positions of these entities, estimating, say Puget Sound within plus or minus 50 percent of its actual of 19 Bcf, a range of 10-29 Bcf, Questar would then know that the remaining non-disclosing storage operators held among them anywhere from 49-68 Bcf (78 - 29 = 49; 78 - 10 = 68). Because this spread must now be allocated among three remaining entities, two approximately the same size and one smaller, Questar would fail to disclose any company-specific confidential information. Any allocation would be wholly speculative, and Questar would not have exposed the market position of any one of them. Moreover, this spread is as great as 68 percent of the size of the largest holding–much larger than the plus-or-minus 50-percent spread in the Guidelines.

Appeal Letter dated July 9, 2004, at 9-10, from Jeffrey W. Mayes, Attorney for Citadel, to George B. Breznay, Director, Office of Hearings and Appeals.

The FOIA puts the burden on EIA to support its withholding by showing that release of the aggregated information would cause competitive injury to the submitters of the underlying information. Citadel has attempted to show that EIA has not met its burden. We find EIA's argument to be more persuasive than Citadel's. As a basic point, we note that EIA's example is based upon the actual information that Citadel is requesting. In contrast, Citadel's example is based upon only publicly available information and different facts (four firms instead of three). In order to substantiate its claim of competitive harm, EIA does not need to show that all of the companies' gas holdings can be determined using the information at issue, merely that one company's gas holdings can be determined.

EIA has explained that the largest firms in each region hold such a proportionately large share of the market that one of those largest firms can extrapolate, by removing its own data from the currently protected aggregated figures, the size of one of the other largest firm's holdings to within a certain range. This range is sufficiently narrow to cause competitive harm to the largest firm if the aggregated information were released. At most, Citadel has only demonstrated that it is not possible to accurately calculate the gas holdings of every single firm in a particular region. This still does not refute EIA's contention that the gas holdings of larger firms could be deduced from the information.

EIA has also convinced us that release of an individual firm's gas holdings indirectly through release of the withheld aggregated information would result in competitive harm to the individual firm. In its October 24, 2003 determination, EIA outlined the competitive harm that would occur if the requested information were released.

> Because of other publicly available information about the storage industry, such as reports filed with the Federal Energy Regulatory Commission, State public utility commissions, EIA, and commercial databases and trade reports, there is general knowledge of the identity of operators and the location of underground natural gas storage fields for the three large storage regions. In some States, reporting firms that are both storage operators and regulated local distribution companies are required by the public utility commissions in the States in which they are located to provide a listing of their plans to meet obligations to supply working gas annually (and seasonally in some cases) and the amounts of gas in storage they have to meet those obligations. Were the names and amounts of gas to be publicly known, these companies' ability to meet those obligations would be revealed. A firm with small amounts of storage gas relative to its obligations would be negatively impacted in a current competitive sense because it would be at the mercy of those who would sell it gas to meet those obligations. Similarly, those in a flush position would be hard pressed to obtain the prices they were seeking were buyers to know that they had large quantities to sell.

Determination Letter dated October 24, 2003, at 2, from Kenneth Vagts to Jeffrey Mayes. We agree with EIA's assessment of the harm that could befall the submitters if the information were released.

III. *Conclusion*

We find that EIA correctly applied Exemption 4 to the withheld material. We concur with EIA's determination that release of the requested information would put submitters at a substantial competitive disadvantage. We also find EIA had met its burden of showing that release of the requested aggregated information would effectively be a release of the underlying information for individual firms, within a predicted range. Lastly, we also find that release of the requested information would cause submitters competitive harm were the information to be released. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See e.g., Vladeck, Waldmas, Elias & Engelhard, P.C.,* 27 DOE ¶ 80,230 at 80,835 (1999). Therefore, we uphold the EIA June 7 determination and decline to order that the information be released.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citadel Energy Products, LCC, on July 9, 2004, Case No. TFA-0066, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 17, 2004

CONCURRENCE SHEET

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Fishman	Schwartz

Peer Review: Steve Fine
Valerie Adeyeye

OGC Review: Dow Davis
Harold Goldsmith
Steve Dove

September 24, 2004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Brian Charles
Date of Filing:	August 11, 2004
Case Number:	TFA-0068

On August 11, 2004, Brian Charles (Charles) filed an Appeal from a determination issued to him on July 8, 2004, by the Richland Operations Office (Richland) of the Department of Energy (DOE) in response to a request for documents that Charles submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland perform an additional search for responsive material.

I. Background

On June 10, 2004, Charles filed a FOIA request with the Pacific Northwest National Laboratory (PNNL) for the names and addresses of any officials at PNNL "whose job it is to remediate radioactive nuclear waste by applying any technology to lower or eliminate radioactivity." Letter from Richland to Charles (July 8, 2004) (Determination Letter). PNNL forwarded the request to Richland for a response. In the Determination Letter, Richland stated that it "conducted a thorough search and no documents were located." *Id.* However, in order to assist Charles with his research, Richland suggested that he visit the following website: www.pnl.gov/main/sectors/nuclear.html. In the Appeal, Charles challenged the adequacy of the search and asks OHA to direct Richland to search again for responsive information.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is

evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

Richland informed us that PNNL had searched its Human Resources Department, including job descriptions, but found no list of names that would be responsive to Charles' request. *See* Memorandum of Telephone Conversation between Dorothy Riehle, Richland, and Valerie Vance Adeyeye, OHA (September 8, 2004); Electronic Mail Message from Dorothy Riehle, Richland to Valerie Vance Adeyeye, OHA (September 21, 2004). In fact, none of the descriptions stated that any employees are assigned to do remediation. */ Richland did not, and the FOIA does not require it to, create a record to comply with Charles' request. Determination Letter. However, the PNNL website explains how PNNL performs the remediation of nuclear waste. Richland suggested that the requester contact PNNL directly via mail, or send an email to the webmaster of the site. We reviewed the PNNL website and found a web page entitled "Effectively Processing Radioactive Wastes." The page is located at www.pnl.gov/etd/solutions/radwaste.htm and it contains the name, telephone number, fax number, and email address of a PNNL contact for further information. We will provide this information to the requester in the event that he does not have ready access to the Internet. After reviewing the record of this case, we find that Richland conducted a search that was reasonably calculated to uncover the requested information. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Brian Charles on August 11, 2004, OHA Case Number TFA-0068, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the

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*/ The requester assumed that the lack of responsive material demonstrated that no one at PNNL is remediating nuclear waste. Letter from Charles to Director, OHA (August 11, 2004). That is not true – Richland's unsuccessful search merely reflects the absence of an existing list of PNNL employees who are assigned to remediate nuclear waste.

requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2004

September 24, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Richard Hammond

Date of Filing: August 30, 2004

Case Number: TFA-0069

On August 30, 2004, Richard Hammond (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Western Area Power Administration (WAPA). In that determination, WAPA responded to a Request for Information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. WAPA released portions of several responsive documents, but continued to withhold other portions of those documents under FOIA Exemption 6. This Appeal, if granted, would require WAPA to release those portions of the documents to the Appellant.

I. BACKGROUND

On April 15, 2004, the Appellant filed a request for information with WAPA seeking: "All EEO settlement agreements between complainants and the Western Area Power Administration . . . made between January 1999 and March 2004." Determination Letter at 1. On July 15, 2004, WAPA issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant. However, WAPA withheld portions of these documents under FOIA Exemption 6. On August 30, 2004 the Appellant submitted the present Appeal.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 6 is at issue in the present case.

Turning to the present case, WAPA, invoking FOIA Exemption 6, redacted information from the copies of the settlement agreements it released to the Appellant claiming that release of the redacted

information constitutes a clearly unwarranted invasion of personal privacy. The Determination Letter does not provide a description of the information withheld by WAPA, however. Instead, WAPA states:

> Information pertaining to the specific group of individuals who have filed employment related complaints involves a great amount of their privacy interest. The association of a person's name, working location, and other personal data intensifies the individual's right to privacy. Additionally, other information associated with the employment background of an individual, by its release or other use, would certainly result in embarrassment to the individual.

Determination Letter at 1. This description of the withheld information is too vague and conclusory to allow for a meaningful analysis of WAPA's withholding. After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The agency must also provide the requester with an opportunity to appeal any adverse determination. *Id*.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80, 139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

In the present case, we have addressed this issue by obtaining un-redacted copies of the settlement agreements. As a result of our *in camera* review of these documents, we have found that the withheld information can be adequately described as falling into five categories. We will discuss each catagory of information withheld by WAPA below.

Before analyzing WAPA's withholdings of the five categories of information, it is necessary to set forth the test which must be used to determine whether information must be withheld under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3. We will apply these principles to each category of documents below.

A. Category 1: Information that, if released, would reveal the identities of persons who had filed EEO complaints.

The first category consists of that information that, if released, would reveal the identities of persons who had filed EEO complaints. This category includes the names of the complainants, their job descriptions, pronouns revealing the gender of the complainants, and information indicating the office or duty station at which the complainant was employed. It is clear that releasing information showing that an Individual has filed an EEO Complaint and linking a particular complainant's identity to the information contained in the settlement agreements would constitute a serious intrusion into the complainant's personal privacy. On the other hand, it is clear that release of the individual's identities would reveal very little, if anything about the operations or activities of the Government. Accordingly, we find that release of information revealing the identities of those individual who had settled their EEO complaints would not further the public interest. Weighing the substantial intrusions into personal privacy that would result from its release against the minimal public interest in its disclosure, we find that release of information revealing these individuals' identities would constitute a clearly unwarranted invasion of personal privacy. Accordingly, WAPA was correct to withhold Category 1 information under Exemption 6.

B. Category 2: Information that, if released, would reveal the identities of DOE management team members.

The second category consists of information that, if released, would reveal the identities of DOE management team members. This category includes the names of DOE management team members as well as their job title. Specifically, WAPA often, but not always, withheld the names and titles of the DOE officials who signed the settlement agreements. Civilian employees of the Federal Government have no expectation of privacy in matters pertaining to their official duties, unless the release of this information could reasonably be expected to raise security or safety concerns. The redacted information in this category simply identifies those public officials who signed these settlement agreements on behalf of the government. These public employees have no personal privacy interests in their titles or in actions taken in their official capacities. Since we find that there are not any privacy interests in the redacted information falling into Category 2, we need not proceed further in

our analysis. Category 2 information may not be withheld under Exemption 6. Accordingly, we are remanding this portion of the Appeal to WAPA. On remand, WAPA must either release the Category 2 information or issue a new determination letter justifying its withholding under another FOIA exemption.

C. Category 3: Information setting forth the terms of the settlement agreements.

The third category consists of information setting forth the terms and substance of the settlement agreements. This category includes information indicating new terms or conditions of employment agreed to by the complainant and DOE offices, and the amount of money received by the complainants in settlement of their complaints. WAPA withheld a considerable amount of information in this category.

Since all the information allowing a third party to ascertain the identity of the individual who filed a particular EEO action is being withheld, the information in this category cannot be attributed to a particular person. Because this information cannot be attributed to particular individuals, its release would not cause any intrusion into personal privacy interests. Accordingly, we need not proceed further in our analysis. Category 3 information may not be withheld under Exemption 6. On remand, WAPA must either release the Category 3 information or issue a new determination letter justifying its withholding under another FOIA exemption.

D. Category 4: Dates redacted from the settlement agreements.

The fourth category consists of various dates that were redacted from the settlement agreements. These dates include the effective dates of retirements agreed to by several complainants, the dates that parties to the document signed the document, the dates that retirement annuity benefits would become available to complainants, and the effective dates of settlement agreements.

The dates themselves are not the type of sensitive information that Exemption 6 is intended to protect. However, in some cases, release of the dates might allow third parties to ascertain the identity of the complainants that are the subject of the Settlement Agreements. In such cases, the dates may be withheld under Exemption 6 for the same reasons we set forth in our discussion of that information contained in Category 1. Protection under Exemption 6 is not available, however, for those dates which, if released, could not reasonably be expected to reveal the identities of the complainants. Accordingly, we are remanding this portion of the Appeal to WAPA. On remand, WAPA must review all Category 4 information to determine whether its release could reasonably be expected to reveal the identity of complainants. If WAPA determines that any Category 4 information could reasonably be expected to reveal the identity of a complainant, it should issue a new determination letter withholding that information and explaining why it concluded that its release could reasonably be expected to reveal the identity of complainants. Any information in Category 4 that WAPA determines could not reasonably be expected to reveal the identity of a complainant upon release must either be released or become the subject of a new determination letter withholding it under a FOIA exemption other than Exemption 6.

E. Category 5: Information revealing the identity of third parties.

The fifth category consists of information that, if released, would identify individuals whose names are mentioned in the settlement agreements, but who are not parties or signatories of the agreement. Such information needs to be considered on a case by case basis. Accordingly, we are remanding this part of the Appeal to WAPA for further consideration. On remand, WAPA must analyze each third-party identity it has protected under Exemption 6 under the standards set forth above. It then must either release the Category 5 information or issue a new determination letter clearly identifying the information it is continuing to withhold and providing a detailed justification for its continued withholding under Exemption 6 or any other FOIA Exemption.

III. CONCLUSION

Because WAPA has not met its burden of showing that it properly withheld information under Exemption 6, we are remanding this matter to WAPA. On remand, WAPA must promptly release the information described in Categories Two through Five or issue a new determination letter, in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by Richard Hammond, Case No. TFA-0069, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Western Area Power Administration for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2004

November 4, 2004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Stephen A. Vaughn
Date of Filing:	September 16, 2004
Case Number:	TFA-0070

On September 16, 2004, Stephen A. Vaughn filed an Appeal from a determination issued to him by the Director of the Department of Energy's (DOE) FOIA/Privacy Act Group (hereinafter referred to as "the Director") in response to a request for documents that Mr. Vaughn submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the Director perform an additional search for responsive material.

I. Background

In his FOIA request, Mr. Vaughn sought access to any documents concerning the employment of his father, James Vaughn, with the Atomic Energy Commission (AEC) or any AEC contractor between 1944 and 1964, including any documents generated pursuant to investigations pertaining to his security clearance. In his response, the Director informed Mr. Vaughn that his request had been referred to the DOE's Office of Security, Office of Personnel Security, and that a search of that Office had failed to locate any responsive documents. In his Appeal, Mr. Vaughn challenges the adequacy of the search that was conducted.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

In order to determine whether the search was adequate, we contacted the Director's Office and the Office of Personnel Security. We were informed that the Office of Personnel Security maintained

records on microfiche of former holders of DOE clearances and those of predecessor agencies such as the AEC. These records were searched and no responsive information was found. We were further informed that according to DOE record retention procedures, records in James Vaughn's Personnel Security File would have been destroyed after 10 years. [1] Since James Vaughn's clearance was most likely terminated in 1964 along with his employment with the AEC or an AEC contractor, it is therefore very likely that any records pertaining to that clearance have been destroyed. [2]

However, during our consultations with the two Offices, it became evident that documents concerning the senior Vaughn's employment might be located in two additional places. As a result, the Director's Office requested that the DOE's Office of Personnel and Office of Worker Transition and Safety search for responsive documents. The Office of Personnel reported that no responsive documents could be found. [3] The Office of Worker Transition and Safety replied that it could not reasonably conduct a search based on the limited information provided by Stephen Vaughn. Specifically, that Office stated that some information regarding his father's place of employment or the identity of his employer was needed. The DOE regulations implementing the FOIA require that requests must be "for reasonably described records," and must provide information that "enable[s] DOE personnel to locate them with a reasonable amount of effort." 10 C.F.R. § 1004.4(b). We believe that the Office of Worker Transition and Safety acted within its discretion in refusing to conduct a search based upon the incomplete information provided by Stephen Vaughn. [4] We also

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1/ *See* memorandum of October 14, 2004 telephone conversation between Robert B. Palmer, OHA Staff Attorney, and Audrey Dixon, Office of Personnel Security.

2/ In his Appeal, Mr. Vaughn requested that he be informed of the existence of any documents pertaining to the destruction of his father's records. We were informed by Ms. Dixon that records of documents destroyed under the DOE's record retention policies are maintained, but that such records only pertain to documents destroyed after 1988.

3/ The Office of Personnel informed the Director's Office that one year after an employee has left federal service, his personnel file is transferred to the Federal Records Center in St. Louis, Missouri, a facility of the National Archives and Records Administration, an independent federal agency. Therefore, if James Vaughn was a federal employee, there is a possibility that records of his employment would be located there. The Center is located at 111 Winnebago Street, St. Louis, MO 63118. They may be contacted by telephone at (314) 801-9257 or by e-mail (cpr.center@nara.gov).

4/ Sheila Dillard of that Office has informed us, however, that she would be happy to arrange for a search for the requested documents if provided with any available additional information about the location of James Vaughn's work site or the identity of his employer(s). Ms. Dillard may be reached at telephone number (202) 586-1311.

conclude that the search performed in response to Mr. Vaughn's request, augmented as described herein, was adequate, and that his Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Stephen A. Vaughn on September 16, 2004, OHA Case Number TFA-0070, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 4, 2004

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October 21, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael J. Barber

Date of Filing: September 22, 2004

Case Number: TFA-0071

On September 22, 2004, Michael J. Barber (the Appellant) filed an Appeal from a final determination that the Freedom of Information/Privacy Act Group (FOI/PA) of the Department of Energy (DOE) issued on July 27, 2004. That determination concerned a request for information the Appellant submitted pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. If the present Appeal were granted, FOI/PA would be required to conduct a further search for responsive documents.

Background

On March 8, 2004, the Appellant submitted a Privacy Act request for "copies of any and all documentation, records, or information related to [the Appellant] in any manner which is [sic] maintained by the U.S. Department of Energy or the former Atomic Energy Commission in the Washington, D.C. Offices or its related Offices and National Laboratories elsewhere." Request Letter dated March 3, 2004, from Michael J. Barber to U.S. Department of Energy Freedom of Information Office. On July 27, 2004, FOI/PA responded that searches of the systems of records of the Idaho Operations Office (Idaho), the Richland Operations Office (Richland), the Chicago Operations Office (Chicago), and the Coordination and Information Center (CIC) under the jurisdiction of the National Nuclear Security Adminstration (NNSA) yielded no responsive documents. Determination Letter dated July 27, 2004, from Abel Lopez, Director, FOI/PA, DOE, to Michael J. Barber. FOI/PA indicated that Idaho and Richland searched Systems of Records DOE-5 "Personnel Records of Former Contractor Employees," DOE-33 "Personnel Medical Records," DOE-35 "Personnel Radiation Exposure Records," and DOE-43 "Personnel Security Clearance Files." *Id.* Chicago conducted searches of DOE-33, DOE-35, and DOE-43. CIC conducted a search of DOE-35 and DOE-86 "Human Radiation Experiments (HREX) Information Management System." *Id.* No records were found that were responsive to the Appellant's request. FOI/PA added that HREX contains historical documents from the Department of Defense, Department of Health and Human Services, Department of Veterans Affairs, Central Intelligence Agency and the DOE. *Id.* The Appellant appealed, claiming that the July 27, 2004 Determination was not responsive to his request because it informed him that

he did not have a U.S. Government personnel file. Appeal Letter dated September 10, 2004, from Michael J. Barber, to Director, Office of Hearings and Appeals (OHA), DOE.

Analysis

The Privacy Act requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

In reviewing the present Appeal, we contacted Idaho, Richland, Chicago, and CIC to determine what type of search was conducted by each of these offices. All of the offices indicated that they conducted database searches of the systems of records indicated in the determination letter. The searches were conducted by using the Appellant's name and social security number. Richland indicated that it also conducted a search of the system of records by the Appellant's date of birth and conducted a hand search of the old archived files. Electronic Mail Message dated September 22, 2004, from Richland to OHA. Chicago also searched its old files archived on such media as cards and microfiche. Electronic Mail Message dated September 23, 2004, from Chicago to OHA. Idaho searched its databases by name and Social Security Number only, as they cannot be searched by birth date. Electronic Mail Message dated September 24, 2004, from Idaho to OHA. In addition to the databases, CIC searched records that are accessible through the Human Radiation Experiments (HREX) Information Management System. Electronic Mail Message from Nevada to FOIA/PA dated March 12, 2004.

No information responsive to the Appellant's request was found. In the Appeal, the Appellant claims that the determination is bizarre in that it informs him that he does not have a government personnel file, something he already knew. However, the systems of records pertaining to government employees were searched to guarantee the most complete search possible. Moreover, the Appellant has not provided any information indicating additional places to search for the requested information. Based on the searches performed by the various offices, we are convinced that these offices followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael J. Barber, on September 22, 2004, Case No. TFA-0071, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552a(g)(1). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 21, 2004

CONCURRENCE SHEET

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Fishman	Schwartz

October 22, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Cynthia A. Frey
Dates of Filing:	September 29, 2004 September 30, 2004
Case Numbers:	TFA-0072 TFA-0073

On September 29, 2004, Cynthia A. Frey filed an Appeal (Case No. TFA-0072) from determinations that two offices of the Department of Energy (DOE) issued to her. The determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In each office's determination, DOE released responsive information to Ms. Frey. This Appeal, if granted, would require the offices to perform new searches for additional responsive information. On September 30, 2004, Ms. Frey filed a Request for Reconsideration (Case No. TFA-0073) of a Decision and Order that the DOE's Office of Hearings and Appeals issued to her on December 19, 2002. In that Decision and Order, the DOE withheld from disclosure any statements that former Federal Energy Regulatory Commission (FERC) Deputy Assistant General Counsel Maynard Ugol might have made to the Office of the Inspector General in the course of a particular investigation. This Request for Reconsideration, if granted, would require the DOE to release those statements to Ms. Frey.

I. Background

On February 15, 2002, Ms. Frey filed a request for information, pursuant to the Freedom of Information Act, for a copy of the records related to an investigation the DOE's Office of the Inspector General (OIG) conducted into alleged drug use and leave abuse at FERC's Office of Pipeline Certificates. OIG responded to that request, and Ms. Frey appealed that response to the Office of Hearings and Appeals (OHA). After due consideration, OHA issued a final Decision and Order (Case No. VFA-0754) in which, *inter alia*, it upheld OIG's determination to withhold any statements that Mr. Ugol might have made in the course of that investigation, holding that Exemptions 6 and 7(C) of the FOIA protected the identities of those interviewed. *Cynthia Frey Nordstrom*, 28 DOE ¶ 80,258 (2002). In her Request for Reconsideration, Ms. Frey contends, and has produced evidence, that Mr. Ugol has died. She argues that the privacy interests in Mr. Ugol's participation in the investigation, which formed the foundation for withholding

information pertaining to him under Exemption 7(C), have expired, and that information should now be released to her under the FOIA.

On June 30, 2004, Ms. Frey, through her counsel, sent a letter to OHA, requesting copies of all DOE records "submitted to, used by, or issued by the Agency in reaching its Decision and Order [in Case No. VFA-0754]." To ensure a complete response, this request was forwarded to the Headquarters FOIA/Privacy Act Group, which assigned search responsibilities to three offices, OIG, OHA and Executive Secretariat, with instructions that each office should respond directly to the requester.

OHA responded to Ms. Frey's request on July 15, 2004, providing copies of the documents contained in the case file that corresponds to Case No. VFA-0754. In her Appeal, Ms. Frey contends that OHA's response is incomplete, because it "did not include any of the OIG's investigative records . . . despite the fact that OHA obtained and reviewed 'unredacted copies' of such materials before issuing its [decision in Case No. VFA-0754]." Appeal at 5.

The Office of the Executive Secretariat responded to Ms. Frey's request on August 4, 2004. In her Appeal, Ms. Frey contends that this response is also incomplete, because it likewise did not include any of OIG's investigative records. Appeal at 6. Ms. Frey does not provide any factual basis for this portion of her Appeal. In fact, the Office of the Executive Secretariat's response is not mentioned again throughout the entirety of her 15-page Appeal. In the absence of any explanation of why this Office's response is incomplete, for example, why it should have any of OIG's investigative records, we conclude that the Office of the Executive Secretariat's search for documents responsive to Ms. Frey's request was adequate.

OIG responded to Ms. Frey's request on August 30, 2004. In its response, OIG stated that it had no responsive documents other than those that it had already provided to Ms. Frey in May 2002, and therefore would not be providing any documents. Ms. Frey appeals OIG's refusal to produce documents responsive to her request. Appeal at 6-7.

II. Analysis

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Alice McMillan*, 28 DOE ¶ 80,118 (2004). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search

reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 834 (D.C. Cir. 1979).

1. Office of Hearings and Appeals

We reviewed the procedure this Office followed in producing its response to Ms. Frey's June 30, 2004 request for documents. According to Valerie Vance Adeyeye, the attorney who prepared that response, she retrieved the case file in Case No. VFA-0754 and photocopied each document in that file. The case file is the only logical place in the office where any documents related to that case would be located. Ms. Adeyeye then prepared the cover letter and enclosed with it all the photocopies she had made. No copies of the OIG records that Ms. Frey now seeks were enclosed, because there were none in the case file. Ms. Adeyeye, who was the staff attorney assigned to Case No. VFA-0754, explained that, in the course of processing that appeal, she compared the unredacted and redacted versions of the records contained in OIG's investigative file by reviewing them in a conference room within the offices of OIG. Memorandum to File in Case No. TFA-0072 (October 14, 2004). Ruby Len of OIG recalled that Ms. Adeyeye reviewed the OIG file at OIG, and stated that OIG's policy is to permit OHA to review files on the premises but not to make copies of them. Memorandum of Telephone Conversation between Ruby Len, OIG, and William Schwartz, OHA (October 6, 2004). In light of those circumstances, the fact that OHA's search for documents did not yield unredacted material from the OIG investigative file does not establish that the search was inadequate. To the contrary, I conclude that OHA's search for responsive documents was adequate.

2. Office of Inspector General

The OIG responded to Ms. Frey's June 30, 2004 request for documents by stating that it was providing no documents to her because it had no responsive documents to give her other than those it provided to her in May 2002. In her Appeal, Ms. Frey contends that she suffered from a medical condition that "prevented her from properly maintaining and/or retaining the previously released documents." Appeal at 9. After discussing this Appeal with a representative of OHA, Ms. Len explained that OIG normally, and certainly in this case, will produce a second set of documents for a requester upon request. Ms. Len indicated that she will provide Ms. Frey with a second set of documents upon receipt of this Decision and Order. Memorandum of Telephone Conversation between Ruby Len, OIG, and William Schwartz, OHA (October 6, 2004). In these circumstances, such action is appropriate.

B. Request for Reconsideration

In her Request for Reconsideration (Case No. TFA-0073), Ms. Frey asks that OHA reconsider its determination, in Case No. TFA-0754, to withhold from disclosure any records pertaining to Mr. Ugol. In that case, OHA agreed with OIG's determination to withhold the names and identities

of all individuals who were interviewed in connection with the OIG investigation described above, under two exemptions of the FOIA, one that protects information the release of which "would constitute a clearly unwarranted invasion of personal privacy" (Exemption 6) and another that protects information compiled for law enforcement purposes, the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (Exemption 7(C)). Ms. Frey contends that any information regarding Mr. Ugol may now be disclosed in light of his death, which she contends extinguishes any personal privacy interests Mr. Ugol may have held while he was alive.

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider requests or motions for reconsideration where circumstances warrant. *See, e.g., Dallas D. Register,* 28 DOE ¶ 80,218 (2002). In reviewing such requests for reconsideration, we may look to Subpart E of 10 C.F.R. Part 1003, OHA's general administrative rules regarding modification or rescission of its orders. *See, e.g., Ron Vader,* 23 DOE ¶ 80,183 (1994). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application demonstrates that it is based on significantly changed circumstances, defined in pertinent part as "a substantial change in the facts or circumstances upon which an outstanding . . . order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R. § 1003.55(b)(1).

In the present case, Mr. Ugol's death appears to meet the definition of significantly changed circumstances. His death may affect the current appropriateness of the determination in Case No. VFA-0754 to withhold documents pertaining to Mr. Ugol on the basis of his personal privacy interests. Consequently, this matter should be reconsidered. We have determined that the proper approach to this reconsideration is to remand the matter to OIG. OIG should review the material that Ms. Frey has submitted in support of these changed circumstances and determine whether it adequately establishes the death of an interviewee who participated in the investigation at issue and, if so, whether the death mandates the release of information heretofore withheld from Ms. Frey.

III. Conclusion

We find that the Office of Hearings and Appeals conducted an adequate search for documents responsive to Ms. Frey's June 30, 2004 request for documents. We have ascertained that the Office of the Inspector General will provide Ms. Frey with a second set of the documents it provided to her in May 2002. Finally, we are remanding to OIG the matter of whether any documents pertaining to Mr. Ugol created or obtained in the course of the OIG investigation described above may now be released to Ms. Frey, in light of the evidence she has submitted regarding his death. Accordingly, Ms. Frey's Appeal will be denied in part and granted in part.

It is Therefore Ordered That:

(1) The Appeals filed by Cynthia A. Frey on September 29 and 30, 2004, OHA Case Nos. TFA-0072 and -0073, respectively, are hereby granted to the extent set forth in paragraphs (2) and (3) below, and denied in all other respects.

(2) The Office of the Inspector General will promptly produce and deliver to Ms. Frey copies of all documents in its possession that are responsive to her June 30, 2004 Freedom of Information Act request.

(3) The Office of the Inspector General will promptly reconsider its determination to withhold any records concerning an investigation into drug use and leave abuse at the Office of Pipeline Certificates of the Federal Energy Regulatory Commission, but only regarding any documents it may have withheld pertaining to Maynard Ugol, in light of the evidence of his death as provided by Ms. Frey in this proceeding. Following such reconsideration, the Office of the Inspector General will promptly issue a new determination either releasing such documents or justifying the withholding of any portion or portions of those documents.

(4) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 22, 2004

November 4, 2004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Natural Resources Defense Council

Date of Filing: October 4, 2004

Case Number: TFA-0074

On October 4, 2004, Meyer & Glitzenstein filed an Appeal from a determination issued to their client Natural Resources Defense Council (NRDC) on September 14, 2004, by the Albuquerque National Nuclear Security Administration (NNSA) Service Center of the Department of Energy (DOE/AL) in response to a request for documents that NRDC submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/AL perform an additional search for responsive material.

I. Background

On July 24, 2004, NRDC filed a FOIA request with DOE's NNSA Service Center in Oakland for various records concerning DOE clean-up activities at the Energy Technology Engineering Center (ETEC) portion of the Santa Susana Field Laboratory (SSFL) in Simi Valley, California. Letter from NRDC to FOIA Officer, Oakland NNSA Service Center (July 24, 2004) (Request). On August 6, 2004, DOE/AL transferred the request to the DOE/HQ FOIA Office for additional processing by the DOE/HQ Office of Environmental Management, which agreed to respond to one item of the request. Request at 2. According to DOE/AL, the FOIA officer then contacted the Program Manager for ETEC at the former Oakland Operations Office, now a part of DOE/AL. The Program Manager located some responsive records and then forwarded those records to the requester. Letter from DOE/AL to NRDC (September 14, 2004) (Determination Letter). NRDC contends that DOE has failed to identify any internal records concerning whether the cleanup complies with government regulations, whether an environmental impact statement is required, or how DOE would address comments on the draft environmental assessment. Letter from NRDC to Director, OHA (October 4, 2004) (Appeal) at 1. According to NRDC, "since the agency simply must have generated such records, DOE's search thus far is patently deficient." *Id.* In the Appeal, NRDC challenged the adequacy of the search and asks OHA to direct DOE/AL to search again for responsive information.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v.*

Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

DOE/AL informed us that upon receipt of the request, they contacted the Program Manager (PM) for the ETEC program at the old Oakland Operations Office. Electronic Mail Message from Carolyn Becknell, DOE/AL to Valerie Vance Adeyeye, OHA (October 28, 2004). The PM, who has been with this project for over 10 years, stated that he is the holder of all material related to the environmental assessment (EA). Because the EA was conducted in the field and he was the EA document manager at the end of the process, the PM considered his files to be "the most complete." *Id.* In addition to reviewing his own files, the PM also reviewed the files of two individuals who were directly involved with this project. The PM reviewed all emails for responsiveness. *Id.* He even reviewed email messages of personnel who no longer work in the field, since he was copied on many emails due to his position on the project. The PM found some responsive material, which DOE/AL sent to the requester with the Determination Letter.

DOE/AL also informed us that during the reorganization of NNSA, personnel from the former Oakland Operations and Nevada Operations Offices became part of the new NNSA Service Center in Albuquerque. During this reorganization, a large group of archived emails were lost, but have been located since DOE/AL issued the Determination Letter. The PM is reviewing these files and has agreed to forward any and all responsive material directly to the requester. Electronic mail message from Caroline Becknell, DOE/AL to Valerie Vance Adeyeye, OHA (October 19, 2004).

NRDC has not presented any evidence that the internal memoranda it discusses in its Appeal exist. It is possible that the responsive material that NRDC contends "simply must have been generated" does not exist, or may be located in the newly recovered archived emails. As stated above, DOE/AL is currently reviewing those files and will send any responsive material to NRDC. After reviewing the record of this case, we find that DOE/AL conducted a search that was reasonably calculated to uncover the requested information. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Natural Resources Defense Council on October 4, 2004, OHA Case Number TFA-0074, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 4, 2004

September 23, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Federation of American Scientists

Date of Filing: October 6, 2004

Case Number: TFA-0075

The Federation of American Scientists (Federation) filed an Appeal from a determination that the Office of Intelligence of the Department of Energy issued on September 29, 2004. In that determination, the Office of Intelligence denied in part a request for a copy of the fiscal year 2005 budget request for that office, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Upon receiving the Federation's request, the Office of Intelligence requested that the Office of Classification and Information Control (OCIC) of the DOE's Office of Security review the requested document. OCIC determined that portions of the requested document contain information properly classified as National Security Information and must therefore be withheld under Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1). This Appeal, if granted, would require the DOE to release the requested document in its entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On February 4, 2004, the Federation requested a copy of the fiscal year 2005 budget request for the DOE's Office of Intelligence. The Office of Intelligence requested that the OCIC perform a classification review of the requested document. The OCIC completed its review, delivering a redacted version of the document to the Office of Intelligence, from which portions of the document had been excised. Those portions contained material the OCIC determined was classified information. The OCIC also recommended that the Central Intelligence Agency (CIA) review this document; the CIA determined in its review that CIA information contained in the document could be released in its entirety. The Office of Intelligence then issued a determination letter to the Federation, together with redacted

version of the requested document. In its determination letter, the Office of Intelligence explained that the portions of the document being withheld from public release contained information properly classified as National Security Information pursuant to sections 1.5(a), (b), (c), (d), and (e) of Executive Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA.[*]

The present Appeal seeks the disclosure of the withheld information described above. In its Appeal, the Federation presents two arguments in favor of releasing the budget request in its entirety: (1) The DOE has the discretion to release the entire 2005 budget request under 10 C.F.R. § 1004.1, in the public interest, as it has in previous years, and (2) to the extent that the requested document contains prior-year information that has been released, the DOE has waived its ability to withhold this same information now.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, the material the DOE withheld from the document must continue to be withheld, because it constitutes classified information that is intelligence-related. The information that the DOE continues to withhold concerns military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; and scientific, technological, or economic matters relating to the national security. This information is currently classified as National Security Information (NSI) under sections 1.4(a), (b), (c), (d), and (e) of Executive Order 12958, and is identified as "DOE b(1)" in the margin of a redacted version of this document, which will be provided to the Federation under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under

[*] Section 1.5, Classification Categories, was renumbered as Section 1.4 in a March 23, 2003 amendment to Executive Order 12958. *See* Executive Order 13292, 68 Fed. Reg. 15315 (March 28, 2003).

Exemption 1 of the FOIA. The denying official for the DOE's withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that Executive Order 12958 requires that the DOE continue withholding portions of the requested document under consideration in this Appeal. Although we agree with the appellant that a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has determined to be properly classified must continue to be withheld from disclosure. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Federation of American Scientists on October 6, 2004, Case No. TFA-0075, is hereby denied.

(2) A redacted version of the fiscal year 2005 budget request for the Department of Energy's Office of Intelligence will be provided to the Federation of American Scientists.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 23, 2005

December 1, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kenneth M. Reim

Date of Filing: November 2, 2004

Case Number: TFA-0076

On November 2, 2004, Kenneth M. Reim (the Appellant), filed an Appeal from a final determination that the Office of the Inspector General (OIG) of the Department of Energy (DOE) issued on September 22, 2004.[1/] That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OIG would be required to conduct a further search for responsive documents.

Background

On April 18, 2003, the Appellant submitted a FOIA request for the "status of follow up action on Audit Report 0589 by DOE/IG, DOE or other federal agencies [and] [c]orrespondence related to the ongoing IG Audit, and responses of the agency(s) being audited." Request letter dated April 18, 2003, from Kenneth M. Reim to Abel Lopez, Director, Freedom of Information and Privacy Act Group (FOIA/PA), DOE. On May 9, 2003, FOIA/PA assigned the request to OIG to conduct a search of its files for responsive documents. Letter dated May 9, 2003, from Abel Lopez to the Appellant. On September 22, 2004, OIG responded that it had nothing responsive to the first part of the Appellant's request, that is, the status of follow up action on Audit Report 0589. It released 10 documents to the Appellant that were responsive to the second part of his request; however, it redacted some information pursuant to Exemptions 5 and 6 of the FOIA.[2/] Determination Letter dated September 22, 2004, from William S. Maharay, Deputy IG for Audit Services, IG, to the Appellant.

[1/] Although the Appeal was received by this office on October 26, 2004, it did not include a copy of the determination letter, which is required by the FOIA regulations. This office received a copy of the September 22, 2004 Determination Letter on November 2, 2004.

[2/] The Appellant is not appealing anything relating to the second part of his request.

On November 2, 2004, the Appellant appealed the September 22, 2004 determination to our Office. Appeal Letter dated October 19, 2004, from Kenneth M. Reim to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant claims that he is appealing what he sees as a non-responsive answer to the first part of his request regarding the status of follow up action on Audit Report 0589. He continues that if no follow up was completed, he wants to know why. *Id.* at 2-3.

Analysis

As an initial matter, with regard to the Appellant's question as to why there was no follow up on the Audit Report, we note that the FOIA is not a mechanism for answering questions. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978). Nevertheless, we did investigate the extent of the search conducted for documents relating to the status of follow up activities related to the Audit Report.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We have contacted OIG to determine what type of search was conducted. OIG informed us that because this part of the request was so narrow, it was common knowledge that no separate piece of paper existed that was responsive. Anything possibly responsive to this part of the Appellant's request would be contained in the Department Audit Resolution Tracking System (DARTS), which is maintained by the Office of the Chief Financial Officer (CFO). CFO then determined that the National Nuclear Security Administration (NNSA) might have information responsive to that part of the request.[3/] NNSA, as the concerned program office in the case of Audit Report 0589, is responsible for entering the information arising from the OIG Audit into the DARTS and updating it on a quarterly basis. After the information is entered into DARTS, OIG reviews the updates from the program office and inputs any OIG comments into DARTS. OIG advises us that it knew that it did not have anything responsive to the Appellant's request because it does not maintain any information after the Audit is completed. That information is placed into DARTS. Given

[3/] It is our understanding that the Appellant has received a document from NNSA responsive to that part of his request. The determination from NNSA is not at issue in this Appeal.

the facts presented to us, we are convinced that OIG followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Kenneth M. Reim, on November 2, 2004, Case No. TFA-0076, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 1, 2004

April 18, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Chang-Su Lim
Date of Filing:	March 15, 2005
Case Number:	TFA-0077

This Decision concerns an Appeal that was filed by Chang-Su Lim in response to a determination issued to him by the Manager of the Chicago Operations Office (hereinafter referred to as "the Manager"). In that determination, the Manager replied to a request that Dr. Lim submitted for access to a specified document under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Manager released the document to Dr. Lim with certain portions withheld. This Appeal, if granted, would require that the Manager release the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R.§ 1004.10(b).

I. Background

In his FOIA request, Dr. Lim sought access to a copy of a Field Work Proposal entitled "Cellular and Molecular Studies of Radio-Adaptive Responses," which was submitted to the DOE for agency funding. In response to this request, the Manager released the Proposal to Dr. Lim, but withheld portions of that document pursuant to Exemptions 4 and 5 of the FOIA. In his Appeal, Dr. Lim contests the Manager's application of Exemptions 4 and 5.

II. Analysis

Exemption 4 shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade

secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Applying these criteria to the present case, it is clear that the withheld information is "commercial." Although it is scientific in nature, it was submitted to the DOE for the purpose of securing government funding for research on the subject matter of the proposal. It is also clear that the submitter, Lawrence Berkeley National Laboratory (LBNL), an organization operated by the University of California at Berkeley, is a "person" for Exemption 4 purposes. *Nadler v. FDIC*, 92 F.3d 93, 95 (2nd Cir. 1996). There is no claim of privilege with regard to the withheld information. We must therefore determine whether the information is "confidential." Because LBNL was required to provide the information to obtain the funding, it was submitted on an "involuntary" basis, and the *National Parks* test applies.

In his determination, the Manager concluded that release of the withheld information would put LBNL at a competitive disadvantage by "revealing the state of the art and direction of research that" LBNL is pursuing. "Such disclosures could well encourage others to pursue research in these areas and to assist others in competing against" LBNL for future research funding. Determination Letter at 2.

We have been informed by the Manager that the withheld material describes a novel procedure that has not previously been published, and includes detailed research methodologies. *Id.* Furthermore, we have examined the material, and we can find no reason to disagree with the Manager's conclusion. We find there to be a substantial likelihood that release of this information would suggest new avenues of inquiry into the subject of the proposal, or would otherwise aid LBNL's competitors in formulating proposals for future research grants. We therefore reject Dr. Lim's

contention that the Manager improperly applied Exemption 4 in withholding the information in question. [*]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Chang-Su Lim, OHA Case Number TFA-0077, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 18, 2005

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*/ The Manager also found that disclosure of the theories and ideas for scientific research described in the withheld material would compromise certain rights that the submitter might have to exploit the commercial value of any inventions that arise from work done under the research grant, and that this would result in a competitive disadvantage. However, because we have found that the Manager has already adequately justified withholding the material in question for the reason discussed above, we need not address this additional justification. For a similar reason, we also do not need to address the Manager's finding that release of the withheld information would compromise the government's ability to exploit the commercial value of any inventions that arise from work done under the research grant, and that the information may therefore be withheld under Exemption 5.

February 4, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Capitol District Information
Date of Filing:	November 29, 2004
Case Number:	TFA-0078

On November 29, 2004, Capitol District Information (CDI) filed an Appeal from a determination issued to it by the Department of Energy FOIA/Privacy Act Group (DOE/HQ) and the Office of Policy and International Affairs (DOE/OP) on November 9, 2004, in response to a request for documents that CDI submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/OP perform an additional search for responsive material.

I. Background

On September 14, 2004, CDI filed a FOIA request with DOE/HQ for various records concerning:

> All documents that are or reflect reports of sales of natural gas to or purchases of natural gas by Pacific Gas and Electric (PG&E) submitted pursuant to paragraph 5 of the Secretary of Energy's January 19, 2001 Temporary Emergency Natural Gas Purchase and Sale Order (attached hereto as Exhibit A) or any extension of that order. Documents responsive to this request may be in the possession of [certain] employees of DOE.

Letter from CDI to DOE/HQ (September 14, 2004) (Request). On October 18, 2004, DOE/HQ informed CDI that the request was assigned to DOE/OP to conduct a search of its files for responsive documents. Letter from DOE/HQ to CDI (October 14, 2004). DOE/HQ also informed CDI that it would be categorized as a "commercial use" requester and would be assessed fees for the search, and for the review and duplication of any responsive documents. On November 9, 2004, DOE/HQ informed CDI that DOE/OP had completed its search but was unable to locate any responsive documents. CDI was charged for 90 minutes of search time. CDI then filed an appeal. Letter from CDI to OHA (November 29, 2004). *Id.* In the Appeal, CDI challenged the adequacy of the search and asks OHA to direct DOE/OP to search again for responsive information. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State,* 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State,* 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner,* 17 DOE ¶ 80,102 (1988).

The Temporary Order authorized PG&E to make emergency purchases of natural gas from certain suppliers in order to assure the continued availability of natural gas to high–priority uses in central and northern California. *See* Temporary Emergency Natural Gas Purchase and Sale Order (January 19, 2001). Paragraph 5 of the order directed PG&E and the suppliers to report weekly to the Secretary of Energy the prices and volumes of natural gas delivered, transported, or contracted for under the Order during the previous week. The order was issued on January 19, 2001, and was extended on January 23, 2001 to February 7, 2001. *See* Further Temporary Emergency Natural Gas Purchase and Sale Order (January 23, 2001).

In its request, CDI stated that two DOE employees, Margo Anderson and Mike Skinker, may have responsive records in their possession.* We contacted Skinker for information about the search. Skinker stated that he worked on a project related to the Order, and had responded to the original request after consulting with Anderson. *See* Memorandum of Telephone Message from Mike Skinker, OGC (December 22, 2004). Skinker thought that responsive material might be located in DOE/OP, but Anderson searched and found no responsive records in her files. *See* Electronic Mail Message from Al Cobb, DOE/OP to Melodie Washington, DOE/OP (January 4, 2005). She referred Skinker to Paul Carrier, another DOE/OP employee. A DOE/OP employee then searched Carrier's files and Anderson's files, and found no responsive material. Electronic Mail Message from Al Cobb, DOE/OP, to Melodie Washington, DOE/OP (January 4, 2005). After two searches, DOE/OP finally concluded on November 3, 2004, that it did not have any responsive material, and notified DOE/HQ. Electronic Mail Message from Edith Horne, DOE/OP to Valerie Vance Adeyeye, OHA (January 21, 2005).

After DOE/OP described its search, this office contacted CDI for the names of any other DOE employees that may have responsive records in their possession, or for any evidence that responsive material exists. *See* Memorandum of Telephone Conversation between Ron Barrett, CDI, and

* Anderson no longer works for DOE/OP, but we contacted her replacement, Al Cobb, for information about the search.

Valerie Vance Adeyeye, OHA (January 24, 2005). The requester had no additional names and has not presented any evidence that responsive material exists. *See* Memorandum of Telephone Conversation between Ron Barrett, CDI, and Valerie Vance Adeyeye, OHA (January 25, 2005). After reviewing the record of this case, we find that DOE/OP conducted a search that was reasonably calculated to uncover the requested information. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Capitol District Information on November 29, 2004, OHA Case Number TFA-0078, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 4, 2005

January 5, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Hammond

Date of Filing: December 6, 2004

Case Number: TFA-0079

On December 6, 2004, Richard Hammond (the Appellant) filed an Appeal from a final determination that the Western Area Power Administration (WAPA) of the Department of Energy (DOE) issued on November 1, 2004. In its determination, WAPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require WAPA to release the information it withheld and to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated April 15, 2004, the Appellant submitted a FOIA request to WAPA for documents including copies of all Equal Employment Opportunity-related (EEO) settlement agreements between complainants and WAPA made between January 1999 and March 2004. Determination Letter dated July 15, 2004, from Liova D. Juarez, General Counsel, FOIA, WAPA, and Privacy Act Officer, to Richard Hammond. On July 15, 2004, WAPA responded that it had identified a number of documents as responsive to the Appellant's request. *Id.* at 1. In that Determination, WAPA indicated that it was releasing them to the Appellant after withholding portions of the documents in accordance with Exemption 6 of the FOIA. *Id.* The Appellant filed an Appeal with this office that was denied in part, granted in part, and remanded to WAPA with instructions to either release

some of the information or issue a new determination justifying its withholding. *Richard Hammond,* Case No. TFA-0069, 29 DOE ¶ 80,152 (2004).

In its second Determination Letter, issued on November 1, 2004, WAPA released some additional information, but withheld information setting forth the terms and substance of the settlement agreements as exempt from disclosure under Exemption 5. WAPA claimed that the information contained material that was prepared in anticipation of pending litigation. Determination Letter dated November 1, 2004, from Liova D. Juarez to Richard Hammond (November 1, 2004 Determination Letter). The Appellant filed this Appeal, claiming first, that the search was inadequate, and second, that the information WAPA withheld should not be considered to have been prepared in anticipation of litigation. Appeal Letter dated November 30, 2004, from Richard Hammond, to Director, Office of Hearings and Appeals (OHA), DOE.

II. ANALYSIS

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We contacted WAPA to determine what type of search was conducted. WAPA informed us that it searched its computer system using keywords. In addition, WAPA conducted a hand search of documents, including those that were waiting to be archived or were already archived. WAPA only searched for EEO settlement agreements, as requested by the Appellant. The Appellant argues that WAPA provided only 15 settlement agreements, far below what he believes an office with 11 employees should have handled. In addition, he stated that no settlement agreements were provided where the complainant was represented by a specific law firm in Lakewood, Colorado. WAPA responded that its EEO office works on many types of cases, not just EEO-related settlement agreements, including Merit Systems Protection Board (MSPB) and Federal Labor Relations Authority (FLRA) cases. Further, although the law firm does represent individuals before WAPA, it is possible that the individuals represented by this firm did not reach settlements with WAPA, that the firm did not represent anyone during the time period for which the Appellant is requesting the information, or that the firm represented an individual or individuals in areas other than EEO, such as MSPB or FLRA claims.

WAPA's search did not locate any settlement agreements involving the specific firm, and the Appellant has not produced convincing evidence that additional responsive documents exist. Given the facts as they were presented to us, we are convinced that WAPA followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request.

None of the Appellant's arguments convinces us otherwise. The Appellant's allegation regarding the particular number of employees working in the EEO office does not provide any new information that would direct WAPA to a new place to search or convince us that additional relevant documents exist. Further, the information that a specific law firm represents individuals before WAPA does not provide information sufficient to suggest that additional settlement agreements exist. As stated above, we believe that WAPA's search was reasonably calculated to discover responsive documents. Accordingly, this part of the Appeal should be denied.

B. Exemption 5-Deliberative Process and Predecisional Documents

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates every civil discovery privilege which the government enjoys under statutory and case law. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 7799 (1983); *FTC v. Grolier*, 462 U.S. 16, 19-27 (1983); *Renegotiation Board v. Grumman Aircraft & Engineering Corp.*, 421 U.S. 164, 184 (1975). Therefore, any communication that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. *Id.* Accordingly, if the requested documents fall within a civil discovery privilege, they may be withheld under Exemption 5.

In its second determination, WAPA withheld the terms and conditions of the majority of the settlement agreements. The terms and agreements are the substance of the agreement between the parties. We believe that these portions of the settlement agreements may be withheld under the privilege for settlement negotiation papers incorporated within Exemption 5. Federal courts ruling squarely on the issue have held that such documents are privileged from discovery. The federal courts have held that information prepared by attorneys "in contemplation of litigation,"*Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980), includes documents relating to possible settlements of litigation. *See, e.g., United States v. Metropolitan St. Louis Sewer District,* 952 F.2d 1040, 1045 (8th Cir. 1992). Specifically, the courts have also recognized a separate civil discovery privilege for information relating to settlement negotiations. *See, e.g., Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 445, 449 (S.D.N.Y. 1985). In light of the case law, OHA has determined that settlement documents are privileged and therefore exempt from mandatory disclosure. *Information Focus on Energy*, 26 DOE¶ 80,192 (1997) (*IFOE*); *Peter T. Torell*, 15 DOE ¶ 80,127 (1987) (*Torell*). In reaching these determinations,

we have concluded that the privilege exists, in large part, to encourage full disclosure between the parties involved in order to promote settlements rather than continued litigation. *Torell* at 80,576.[*/] Promotion of this important objective would be harmed if these documents were released. We therefore conclude that WAPA properly withheld information relating to the settlement agreements.

III. THE PUBLIC INTEREST

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. The Appellant argues that release would be in the public interest. Appeal Letter at 2. We disagree. The release of individual settlement agreements would result in foreseeable harm to the interests that are protected by the settlement negotiation privilege. *IFOE* at 80,794. An opposing party could gain substantial benefit (and cause corresponding detriment to an agency) if the party could obtain work product generated by an agency in connection with earlier settlements. The party could unfairly gain insight into the agency's strategic and tactical approach to deciding what terms may be offered and accepted by the agency. The release of these agreements could compromise the DOE's efforts at negotiating future settlements in similar cases.

IV. CONCLUSION

WAPA properly withheld portions of the documents under the Exemption 5. Further, we believe the search that was conducted was adequate. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Richard Hammond on December 6, 2004, Case No. TFA-0079, is hereby denied.

[*/] In an alternative analysis discussed in *Las Vegas Review-Journal*, Case No. TFA-0007, 28 DOE ¶ 80,273 (2003), OHA held that settlement agreements and information reflecting the settlement amount or other terms of the agreement are attorney work product, and therefore exempt from mandatory disclosure. *Id.* at 4.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 5, 2005

February 11, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Paul E. Guy, Jr.

Date of Filing: December 8, 2004

Case Number: TFA-0080

This Decision concerns an Appeal filed by Paul E. Guy, Jr. from a determination issued to him by the Chief Counsel of the Department of Energy's (DOE) Savannah River Operations Office. That determination was issued in response to a request for documents that Mr. Guy submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act (PA), 5 U.S.C. § 552(a), as implemented by the DOE in 10 C.F.R. Part 1008. In that determination, the Chief Counsel withheld portions of certain documents from Mr. Guy. This Appeal, if granted, would require that the Chief Counsel release most of the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release.

The PA requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. A PA request requires only that an agency search systems of records, while the FOIA generally requires a broader search. The DOE regulations define a system of records as being "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

I. Background

In his FOIA/PA request, Mr. Guy sought access to all documents generated by a named contractor employee during his investigation of Mr. Guy's complaints against a named employee of the DOE's Office of Safeguards and Security, and all documents relating to the cost of this investigation. In her response, the Chief Counsel informed Mr. Guy that a search of all systems of records pursuant to the PA had failed to identify any responsive documents. However, she also stated that a search of other records pursuant to the FOIA had resulted in the location of a number of responsive documents. These documents were released to Mr. Guy in their entireties, with the exception of

Documents 2, 3.1 and 5, which were released with portions withheld pursuant to Exemptions 3, 5 and 6 of the FOIA. 5 U.S.C. § 552(b)3, (b)5 and (b)6. In his Appeal, Mr. Guy challenges the Chief Counsel's application of Exemptions 5 and 6. *

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*).

In this case, the Chief Counsel relied upon the "deliberative process" privilege of Exemption 5. This privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be an inter- or intra-agency memorandum that is both pre-decisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

The Chief Counsel withheld portions of Document 3.1 under Exemption 5. Document 3.1 is the report generated by the contractor employee who investigated Mr. Guy's complaints. The withheld portions of this Document consist of the sections entitled "Observations/Findings," "Conclusions," and "Recommendations." In his Appeal, Mr. Guy contends that this document is not "pre-decisional" because the final decision regarding his complaints has already been issued.

This argument is not well taken. The term "pre-decisional" refers to the point in a particular decision-making process at which the document in question was generated, and the federal courts have consistently held that a document does not lose its pre-decisional character after deliberations have ended and a final decision has been issued. *See, e.g., Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 360 (1979); *May v. Department of the Air Force,*

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*/ He does not challenge the withholding of portions of Document 5 pursuant to Exemption 3 of the FOIA.

777 F.2d 1012, 1014-15 (5th Cir. 1985); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 357 (3rd Cir. 1985).

Furthermore, we have examined Document 3.1 and have concluded that the Chief Counsel properly applied Exemption 5 in withholding the sections set forth above. As an initial matter, the document qualifies as an "inter-agency or intra-agency memorandum" despite the fact that it was prepared by a contractor employee. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 n.2 (D.D.C. 2003). In addition, the withheld material reflects the give-and-take of the deliberative process in that it reflects the opinions of the contractor employee as to the allegations made by Mr. Guy, rather than the final agency position on these matters. Accordingly, we conclude that the Chief Counsel properly applied Exemption 5 in withholding the material in question.

A finding that information can be withheld under Exemption 5 does not end our inquiry. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, although Mr. Guy's interest in gaining access to this information may be substantial, the public interest in the release of the withheld material is negligible. The opinions, preliminary findings and suggestions set forth therein would provide little insight into the workings of the DOE. However, the release of this deliberative material could discourage employees from making honest and open recommendations concerning similar matters in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We will therefore not release the portions of Document 3.1 that were withheld under Exemption 5.

The Chief Counsel also cited Exemption 6 in withholding portions of Documents 2 and 3.1. Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). In order to determine whether information may be withheld under this Exemption, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of such information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991). In determining whether release of the document would further the public interest, the Supreme Court has held that the personal interest of the requester is irrelevant. *Reporters Committee*, 489 U.S. at 772-773. Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*; *see also Frank E. Isbill*, 27 DOE ¶ 80,215 (1999).

The information that was redacted from Documents 2 and 3.1 pursuant to Exemption 6 consists of the names and other identifying information of the employees who were interviewed by the contractor employee during his investigation of Mr. Guy's allegations. In his Appeal, Mr. Guy contends that these employees have no privacy interests in maintaining their anonymity because their names are not the type of personal information that Exemption 6 was meant to protect. Furthermore, Mr. Guy argues that the "Privacy Act Notice" that each interviewee signed, and that together comprise Document 2, serves as a waiver of any privacy interest. That Notice provides, in pertinent part, that

> The information you supply will be used by Management to determine if a breach of the Department of Energy, Savannah River Operations Office Policies has occurred. This information may be furnished to designated officers and employees of the agency and/or departments of the Federal Government in order to resolve the complaint. The information may also be disclosed to any agency of the Federal Government having oversight or review authority with regard to the Equal Employment Opportunity Office activities or to others having reasons published in the Federal Register.

Mr. Guy's contention that the identities of federal employees are generally not the type of personal information that Exemption 6 was designed to protect is correct in the sense that their names, job titles and salaries are matters of public record. However, we have repeatedly found that, while a person has no privacy interest in his or her status as a federal employee, that same person may have a significant interest in maintaining the confidentiality of their participation in an investigation, particularly where, as here, that investigation involves a co-worker. *See, e.g., Technology & Management Services, Inc.,* 27 DOE ¶ 80,232 (1999); *Burlin McKinney,* 26 DOE ¶ 80,172 (1997). This is because a person who is revealed as having participated in an investigation may be subject to coercion, harassment or intimidation based on the mere fact of their participation, or on the content of their statements to investigators. For this reason, we conclude that the witnesses specifically named or identified in Documents 2 and 3.1 maintain a substantial privacy interest in the continued confidentiality of the withheld material.

We further conclude that the witnesses did not waive their privacy interests with respect to release of their identities to Mr. Guy or to the public at large by signing the Privacy Act Notices. As set forth above, those notices specifically describe the people and entities to whom the witnesses' statements may be revealed, and Mr. Guy has not demonstrated that those descriptions apply to him.

Next, we must determine whether there is a public interest in release of the witnesses' identities, and, if so, whether that interest outweighs the witnesses' privacy interests. Simply put, Mr. Guy has not suggested any *public* interest in disclosure, and we are unable to identify any such interest. He does argue that, without access to this information, he will be unable to effectively respond to the information developed during the investigation. However, as previously stated, the interests of the requester are irrelevant in determining whether the release of material withheld under Exemption 6 would further the public interest. *Reporters Committee,* 489 U.S. at 772-773. In fact, we conclude that the public is better served by maintaining the witnesses' confidentiality. Participants in future investigations might be less than totally open and candid in their statements to investigators if they

believed those statements would be publically disclosed, thereby adversely effecting the quality of the information provided. Because the witnesses maintain a substantial privacy interest in the withholding of their identities and there is no ascertainable public interest in disclosure, the Chief Counsel correctly determined that the witnesses' identities should not be released. We will therefore deny Mr. Guy's Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Paul E. Guy, Jr., OHA Case Number TFA-0080, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 11, 2005

March 30, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gideon Group, Inc.

Date of Filing: December 13, 2004

Case Number: TFA-0081

On December 13, 2004, Gideon Group, Inc. (Gideon) filed an Appeal from a determination issued to it by the Department of Energy's National Energy Technology Laboratory (NETL). In that determination, NETL released some documents with redactions. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NETL to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. ¶ 1004. [1]

I. Background

On October 19, 2004, Gideon submitted a FOIA request to DOE for copies of proposals submitted by two companies (TIAX and ECR) in response to DOE Solicitation Number DE-PS36-03GO93014. Letter from Gideon to DOE (October 19, 2004). The DOE solicitation sought applications for research and development projects "that will advance the integration of energy-efficient technologies in residential Micro-Cooling, Heating and Power (CHP) applications." Letter from NETL to OHA (February 11, 2005) (NETL Comments). NETL forwarded copies of each company's application to its respective submitter for comments. The submitters reviewed their applications and identified all information that they considered exempt from disclosure under Exemption 4. [1] NETL reviewers concurred with the redactions made by TIAX and ECR personnel. On November 22, 2004, NETL sent the redacted applications to Gideon, describing in general terms the information that was withheld under Exemption 4. Letter from NETL to Gideon (November 22, 2004) (Determination Letter). On December 14, 2004, Gideon filed this Appeal. Letter from Gideon to Director, OHA

1 Gideon requested "proposals" submitted by TIAX and ECR. However, because the solicitation was conducted under DOE's financial assistance regulations, the word "applications" is more accurate. Letter from NETL to OHA (February 11, 2005) footnote 1.

(December 14, 2004) (Appeal). In the Appeal, Gideon requested that OHA direct NETL to release any responsive material in its possession that was not marked confidential in accordance with the instructions in the solicitation. *Id.*

II. Analysis

A. Exemption 4

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Thus, in order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial or financial, obtained from a person and privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770. Information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

Information submitted in a procurement process is considered submitted involuntarily, and thus the *National Parks* test applies in this case. *Glen M. Jameson*, 26 DOE ¶ 80,236 (1997). In response to this Appeal, NETL provided us with unredacted and redacted copies of the responsive material, along with detailed comments explaining their withholding. *See* NETL Comments. We have reviewed the material withheld under this exemption and find that the deleted information was properly withheld under the *National Parks* test. First, the information withheld was clearly commercial information. The withheld material referred to new products that had been designed for commercial application, along with marketing and personnel information. Second, the information was obtained from TIAX and ECR, both corporations. We have previously found that corporations are deemed "persons" for purposes of Exemption 4. *See Myers Bigel Sibley & Sajovec*, 27 DOE ¶ 80,225 (1999). Finally, we find that the information was properly considered confidential for purposes of Exemption 4 because its disclosure is likely to cause substantial harm to the competitive positions of TIAX or ECR if released. For instance, the type of information withheld (e.g., commercialization strategy, labor hour estimates, specific results of market research), if released, would provide competitors of the two companies with information that could be used to gain unfair advantage against the companies in future procurements.

However, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm to a person, it must state the reason for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are

unacceptable and cannot support an agency's decision to withhold requested documents. *Southern California Edison*, 28 DOE ¶ 80,177 (2001).

In its determination, NETL stated:

> The following information has been deleted from the documents and withheld from release pursuant to 5 USC § 552(b)(4) of the Act which protects "trade secrets and commercial or financial information obtained from a person which is privileged or confidential," the disclosure of which would be likely to cause substantial competitive harm to the companies involved. A discretionary release of this type of information cannot be made.

Determination Letter at 1. NETL then listed a description of each type of information (e.g. description of commercialization strategy; labor hour estimates; specific results of market research; proprietary product performance information) and instructions on how to appeal the determination. Determination Letter at 2. In this case, NETL's conclusory Exemption 4 determination does not meet the requirements set forth above. [2] Accordingly, we shall remand this portion of the Appeal to NETL for a more thorough justification of its withholdings. On remand, NETL must either release the information it withheld or issue a new determination letter providing a detailed justification for withholding in accordance with the instructions set forth above. [3]

B. Submitter's Failure to Designate Restricted Information

Gideon has also asked us to decide whether DOE's redactions were proper, given that TIAX and ECR did not mark all proprietary information upon first submission to NETL as clearly instructed in the solicitation. *See Xerxe Group Inc.v. United States*, 278 F.3d 1357 (Fed. Cir. 2002) (*Xerxe*) (holding that failure to properly label proprietary information in an unsolicited proposal denied the submitter protection against disclosure). The DOE solicitation directed applicants to place a certain paragraph on the cover page of the application to identify all pages containing proprietary information. The solicitation also directed the applicants to place a legend on each page that contained proprietary information. TIAX and ECR put the legends on their cover sheets and listed those pages with proprietary information. TIAX also marked the specific pages as proprietary, but ECR made no further designations.

We agree with NETL that *Xerxe* is not a FOIA case and thus is not relevant to the issue presented. *See* NETL Comments at 2-3. Further, DOE FOIA regulations and an executive order permit the agency to consider the submitter's views at any time in the FOIA process. The DOE regulation states:

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2 Gideon noted that some of the information withheld from the TIAX response had been released to the public in a TIAX press release. NETL agrees that information should not be withheld. NETL Comments at 4.

3 The NETL Comments provide an acceptable level of detail on this issue. We also note that NETL has properly released reasonably segregable portions of the documents to Gideon, pursuant to 5 U.S.C. § 552(b).

> Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter's views (as that term is defined in this section) in making its own determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, *or at any other time*.

10 C.F.R. § 1004.11 (a) (emphasis added). The executive order formally established a procedural structure for notifying those who submit business information to the government when that information becomes the subject of a FOIA request. Exec. Order No. 12,600, 52 Fed. Reg. 23781 (1987). The order was designed to give business submitters notification and an opportunity to object to disclosure before an agency makes a determination on withholding proprietary information. The Order provides the submitter an opportunity to designate confidential information even if the submitter *did not do so at the time of submission*, as long as "the agency has substantial reason to believe that disclosure of the information would result in competitive harm . . . ." Exec. Order No. 12,600, Section 8(e) (1987).

In view of the competitive environment in which TIAX and ECR operate, we agree with NETL's argument that public release of any proprietary information could cause substantial harm to their competitive position. *See* NETL Comments at 4-5. Some information within the applications has great commercial value to the companies. Therefore, we conclude that NETL properly provided TIAX and ECR a second chance to designate proprietary information in their applications prior to making a determination on withholding proprietary information under Exemption 4 of the FOIA.

It Is Therefore Ordered That:

(1) The Appeal filed by Gideon Group, Inc. on December 14, 2004, OHA Case No. TFA-0081, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 30, 2005

March 21, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael J. Ravnitzky

Date of Filing: January 6, 2005

Case Number: TFA-0082

Michael J. Ravnitzky filed an Appeal from a determination that the Office of Classification and Information Control (OCIC) of the Department of Energy's Office of Security issued on December 10, 2004. In that determination, OCIC denied in part a request for information that the Appellant submitted on September 18, 2003, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OCIC located three documents that were responsive to Mr. Ravnitzky's request, released one in its entirety, and withheld the other two in their entireties. OCIC determined that the withheld documents contained classified information and that removal of the classified information from those documents would result in the release of no meaningful information. This Appeal, if granted, would require the DOE to release those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On September 18, 2003, Mr. Ravnitzky requested records at the Department of Energy (DOE) headquarters concerning Charles "Chuck" Hansen, primarily any government investigations into Mr. Hansen's activities or assessments of his work. The DOE Headquarters FOIA and Privacy Group responded to the request by requiring five offices to conduct searches for documents responsive to Mr. Ravnitzky's request. Only one office, OCIC, identified any responsive documents. OCIC informed Mr. Ravnitzky that it had located three potentially responsive documents and provided him with one of them in full. However, OCIC also withheld from release the other two responsive documents it had located. In its determination letter, OCIC explained that one withheld document contained information properly classified as National Security Information pursuant to Executive

Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA. It also stated that the other withheld document contained information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, and therefore warranted protection from disclosure under Exemption 3. Finally, the determination letter stated that there were small amounts of unclassified material in each document, but it declined to release that material because it was "so inextricably intertwined with the classified material that removal of the classified information would result in the release of no meaningful information."

The present Appeal seeks the disclosure of the withheld information described above. In his Appeal, Mr. Ravnitzky acknowledged that each of the withheld documents may contain classified information, but he contended that the unclassified portions, small though they may be, might in fact provide him with some meaningful information, and requested that those portions be released to him. In addition, he requested that the DOE reconsider its determination to withhold the title page of each of the withheld documents as classified information.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the two documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from each of the documents may now be released. With respect to one of the documents, a one-page memorandum from

the Acting Chief Weapons Program Branch, Office of Classification, to the Deputy Director, Office of Classification, dated September 13, 1982, the information that the DOE continues to withhold concerns military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; and United States Government programs for safeguarding nuclear material or facilities. This information is currently classified as National Security Information (NSI) under sections 1.5(a), (b), (c), (d), (e), and (f) of Executive Order 12958, and is identified as "DOE b(1)" in the margin of a redacted version of this document, which will be provided to Mr. Ravnitzky under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA.

With respect to the other document, a 16-page letter from Jack W. Rosengren to Robert T. Duff, dated August 27, 1982, the information that the DOE continues to withhold concerns nuclear weapons design that is currently classified as Restricted Data (RD) and is identified as "DOE b(3)" in the margin of a redacted version of this document, which will also be provided to Mr. Ravnitzky under separate cover. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3. Attached to the letter is a one-page routing slip from which a portion of the information has been withheld from disclosure under Exemption 1. The rationale for withholding the Exemption 1 information, and the method of identifying it, is set forth in the preceding paragraph.

The denying official for the DOE's withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that Executive Order 12958 and the Atomic Energy Act require DOE to continue withholding portions of the two documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael J. Ravnitzky on January 6, 2005, Case No. TFA-0082, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the following two documents will be provided to Mr. Ravnitzky: a 16-page letter from Jack W. Rosengren to Robert T. Duff, dated August 27, 1982, with attached one-page routing slip, and a one-page memorandum from the Acting Chief Weapons Program Branch, Office of Classification, to the Deputy Director, Office of Classification, dated September 13, 1982.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 21, 2005

May 24, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of Nevada

Date of Filing: January 5, 2005

Case Number: TFA-0083

On January 5, 2005, the State of Nevada (the Appellant) filed an Appeal from a determination that the Office of Civilian Radioactive Waste Management (OCRWM) of the Department of Energy (DOE) issued on November 24, 2004. In its determination, OCRWM partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OCRWM to release the information it withheld and to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

DOE is required to apply to the Nuclear Regulatory Commission for a license to construct the Yucca Mountain Project ("YMP"). In its May 27, 2004 FOIA request, Appellant requested documents regarding DOE's Licensing Support Network ("LSN") database for the YMP. On November 24, 2004, OCRWM issued a Determination Letter stating that it had identified a number of documents as being responsive to the Appellant's FOIA request. Determination Letter dated November 24, 2004, from Kenneth W. Powers, OCRWM, to Charles J. Fitzpatrick. In the Determination Letter, OCRWM stated that it was releasing some of the documents to the Appellant in full and it was withholding the remaining documents in their entirety. *Id.* OCRWM asserted that the withheld documents were prepared by or for an attorney and are thus privileged and exempt from release pursuant to Exemption 5 of the FOIA. *Id.* The Appellant subsequently filed this Appeal.

II. ANALYSIS

A. Adequacy of the search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988). The Appellant makes a number of arguments that OCRWM did not provide all documents responsive to its FOIA request.

The Appellant essentially argues that OCRWM did not conduct an adequate search for responsive documents because OCRWM failed to locate a number of specific documents that the Appellant had identified from other documents in its possession. In general, OCRWM has informed us that it had, in fact, located the documents the Appellant specifically identified but did not address most of them in its determination because it found that they were not responsive to the request. We discuss these documents below. [1/]

One document that the Appellant identified but which OCRWM did not provide is entitled a "Requirements Traceability Matrix." OCRWM has informed us that the Requirements Traceability Matrix is not a responsive document as it does not deal with "standards or criteria," which was an element of the request. February 9, 2005 Memorandum at 2 ("Memorandum"), from Diane Quenell, FOIA Officer, Office of Repository Development, OCRWM, to Janet R. H. Fishman, OHA. OCRWM's explanation lacks sufficient detail to permit us to determine whether this document is in fact responsive to the Appellant's FOIA request. Because we are remanding a significant portion of this matter back to OCRWM, we will require OCRWM on remand to issue another determination concerning whether this document is responsive.[2/]

[1/] OCRWM asserts that several of the documents identified by the Appellant were responsive but were properly withheld under Exemption 5 of the FOIA. We will address OCRWM's Exemption 5 claims in Section B below.

[2/] Even if this document is not responsive to the Appellant's recent FOIA Request, it is obvious that the Appellant desires it and could easily make another FOIA request for it. OCRWM may wish to consider whether it would not be more administratively efficient either to release this document to the Appellant or issue a determination letter explaining why this document must be withheld from release under the FOIA.

The Appellant next claims that "information letters sent to responsible managers" which the Appellant and OCRWM identified as having been dated March 22, 2004, were not included with OCRWM's determination. Appeal letter at 4. The Appellant is correct. However, OCRWM has stated to us that these letters contain no information regarding the LSN database, but merely transmit that information. Memorandum at 2. Consequently, the letters are not responsive to the Appellant's FOIA request and OCRWM was not required to release them to the Appellant. [3/]

The Appellant also contends that a document referencing training procedures that were "conducted covering the identification and submission to [CACI, Inc.] of potentially relevant documents" exists but was not provided by OCRWM. Appeal letter at 5. OCRWM has informed us that the document the Appellant identified above was in fact released to the Appellant. In its Determination Letter, OCRWM identified it as a Memorandum from Ms Otis and Dr. Chu. Memorandum at 2.

The Appellant also claims that a document attached to an electronic mail message, which stated it included information on the status of the LSN resizing efforts, must exist yet was not released. Appeal letter at 5. OCRWM states it will provide a copy of this document directly to the Appellant. Memorandum at 4.

The Appellant has also identified other documents as not having been released, and OCRWM has confirmed the existence of these documents in the Memorandum. However, in the Memorandum, OCRWM has determined those documents were not responsive to the Appellant's request but did not provide any justification for this determination. We will remand this matter back to OCRWM to make a formal determination regarding whether the remaining identified documents are responsive to the Appellant's FOIA Request. [4/]

In sum, OCRWM's search was reasonably calculated to discover responsive documents. It did, in fact, uncover the documents that the Appellant believed it had overlooked. For the reasons stated above, we believe that this part of the Appeal should be granted with respect to the electronic mail

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[3/] Again, it is apparent that the Appellant is interested in these documents. OCRWM may wish to consider whether it would not be more administratively efficient either to release these documents to the Appellant or to issue a determination letter explaining why these documents must be withheld from release under the FOIA.

[4/] *See* n.3 *supra.*

message mentioned above, denied with respect to the information letters and the memorandum from Ms Otis and Dr. Chu, and otherwise remanded to OCRWM for further processing.

B. Exemption 5

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates every civil discovery privilege which the government enjoys under statutory and case law. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 7799 (1983); *FTC v. Grolier*, 462 U.S. 16, 19-27 (1983); *Renegotiation Board v. Grumman Aircraft & Engineering Corp.*, 421 U.S. 164, 184 (1975). Therefore, any communication that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. *Id.* Accordingly, if the requested documents fall within a civil discovery privilege, they may be withheld under Exemption 5.

1. Adequacy of Justification

In its determination, OCRWM withheld over 600 pages of documents claiming that the documents were exempt from disclosure under Exemption 5 of the FOIA. OCRWM did not, however, identify individual documents, describe their contents, or clarify how the Exemption applies in each instance it was invoked in support of withholding information. Instead, OCRWM's Determination Letter provides only a general statement that there are documents consisting of a specific number of pages that are attorney work-product or were prepared by an attorney and are confidential communications. This justification for invoking Exemption 5 is the type of conclusory explanation that we have previously found to be invalid. *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,528 (1984). It lacks sufficient specificity to permit the requester and the appellate authority to understand the rationale for the various withholdings.

At the administrative level, such as the present review, determinations under the FOIA must include a general description of the denied material, a statement of the reason for the denial, and and an explanation of how the specific exemption applies to the withheld information. *Natural Resources Defense Council*, 20 DOE ¶ 80,145 at 80,627 (1990); *William R. Bowling, II*, 20 DOE ¶ 80,134 at 80,596-97 (1990). We will remand the matter to OCRWM in order that it set forth a description of the documents and, for each document or portion of document withheld, identify the privilege claimed under Exemption 5 and provide an explanation of how that privilege applies. On remand, OCRWM may group documents of similar type into categories, but must specifically identify each document in a category and ensure that the explanation of the withholding applies to each document in the category.

2. Segregability

The Appellant argued that OCRWM failed to segregate factual portions of the withheld documents. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this

subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester. The attorney work-product privilege, however, affords sweeping protection to factual materials. *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983). Nevertheless, OCRWM bears the burden of showing that the privilege applies to all the information it withholds under that privilege. On remand, OCRWM must consider whether any of the information it intends to withhold under Exemption 5 through claim of privilege can be segregated and released. [5/]

3. *The Public Interest*

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. Since we are remanding the matter to OCRWM, we need not weigh the public interest in release of the information. This is a matter for OCRWM to consider on remand, and it will be subject to review in the event of a future appeal.

III. CONCLUSION

OCRWM conducted a search reasonably calculated to uncover the information sought by the Appellant. However, we are remanding the matter to OCRWM concerning a number of matters. OCRWM should make a further determination concerning whether the specific documents described in Section A of this decision are responsive to the Appellant's request. Further, we are remanding the matter to OCRWM so that it may provide an adequate justification of how Exemption 5 applies to the documents or portions of documents it has withheld, including identifying the documents and determining whether any factual information can be reasonably segregated or should be released in the public interest. Therefore, the Appeal will be denied in part, granted in part, and remanded to OCRWM for a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada on January 5, 2005, Case No. TFA-0083, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

[5/] It is possible that release of a memorandum dated May 5, 2003--from Lee Liberman Otis, DOE General Counsel, to a large internal distribution list--constitutes waiver of the attorney work-product privilege with respect to certain documents. On remand, OCRWM should consider whether this release has waived the privilege and, consequently, protection under Exemption 5.

(2) This matter is hereby remanded to Office of Civilian Radioactive Waste Management of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 24, 2005

March 24, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Public Utility District #1
Dates of Filing:	January 18, 2005 February 23, 2005
Case Numbers:	TFA-0084 TFA-0089

This Decision concerns two Appeals that were filed by the Public Utility District No. 1 of Snohomish City, Washington (hereinafter referred to as "the District"). The first Appeal (TFA-0084) was filed in response to a determination issued to the District by the Special Assistant General Counsel, Bonneville Power Administration (hereinafter referred to as "BPA"). In that determination, BPA replied to three requests for documents that the District submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. BPA released certain documents in their entirety to the District, and withheld other material pursuant to Exemption 5 of the FOIA. This Appeal, if granted, would require that BPA release the withheld information. In the second Appeal (TFA-0089), the District contests BPA's assessment of fees for processing its requests in Case No. TFA-0084, and five other requests.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. The FOIA also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

I. Background

In its FOIA requests, the District sought access to "all written and electronic documents, including communications between BPA, members of Congress (or their staffs) and the [DOE] or any other federal power marketing agencies concerning P.L. 106-377, Title III, § 311 (Energy and Water Appropriations Act of 2001) before and after passage." *See* November 16, 2004 letters from Michael Goldfarb, Counsel for the District, to Annie Eissler, FOIA Officer, BPA. In its response, BPA identified a number of e-mails and documents as responsive to the District's request. Portions of

some of the e-mails were redacted from the material provided to the District because they consist of information that is not responsive to the request. In addition, five e-mails were withheld in their entirety under Exemption 5. * Those e-mails, all sent on June 22, 2000, were from

1. Randy Roach, General Counsel, to Jeffrey Stier, Vice-President, National Relations, providing legal advice on proposed legislative language;

2. Roach to Stier, with attachment of alternative proposals for legislative language;

3. Stier to Roach, requesting that Roach draft legislative language along the lines cited in the communication;

4. Stier to Roach requesting legal review of suggested change in legislative language; and

5. Stephen Wright, Senior Vice-President, Corporate, to Roach and Stier providing Wright's views and suggestions on various alternatives for legislative language.

In its Appeal of BPA's FOIA determination (Case No. TFA-0084), the District challenges the adequacy of BPA's search for responsive documents and the adequacy of the agency's justification for withholding e-mails one through four. The District also contests BPA's decision to withhold portions of certain communications because they were found to be unresponsive to the District's requests. The District asks that it be provided with any responsive documents that are not properly subject to withholding under Exemption 5 and with an adequate justification for any withheld material.

In its submission in Case No. TFA-0089, the District contends that the BPA incorrectly classified it as a "commercial use" requester, and contests what it claims is BPA's rejection of its request for a fee waiver.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg*

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*/ In its Determination Letter, BPA identified six e-mails as being withheld in full under Exemption 5. However, BPA has informed us that the e-mails identified as (b) and (e) are identical, and that, therefore, only five e-mails were withheld. BPA Response at 4.

v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In support of its claim that BPA's search was inadequate, the District points out that it did not receive copies of any communications between BPA and Congress or the DOE concerning the legislation in question. Because "[i]t is unlikely that BPA did not communicate with any members of Congress or with the [DOE] in formulating its plan to get [the] legislation passed,"Appeal at 1, the District concludes that BPA's search was deficient. Moreover, the District points out that it did not receive copies of two responsive communications that were referred to in material that the District did receive.

In its February 25, 2005 Response to the District's Appeal (Response), BPA described the search that was performed. Because the subject of the District's requests involved the national legislative process, BPA stated, the number of BPA employees who "may have been involved is quite limited. These were the Administrator and Deputy Administrator; the staff of our Washington, D.C. Office in the Forrestal Building; the BPA General Counsel; [the author of the Response] (as the attorney working on RTO matters); and the two leaders of BPA's RTO project at that time. Personal files of these officials and employees, both electronic and hard copy, were reviewed as were official files." Response at 1-2.

BPA further responds that, contrary to the District's assertion, BPA provided copies of two communications with or from the DOE concerning the legislation in question. Those communications are (1) a July 14, 2000 memorandum about the legislation from Roger Seifert in BPA's Washington, D.C. office to various DOE officials, and (2) a May 16, 2000 memorandum from T.J. Glauthier, DOE Deputy Secretary. The absence of other such communications between BPA and Congress or between BPA and other parts of the DOE is not unusual, BPA states, because matters involving national legislation are handled through the Washington Office, and the practice of that Office is to avoid maintaining copies of informal written communications with congressional offices or DOE staff. BPA e-mails that are deleted from a user's computer are erased from the system after 90 days. Response at 2.

With regard to the District's contention that BPA's search was inadequate because two communications that were referenced in material provided to the District were not located, BPA replied that it conducted another search for these two communications, without success. *Id*. With regard to the second referenced communication, which was between Mark Maher of BPA and certain public utilities, BPA opined that what "likely happened was that Mr. Maher distributed, in person at a regular filing utility meeting, copies of the proposed legislative language (which is cited verbatim in the e-mail chain provided to [the District]) to the filing utility representatives without an accompanying memorandum or description." Response at 3.

After careful consideration of the Appeal and BPA's Response, we conclude that BPA's search was adequate. BPA's description of the scope of the search convinces us that it was reasonably calculated to locate the requested documents. Furthermore, the District's arguments do not lead us

to believe that a further search would be likely to result in the identification of additional responsive materials. We therefore reject the District's challenge to the adequacy of BPA's search.

B. BPA's Withholding of Non-Responsive Material

Next, the District contends that BPA lacked the authority to withhold portions of the e-mails provided to the District because they consisted of information that is not responsive to the FOIA requests. However, in *Northwest Technical Resources, Inc.*, 28 DOE ¶ 80,119 (2000), we upheld the withholding of non-responsive information from documents provided to a FOIA requester. The District has not convinced us that our holding in that case is incorrect. E-mail chains, such as those in question here, routinely contain information on a wide variety of subjects. We conclude that BPA properly redacted non-responsive information from the documents provided to the District.

C. BPA's Application of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The District does not challenge BPA's withholding of e-mail five under the deliberative process privilege of Exemption 5. Moreover, BPA has now abandoned any reliance on the attorney work product privilege as a ground for withholding e-mails one through four. Response at 4. Therefore, only BPA's application of the attorney-client privilege is at issue here.

The attorney-client privilege protects from mandatory disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, *see, e.g., Jernigan v. Department of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998), as well as communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, 24 DOE ¶ 80,129 at 80,570 (1994).

Applying these criteria to e-mails 1-4, it is apparent that they consist almost entirely of communications between an attorney (General Counsel Randy Roach) and his client (BPA) in which BPA asks for, and receives legal advice about a legal matter (*i.e.*, proposed legislative language). It is this type of communication that the privilege was designed to protect. However, our review of the e-mails reveals that there are portions that are social, informational or procedural in nature. These portions are not exempt from mandatory disclosure under the attorney-client privilege and must therefore be provided to the District. They are (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach (e-mail number three); (ii) the 3:21 p.m. e-mail from Roach to Stier (without the attachment containing the four legislative alternatives authored by Roach) (e-mail number two), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier (e-mail number one).

In its Appeal, the District correctly points out that the privilege applies only to confidential communications, and that BPA's determination did not indicate whether these e-mails were in fact confidential. However, based on representations made to this Office by BPA, we conclude that these e-mails have been treated as confidential by BPA. *See* memorandum of March 18, 2005 telephone conversation between Steven Larson, BPA and Robert Palmer of this Office. With the exceptions noted above, we conclude that BPA properly applied the attorney-client privilege in withholding the e-mails in question.

D. The Assessment of Fees for Processing the District's FOIA Request

In its Appeal in Case No. TFA-0089, the District contests what it claims is BPA's January 26, 2005 denial of its request for a fee waiver. In the alternative, the District contends that BPA improperly classified it as a "commercial use" requester for purposes of calculating fees.

Contrary to the District's claim, our review of BPA's January 26 letter convinces us that it was not a final determination of the District's eligibility for a partial or full fee waiver, but was instead a request for more information. The letter states, in pertinent part that upon

> review of your FOIA requests, it does not appear that you have met the burden of establishing that you qualify for a reduction or waiver of fees for the requested information. *At this time, we are offering you the opportunity to provide additional information to demonstrate that you qualify for a reduction or waiver of fees.* The FOIA provides for a reduction or waiver of fees, but only if a requester shows that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to the public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).
>
> In order to satisfy the public interest, a requester must show each of the following:

> (A) The subject of the requested records concerns the operations or activities of the government;
>
> (B) Disclosure of the requested records is likely to contribute to an understanding of government operations or activities;
>
> (C) Disclosure of the requested records would contribute to an understanding of the subject by the general public; and
>
> (D) Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activiities.

10 C.F.R. § 1004.9(a)(8)(i). If a requester satisfies the four factors of the public interest, he must then satisfy the commercial interest factor by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Factors to be considered in applying these criteria include but are not limited to:

> (A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
>
> (B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.
>
> ***

We will not proceed further on your FOIA requests until (1) *you provide additional information so that we may evaluate your request for a waiver or reduction of fees, and if denied then* (2) your willingness to pay estimated processing fees, or (3) narrow the scope of your FOIA requests.

January 26, 2005 letter from Annie Eissler, BPA Freedom of Information Officer, to Michael Goldfarb, Counsel for the District (italics added).

Under section 1004.8(a) of the DOE's FOIA regulations, a requester may file an Appeal with the Office of Hearings and Appeals "when the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees . . . ." Because BPA's FOI Officer has not denied the District's request for a fee waiver, the circumstances necessary for an Appeal do not yet exist in Case No. TFA-0089. We will therefore dismiss this Appeal without prejudice to refiling should BPA deny the District's request.

Accordingly, the District should attempt to demonstrate to BPA that its request satisfies each of the criteria that are set forth in its January 26 letter and reproduced above.

Because the issue of whether BPA properly categorized the District as a "commercial use" requester is likely to arise again in the event that BPA denies the District's fee waiver request, we will address that issue here. The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"--and places requesters into one of three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

The District argues that because it is a non-profit, publically owned utility, its requests are "not for a use or purpose that furthers a commercial, trade, or profit interest." Appeal in Case No. TFA-0089 at 2. Accordingly, the District contends that it falls under the "all other requesters" category. However, the District's status as a non-profit is not dispositive of this issue. Many non-profits engage in trade or commerce, and BPA could have properly concluded that the information requested would be put to a use that would further a commercial or trade interest. As a public utility, the District is engaged in the business of selling electricity and water to its customers. Depending on the manner in which the District intends to use the material that it requested, BPA could have properly concluded that the FOIA requests were made in furtherance of the District's commercial interests.

However, it is not clear that BPA considered the manner in which the District would use the requested information in concluding that the District is a commercial use requester. BPA has informed us that it reached this conclusion because "we know our customers." *See* memorandum of March 3, 2005 telephone conversation between Joseph Bennett, BPA and Robert Palmer, OHA Staff Attorney. It therefore appears that BPA may have based this decision solely on its knowledge of the District's business activities without considering the manner in which the District intended to use the material requested. Section 1004.2(c) of the DOE's FOIA regulations provides, however, that "in determining whether a requester properly belongs in [the commercial use] category, agencies must determine how the requester will use the documents requested." Therefore, if BPA denies the District's request for a fee waiver, it should also consider the use to which the District will put the information obtained in making its determination as to the proper fee category for the District's request.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0084, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) BPA shall promptly release the following to the District: (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach; (ii) the 3:21 p.m. e-mail from Roach to Stier (without

the attachment containing the four legislative alternatives authored by Roach), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier.

(3) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0089, is hereby dismissed without prejudice to refiling upon the issuance of a final fee waiver determination by BPA.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 24, 2005

PALMER_____

May 6, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Keith B. Baranski

Date of Filing: January 24, 2005

Case Number: TFA-0086

On January 24, 2005, Keith B. Baranski filed an Appeal from a determination issued to him on September 8, 2004, by the Department of Energy's (DOE) FOIA/Privacy Act Group. That determination concerned a request for information that Mr. Baranski submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the requested information or to issue a new determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On April 12, 2004, Mr. Baranski filed a FOIA request seeking a list of all firearms and destructive devices possessed by or in the control of the DOE. Specifically, Mr. Baranski requested that the list include the manufacturer, model number, type and caliber. In its September 8, 2004 determination letter, the FOIA/Privacy Act Group identified a document responsive to Mr. Baranski's request. However, the FOIA/Privacy Act Group withheld portions of this document pursuant to Exemptions 2 and 3 of the FOIA. *See* September 8, 2004 Determination Letter.

On January 24, 2005, Mr. Baranski filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Baranski challenges DOE's withholding of information under Exemptions 2 and 3 of the FOIA. He also asserts that the public interest would be served by the release of the withheld information. *See* Appeal Letter at 2. Mr. Baranski asks that the OHA direct the FOIA/Privacy Act Group to release the withheld information.

II. Analysis

A. Exemption 2

The courts have interpreted Exemption 2 to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-prong test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

We have reviewed the responsive document and find that information deleted from the document relates to the physical security, including the total staffing of security personnel, of sites throughout DOE. This information is predominantly internal in nature because it is not intended for dissemination outside the DOE and does not purport to regulate activities among members of the public. In addition, disclosure of this information would reveal agency determinations about physical security measures taken to protect the safety of DOE personnel and property. The FOIA/Privacy Act Group has stated that "this information could be used by terrorists in planning or executing an attack on DOE personnel and facilities by allowing them to determine the number of and types of weapons used by personnel to protect individuals and the specific site." *See* Determination Letter at 2. Thus, the letter goes on, disclosure of this information significantly risks circumvention of agency regulations or statutes. We agree. DOE has a legislated duty to protect its sites and its workers. Accordingly, we find that this information in the responsive document can be properly withheld under the "high two" prong of Exemption 2.

DOE regulations, 10 C.F.R. § 1004.1, provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the deleted information is protected under Exemption 2, we must address whether disclosure of this information is in the public interest. We find that it is not.

As discussed above, the information deleted from the responsive document relates to the physical security of sites throughout the DOE. We agree with the FOIA/Privacy Group that disclosure of this information would reveal agency determinations about physical security measures taken to protect the safety of DOE personnel and property. Clearly, disclosing such information is not in the public interest as this information could render DOE personnel and facilities vulnerable to attack.

B. Exemption 3

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II* 20 DOE ¶ 80,134 (1990). Among the types of information of which dissemination is prohibited under the Atomic Energy Act is Unclassified Controlled Nuclear Information (UCNI). 42 U.S.C. §2168.

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.1 (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of the Office of Security reviewed those portions of the document for which the FOIA/Privacy Act Group had claimed exemptions from mandatory disclosure under the FOIA. This review identified those portions as UCNI that must remain protected. The Unclassified Controlled Nuclear Information being withheld from the document concerns the details of weaponry used by security forces at departmental sites involved in atomic energy defense programs.

Based on the review performed by the Director of the Office of Security, we have determined that the Atomic Energy Act requires the continued withholding of the information withheld as UCNI in the initial determination. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the document at issue that have been determined to be UCNI must continue to be withheld from disclosure. Accordingly, Mr. Baranski's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. Keith B. Baranski, OHA Case No. TFA-0086, on January 24, 2005, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 6, 2005

May 26, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gwyn Thorpe

Date of Filing: January 27, 2005

Case Number: TFA-0087

On January 27, 2005, Gwyn Thorpe filed an Appeal from a determination issued to her on December 20, 2004 by the Department of Energy's Oak Ridge Operations Office (Oak Ridge). That determination was issued in response to a request for information that Ms. Thorpe submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Thorpe asks that Oak Ridge conduct an additional search for documents responsive to her request.

I. Background

Ms. Thorpe filed a request for information in which she sought the medical, personnel, industrial hygiene, radiation exposure, payroll and disability records on Thomas Lee Gaus, her deceased father. *See* December 20, 2004 Determination Letter at 1. On December 20, 2004, Oak Ridge issued a determination which stated it conducted a thorough search for all records responsive to Ms. Thorpe's request and located no responsive records. *Id.* On January 27, 2005, Ms. Thorpe filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Thorpe challenges the adequacy of the search conducted by Oak Ridge. *See* Appeal Letter. She asserts that DOE has been provided with specific details of the employment of Mr. Gaus and " has a duty under FOIA to use reasonable efforts to locate these records." *Id.* She asks that the OHA direct Oak Ridge to conduct a new search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire,* 28 DOE ¶ 80,239 (2002); *Marlene R. Flor,* 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment,* 23 DOE ¶ 80,149 (1993). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive

documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Oak Ridge to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Thorpe's request might reasonably be located. Upon receiving Ms. Thorpe's request for information, Oak Ridge conducted a search for records in the Mallinckrodt facility files (the facility where Mr. Gaus worked) of the Records Holding Area (RHA) at the Oak Ridge Office. Records in the RHA are retrievable by identifier. Oak Ridge searched using the identifiers provided by the requester for Mr. Gaus, i.e., social security number, name, etc. Oak Ridge stated that it could not locate any responsive documents. Oak Ridge has further indicated that the RHA is the only repository in Oak Ridge which contains any existing personnel, medical or similar records on individuals who worked at Mallinckrodt facilities.

Given the facts presented to us, we find that Oak Ridge conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Thorpe's request. Accordingly, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Gwyn Thorpe, OHA Case No. TFA-0087, on January 27, 2005, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 26, 2005

March 7, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Federation of American Scientists
Date of Filing:	February 7, 2005
Case Number:	TFA-0088

On February 7, 2005, Federation of American Scientists (the Appellant) filed an Appeal from a final determination issued on January 24, 2005 by the Office of Security and Safety Performance Assurance (SSPA), within the Department of Energy's (DOE) Office of Security (OOS). In that determination, SSPA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. SSPA's determination identified one document as responsive to this request and withheld it in its entirety under Exemptions 2 and 5of the FOIA. This Appeal, if granted, would require SSPA to release that information withheld under Exemptions 2 and 5 to the Appellant.

I. BACKGROUND

The Appellant filed a Request for Information with SSPA seeking a copy of a report entitled "Highly Enriched Uranium: Striking a Balance" (The Report). The Report is a draft report that describes the history of the highly enriched uranium inventory in the United States from 1945 to 1996.[1] On January 24, 2005, SSPA issued a determination letter (the Determination Letter) withholding the Report in its entirety under FOIA Exemptions 2 and 5. Specifically, SSPA contends that the Report

> reflects the tentative views of the author(s) and reflects draft sections and chapters for consideration by agency officials. The [Report] does not represent a final agency position on the matter discussed in the [R]eport. It was subject to further review by DOE officials. Thus the preliminary opinions reflected in the [Report] are by their very nature pre-decisional.

Determination Letter at 2. The Determination Letter further states:

> The [Report] was reviewed to determine if any portion could be provided after redaction of any exempt material. Any parts that might be considered for [release

[1] The Report has never been issued to the public. Each page of the Report is marked "Official Use Only-Draft."

> following] redaction, however, are 'high 2' information. Its disclosure could reveal possible locations and quantities of fissile material that could be targeted for destruction by terrorists and others who wish to harm us.

Id. On February 7, 2005, the Appellant submitted the present Appeal which challenges SSPA's withholding determinations under Exemptions 2 and 5.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemptions 2 and 5 are at issue in the present case.

A. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *United States Department of the Interior v. Klamath Water Users Protective Association*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S. Ct. 1488 (1984) (*Weber Aircraft*)*; NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath*, 121 S. Ct. at 1065.

The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are

formulated." *Sears*, 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. *See EPA v. Mink*, 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft Corp.*, 465 U.S. at 802, 104 S. Ct. 1488.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, i.e. generated before the adoption of agency policy, and *deliberative*, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the document at issue in the present case, we note that much of the Report is clearly deliberative and pre-decisional. The Report itself is a draft document which never evolved into a final, finished form. While the Report was originally intended to be released to the public, the document was never completed and was never released to the public and thus reflects only the tentative, preliminary opinions of its authors rather than the policies or findings of the DOE.

While the document itself is clearly pre-decisional and deliberative in nature, it contains a great deal of purely factual information, such as facts, figures, photographs and historical narrative. As discussed above, factual information is generally not considered to be pre-decisional and deliberative in nature. This fact was implicitly recognized in the Determination Letter, which contends that "Any parts [of the Report] that might be considered for [release following] redaction, however, are 'high 2' information." Determination Letter at 2. Accordingly, we now turn to SSPA's withholding under Exemption 2.[2]

B. Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir.

[2] Our discussions with SSPA officials indicate that a small portion of the data contained in the Report was preliminary in nature. Preliminary or tentative data is considered pre-decisional and deliberative in nature and can therefore be properly withheld under Exemption 5.

1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

SSPA's Determination Letter indicates that it withheld those portions of the Report that were factual in nature because its release could reveal the locations and quantities of fissile material, which could be used by terrorists or other enemies to harm national security interests.

SSPA may continue to withhold that information in the Report which would reveal the location or quantity of fissile material under Exemption 2. That information is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information contained in the Report that would reveal the location or quantity of fissile material if released neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is clearly predominantly internal.

The information contained in the Report that would reveal the location or quantity of fissile material if released meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency,* 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Disclosure of information revealing the location and quantity of fissile material risks allowing terrorists to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of fissile materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public that requested it. Accordingly, we find that the information revealing the location and quantity of fissile material can be properly withheld under the "high two" prong of Exemption 2.

We contacted SSPA officials as part of our review of its withholdings of information under Exemption 2. Our discussion with those officials revealed that a significant amount of the withheld factual information contained in the Report could be released without revealing the location or

quantities of fissile materials. Since such information could be released without risking the harm cited in the Determination Letter, SSPA cannot continue to withhold this information under the cited reasoning. Accordingly, we are remanding this matter to SSPA. On remand, SSPA must promptly conduct a new review of the Report and issue a new determination letter in which it either segregates and releases all factual information contained in the Report that does not reveal the location or quantity of fissile material or explains why it is continuing to withhold such information under different reasoning.

III. CONCLUSION

Because some information contained in the Report cannot continue to be withheld under the justification provided in the Determination Letter, we are remanding this matter to SSPA. Those portions of the Report which are not factual in nature or which involve preliminary or tentative data are properly withheld under Exemption 5. Those portions of the Report which would reveal the locations or quantities of fissile material are properly withheld under Exemption 2. Factual information contained in the Report that is neither preliminary or tentative in nature nor would reveal the location or quantity of fissile material cannot continue to be withheld under the justification provided in the Determination Letter. On remand, SSPA must either release this information, or withhold it under a different justification. If SSPA withholds this information under different reasoning, the new reasoning must be fully explained in a new Determination Letter.

It Is Therefore Ordered That:

(1) The Appeal filed by the Federation of American Scientists, Case No. TFA-0088, is hereby granted in part as set forth in Paragraph (2) and is denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Security and Safety Performance Assurance for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 7, 2005

April 7, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Cornell Pieper
Date of Filing:	March 1, 2005
Case Number:	TFA-0090

On March 1, 2005, Cornell H. Pieper (Pieper) filed an Appeal from a determination issued to him on January 20, 2005, by the Richland Operations Office (Richland) of the Department of Energy (DOE/HQ) in response to a request for documents that Pieper submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland perform an additional search for responsive material.

I. Background

On December 9, 2004, Pieper filed a FOIA request with DOE/HQ for any information that would confirm the employment of his father, Hilary G. Pieper, at the Hanford Site in 1944. Electronic mail message from Dorothy Riehle, Richland to Valerie Vance Adeyeye, Office of Hearings and Appeals (OHA) (March 30, 2005). Richland stated that it conducted a thorough search of its archived records database but was unable to locate any employment records for Pieper's father. Electronic mail message from Richland to OHA (March 24, 2005). In the Appeal, Pieper challenged the adequacy of the search and asks OHA to direct Richland to search again for responsive information. Letter from Pieper to Director, OHA (March 1, 2005) (Appeal).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

Pieper wanted information that would confirm his father's employment at the Hanford Site in 1944. Pieper contacted the Social Security Administration and established that his father had worked for

DuPont in 1944 and 1945. *See* Itemized Statement of Earnings. The statement did not, however, contain the exact location of the elder Pieper's employment, and his son contacted DuPont for employment information relating to his father. DuPont sent Pieper a letter stating that it had no employment records on his father. Letter from E. I. DuPont de Nemours & Company, Inc. to Pieper (February 7, 2005). Pieper then filed this Appeal, arguing that records must exist in Richland. *See* Appeal; Memorandum of Telephone Conversation between Valerie Vance Adeyeye, OHA and Pieper (March 30, 2005).

We contacted Richland for information regarding its search for responsive information. Richland searched its archived records database using the elder Pieper's name and social security number, but was unable to find any employment records relating to the father. Electronic mail message from Dorothy Riehle, Richland, to Valerie Vance Adeyeye, OHA (March 24, 2005). According to Richland, DuPont took all of its records when it left the Hanford Site, including employment records. *Id*. If the responsive information is in the possession of a private entity, it is beyond the reach of the FOIA. *See Nancy Denlinger*, 28 DOE ¶ 80,300 (2003) at 80,921.*

After reviewing the record of this case, we find that Richland conducted a search that was reasonably calculated to uncover the requested information. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Cornell Pieper on March 1, 2005, OHA Case Number TFA-0090, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 7, 2005

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* It is possible that no DuPont records exist. *See Carole L. Norris*, 28 DOE ¶ 80,290 (2003) fn.3 (stating that Richland discovered that DuPont had removed DuPont personnel records from the Hanford Site and that these records were subsequently destroyed).

April 5, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Minneapolis Star Tribune

Date of Filing: March 8, 2005

Case Number: TFA-0091

On March 8, 2005, the Minneapolis Star Tribune (the Appellant) filed an Appeal from a final determination issued on January 14, 2005 by the Department of Energy's (DOE) National Energy Technology Laboratory (NETL). In that determination, NETL responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NETL's determination identified and released one document as responsive to this request. However, NETL withheld portions of this document under FOIA Exemptions 4 and 5. This Appeal, if granted, would require NETL to release that information withheld under Exemption 5 to the Appellant.

I. BACKGROUND

The Appellant filed a Request for Information with NETL seeking information concerning the DOE's award of financial assistance to the Mesaba Energy Project (the MEP). On January 14, 2005, NETL issued a determination letter (the Determination Letter) identifying one responsive document: The Report of the Merit Review Committee for the Clean Coal Initiative, Round 2 (the Report). NETL released the Report to the Appellant. However, NETL withheld portions of the Report under FOIA Exemptions 4 and 5. On March 8, 2005, the Appellant submitted the present Appeal which challenges NETL's withholding determinations under Exemption 5. [1]

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*,

[1] The Appellant does not challenge NETL's withholdings under Exemption 4.

617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *United States Department of the Interior v. Klamath Water Users Protective Association*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*)*; NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath, 121* S. Ct. at 1065.

The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears,* 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. *See EPA v. Mink,* 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft Corp.*, 465 U.S. at 802, 104 S. Ct. 1488.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, i.e. generated before the adoption of agency policy, and *deliberative*, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the document at issue in the present case, we find that the portions of the Report withheld by NETL under Exemption 5 are clearly deliberative and pre-decisional. The information withheld by NETL under Exemption 5 consists of the names of evaluation committee members, consultants

and other participants in the decision making process, the conclusions and recommendations of the evaluation panel members, the Technical Ranking Sheets, the Repayment, Finance and Budget Ranking Sheet, the Summary Ranking Sheet, Actual Scores, and Description of Strengths and Weaknesses.

The names of evaluation committee members, consultants and other participants in the decision making process are properly withheld under Exemption 5's deliberative process privilege. The privilege exists to protect the integrity of the deliberative process. Releasing the names of individuals who participate in the deliberative process might discourage them from fully and frankly communicating their opinions and recommendations, exactly the result that the privilege's authors sought to prevent. For this reason, the courts have routinely held that withholding the names of individuals participating in the deliberative process is entirely appropriate under Exemption 5's deliberative process privilege. *Brinton v. Department of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *City of West Chicago v. Nuclear Regulatory Commission*, 547 F. Supp. 740, 750 (N.D. Ill. 1982). Accordingly, the names of evaluation committee members, consultants and other participants in the decision making process were properly withheld.

The conclusions and recommendations of the evaluation panel members, the Technical Ranking Sheets, the Repayment, Finance and Budget Ranking Sheet, the Summary Ranking Sheet, Actual Scores, and Description of Strengths and Weaknesses are also properly withheld under Exemption 5's deliberative process privilege. This information consists of the non-binding opinions and recommendations of advisors and consultants to the official who ultimately decided to grant financial assistance to the MEP. This information is therefore both pre-decisional and deliberative in nature. For these reasons, we have concluded that they were properly withheld under Exemption 5.

The Appellant contends that release of the withheld information would be in the public interest. We disagree. The chilling of the deliberative process that would result from release of the withheld information, as we have discussed above, would not further the public interest. Nor would release of mere opinions or recommendations, as opposed to information reflecting actual governmental decisions and reasoning, shed any useful light on the operations and activities of the Government.

III. CONCLUSION

For the reasons stated above, we have found that all the information withheld under Exemption 5 by the National Energy Technology Laboratory was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Minneapolis Star Tribune, Case No. TFA-0091, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 5, 2005

February 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Scott A. Hodes

Date of Filing: March 29, 2005

Case Number: TFA-0096

On March 29, 2005 , Scott A. Hodes (the Appellant) filed an Appeal from a second and final determination issued by the Department of Energy's (DOE) Freedom of Information Act/Privacy Act Group (FOI/PA). In that determination, the FOI/PA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. The FOI/PA released portions of responsive documents, but withheld other portions of the documents under FOIA Exemption 4. This Appeal, if granted, would require the FOI/PA to release those portions of the documents to the Appellant.

I. Background

On August 11, 2004, the Appellant filed a request for information with the FOI/PA seeking "all studies maintained by your agency concerning the use of Gulf Stream Currents for Ocean Wave Energy applications." Request Letter dated August 11, 2004, from Scott A. Hodes to FOIA Officer, DOE. On March 16, 2005, the FOI/PA responded to the request with a final determination. Determination Letter dated March 16, 2005, from Abel Lopez, Director, FOI/PA, to Appellant. In its March 16, 2005 Determination Letter, the FOI/PA withheld portions of documents concerning two grants, awarded under the Small Business Innovation Research (SBIR) grant program, under Exemption 4, concluding that release of the withheld information would cause the submitter competitive harm. The FOI/PA withheld the information because it was submitted to the DOE with the understanding that it would remain confidential for four years after acceptance of all items to be delivered under the grant. The government agreed to use the data only for its own purposes. The government had further agreed, in accordance with the U.S. Small Business Administration's SBIR Program Policy Directive of 2002, that the information would not be disclosed outside of the government. March 16, 2005 Determination Letter at 2. The FOI/PA indicated that the information it withheld under Exemption 4 would disclose the submitter's organizational structure and its approach to analyzing and responding to various requirements under the grant, including mechanical, electronic, personnel and

documentary requirements. *Id.* FOI/PA further stated that such information would give competitors a clear competitive advantage in future competitions, and release of the information would cause substantial competitive harm to the submitters. *Id.* On March 29, 2005, Mr. Hodes filed an Appeal responding to the FOI/PA's determination. Appeal Letter dated March 22, 2005, from Scott A. Hodes to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 4 is at issue in the present case.

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must engage in a more complex analysis, as set forth in *National Parks*.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982). Second, the information must be "obtained from a person." "Person" refers to a

wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. For this information to be found to be "confidential," it must meet one of two tests: its release would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. *National Parks*, 498 F.2d at 770. In this case, the submitters presented the requested information to the DOE on an involuntary basis, because it was required by the grant program. Release of this information is not likely to impair the government's ability to obtain necessary information of this type in the future because, as stated above, it is required to be submitted under the grant program. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release will substantially harm the submitter's competitive position.

Using the "competitive harm" prong of the *National Parks* test, the FOI/PA withheld the redacted information. March 16, 2005 Determination Letter at 2. The FOI/PA alleges that release of the withheld information is likely to cause substantial competitive harm to the submitter. *Id.* at 3. The FOI/PA goes on to state that if the information were released, a competitor would have a clear advantage in future competitions and the method used to respond to solicitations. *Id.* We agree. We have reviewed the information which was redacted. The information concerns two grants, awarded under the SBIR grant program. The information is of a technical nature that appears to be unique to the submitter in the way it was collected and presented in its proposal. Release of the information withheld by the FOI/PA would result in competitive harm to the submitter.

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would

constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g.*, *Martin Becker, Case No. VFA-0710,* 28 DOE ¶ 80,222 (2002). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

C. Other Matters Raised on Appeal

Finally, we note that the Appellant requested information about the Coriolis program and stated in his Appeal that no mention was made of this portion of his request in the March 16, 2005 Determination Letter. On May 18, 2005, FOI/PA transferred this portion of his request to the Golden Field Office to determine if any documents responsive to his request exist there. Letter dated May 18, 2005, from Abel Lopez, Director, FOIA/Privacy Act Group, DOE, to Appellant. The Golden Field Office will respond to the Appellant directly. Secondly, in the Appeal, the Appellant requests copies of the statements and justifications offered by the grant recipients. This constitutes a new request in that the information now sought lies beyond the scope of the Appellant's original request. The Appellant must file a new request for this information. Consequently, we will not consider this aspect of the Appeal.

III. Conclusion

Because the FOI/PA has met its burden of showing that it properly withheld the information under Exemption 4, we are denying the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Scott A. Hodes, Case No. TFA-0096, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 16, 2006

May 17, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Charles J. Fitzpatrick

Date of Filing: April 4, 2005

Case Number: TFA-0097

On April 4, 2005, Charles J. Fitzpatrick (Fitzpatrick) filed an appeal from a determination issued to him on March 3, 2005 by the Office of Repository Development (ORD) of the Department of Energy's Office of Civilian Radioactive Waste Management (OCRWM), in response to a request for documents that Fitzpatrick submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This appeal, if granted, would require ORD to release additional responsive information to Fitzpatrick or provide a detailed explanation of its reasons for withholding such material.

I. Background

On January 26, 2005, Fitzpatrick requested six documents from ORD:

1. Continued Storage Analysis Report (scenarios 1 and 2) – November 4 [,1998]
2. Reference Cost Report for Continued Storage (scenarios 1 and 2) – November 12 [,1998]
3. Comparison Sheet (scenarios 1 and 2) – November 12 [,1998]
4. Continued Storage Analysis Report (scenario 1 only) – November 12 [,1998]
5. Reference Cost Report for Continued Storage (scenario 1 only) – November 12 [,1998]
6. Comparison Sheet (scenario 1 only) – November 12 [,1998]

On March 3, 2005, ORD issued a determination in response to Fitzpatrick's request. Letter from ORD to Fitzpatrick (March 3, 2005) (Determination Letter). ORD stated that document (2) was publicly available and a copy had been included in documents previously provided to Fitzpatrick. Determination Letter at 1. ORD withheld the remaining five documents in their entirety, citing Exemption 5 of the FOIA. *Id.* ORD justified withholding the documents by explaining that "these documents were determined to involve communications that are pre-decisional and are

part of a deliberative process in that they involve recommendations and opinions resulting from a review of Yucca Mountain site activities." *Id.*

Fitzpatrick filed the present appeal on April 4, 2005. Letter from Fitzpatrick to OHA (April 1, 2005) (Appeal).

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp 939 (Ct. Cl. 1958).

In its determination letter, ORD withheld the requested documents (1), (3), (4), (5), and (6) under Exemption 5. In the processing of this appeal, we have learned that documents (1), (3), and (6) were not in existence at the time of the initial request. Electronic mail message from Diane Quenell, ORD, to Diane DeMoura, OHA (April 21, 2005). According to ORD,

> [D]ocuments 1, 3, and 6 were never made part of the Final EIS Record or put in the Records Information System (RIS), therefore, a copy of these documents cannot be located. These documents were prepared at Lake Barrett's direction (at one time he was OCRWM's Acting Director, among other positions). He retired several years ago and we cannot determine what happened to all his documents, especially draft documents. At the time we responded to this request, [ORD] was not aware that we could not locate the documents, only that they were drafts and never finalized.

Id. Consequently, ORD is unable to produce documents which no longer exist.

The remaining documents to be considered here are documents (4) and (5). ORD must give further consideration to those documents. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the

portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979). Since the ORD determination letter did not identify segregable, nonexempt factual material in documents (4) and (5), we find ORD's determination to be insufficient in this regard. Our review finds that these documents contain factual information that appears to us to be reasonably segregable from the exempt portions of the documents. Accordingly, we shall remand this matter to ORD. On remand, ORD must review documents (4) and (5) and segregate and release all purely factual portions, or issue a new determination that justifies withholding the factual portions of those documents.

It Is Therefore Ordered That:

(1) The Appeal filed on April 4, 2005 by Charles J. Fitzpatrick, OHA Case No. TFA-0097, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Civilian Radioactive Waste Management, Office of Repository Development for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 17, 2005

May 23, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner:	State of Nevada
Date of Filing:	April 6, 2005
Case No.:	TFA-0098

On April 6, 2005, the State of Nevada (the Appellant) filed an Appeal from determinations that the Acting Assistant General Counsel for General Law of the Department of Energy (DOE/GC) and the Office of Civilian Radioactive Waste Management (OCRWM) issued in response to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. DOE/GC issued its determination on February 24, 2005, and OCRWM issued its determination on March 23, 2005. This appeal, if granted, would require that DOE/GC and OCRWM release additional responsive information to the Appellant or provide a detailed explanation of their reasons for withholding such material.

I. Background

On January 8, 2005, the Appellant requested "detailed information with respect to the factors and criteria considered by the DOE in analyzing the five potential [transportation routes, or] corridors, as well as any documents disclosing the reasons for the selection of the Caliente corridor or the rejection of the other four, or the ranking in preference of the five."[1] On February 24, 2005, DOE/GC issued a determination letter stating that it located 23 documents that were responsive to the Appellant's request. DOE/GC provided six documents in their entirety and ten documents with deletions and withheld seven records in their entirety pursuant to FOIA Exemption 5.[2] Two documents were withheld on the basis of the attorney-client privilege and the remaining 15 documents were withheld on the basis of the deliberative process privilege. In addition, a portion of one of the documents provided with deletions was withheld pursuant to FOIA Exemption 6. On March 23, 2005, OCRWM issued its determination letter stating that it

[1] Appellant's Appeal Letter (dated April 6) at 2.
[2] Letter from Abel Lopez, Director, FOIA/Privacy Group (Feb. 24, 2005) [hereinafter "DOE/GC Determination Letter"].

had located 84 responsive records.[3] OCRWM provided five documents in their entirety and withheld 79 documents in their entirety pursuant to FOIA Exemption 5.[4] OCRWM withheld one document on the basis of the attorney-client privilege and the remaining 78 on the basis of the deliberative process privilege.

The Appellant filed its appeal with OHA on April 6, 2005, asserting three grounds of appeal. In the appeal, the Appellant alleges:

1. Incomplete Documents Produced: Even as to the documents which DOE asserted "are provided to you in their entirety," less than the entire document was delivered in some instances.

2. Unsubstantiated Assertion of the Deliberative-Process Exemption: DOE provides only boilerplate, conclusory reasons for delivering documents in redacted form due to alleged deliberative process privilege. DOE provides no description of the contents of any of those individual documents, nor does it specify what information in them is entitled to protection under the privilege asserted.

3. Failure to Segregate: DOE failed to explain its withholding of a very substantial amount of non-exempt factual information contained in the documents which have been delivered in extremely redacted form or which have been withheld in their entirety. [5]

We note that the Appellant does not appeal the information withheld pursuant to FOIA Exemption 5 under the attorney-client privilege or FOIA Exemption 6. Therefore, we will confine our analysis to documents which were withheld in part or in their entirety pursuant to FOIA Exemption 5 under the deliberative-process privilege. In addition, we will examine two documents which the Appellant contends were produced in part, although the determination letter stated that they were provided in their entirety.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request.[6] Nine exemptions set forth the types of information that an agency may withhold.[7] Federal courts have determined that these nine exemptions must be narrowly construed.[8] In addition, DOE regulations provide that the agency should release to the public material exempt from mandatory disclosure under the FOIA if the DOE

[3] Letter from Ronald A. Milner, Chief Operating Office, OCRWM (Mar. 29, 2005) [hereinafter "OCRWM Determination Letter"].
[4] *Id.*
[5] Appellant's Appeal Letter at 3.
[6] 5 U.S.C. § 552(a)(3).
[7] 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9).
[8] *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (*citing Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)).

determines that federal law permits disclosure and if disclosure is in the public interest. [9] Accordingly, even if a document can properly be withheld under an exemption, we must also consider whether the public interest demands disclosure pursuant to DOE regulations.

A. Incomplete Documents

As an initial matter, we note that we contacted DOE/GC regarding the two incomplete documents received by the Appellant. DOE/GC stated that one of the documents, entitled "Spent Nuclear Fuel Transportation," is publicly available. Although the cover of this document states that it is available at the DOE or Yucca Mountain Project websites, we searched the sites and were unable to locate this document. DOE/GC should provide the Appellant with information about how to access this document. With respect to the second document, entitled "Transportation-related Decisions" and dated July 18, 2002, DOE/GC stated that the record produced was the title page of a larger document. The DOE should produce the document, or issue a new determination letter explaining reasons for withholding any portions of it.

B. Exemption 5

Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency."[10] In order to qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter-agency or intra-agency document, i.e., its source and its recipient must each be a Government agency, and it must fall within the ambit of a privilege against discovery under the judicial standards that would govern litigation against the agency that holds it.[11] In the present case, DOE/GC and OCRWM each relied upon the deliberative process and attorney-client privileges of Exemption 5. However, since the Appellant only appeals the determination concerning those documents withheld under the deliberative process privilege, we will confine our analysis solely to those materials.

The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated.[12] It is intended to protect frank and independent discussion among those responsible for making governmental decisions.[13] In order to be shielded by Exemption 5 under this privilege, a record must be predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process.[14] This privilege covers records that reflect the personal opinion of the writer rather than final agency

[9] 10 C.F.R. § 1004.1.
[10] 5 U.S.C. § 552(b)(5).
[11] *Department of the Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001).
[12] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974).
[13] *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).
[14] *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 856 (D.C. Cir. 1980).

policy.[15] Consequently, the privilege does not generally protect records containing purely factual matters. The determination must also adequately justify withholding of a document by explaining briefly how the claimed exemption applies to the document.[16]

As a preliminary matter, we note that DOE/GC withheld documents in connection with its exchanges with the DOE Office of the Secretary, the DOE Office of the Executive Secretariat, and OCRWM. OCRWM withheld documents conveying its communications with the Office of National Transportation. Therefore, these documents clearly qualify as either intra-agency or inter-agency communications.

1. Documents Withheld by DOE/GC

With respect to the documents redacted in part or withheld in their entirety by DOE/GC, the Appellant asserts that

> DOE's explanation and justification for the deletions [in the records] are vague and general and lack any specificity and any "nexus" to the specific information redacted from any particular document. It is impossible to tell, from the DOE's explanation, what portions of what documents were withheld for what reason.[17]

We find that the determination letter clearly indicates the nature of the privilege claimed—the deliberative process privilege. The letter also states that the documents are pre-decisional because "they were prepared prior to the undertaking of any action by the agency," and are deliberative "because they are part of the deliberative process by which agency action was considered and taken."[18] It further explains that the "information deleted reflects advisory opinions from subordinates that are part of the process by which government decisions and policies were considered."[19] Under the circumstances of this case, we find these statements specific enough. We have examined all the materials withheld by DOE/GC and agree that portions of each document are pre-decisional and deliberative. Therefore, we find that the documents qualify for withholding under the deliberative process privilege of Exemption 5.

2. Documents Withheld by OCRWM

The Appellant asserts that OCRWM did not adequately justify the documents withheld under the deliberative process privilege.

> Nowhere in its correspondence does DOE-OCRWM ever attempt to discuss or explain individual documents, but simply limits its conclusory remarks to the group of 79 cumulatively. [20]

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[15] *Id.*
[16] *Arnold & Porter*, 12 DOE at ¶ 80,108 at 80,527 (1984); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995).
[17] Appellant's Appeal Letter at 3.
[18] DOE/GC Determination Letter at 2.
[19] *Id.* at 2.
[20] *Id.*

We find that the determination letter issued by OCRWM adequately describes the basis for withholding the information under Exemption 5. The letter states that the withheld documents were drafts and, therefore, "by their very nature, are pre-decisional" and "part of the deliberative process by which […] agency action was considered and taken."[21] OCRWM need not provide an individualized basis for each of the documents withheld where the same justification applies to each invocation of Exemption 5 in all 79 documents.

Nevertheless, non-deliberative portions of DOE/GC and OCRWM documents must be segregated and released to the Appellant as explained in Section D below.

C. Description of Withheld Material

A document must be described with enough specificity to allow the requester to: (1) ascertain whether the claimed exemptions reasonably apply to the documents and (2) formulate a meaningful appeal.[22] Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. [23]

1. Documents Withheld by DOE/GC

The following four descriptions are representative of the descriptions of the other 17 documents withheld by DOE/GC[24]:

1) Document #5 (Withheld in Entirety): Document entitled "Nevada Rail Project, Caliente Overview, dated November 26, 2003." Presented to Robert Card, Presented by: Nevada Transportation Project Team, TBD, Las Vegas, Nevada. U.S. Department of Energy, Office of Civilian Radioactive Waste Management. 19 pages.

2) Document #4 (Withheld in Entirety): Document entitled "Activities That Could be Accomplished If No Mode/Corridor Decision Made Until 1/05" 1 page.

3) Document #11 (Withheld in Part): Undated Memorandum for The Secretary, Through Robert G. Card, Under Secretary, From Margaret Chu, Director, Office of Civilian Radioactive Waste Management and Beverly Cook,

[21] OCRWM Determination Letter at 2.
[22] *See R.E.V. Eng.*, 28 DOE ¶ 80,116 at 80,543 (2000); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995), *citing James L. Schwab*, 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE at 80,527.
[23] *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter*, 12 DOE at 80,527.
[24] There are two enclosures list from DOE/GC. One includes documents released or withheld in part. The other list contains documents withheld in their entirety.

Assistant Secretary for Environment, Safety and Health. Subject: Selection of a preferred rail corridor to Yucca Mountain. 1 page.

After reviewing all the descriptions in the list, we find that DOE/GC adequately identified the subject matter and, where available, the date, author and recipient of the documents.

2. Documents Withheld by OCRWM

The following documents demonstrate the level of description provided for the vast majority of the 79 withheld documents[25]:

1) Document #9: Undated document entitled "Memorandum for the Secretary," from Margaret Chu and Beverly Cook through Robert G. Card, Subject: ACTION: Approve Mostly Rail as Mode of Transportation and Caliente as Corridor Preference for Transportation of Spent Nuclear Fuel and High-level Radioactive Waste to Yucca Mountain, and Publish these decisions in the *Federal Register*. 4 pages.

2) Document #44: Draft letter regarding issuance of the ROD and NOI dated April 1, 2004. 2 pages.

This level of description is adequate. We, however, identify two documents that are not adequately described:

1) Document #14: Undated note. 1 page.

2) Document #17: Email from Gary Lanthrum to Jay Jones, Nancy Slater Thompson, Robin L. Sweeney, Tom Cotton, and Ted Garrish, dated December 10, 2003. 2 pages.

With respect to these two documents, we shall remand this matter to OCRWM to provide an adequate description of the material withheld. We note that, on the whole, OCRWM provided sufficient descriptions for most of the withheld documents. The remaining 77 withheld documents were sufficiently identified to allow the requester to ascertain the matters withheld and to formulate an appeal. Moreover, the Appellant did in fact raise cogent arguments regarding those 77 documents.

D. Segregability of Non-Exempt Material of DOE and OCRWM Documents

The FOIA requires that "any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."[26]

[25] OCRWM List, Documents Withheld in their Entirety.
[26] 5 U.S.C. § 552(b), *see also Greg Long*, 25 DOE ¶ 80,129 (1995).

In cases where the exempt material is so inextricably intertwined that disclosure of it would reveal "only essentially meaningless words and phrases," it need not be released.[27]

In the instant case, DOE/GC withheld seven documents in their entirety and substantial portions of ten other documents, and OCRWM withheld 79 documents in their entirety. On inspection of these documents from each of these offices, we find that there are portions of factual material which could be segregated from the exempt portions of several of these documents. For example, we identify the following DOE/GC documents which appear to contain nonexempt factual information:

1) Document #3(A) (Withheld in Entirety): Document entitled "Opening Statement," March 21, 2001. 7 pages.

2) Document #2(A) (Withheld in Part): Undated draft document entitled "Department of Energy Record of Decision on Mode of Transportation and Nevada Rail Corridor for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, with handwritten notations." 31 pages.

OCRWM also withheld documents containing segregable factual information:

1) Document #26 (Withheld in Entirety): "Department of Energy Notice of Preferred Rail Corridor," dated December 2, 2003. 8 pages.

2) Document #19 (Withheld in Entirety): Undated draft letters (6) from Margaret Chu to Governor Kenny Guinn. 1 page each.

The DOE/GC determination letter does not discuss segregability. The OCRWM determination letter states that it applied the "reasonable segregation" standards to the documents, but it determined that "nonexempt factual material is so interspersed with exempt material that segregation would only leave meaningless words and phrases."[28] However, based on our review, sections of DOE/GC and OCRWM documents contain purely factual information that is clearly separate from recommendations, advice, opinions and other information protected by the deliberative process privilege. On remand, DOE/GC and OCRWM should review all the documents which were withheld in part or in their entirety, and either segregate and release all factual information or issue a new determination that justifies any withholding.

IT IS THEREFORE ORDERED THAT:

(1) The Freedom of Information Act Appeal filed by the State of Nevada on April 6, 2005, OHA Case No. TFA-0098, is hereby granted as set forth in paragraph (2) below and is denied in all other respects.

[27] *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).
[28] OCRWM Determination Letter at 3.

(2) This matter is hereby remanded to the Acting Assistant General Counsel for General Law of the Department of Energy and the Office of Civilian Radioactive Waste Management for the issuance of new determinations in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy form which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 23, 2005

June 6, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Softsmiths, Inc.

Date of Filing: May 11, 2005

Case Number: TFA-0101

On May 11, 2005, Softsmiths, Inc. (Softsmiths) filed an appeal from a determination issued to it on April 4, 2005, by the Department of Energy's (DOE) Office of the Inspector General (OIG). In that determination, OIG responded to a request for documents that Softsmiths submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIG's determination identified and released nine documents as responsive to Softsmiths' request. However, OIG withheld portions of the documents pursuant to FOIA Exemptions 5 and 6. This appeal, if granted, would require OIG to release the withheld information to Softsmiths.

I. Background

Softsmiths requested several categories of documents from OIG regarding an OIG report entitled "IG-0637 Electricity Transmission Scheduling at the Bonneville Power Administration":

1. List of all documentation collected and reviewed including: document name, author, date and version number, and source providing the document.

2. List of all individuals interviewed (internally-BPAT and externally).

3. Minutes of meetings held.

4. Criteria set used by audit staff to formulate project assessments and conclusions as to capabilities and viability.

5. Systems tests (functional and performance) performed by the audit team.

6. Comparative analysis of other similar systems performed to arrive at report conclusions.

Letter from OIG to Softsmiths (April 4, 2005) (Determination Letter). On April 4, 2005, the OIG issued a determination in response to Softsmiths' request. Determination Letter. OIG identified nine responsive documents, which it provided to Softsmiths.[*] Determination Letter at 1. However, OIG withheld certain portions of the nine documents, citing Exemptions 5 and 6 of the FOIA. *Id.* OIG stated that "[d]ocuments 3, 7, [and] 8 are released with material withheld pursuant to Exemption 6. Documents 1, 2, 4, 5, 6, and 9 are released with material withheld pursuant to Exemption 5 and Exemption 6." *Id.* OIG justified the withholdings by stating that "[t]he material that is withheld pursuant to Exemption 5 contains predecisional deliberative data that was subject to further review and possible change." *Id.* at 2. OIG also stated that "[n]ames and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemption 6…[t]he public interest in the identity of individuals whose names appear in these files does not outweigh these individuals' privacy interests." *Id.*

Softsmiths filed the present appeal on May 11, 2005. Letter from Softsmiths to OHA (May 4, 2005) (Appeal).

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion

[*] OIG identified 23 documents responsive to Softsmiths' request. However, 14 of the documents were generated by Bonneville Power Administration (BPA) and, therefore, OIG forwarded those documents to BPA for a determination concerning their release. See Determination Letter at 1. According to OIG, BPA was to respond directly to Softsmiths concerning release of those documents. At the time of the filing of this appeal, Softsmiths had not received a response from BPA regarding the 14 documents and, therefore, those documents are beyond the scope of this appeal. However, we contacted BPA to determine the status of Softsmiths' request regarding the 14 BPA documents. According to BPA, a determination on the request should be issued to Softsmiths "within the next couple of weeks." Electronic Mail Message from Annie Eissler, BPA, to Diane DeMoura, OHA (May, 19, 2005). In its Determination Letter OIG determined that certain information contained in the BPA documents should be withheld pursuant to Exemptions 5 and 6. Softsmiths may appeal BPA's determination concerning its 14 documents, including any withholding of information it claims at the direction of OIG.

among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The documents in question are summaries of meetings held between OIG auditors and Softsmiths' personnel. They contain, *inter alia*, opinions and concerns raised by various parties in the meetings, discussions of decision-making procedures, and recommendations. After reviewing the documents, we find that they contain material that reflects OIG's deliberative process and are, therefore, exempt from disclosure under Exemption 5 of the FOIA.

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

In this case, OIG found that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose the identity of certain individuals. Releasing the names of the individuals, subordinates who were sharing their opinions or concerns with or making recommendations to their superiors, could allow a third party to connect the individual with a particular opinion or action raised or undertaken in conjunction with their work. This could, in turn, lead to those individuals being intimidated, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. See *Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Upon reviewing the documents in question, we find that there is little, if anything, the public would learn about the workings of the government from the release of the withheld names and identifying information. Consequently, the public interest in such information is minimal at best. Therefore, after weighing the identified privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities of federal employees could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that OIG complied with the FOIA by releasing to Softsmiths all factual, non-deliberative portions of the documents.

III. Conclusion

For the reasons stated above, we have determined that OIG properly withheld portions of responsive documents pursuant to Exemptions 5 and 6 of the FOIA. Therefore, Softsmiths' appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on May, 11, 2005 by Softsmiths, Inc., OHA Case No. TFA-0101, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 6, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Moran

Date of Filing: May 17, 2005

Case Number: TFA-0102

On May 17, 2005, Barbara Moran filed an Appeal from a determination issued to her on April 26, 2005, by the Director of the Headquarters Freedom of Information Act/Privacy Act Group (FOIA/PA) of the Department of Energy's Office of the Executive Secretariat. This determination responded to a request for documents that Ms. Moran submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to perform an additional search for responsive material.

I. Background

Ms. Moran inquired with various offices of the Navy about documents concerning a 1966 aircraft salvage operation that the United States Navy conducted in the Mediterranean Sea. Ultimately, she was advised to request the documents from the DOE: "[Personnel at the Navy] said that because the operation involved a nuclear weapon, the documents fall under the jurisdiction of the DOE." Appeal at 1. Ms. Moran then filed a FOIA request with FOIA/PA for three documents, identified by title, description and date, that the Navy's Office of Naval Operations had published in 1967. FOIA/PA determined that the History Division in the Office of the Executive Secretariat was the only reasonable location that might possess the requested documents, and referred the request to that office. The History Division performed a search for the documents and determined that it did not possess them. In her Appeal, Ms. Moran challenges the adequacy of the search, on the grounds that the Navy has stated that the documents do exist.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to

uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Jo Ann Estevez*, 28 DOE ¶ 80,309 (2003).

FOIA/PA informed me that the DOE repository for documents dating from the 1960s is the History Division. *See* Memorandum of Telephone Conversation between Sheila Jeter, FOIA/PA, and William Schwartz, Office of Hearings and Appeals (May 19, 2005). Ms. Jeter knew of no other logical location to search for documents from that era. *Id.* The History Division also informed me that it was in all likelihood the only office in the DOE that might have the requested documents. *See* Memorandum of Telephone Conversation between Terrence Fehner, History Division, and William Schwartz, OHA (May 19, 2005). Mr. Fehner explained to me that the search he conducted in response to this request consisted of looking in the History Division's subject files that bore headings related to the facts surrounding the salvage operation. He was not surprised that his search was unsuccessful because the History Division generally does not maintain copies of published materials, and rarely maintains copies of materials published outside of the DOE or its predecessors. *Id.* After reviewing the record in this case, we find that FOIA/PA conducted a search that was reasonably calculated to uncover the requested information. [*] Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Barbara Moran on May 17, 2005, OHA Case Number TFA-0102, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 1, 2005

[*] In a telephone conversation with this Office, Ms. Moran asked whether the documents she seeks might be maintained at the DOE's Los Alamos or Sandia facilities, because, she stated, those facilities were involved with the salvage operation. We have spoken with the Alternative FOIA Officer responsible for FOIA requests at those locations. She informed us that neither location has copies of any of the three documents Ms. Moran seeks. Memorandum of Telephone Conversation between Ms. Terry Apodaca, Alternate FOIA Officer, NNSA Albuquerque Service Center, and William Schwartz (May 23, 2005).

February 14, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeffrey T. Richelson

Date of Filing: June 15, 2005

Case Number: TFA-0105

Jeffrey T. Richelson filed an Appeal from a determination that the Office of Emergency Response of the National Nuclear Security Administration (NNSA) issued on May 19, 2005. In that determination, the NNSA denied a request for information that the Appellant had submitted on July 22, 2002, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information sought was withheld after the NNSA determined that the document contained unclassified controlled nuclear information (UCNI) and other information the disclosure of which would result in circumvention of agency rules. This Appeal, if granted, would require the DOE to release the information that the NNSA withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On July 22, 2002, Mr. Richelson requested, among other documents, a copy of the October 1993 "NEST [Nuclear Emergency Search Team] Energy Senior Official's Reference Manual." The Office of Emergency Response, which had control over that document, responded to the request by withholding virtually all of the manual from Mr. Richelson. In his May 19, 2005 determination letter, the program manager of the Office of Emergency Response stated that portions of the manual contained UCNI, the disclosure of which is prohibited by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3 of the FOIA. In addition, he stated that other portions of the manual contained information about the categorization of information into various levels of classification, and warranted protection from disclosure under Exemption 2 of the FOIA, because their disclosure was "likely to

result in circumvention of a legal requirement."

The present Appeal seeks the disclosure of the manual described above. In his Appeal, Mr. Richelson contends that a significant amount of the information in the manual has been released to the public since its publication. He also challenges the appropriateness of the determination that the contents of the manual are UCNI.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,171 (2004). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Director of Operations of the Office of Security and Safety Performance Assurance. Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the manual that Mr. Richelson requested.

According to the Deputy Director, the DOE determined on review that, based on current DOE classification guidance, the requested document contains UCNI. The information that the DOE identified as UCNI concerns the operational details of the NEST. The DOE also determined, however, that the majority of the document's content is not UCNI. The Deputy Director has provided this Office with a copy of the document from which the UCNI has been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director of Operations, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the

Deputy Director has now determined to be properly identified as UCNI must be withheld from disclosure. Nevertheless, the Deputy Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Director's findings, and at his suggestion, we remanded this manual to the NNSA's Office of Emergency Response for a new review, to consider whether the FOIA dictates that other, previously withheld portions of the document, including those previously withheld under Exemption 2, should not be released to Mr. Richelson. After completing its review, the Office of Emergency Response informed this Office that no portions of the manual were withholdable other than those identified as UCNI by the Deputy Director. Accordingly, Mr. Richelson's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey T. Richelson on June 15, 2005, Case No. TFA-0105, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the October 1993 "NEST [Nuclear Emergency Search Team] Energy Senior Official's Reference Manual" will be provided to Mr. Richelson under separate cover.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 14, 2006

July 21, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Tri-Valley CAREs
Date of Filing:	June 22, 2005
Case Number:	TFA-0106

On June 22, 2005, Tri-Valley CAREs (the Appellant) filed an Appeal from a final determination issued on May 23, 2005 by the National Nuclear Security Administration's Albuquerque Service Center (NNSA). In that determination, NNSA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NNSA's determination identified and released several documents as responsive to this request. However, NNSA withheld portions of three documents under FOIA Exemption 2. This Appeal, if granted, would require NNSA to release that information to the Appellant, to conduct a new search for responsive documents, and to issue a new determination letter.

I. BACKGROUND

The Appellant filed a Request for Information with NNSA seeking information concerning a contract to construct a "Biosafety Level III Laboratory" at NNSA's Lawrence-Livermore National Laboratory (LLNL). On December 9, 2003, NNSA issued a partial response to the Appellant releasing one responsive document from which it had redacted information under Exemption 2. On May 23, 2005, NNSA issued a final determination letter (the Determination Letter) identifying and releasing a number of additional responsive documents and withholding portions of two documents under Exemption 2. On June 22, 2005, the Appellant submitted the present Appeal, which challenges its withholding determinations under Exemption 2, the adequacy of NNSA's search for responsive documents, and the adequacy of its determination.

II. ANALYSIS

Withholdings Under Exemption 2

NNSA withheld portions of three documents under FOIA Exemption 2: a slide presentation entitled *Highlights of Modular Construction Practices and Benefits of Modular Design*; a letter dated October 28, 2003, from John Fuelling to Mike Atkinson; and a letter dated October 30, 2003, from Atkinson to Fuelling.

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 2 is at issue in the present case.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

NNSA's Determination Letter indicates that it withheld portions of the letters and the slide show because their release could reveal information which could be used by terrorists or other enemies to harm national security interests. Specifically, the information withheld by NNSA under Exemption 2 consists of equipment diagrams, specifications diagrams, and floor plan designs of the Biosafety Level III Laboratory at the NNSA's Lawrence-Livermore National Laboratory.

That information is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities

among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow espionage agents, terrorists or other malefactors to identify potential security vulnerabilities or assist such enemies' strategic planning. Accordingly, disclosure of the information at issue risks allowing espionage agents, terrorists, or any other potential malefactors to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Accordingly, we find that the information can be properly withheld under the "high two" prong of Exemption 2.

The Appellant also contends that release of the withheld information would be in the public interest. Specifically, the Appellant contends that the release of the withheld information would "inform surrounding communities about the proposed advanced biological warfare agent research at LLNL," provide the public with the ability to evaluate the fairness of the bidding process, and provide the public with an opportunity to discover governmental waste. We disagree. Even if the Appellant's contentions were accurate, when balanced against the potential harms discussed above, the potential for this information's misuse is too great for us to conclude that its release would further the public interest. Accordingly, NNSA may continue to withhold that information under Exemption 2.

Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

The Appellant contends that NNSA's search for responsive documents was inadequate. Accordingly, we contacted NNSA in order to review the search it conducted for documents that were responsive to the Appellant's request for information. NNSA informed us that the search was conducted by the DOE's Oakland Operations Office (OOO). The OOO was shut down and its FOIA files were transferred to the NNSA. Moreover, some of the individuals who apparently conducted the search for OOO have since left the DOE or LLNL. As a result, we were unable to obtain sufficient information about this search to conduct a meaningful review. Accordingly, at the NNSA's suggestion, we are remanding this portion of the Appeal to NNSA in order to allow it an opportunity to provide a more detailed description of its search or conduct a new search for documents that are responsive to the Appellant's request.

Adequacy of Determination

After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The agency must also provide the requester with an opportunity to appeal any adverse determination. *Id*.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

The Appellant contends that NNSA's determination is inadequate. First, the Appellant contends that the determination is inadequate because it does not explain why more responsive documents were not found. This contention is without merit. Neither the FOIA statute nor any relevant case law requires an agency to explain why responsive documents were not found. Therefore, NNSA was not under any obligation to do so.

Second, the Appellant contends that the determination is inadequate because it does not state whether requested documents ever existed or whether they were disposed of. Citing DOE FOIA Regulation 10 C.F.R. § 1004.4(d)(3), which states, in pertinent part, "[i[f a requested record is *known* to have been destroyed or otherwise disposed of, or if no such record is *known* to exist, the requester is so notified" (emphasis supplied), the Appellant contends that the NNSA was obligated to state whether requested documents were disposed of and whether they ever existed. This contention is based upon an erroneous interpretation of § 1004.4(d)(3). The regulation does not require NNSA to affirmatively state whether a requested document ever existed or was disposed of, *unless*, it had *knowledge* that a requested document never existed or was destroyed. In this case, NNSA does not have that knowledge.

Thirdly, the Appellant contends that the determination was inadequate because it did not state whether there had been previous contracts between DOE and Britz-Heidbrink and had not disclosed which permits were sought and obtained or were rejected for the performance of the contract. NNSA is not required to answer these questions, since it is well settled that the FOIA does not require agencies to answer questions posed as FOIA requests. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

Finally, the Appellant correctly noted that NNSA's determination did not indicate that it was withholding the contract price of the contract between LLNL and Britz-Heidbrink. Nor did it indicate under which FOIA exemption the contract price was being withheld. Therefore, the determination was inadequate in this respect. Accordingly, we are remanding this portion of the Appeal to the NNSA. On remand, NNSA should either release the contract price to the Appellant, or issue a new determination letter indicating which exemption(s) it is claiming along with a thorough explanation of why it finds the claimed exemption(s) applicable to the withheld information.

For the reasons stated above, we have concluded that the present appeal should be granted in part and denied in all other aspects.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, TFA-0106, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the National Nuclear Security Administration's Albuquerque Service Center for further processing, in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 21, 2005

November 7, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Samuel D. Johnson

Date of Filing: June 24, 2005

Case Number: TFA-0107

On June 24, 2005, Samuel D. Johnson filed an Appeal from a determination issued to him on April 21, 2005, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ). That determination was issued in response to a request for information that Mr. Johnson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Johnson asks that DOE/HQ conduct an additional search for documents responsive to his request and release information that was withheld.

I. Background

On September 24, 2002, Mr. Johnson filed a request for information in which he sought a copy of his personnel security file and all other information pertaining to him that the DOE maintains. *See* April 21, 2005 Determination Letter at 1. In a letter dated November 28, 2003, Mr. Johnson was provided a partial response that included 57 documents that were generated from his personnel security file. At that time, Mr. Johnson was told that two other documents from the Office of Counterintelligence were located in the file but had to be reviewed to determine their releasability. On April 21, 2005, DOE/HQ issued a final determination in which it stated that it was releasing one of the documents in its entirety. The determination further stated that the second document was being released with certain deletions pursuant to Exemption 7(E) of the FOIA. The document is a memorandum to Joseph S. Mahaley from Michael J. Waguespack, Office of Counterintelligence, dated October 16, 2001, and discusses a summary of polygraph-derived information.

On June 24, 2005, Mr. Johnson filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Johnson in general challenges the adequacy of the search conducted by DOE/HQ. */ *See* Johnson Appeal. He asks that the OHA direct DOE/HQ to conduct a new search for responsive documents.

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*/ Mr. Johnson submitted a voluminous Appeal addressing various arguments, many of which we are unable to respond to in the context of this FOIA determination. Among his many arguments, Mr. Johnson states that DOE/HQ took excessive time to respond to his FOIA request. *See* Johnson Appeal.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 11384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted officials at DOE/HQ to ascertain the extent of the search that had been performed by the Office of Counterintelligence and to determine whether any other documents responsive to Mr. Johnson's request might reasonably be located. DOE/HQ has informed us that since it issued its April 21, 2005 determination to Mr. Johnson, Mr. Johnson has filed several additional requests for information. DOE/HQ has provided additional documents related to Mr. Johnson's original request. DOE/HQ has also informed us that more responsive material may be forthcoming. In light of this information, this Appeal is therefore granted in part and this matter is remanded to the Office of Counterintelligence. This will allow the requester to obtain additional information bearing upon his original request and to reconsider or reformulate his argument on adequacy of search. It should also reduce delays and inefficiencies associated with piecemeal appeals. The Office of Counterintelligence will thereby also have an opportunity to reconsider its deletions from the second document in light of arguments made by the requester on appeal. On remand, the Office of Counterintelligence shall release any additional responsive material to Mr. Johnson. To the extent release is denied, the Office of Counterintelligence shall issue a new determination letter justifying the withholding of any information that it redacts from any responsive material it provides to the requester.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Samuel D. Johnson on June 24, 2005, OHA Case No. TFA-0107, is hereby granted as set forth in paragraph (2) and denied in all other respects.

(2) This matter is remanded to the Office of Counterintelligence for processing in accordance with the guidance in the Decision above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2005

July 14, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	James Salsman
Date of Filing:	June 29, 2005
Case Number:	TFA-0108

This Decision concerns an Appeal that was filed by James Salsman in response to an interim determination issued to him by the Director of the Department of Energy's (DOE) Freedom of Information/Privacy Acts Group (hereinafter referred to as "the Director"). In that determination, the Director denied Mr. Salsman's request for expedited processing of a request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Mr. Salsman's FOIA request be processed on an expedited basis.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to FOIA requests within twenty working days of its receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

In his FOIA request, Mr. Salsman sought access to copies of all DOE records pertaining to funds appropriated, budgeted or spent for the purposes of determining the full toxicological profile of uranium and uranium-related substances from 1995 to the present. He further requested that his submission be processed in an expedited manner. In his determination, the Director found that Mr. Salsman's request did not meet the criteria for expedited processing. Mr. Salsman then filed the Appeal at issue here.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of other, earlier, requests. Therefore, the FOIA provides that expedited processing is to be provided only when the requester demonstrates "compelling need," or when otherwise determined by the

agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the Federal Government. 5 U.S.C. § 552(a)(6)(E)(v).

Mr. Salsman has not attempted to show that he is primarily engaged in disseminating information and has an urgency to inform the public about an activity of the Federal Government. Therefore, in order to prevail he must show that failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. Mr. Salsman attempts to make this showing by arguing that the toxicological profile of uranium is incomplete (i.e., it lacks information concerning the long-term reproductive and developmental effects of uranium exposure on humans), that this lack of information means that an undetermined number of people are exposed to uranium that is released into the environment by government and industry who would not be exposed if uranium's full toxicological profile was known, that these people's lives or physical safety are at risk, and that release of the requested information will "very likely" result in the swift completion of the toxicological profile. Appeal at 4. In support of his position, Mr. Salsman cites a number of studies and scientific publications about the negative effects of uranium on human health.

We do not find Mr. Salsman's arguments to be convincing. As an initial matter, he assumes that a completed toxicological profile will show that some people are being put at risk by current levels of uranium exposure, and that this exposure will cease shortly after release of the profile. While each of these statements may be true, their validity is by no means assured, and we are not convinced by his claims. More importantly, Mr. Salsman has not explained how release of information about the funding for determining the full toxicological profile will result in the swift completion of that profile. If people are being put at imminent risk because of their exposure to uranium and uranium-related products, it is those substances themselves that are causing the risks, and not any inability to obtain government funding information on an expedited basis.

We are firmly committed to providing expedited processing of FOIA requests where there is a reasonable expectation that failure to do so would jeopardize the life or physical safety of an individual. *Edward A. Slavin, Jr.*, 27 DOE ¶ 80,279 (2000). No such expectation has been shown to exist in this case. We conclude that the Director correctly denied Mr. Salsman's request for expedited processing of his FOIA request.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James Salsman in Case No. TFA-0108 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 14, 2005

September 23, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Missouri Coalition for the Environment Foundation
Date of Filing:	August 1, 2005
Case Number:	TFA-0111

On August 1, 2005, Missouri Coalition for the Environment Foundation (MCEF) filed an Appeal from a determination issued to it on June 28, 2005, by the Oak Ridge Office of the Department of Energy (OR) in response to a request for documents that MCEF submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/OR perform an additional search for responsive material.

I. Background

During February 2005, the Advisory Board on Radiation and Worker Health (ABRWH) held a meeting in St. Louis, Missouri. [1] At that meeting, officials from Oak Ridge Associated Universities (ORAU) and National Institute for Occupational Science and Health (NIOSH) discussed the contents of six boxes. These boxes contained material related to the pending Special Exposure Cohort (SEC) petition for the Mallinckrodt Chemical Works (MCW) site that was in operation in Missouri from 1942 to 1957. Letter from MCEF to OHA (August 1, 2005) (Appeal) at 1. According to MCEF, during the meeting the officials described the contents of the six boxes as declassified Mallinckrodt records from the Oak Ridge Institute for Science and Health (ORISE) vaults that were transferred to the OR vaults, records which "might materially affect the deliberations" of ABRWH on the MCW petition. *Id.*

[1] The ABRWH is sponsored by the National Institute for Occupational Science and Health (NIOSH), part of the Centers for Disease Control (CDC). NIOSH is responsible for conducting research and making recommendations for the prevention of work-related illnesses and injuries. ABRWH is chartered to advise the Secretary of the Department of Health and Human Services about guidelines for implementing the Energy Employees Occupational Illness Compensation Program (EEOICPA). *See* Meeting Minutes, Savannah River Site Health Effects Subcommittee Meeting, CDC (March 13, 2003).

On March 10, 2005, MCEF filed a FOIA request with OR for various records regarding MCW. Letter from MCEF to OR (March 10, 2005) (Request). [2] There were three parts to the request. First, MCEF asked DOE for an index of the complete contents of the six boxes (Request 1). The second request was for an index of documents in the ORISE vaults pertaining to MCW operations that were or will be declassified before being placed in the six boxes mentioned in Request 1. The third request was for an index of any and all MCW classified documents that currently reside in ORISE or OR vaults.

OR conducted a search and found documents responsive to Request 1, but found no material that was responsive to the other two requests. Letter from OR to MCEE (June 28, 2005) (Determination Letter). MCEF contends that the search conducted by DOE was inadequate and untimely, that the portion of the determination addressing the responsive material ignored the key element of Request 1, and that the response to the second and third requests was "equally brief, vague and uninformative." Appeal at 2. MCEF stated that it expected "specific statutory exemptions to be cited as to why the requested indexes to MCW related documents and about classified and declassified records were not provided in a more timely manner." Appeal at 2. In the Appeal, MCEF challenged the adequacy of the search and asks OHA to direct OR to search again for responsive information.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

The OR FOIA Officer informed us that upon receipt of the request, she contacted DOE records managers, contractor records custodians, ORISE contractor personnel and DOE/OR classification

[2] MCEF also filed the request with ORAU and NIOSH because it did not know the "exact current location of the records." Request at 1.

personnel to identify any responsive material. Electronic Mail Message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). She is familiar with NIOSH review activities at OR over the last ten years, and prior to completing the OR determination letter, discussed the complexity of the search and her knowledge of the documents in the Mallinckrodt boxes with the requester. *Id.* According to the FOIA Officer, DOE was unable to identify the six boxes that MCEF wanted to locate and concluded that a NIOSH representative would have more information. *Id.* She then provided the requester with all indices and all search terms aids available for all Mallinckrodt documents held at OR. *Id.* NIOSH, on the other hand, also received the request but was able to accurately identify the responsive six boxes. In response to the request, the CDC FOIA Officer sent MCEF a summary of the types of information in each box and a list of the contents of each folder in those boxes entitled "List of Documents Found in the Mallinckrodt Boxes." *See* Letter from CDC to MCEW (April 25, 2005). Despite this information, MCEF stated that CDC/NIOSH had provided only "one version" of an index to the records, and it wanted a DOE index to confirm the accuracy of the CDC/NIOSH index. Appeal at 1.

After reviewing the record of this case, we find that OR conducted a search that was reasonably calculated to uncover the requested information. OR searched all records in DOE's possession but found none that were responsive.[3] Nonetheless, in response to Request 1, OR provided the requester with additional information that it believed MCEF could use in conjunction with the NIOSH index. Electronic mail message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). The FOIA does not require OR to create a DOE version of the NIOSH index for the convenience of the requester. As for the remaining requests, OR searched but did not find the other indices that MCEF requested. Further, MCEF has not provided any evidence that these documents exist, and the FOIA does not require OR to generate new documents in response to a request. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Missouri Coalition of Environment Foundation on August 1, 2005, OHA Case Number TFA-0111, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in

[3] The FOIA Officer explained that the final response was delayed as a result of coordinating the search across four separate offices and repositories and for clarification of the scope of the search. Electronic mail message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). OR also has a backlog of 460 FOIA requests and processes the backlog on a "first in, first out" basis. *Id.*

which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 23, 2005

September 12, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dorothy Pritchett

Date of Filing: August 2, 2005

Case Number: TFA-0112

This decision concerns an Appeal that Dorothy Pritchett (Appellant) filed on August 2, 2005. The Appellant submitted a request for information to the Department of Energy's (DOE) FOIA and Privacy Act Group (FPAG) seeking copies of all information pertaining to her in the files of 16 present or former DOE employees.[1] The FPAG referred a small portion of the Appellant's request, concerning one of these 16 employees, to the Office of Inspector General (IG). On July 16, 2005, the IG issued a Determination Letter in response to that portion of request. The IG's determination identified 72 documents that were responsive to this portion of the Appellant's request. The IG released most of these documents to the Appellant.[2] However, the IG withheld significant portions of this information under FOIA Exemptions 6, 7(A), 7(C) and 7(D). On August 2, 2005, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.[3]

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA, which set forth the

[1] The request was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

[2] Apparently, the IG's Determination Letter pertained to 40 of these documents. The Determination Letter indicated that the other 32 responsive documents had been previously supplied to the Appellant.

[3] The Appeal also requests in her Appeal, copies of "all emails and documents in the actual or constructive possession of Inspector General Gregory Friedman, Stephan Durbin and/or Barbara Hall."' Appeal at 1. The Appellant's request is untimely, and cannot be made on appeal, since she did not request this information in her original request. We do not permit FOIA appellants to broaden their requests for information in their appeals. Alan J. White, 17 DOE **&** 80,117, 80,539 (1988); see also Arthur Scanla, 13 DOE **&** 80,133 at 80,622 n.2 (1986). Since the Appellant now wishes to obtain information of a broader nature than that which she sought initially, her broadened request constitutes a new request for information. She must therefore file a new request for information with the FPAG in order to obtain the information she is seeking. The Appellant also requests an opportunity for oral argument and an evidentiary hearing. These requests are denied. The DOE FOIA Regulations contain no provision for hearings during the adjudication of an administrative appeal.

types of information agencies are not required to release. Exemptions 6, 7(A), 7(C) and 7(D) are at issue in the present case.

Exemption 7(A)

The Determination Letter withheld the entire case file of a pending IG investigation under Exemption 7(A). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. ' 552(a)(6); 10 C.F.R. ' 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE & 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE & 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE & 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE & 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has provided a sufficient description of the withheld records. The determination letter indicates that the information withheld under Exemption 7(A) is the case file for a currently pending IG investigation. Determination Letter at 1. The IG states, "The material that is withheld under Exemption 7(A) includes documents pertaining to an ongoing investigation and includes case processing forms, memorandum of interviews and investigative activity." Determination Letter at 1.

The determination letter also provides a sufficient articulation of the harm that could reasonably be expected to occur if the withheld information was released. Specifically the determination letter notes that:

> Release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. . . . [R]elease could tend to prematurely disclose enforcement efforts, or provide individuals involved in the investigation an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede an appropriate resolution of the investigation.

Determination Letter at 2. Since we agree with the reasoning set forth by the IG in its determination letter, we find that the IG has properly withheld the information under Exemption 7(A).

Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in the OIG enforcement matter, which in this case includes witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 2. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990). Therefore, we find that release of the individuals' identities would result in significant invasions of privacy.

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to

the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that the identities of the individuals were properly withheld under Exemptions 6 and 7(C). *See, e.g.*, *Tod Rockefeller*, 26 DOE ¶ 80,238 (1997).

Exemption 7(D)

Finally, the IG has withheld information under Exemption 7(D), claiming that (1) release of this information would reveal confidential sources, or (2) the information was supplied by confidential sources. Determination Letter at 2. Exemption 7(D) allows for the withholding of "Records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source . . . [or] information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D) (1994). "Exemption 7(D) is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, s*ee Brant Construction v. United States EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985), and (2) "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985)." *Ortiz v. Department of Health and Human Services*, 70 F.3d 729, 732 (2d Cir. 1995) (*Ortiz*). As the court stated in *Ortiz:* "[A] source is confidential within the meaning of Exemption 7(D) if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id., citing United States v. Landano*, 508 U.S. 165; 113 S. Ct. 2014, 2019 (1993).

After conducting an in-person review of the information that the IG withheld under exemption 7(D), we are assured that the information was supplied by confidential sources and that its release would identify those confidential sources. Accordingly, we find that the information withheld by the IG under this exemption was properly withheld.

For the reasons set forth above, we have found that the Office of Inspector General's withholdings under Exemptions 6, 7(A), 7(C) and 7(D) were appropriate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dorothy Pritchett on August 2, 2005, Case Number TFA-0112, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 12, 2005

December 20, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph M. Santos

Date of Filing: August 5, 2005

Case Number: TFA-0113

This decision concerns an Appeal that Joseph M. Santos (Appellant) filed on August 5, 2005. The Appellant submitted a request for information to the Department of Energy's (DOE) FOIA and Privacy Act Group (FPAG) seeking copies of all e-mails, records, and other documents in the possession of Ray Madden.[1] The FPAG referred Appellant's request to the Office of Inspector General (IG). On July 26, 2005, the IG issued a Determination Letter in response to Appellant's request. The IG's determination identified four case files as being responsive to the Appellant's request. With respect to three of the case files, the IG withheld significant portions of this information under FOIA Exemptions 5, 6, and 7(C). The IG stated that the other case file remained open at the time, and therefore the documents were being withheld in their entirety pursuant to FOIA Exemption 7(A). On August 5, 2005, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA, which set forth the types of information agencies are not required to release. Exemptions 5, 6, 7(A), and 7(C) and are at issue in the present case.

Exemption 7(A)

The Determination Letter withheld the entire case file of a pending IG investigation under Exemption 7(A). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). By law, the IG is charged with investigating waste, fraud, and abuse in programs and

[1] The request was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. *See Dorothy Pritchett*, 20 DOE ¶ 80,224 (2005). In the present case the IG's investigatory actions were clearly within this statutory mandate.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has provided a sufficient description of the withheld records. The determination letter indicates that the information withheld under Exemption 7(A) is the case file for a currently pending IG investigation. Determination Letter at 1. The IG states, "The material that is withheld under Exemption 7(A) includes documents pertaining to an ongoing investigation and includes case processing forms, memorandum of interviews and investigative activity." Determination Letter at 1.

The determination letter also provides a sufficient articulation of the harm that could reasonably be expected to occur if the withheld information was released. Specifically the determination letter notes that:

> Release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. . . .

Determination Letter at 2. Since we agree with the reasoning set forth by the IG in its determination letter, we find that the IG has properly withheld the information under Exemption 7(A). We turn next to the information withheld from the other three case files.

Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in the OIG enforcement matter, which in this case includes witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 2. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990). Therefore, we find that release of the individuals' identities would result in significant invasions of privacy.

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that the identities of individuals were properly withheld under Exemptions 6 and 7(C). *See, e.g.*, *Tod Rockefeller*, 26 DOE ¶ 80,238 (1997).

Exemption 5

Finally, the IG has withheld information under Exemption 5. Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sea*rs). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In withholding portions of document from the Appellant, the IG relied upon both the "deliberative process" privilege and the attorney-client privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150.

It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. V. United States*, 157 F.Supp. 939 (Cl. Ct. 1958)) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of security or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead*); *California Edison*, 28 DOE ¶ 80,173 (2001) (*California Edison*). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id*. at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665. "Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication." *Mead*, 566 F.2d at 253 n. 24.

After reviewing the requested documents at issue, we have concluded that the determination made by the IG in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from the Appellant is contained in hotline complaint forms and memorandum of records which were prepared by DOE employees and intended only for internal DOE use. This information properly falls within the definition of "intra-agency memoranda" in the FOIA. In addition, the information withheld under Exemption 5 is clearly predecisional and deliberative. The information reflects the advisory opinions by subordinates in the IG and does not represent final agency positions. Accordingly, we find that these advisory opinions contained in the documents at issue meet all the requirements for withholding material under the Exemption 5 deliberative process privilege. Likewise, the information was also properly withheld under the attorney-client privilege of Exemption 5. The document at issue contains legal opinions and advice sought by IG Hotline employees from IG's Counsel. [2] For the reasons set forth above, we

[2] The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t[o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of both the deliberative material and the

(continued...)

have found that the Office of Inspector General's withholdings under Exemptions 5, 6, 7(A) and 7(C) were appropriate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Joseph M. Santos on August 5, 2005, Case Number TFA-0113, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 20, 2005

[2](...continued)
attorney-client communication could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

September 7, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James Salsman

Date of Filing: August 17, 2005

Case Number: TFA-0114

On August 17, 2005, James Salsman (Salsman) filed an appeal from a determination issued to him on August 5, 2005, by the Department of Energy's (DOE) Chicago Operations Office (CO). In that determination, CO denied a request for a waiver of fees in connection with a request Salsman submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn CO's determination and waive in full the fees associated with his request.

I. Background

Salsman filed a request under the FOIA for "all records of funds appropriated, budgeted, allocated, committed, programmed, expended, encumbered, utilized, or spent for the purposes of determining the full toxicological profile of uranium, uranium compounds, or uranium combustion products." Letter from Linda M. Rohde, Freedom of Information Officer, to James Salsman (July 7, 2005). Salsman planned to include this information in a Petition for Rulemaking he submitted to the Nuclear Regulatory Commission (NRC).

In his FOIA request, Salsman also requested a fee waiver for the costs associated with processing the request. In its August 5, 2005 determination letter, CO denied a fee waiver. Letter from Linda M. Rohde, Freedom of Information Officer, CO, to James Salsman (August 5, 2005) (Determination Letter). CO denied the request for a waiver because Salsman did not "demonstrate how [he] will disseminate the information to the general public." *Id*.

Salsman filed the present appeal on August 17, 2005. Letter from James Salsman to OHA (August 8, 2005) (Appeal Letter). In his appeal, Salsman states the requested information will be

disseminated to the public because it is the practice of the NRC to publish all comments it receives on its website.[1] Therefore, he says, "publication will occur." Appeal Letter.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, there appears to be no dispute that the requested information – records of funds appropriated, budgeted, allocated, committed, programmed, expended, encumbered, utilized, or spent for the purposes of determining the full toxicological profile of uranium, uranium compounds, or uranium combustion products – concerns activities or operations of the government. Therefore, we find that Salsman's request satisfies Factor A.

[1] The website referred to in the Appeal Letter is ruleforum.llnl.gov. It is a webpage on the NRC's website that allows users to submit comments electronically, rather than by regular mail.

Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, it is unclear whether the requested information is already publicly available. However, given the nature of the information requested – records regarding funds allocated for determining the toxicological profile of uranium and other uranium products – and because we have no evidence that the information is already publicly available, we will assume that the information is not already in the public domain. Therefore, we find that Salsman has satisfied Factor B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, it is not disputed that Salsman intends to disseminate the requested information to the public. However, CO determined that Salsman did not establish his ability to disseminate the information.

We find that Salsman has not provided adequate evidence of his ability to disseminate the requested information to the public. Salsman contends that publication of the requested information will occur because he plans to include the requested information in a comment he will submit to the NRC and it is the practice of the NRC to place all comments it receives on its website. This falls short of the proof required to establish a requester's ability to disseminate responsive information to the public. We have previously held that a plan to place information on the internet is a passive method of placing the information in the public domain, compared to, for example, including the information in a newsletter or in printed articles and, therefore, falls short of the showing necessary to satisfy Factor C. *See Donald R. Patterson*, 28 DOE ¶ 80,107 (2000); *see also STAND*, 27 DOE ¶ 80,250 (1999). In this case, Salsman's plan is an even more passive method of disseminating the requested information to the public because he is relying on a third-party, the NRC, to post the information on its website. Salsman has no control over whether the information actually gets posted and, therefore, disseminated to the public. In fact, under the federal Administrative Procedure Act, the NRC is not obligated to publish every

comment it receives; rather it is required only to address every issue raised by those comments. *See* 5 U.S.C. §553(c). Consequently, we find that Salsman has not satisfied Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it remains unclear to what extent the public's understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (*citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

III. Conclusion

As the foregoing indicates, Salsman has failed to adequately demonstrate his ability to disseminate the requested information to the public. Therefore, we find that Salsman has not shown that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. Because Salsman has not satisfied the public-interest prong of the test set forth in the FOIA and in the DOE regulations concerning fee waivers, we need not address the commercial-interest prong of that test. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 17, 2005 by James Salsman, OHA Case No. TFA-0114, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 7, 2005

September 6, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: August 16, 2005

Case Number: TFA-0115

The National Security Archive filed an Appeal from a determination that the Headquarters FOIA/Privacy Act Group (FOIA/PA) of the Department of Energy issued on August 2, 2005. In that determination, FOIA/PA denied a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA/PA located one document that was responsive to the National Security Archive's request, which it withheld in its entirety. FOIA/PA determined that the withheld document contained classified information and that removal of the classified information from those documents would result in the release of no meaningful information. This Appeal, if granted, would require the DOE to release that document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On August 7, 1996, the National Security Archive requested intelligence reports produced by the Atomic Energy Commission about a possible Chinese nuclear weapons test from 1964. After considerable involvement of the History and Archives Group of the Office of the Executive Secretariat and the Office of Classified and Controlled Information Review, FOIA/PA responded to the request by informing the National Security Archive that it had located one responsive document, a memorandum to Atomic Energy Commission Chairman Glenn T. Seaborg, dated November 19, 1964, concerning the Chinese nuclear weapons test in October 1964. In its determination letter, FOIA/PA explained that the responsive document contained information properly classified as National Security Information pursuant to Executive Order 12958 and information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, therefore warranting

protection from disclosure under Exemptions 1 and 3 of the FOIA. Finally, the determination letter stated that there was unclassified material in the document that was inextricably intertwined with the classified information. It further stated that "[t]he release of the information remaining after removal of the classified information, therefore, would not provide any meaningful information."

The present Appeal seeks the disclosure of the responsive document. In its Appeal, the National Security Archive sought further review of the document to determine "whether some information may be released without violating statutory requirements or harming national security," particularly in light of previously declassified information regarding this same test.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g.*, *Michael J. Ravnitzky*, 29 DOE ¶ 80,208 (2005).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Director of the Office of Security and Safety Performance Assurance (Deputy Director). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the document the DOE had withheld in its entirety.

According to the Deputy Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold falls into two

categories. Some of it concerns intelligence sources or methods, which is currently classified as National Security Information (NSI) under section 1.4(c) of Executive Order 12958, as amended by Executive Order 13292, and is identified as "DOE b(1)" in the margin of a redacted version of this document, which will be provided to the Appellant under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA. Other information in this document that the DOE continues to withhold concerns nuclear weapons design that is currently classified as Restricted Data (RD) and is identified as "DOE b(3)" in the margin of the document. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3.

The denying official for the DOE's withholdings is Mr. Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director's review, we have determined that Executive Order 12958 and the Atomic Energy Act require DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Deputy Director has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on August 16, 2005, Case No. TFA-0115, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the memorandum to Atomic Energy Commission Chairman Glenn T. Seaborg, dated November 19, 1964, concerning the Chinese nuclear test in October 1964, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 6, 2006

September 21, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Joseph T. Maddox
Date of Filing:	August 19, 2005
Case Number:	TFA-0116

This Decision concerns an Appeal that was filed by Joseph T. Maddox in response to a determination issued to him by the Department of Energy's Oak Ridge Office (Oak Ridge). In that determination, Oak Ridge replied to a request for documents that Mr. Maddox submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Oak Ridge stated that no documents responsive to Mr. Maddox's request could be located. This Appeal, if granted, would require that Oak Ridge conduct another search.

In his FOIA request, Mr. Maddox sought access to medical, payroll, personnel, radiation exposure and industrial hygiene records pertaining to the employment of his father, Jesse H. Maddox, as a sheet metal worker at the Portsmouth, Ohio Gaseous Diffusion Plant. [*] As previously indicated, Oak Ridge replied that a search of its facilities failed to produce any responsive documents. In his Appeal, Mr. Maddox challenges the adequacy of Oak Ridge's search.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue

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*/ In his request, Mr. Maddox did not identify his father's employer or provide dates of employment. However, in a September 9, 2005 telephone conversation with Robert Palmer of this Office, he said that he believed that his father worked at the Portsmouth plant from the early 1950s to the mid-1960s or early 1970s. *See* memorandum of September 9, 2005 telephone conversation between Mr. Maddox and Mr. Palmer.

is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to ascertain the scope of the search that was performed, we contacted Oak Ridge, which is the DOE Office that oversees the Portsmouth facility. We were informed that a computerized search of databases maintained by Oak Ridge and by the East Tennessee Technology Park (which is comprised of the former K-25 plant and other facilities involved in nuclear weapons production) utilizing the elder Maddox's name and social security number was performed for each category of records requested. Mr. Maddox's request was also referred to United States Enrichment Corporation, the Management and Operations contractor at the Portsmouth Gaseous Diffusion Plant, and Bechtel Jacobs Company, another Portsmouth contractor, for searches of their records. No responsive documents were identified in any of these searches. *See* memorandum of September 14, 2005 telephone conversation between Leah Ann Schmidlin, Oak Ridge and Mr. Palmer. Based on the information provided to us, we conclude that the search was reasonably calculated to produce the requested documents, and was therefore adequate. We will therefore deny Mr. Maddox's Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Joseph T. Maddox, Case Number TFA-0116, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 21, 2005

October 13, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Holmes & Narver, Inc.

Date of Filing: August 25, 2005

Case Number: TFA-0117

On August 25, 2005, Holmes & Narver, Inc. (Holmes) filed an appeal from a determination issued to it on July 28, 2005, by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA). In that determination, NNSA responded to a request for a document that Holmes submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA released the document but withheld most of the information contained therein pursuant to FOIA Exemptions 5 and 6. This appeal, if granted, would require NNSA to release the withheld information to Holmes.

I. Background

On July 27, 2005, Holmes requested from NNSA one document entitled "SURF Lessons Learned Documentation." On July 28, 2005, NNSA released the "publicly available" version of the document to Holmes. Letter from Carolyn A. Becknell, NNSA, to Robyn L. Miller, Holmes (July 28, 2005) (Determination Letter). However, most of the information in the document was withheld. The original Determination Letter did not contain a justification for withholding the information in the document. In a subsequent determination letter, NNSA justified most of the withholdings under FOIA Exemption 5, by stating:

> The withheld information contains the opinions and recommendations of reviewers as to why this project was cancelled. Their opinions and recommendations were provided for the purpose of determining how processes for future projects of this kind might be improved. Their opinions and recommendations are the analyses of the reviewers and release of their candid appraisals would have a chilling effect on such evaluations in the future.

Letter from Tracy L. Loughead, NNSA, to Robyn Miller, Holmes (August 30, 2005) (Supplemental Determination Letter). NNSA further stated that, pursuant to FOIA Exemption 6, the names of employees were withheld because, "[a]s the release of contractor

employees…would not reveal anything of significance to the public and might cause inevitable harassment, the interest in protecting against the invasion of the individual's privacy far outweighs the public interest in such disclosure." Supplemental Determination Letter.

Holmes filed the present appeal on August 25, 2005 and supplemented its appeal on September 12, 2005. Letter from Robyn L. Miller, Holmes, to Samuel W. Bodman, Secretary of Energy (August 18, 2005); Letter from Robyn L. Miller, Holmes, to OHA (September 12, 2005).

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980) (*Coastal States*). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

After reviewing the document at issue, we have concluded that the determination made by NNSA in applying Exemption 5 was correct. The withheld information consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use; therefore, the requested document falls within the definition of "intra-agency memoranda" in the FOIA. In addition, the comments, recommendations, and opinions withheld are clearly predecisional and deliberative. They were generated following the cancellation of a particular program in order to develop improved processes for implementing similar projects in the future. Accordingly, we hold that the comments, recommendations, and opinions withheld from the requested document meet the requirements for withholding material under the deliberative process privilege of Exemption 5. [1]

Segregability of Non-Exempt Information

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this

[1] Names were withheld from the document under Exemption 6. However, Holmes is not challenging that withholding and, therefore, we need not reach the issue of whether Exemption 6 was properly applied to the names.

subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979).

In this case, the document consists almost entirely of exempt comments, opinions, and recommendations. NNSA released the title page, the table of contents, and the first paragraph of page one of the document. However, our review of this document finds that it contains some factual information that appears to be reasonably segregable from the exempt portions of the document. For example, sentence one of paragraph two on page one and sentence one of paragraph three on page two appear to be factual statements. Also, NNSA redacted the section headings despite the fact that the table of contents, with those same section headings, was not withheld. Accordingly, we shall remand this matter to NNSA. On remand, NNSA must review the document and segregate and release all purely factual portions, or issue a new determination that justifies withholding the factual portions of the document.

This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Decision and Order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeal filed on August 25, 2005 by Holmes & Narver, Inc., OHA Case No. TFA-0117, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the National Nuclear Security Administration for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 13, 2005

November 18, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:

Date of Filing: August 29, 2005

Case Number: TFA-0118

On August 29, 2005, XXXXX filed an Appeal from a determination issued to him on July 21, 2005, by the Richland Operations Office (Richland) of the Department of Energy (OR) in response to a request for documents that XXXXX submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland release any responsive material to XXXXX.

I. Background

In a FOIA request, XXXXX sought "all notes, papers, records of phone calls, interview records, e-mails, investigative reports and/or complaints pertaining to the late April or early May complaints filed by Dr. Thomas Fogwell" against XXXXX with the Richland Employee Concerns Program. Letter from Richland to XXXXX (July 21, 2005) (Determination Letter). Richland responded that it could neither confirm nor deny the existence of records responsive to the request. An agency's statement in response to a FOIA request that it can neither confirm nor deny the existence of records is commonly called a "Glomar" response, referring to the first instance in which a federal court upheld the adequacy of such a response. *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a ship named the "Hughes Glomar Explorer" by neither confirming nor denying the existence of any such documents). Richland went on to state that without the consent of Dr. Fogwell, "even to acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." *Id.* XXXXX then appealed the determination. If this Appeal were granted, Richland would be required to release the requested information, if it exists.

II. Analysis

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982). Further, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602. Accordingly, Richland neither confirmed nor denied the existence of any records responsive to XXXXX's request because without the consent of Dr. Fogwell, "even to acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." Determination at 1.

A Glomar response is justified when the confirmation of the existence of certain records would itself reveal exempt information. *William H. Payne*, 26 DOE ¶ 80,161 (1997) (quoting *Antonelli v. F.B.I.*, 721 F.2d 615 (7th Cir. 1983)). If the responsive material existed, it would fall within the purview of the types of files exempt from disclosure under Exemption 6. However, if Richland withholds these records, it would be an acknowledgment that the material exists. Thus, Richland properly applied the Glomar response. The danger of disclosing such information is accurately described in *Payne*:

> "Lacking evidence of an individual's consent, an official acknowledgment of an investigation by the agency, or an overriding public interest in the information, even to acknowledge the existence of such records pertaining to any named individual could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Payne, 26 DOE at 80,696 (1997).

Richland stated that in invoking Exemption 6, it considered: 1) whether a significant privacy interest would be invaded by disclosure of information, 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government, and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. Electronic mail message from Dorothy Riehle, Richland, to Valerie Vance Adeyeye, OHA (September 21, 2005). According to Richland, the release of such information, if it exists, would not contribute significantly to the public's understanding of Richland's operations and does not outweigh Dr. Fogwell's privacy interests.

XXXXX argues that releasing the information is in the public interest because it would allow him to effectively conduct contractor oversight and determine whether the contractor serves the best interest of the taxpayer. We disagree and find that release of this information, if it exists, is of minimal public interest and is clearly outweighed by the privacy interest of Dr. Fogwell.

In conclusion, we find that Richland was justified in providing a Glomar response to the FOIA request because the confirmation of the existence of such records would itself reveal exempt information. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Kevin XXXXX on August 29, 2005, OHA Case Number TFA-0118, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 18, 2005

October 17, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Public Utility District No. 1

Date of Filing: September 13, 2005

Case Number: TFA-0119

On September 13, 2005, Public Utility District No. 1 of Snohomish County, Washington (the Appellant) filed an Appeal from a final determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on August 9, 2005. In the determination, BPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information it withheld and grant a fee waiver to the Appellant.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated November 16, 2004, the Appellant submitted a FOIA request to BPA for documents including "[a]ll comments received by BPA relating to the 2004 Transmission – Policy Level Environmental Impact Statement (EIS); and . . . [a]ll internal communications, whether written or electronic, relating to BPA's decision to suspend work on the 2004 Transmission – Policy Level EIS." Request Letter dated November 16, 2004, from Michael A. Goldfarb, Attorney for Appellant, to Ms Annie Eissler, BPA. On June 1, 2005, BPA responded, stating that it was enclosing all documents in their entirety responsive to the request. Determination Letter dated June 1, 2005, from Annie Eissler to Michael A. Goldfarb.

On July 6, 2005, the Appellant filed an Appeal of the June 1, 2005 Determination with the Office of Hearings and Appeals (OHA) of the DOE. Shortly thereafter on August 9, 2005, BPA withdrew its June 1, 2005 Determination and issued a new determination. Determination Letter dated August 9, 2005, from Annie Eissler to Michael A. Goldfarb. In that Determination, BPA enclosed all documents that it had identified as responsive to the first part of the Appellant's request. It also released all documents responsive to the second part of the Appellant's request, but these documents were heavily redacted. BPA relied on Exemption 5 of the FOIA to make these redactions. August 9, 2005 Determination Letter at 1.

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues that because BPA disclosed some of its internal communications relating to its decision to terminate the EIS, it has waived the privilege as to any additional similar communications. Appeal Letter dated September 12, 2005, from Michael Goldfarb to Director, OHA, at 2. Second, the Appellant argues that both it and the public have a right to any information pertaining to BPA's decision not to perform an environmental assessment. *Id.* at 2. The Appellant then goes on to argue that it wishes to challenge BPA's fee estimate as excessive. Further, because it is a municipal corporation, it claims the fees should be reduced. *Id.* at 3.

II. ANALYSIS

Deliberative Process and Predecisional Documents

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Included within the scope of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather

than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications. Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

BPA has provided to the OHA copies of the documents that it released to the Appellant in redacted form. We have reviewed these documents and believe that they were properly redacted under Exemption 5. We have determined that BPA released the factual portions of these documents to the Appellant. The Appellant's first argument is that because BPA released a portion of its internal communications, all similar communications should be released. This argument does not apply to the facts in this case. In *Smith v. Alyeska Pipeline Serv.*, 538 F. Supp. 977 (D.C. Del. 1982), the court stated that "if a client chooses to disclose some privileged communications between the attorney and himself, then he waives the remainder of the communications which related to the *same subject matter*." *Id.* at 979 (emphasis added). We have reviewed the information that BPA redacted and it does not relate to the same subject matter as the information that BPA released in its discretion; that is, it does not discuss BPA's decision to suspend work on the 2004 Transmission Policy EIS.

The Appellant's second argument is that it and its customers have a right to any information pertaining to BPA's decision not to perform an environmental assessment. Essentially, the Appellant is arguing that discretionary release would be in the public interest. Appeal Letter at 2. We disagree. The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the comments and opinions contained in the documents, which contain deliberative material. The release of

this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Public Utility District No. 1*, 28 DOE ¶ 80,241 (2002); *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Fees

In its Appeal, the Appellant challenges BPA's fee estimate as excessive. In addition, the Appellant claims that because it is a municipal corporation and is a not-for-profit, publicly owned utility, its request is not for a use or purpose that furthers a commercial, trade, or profit interest. Therefore, it argues that its request is not for commercial use and BPA's fees must be limited to "reasonable standard charges for document search and duplication" but not for document review. 5 U.S.C. § 552 (a)(4)(A)(ii)(III); 10 C.F.R. § 1004.9(b)(4). We contacted BPA to determine whether the Appellant had raised this issue before it. We were informed that it had not. Therefore, we will remand this part of the Appeal to BPA, so BPA can consider the Appellant's request.

III. CONCLUSION

BPA properly withheld the redacted material under the Exemption 5 deliberative process privilege. Therefore, this part of the Appeal will be denied. We will remand the matter to BPA so that it can consider the Appellant's claim that its request is not for commercial use, and therefore, fees must be limited to standard charges for document search and duplication.

It Is Therefore Ordered That:

(1) The Appeal filed by Public Utility District No. 1 on September 13, 2005, Case No. TFA-0119, is hereby denied in part and granted in part as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Bonneville Power Administration which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 17, 2005

April 5, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph K. Huffman

Date of Filing: September 15, 2005

Case Number: TFA-0120

On September 15, 2005, Joseph K. Huffman filed an Appeal, through his attorney, from a determination issued to him on August 16, 2005, by the Department of Energy's (DOE) Pacific Northwest Site Office (PNSO). That determination concerned a request for information that Mr. Huffman submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, PNSO would be ordered to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 21, 2005, Mr. Huffman filed a FOIA request seeking the following information pertaining to him:

> 1) complete personnel file including all performance reviews and goals and awards;
> 2) complete DOE personnel security file;
> 3) complete records of the investigation which led to my termination. Including, but not limited to, emails, memos, and meeting notes between investigators, human resources, supervisors, and co-workers;
> 4) copies of all printouts from your web site present at any meetings regarding the investigation(s) and termination of my employment;
> 5) details of why the investigation was started; and
> 6) complete copy of Pacific Northwest National Laboratory's (PNNL) policies and procedures.

See August 16, 2005 Determination Letter.

In its August 16, 2005 determination letter, PNSO responded to his information request. PNSO stated that Mr. Huffman's DOE personnel security file is maintained by DOE's Chicago Office, Safeguards and Security Services. It stated his request was forwarded to that office to complete a search for that information. Regarding his personnel file, PNSO informed Mr. Huffman that he was already provided with a copy of his official personnel file on June 21, 2005, and therefore a second copy was not provided. With respect to PNNL Policies and Procedures, PNSO withheld these documents pursuant to Exemptions 2 and 4 of the FOIA. *Id.* Finally, regarding the balance of the request, PNSO stated that no responsive documents existed in that the requested records are non-agency (contractor-owned) records. PNSO further stated that according to DOE's contract with Battelle, most employment-related records are considered contractor-owned records, and therefore are not subject to the FOIA or Privacy Act.

On September 15, 2005, Mr. Huffman filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Huffman challenges PNSO's withholding of PNNL Policies and Procedures under Exemptions 2 and 4 of the FOIA . He asserts that even if some of this information "can arguably be owned by Battelle (the contractor that operates PNNL) not all of it would cause harm to the contractor by its release." *See* Appeal Letter at 2. He further asserts that the "low two" exemption of the FOIA is not applicable to the request and that "it is inconceivable that the release of all of PNNL Policies and Procedures would cause this harm [harm to agency operations]" pursuant to the "high two" exemption of the FOIA. *Id.* Lastly, Mr. Huffman challenges PNSO's assertion that the remaining portions of the request (numbers 3, 4, and 5 stated above) are not agency records. *Id.* Mr. Huffman asks that OHA direct PNSO to release the withheld information.

II. Analysis

A. Exemption 2

The courts have interpreted Exemption 2 to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Some of the information whose withholding is at issue in the present case involves both "low two" and "high two" information. The first category, "low two" information, includes information relating to internal matters of an agency in which the public could not reasonably be expected to have an interest, e.g., information concerning lunch hours or parking regulations. *Department of Air Force v. Rose*, 425 U.S. 352 (1976). With respect to the "high two" category, the courts have fashioned a two-prong test for determining whether information can be exempted from mandatory disclosure. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

As an initial matter, it is important to note that the PNNL Policies and Procedures at issue are agency records. Although they affect PNNL operations, they are agency records for purposes of the FOIA because the records were "obtained" by the DOE and were under DOE's control at the time of Mr. Huffman's request.

We have contacted PNSO in order to obtain a fuller explanation of how it believes the "low two" and "high two" exemptions of the FOIA apply to the PNNL Policies and Procedures. With respect to the "low two" exemption, PNSO has indicated that PNNL Policies and Procedures consist of records that describe internal PNNL practices and are drafted to assist employees in carrying out their duties in a safe, secure and compliant manner. *See* Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department, and Kimberly Jenkins-Chapman, OHA (March 13, 2006). PNSO has indicated that the policies and procedures in its web-based Standards Based Management System (SBMS) contain approximately 190 subject areas, with over 2000 web pages and include such "low two" matters as conference room scheduling, letterhead logos, arranging foreign travel and use of security badges. *Id.* We agree that this information consists of internal matters that are relatively trivial in nature, and therefore find that PNSO properly applied the "low two" exemption to this information. 1/

With respect to its application of the "high two" exemption to the information in question, PNSO has indicated that the non-public policies and procedures in this category are covered by this exemption because they include "a wide range of substantive safeguards and security practices, unclassified computer security, export control, and chemical, biological and criticality safety. These procedures cover much of the Laboratory's critical infrastructure, and making them public increases the risk of harm to system, facility and asset vulnerabilities." *Id.* We agree that this information is predominantly internal in nature because it is not intended for dissemination outside PNNL and does not purport to regulate activities among members of the public. In addition, disclosure of this information significantly risks circumvention of statutes and agency regulations created to secure the DOE's assets. Accordingly, we find that this information can be properly withheld under the "high two" prong of Exemption 2.

DOE regulations at 10 C.F.R. § 1004.1 provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the deleted information is protected under Exemption 2, we must address whether disclosure of this information is in the public interest. We find that it is not.

As discussed above, the information covered by this category from the PNNL Policies and Procedures relates to safeguards and security practices as well as access control procedures that are password protected and accessible only to staff. The disclosure of this information would reveal agency determinations on safeguards and security practices taken to protect the safety of DOE and

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1/ In its determination letter, PNSO stated that a wide range of non-sensitive PNNL Policies and Procedures are publicly accessible on the internet.

contractor personnel and property. Clearly, disclosing such information is not in the public interest as this information could render DOE personnel and facilities vulnerable.

B. Exemption 4

PNSO also withheld the non-public portions of the PNNL Policies and Procedures under Exemption 4. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material requested is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552 (b)(4). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was involuntary or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Using the "competitive harm" prong of the *National Parks* test, PNSO withheld the non-public PNNL Policies and Procedures. Determination Letter at 2. In its Determination Letter, PNSO indicated that "other competitors could gain insight into Battelle's business practices, which are unique to them and have been developed as part of Battelle's unique approach to managing national laboratories." *Id.* It further argues that "the result of such a release would place them [Battelle] at a competitive disadvantage by giving their competitors insight into how they do business." Mr. Huffman asserts, *inter alia*, that not all of the information would cause harm to the contractor by its release. We have contacted PNSO for a fuller explanation of its application of Exemption 4 to the PNNL Policies and Procedures and to further review the comments submitted by the contractor. In the course of these discussions, PNSO reiterated that while PNNL is a federal entity, the manner, methods and approaches that Battelle uses to manage this Laboratory for DOE are matters of a competitive nature. According to the PNNL Legal Department, "Battelle's approach to managing

national laboratories is a 'brand' comprised of certain methods, policies, tools and management systems." *See* Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department and Kimberly Jenkins-Chapman, OHA (March 13, 2006). We agree. The release of the PNNL Policies and Procedures would clearly result in competitive harm to Battelle. Accordingly, we find that PNSO properly applied Exemption 4 to the non-public PNNL Policies and Procedures.

C. Agency Records

Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and when it was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of National Affairs, Inc. v. Department of Justice*, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*); *J. Eileen Price*, 25 DOE ¶ 80,114 (1995) (*Price)*. In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. *See BNA*, 742 F.2d at 1492-93; *Pric*e.

In his Appeal, Mr. Huffman challenges PNSO's claim that the material sought in portions of his request (numbers 3, 4 and 5) are not agency records. He further argues that these records are agency records under the Privacy Act. 2/ We find his arguments to be incorrect and misplaced. In its Determination Letter, PNSO stated that it had no responsive documents with respect to numbers 3, 4, and 5 of Mr. Huffman's request because those documents are not in PNSO's possession. Thus, the documents Mr. Huffman seeks are not in DOE's possession, and therefore are not agency records.

A finding that the items at issue are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). PNSO maintains that to the extent the documents exist elsewhere than in DOE's possession, the requested records are non-agency (contractor-owned) records. PNSO notes that "according to DOE's contract with Battelle, most employment-related records are considered contractor-owned records, and therefore, not subject to the FOIA or Privacy Act." Determination Letter at 2. We contacted PNSO and the PNNL Legal Department for further elaboration on their argument. To support its claim that the documents in this category are non-agency records, PNSO directed us to Contract Clause I-81. The pertinent portions as summarized by PNNL are the following:

2/ The definition of agency records is the same under both the FOIA and the Privacy Act.

> Paragraph (a) states that all records acquired or generated by Battelle in the performance of the Contract are government-owned records, except those identified in paragraph (b).
>
> Paragraph (b), titled Contractor-owned records, states that the following records are considered the property of the Contractor and are not within the scope of paragraph (a).
>
> Subsection (b) (1) is titled Employment-related records, and includes workers' compensation files, employee relations records, salary and benefits, drug testing, labor negotiations, ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality, EAP records, personnel and medical/health records and similar files (except those in a Privacy Act system of records).
>
> Subsection (b) (4) includes legal records, litigation files, and attorney-client/attorney work product privileged material. In addition, clause H-32(b) reinforces that Contractor-owned legal records require special handling to preserve privileges and may only be inspected or audited by DOE counsel.

See Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department, and Kimberly Jenkins-Chapman, OHA (March 13, 2006). We have independently reviewed the terms of the contract and reach the conclusion that the documents Mr. Huffman seeks are not the property of DOE according to the terms of the DOE-Battelle contract.

Finally, PNNL further stated that in regard to Privacy Act systems of records excepted in paragraph (b)(1), Battelle has identified six in prime contract clause H-15 (five are security related and one concerns personnel radiation exposure). According to PNNL, none apply to Mr. Huffman's request. In regard to records generated during Battelle's investigation of the matters that led to Mr. Huffman's termination (requests numbered 3, 4 and 5), PNNL states that these records are within the scope of Contractor-owned records identified in Contract Clause I-81(b). PNNL further explains that "the investigation was conducted by Battelle's human resources staff, assisted by security staff and line management, and with direction and advice of Battelle legal counsel. The Battelle PARC (Personnel Action Review Committee) decision, and related records, to terminate Mr. Huffman is also covered by I-81(b), as well as potential claims of attorney-client privilege. Moreover, we have been informed that "all of the staff at PNNL are employees of Battelle, and fundamental employment/employee relations decisions are those of the company, not any federal agency." Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department and Kimberly Jenkins-Chapman, OHA (March 13, 2006). Consequently, items 3, 4 and 5 of Mr. Huffman's request do not fall within the Privacy Act systems of records the contents of which are property of the DOE under the terms of the contract.

Accordingly, we have examined the relevant portions of the contract between Battelle and the DOE, and we conclude that documents responsive to items 3, 4 and 5 of Mr. Huffman's request are not

agency records and not the property of DOE according to the terms of the DOE-Battelle contract. Therefore, these records are not subject to disclosure under the FOIA, under the Privacy Act, or under 10 C.F.R. § 1004.3(e)(1).

It Is Therefore Ordered That:

(1) The Appeal filed by Joseph K. Huffman, OHA Case No. TFA-0120, on September 15, 2005, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 5, 2006

October 28, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Allan C. Harris

Date of Filing: September 23, 2005

Case Number: TFA-0121

On September 23, 2005, Allan C. Harris (Harris) filed an appeal from a determination issued to him on August 22, 2005 by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (CBC). In that determination, CBC denied a request for a waiver of fees in connection with a request that Harris submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn CBC's determination and waive in full the fees associated with his request.

I. Background

Harris filed a request under the FOIA for "electronic records, with supporting descriptive documents and etc., of all at- and below-grade soil data and all remotely sensed (aerial and/or satellite) data from the U.S. Department of Energy Miamisburg Closure Project and the U.S. Department of Energy Fernald Closure Project." Electronic Mail Message from Harris to Claudia S. Gleicher, CBC (July 12, 2005). According to Harris, he planned to use this information in preparing an unsolicited proposal to the DOE. *Id*.

In his FOIA request, Harris also requested a fee waiver for the costs associated with processing the request. In its August 22, 2005 determination letter, CBC denied a fee waiver. Letter from Marian Wilcox, Freedom of Information Officer, CBC, to Harris (August 22, 2005) (Determination Letter). CBC determined that "the primary purpose for [Harris'] FOIA request is commercial." *Id*.

Harris filed the present appeal on September 23, 2005. Letter from Harris to OHA (September 22, 2005) (Appeal Letter). In his appeal, Harris states that the requested information will not be used for commercial activity. Rather, he states, the information will be used "to implement a Stakeholder Environmental Management System (SEMS)" and to develop educational research courses. Appeal Letter.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 1004.9(a)(8).

A. Whether Requested Information Is In the Public Interest

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

1. Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, there appears to be no dispute that the requested information – electronic records, with supporting descriptive documents, etc., of all at- and below-grade soil data and all remotely sensed (aerial and/or satellite) data from the U.S. Department of Energy Miamisburg Closure Project and the U.S. Department of Energy Fernald Closure Project – concerns activities or operations of the government. Therefore, we find that Harris' request satisfies Factor A.

2. Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, CBC has been informed us that the requested information is not already publicly available. *See* Memorandum of Telephone Conversation between Marian Wilcox, CBC FOIA/PA Officer, and Diane DeMoura, OHA (October 3, 2005). Therefore, we find that Harris has satisfied Factor B.

3. Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, Harris states that, in addition to aiding in his preparation for an unsolicited proposal to DOE, the requested information will be used to create educational courses and will assist the DOE in various ways. CBC determined that Harris' primary intention in making the request was not directed at contributing to the general public's understanding of government operations, but rather was to assist him in preparing an unsolicited proposal to the DOE. *See* Appeal Letter. Furthermore, CBC determined that, even if the request were directed at contributing to the public's understanding of government operations, Harris did not adequately demonstrate an ability to disseminate the information. *Id*.

We agree with CBC that Harris has not provided adequate evidence of his ability to disseminate the requested information to the public. Any public benefit derived from Harris' unsolicited proposal is contingent on the DOE accepting and then publishing that proposal or on Harris' publishing the information himself. We have no evidence before us to indicate that such publication will occur. Furthermore, Harris has not demonstrated that the general public will benefit from his development of educational courses. Consequently, we find that Harris has not satisfied Factor C.

4. Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act*, 381 (1995)).

In the present case, it remains unclear to what extent the public's understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (*citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

B. Whether Requested Information is Primarily in Requester's Commercial Interest

As stated above, we have determined that Harris has not demonstrated that his request is "in the public interest because it is likely to contribute significantly to public understanding of the operations of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 1004.9(a)(8). However, assuming *arguendo* that Harris' request did satisfy the public-interest prong of the test, we find that the request is primarily in Harris' commercial interest and, therefore, does not satisfy the commercial-interest prong of the test.

A "commercial interest" has been defined as "one that furthers a commercial, trade or profit interest as those terms are commonly understood." *See Department of Justice Freedom of Information Act Guide*, 133 (2004). In the present case, CBC determined that the primary purpose of Harris' request – to use the information in developing an unsolicited proposal to the DOE – was commercial. Appeal Letter. Harris contends that the requested information will be used to develop educational research classes and therefore "will not be commercialized." *Id*.

We agree with CBC that the request is primarily in Harris' commercial interest. While it is true that a proposal, if accepted, could potentially provide some benefit to an agency or the general public, submitting an unsolicited proposal to an agency is an inherently commercial activity. A submitter's desired result is for the agency to accept the proposal and compensate the submitter in some manner.

III. Conclusion

As the foregoing indicates, Harris has failed to adequately demonstrate his intention and ability to disseminate the requested information to the public. Therefore, we find that Harris has not shown that disclosure of the requested information is likely to contribute to public understanding of government operations or activities. We further find that even if Harris had demonstrated that the disclosure of the requested information would be in the public

interest, the requested information is primarily in Harris' commercial interest. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 23, 2005 by Allan C. Harris, OHA Case No. TFA-0121, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 28, 2005

November 7, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cliff Jenkins

Date of Filing: October 12, 2005

Case Number: TFA-0122

On October 12, 2005, Cliff Jenkins (Jenkins) filed an appeal from a determination issued to him on August 22, 2005 by the Department of Energy's (DOE) Office of Legacy Management (LM). In that determination, LM responded to a request for documents that Jenkins submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LM determined that it did not have any documents responsive to Jenkins' request. This appeal, if granted, would require LM to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Jenkins filed a request under the FOIA for "copies of any documentation, contracts, notes on verbal agreements, or Memorandums of Understanding for Union Carbide, U.S. Vanadium, Vanadium Corporation of America or the town of Uravan, CO." Letter from Michael Owens, LM, to Cliff Jenkins (September 1, 2005) (Determination Letter). LM determined that the requested documents did not exist. LM stated, "According to our information the Atomic Energy Commission (AEC) never owned or managed the property. They only contracted for the purchase of material." Determination Letter. As a result, LM denied the request and Jenkins filed the present appeal.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials."

Miller v. United States Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

As an initial matter, we note that in his appeal, Jenkins requested documents which he did not include in his initial request to LM. Specifically, Jenkins stated,

> In addition to the contract sited [sic] above, I am requesting any indemnification agreements that may exist, or may have existed between Union Carbide, U.S. Vanadium Corp. or the Vanadium Corporation of America and the Department of Energy either negotiated directly with Union Carbide or inherited by DOE and negotiated by outside agencies.

Letter from Cliff Jenkins to OHA (September 15, 2005) (Appeal Letter). We do not permit requesters to expand the scope of their request on appeal. *F.A.C.T.S.*, 26 DOE ¶ 80,132 at 80,578 (1996); *Alan J. White*, 17 DOE ¶ 80,117, 80,539 (1988); *see also Arthur Scanla*, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). If Jenkins wishes to request this additional information, he must file a new FOIA request seeking those documents.

In reviewing this appeal, we contacted LM to discuss the initial search. LM informed this office that the search involved "electronic and paper finding aids for both the LM active and inactive record holdings in the custody of the LM Grand Junction Office and the Federal Records Centers. This process included key word searches ... review of paper indexes, and contact with a retired AEC subcontractor who was directly responsible for the AEC uranium mining and milling program." Electronic Mail Message from Sheila Dillard, LM, to Diane DeMoura, OHA (October 26, 2005). Based on this information, we find that LM conducted a search reasonably calculated to reveal records responsive to Jenkins' initial request and, therefore, was adequate. However, based on new information Jenkins provided in his appeal, LM has informed us that it has located additional records which may be responsive to Jenkins' request. Electronic Mail Message from Sheila Dillard, LM, to Diane DeMoura, OHA (October 19, 2005).

Accordingly, this appeal is granted in part and this matter is remanded to LM to complete a new search using the additional information provided in the appeal. After completing its search, LM is to provide Jenkins with any responsive documents or to issue a new determination justifying the withholding of any responsive information.

It Is Therefore Ordered That:

(1) The Appeal filed on October 12, 2005 by Cliff Jenkins, OHA Case No. TFA-0122, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Legacy Management for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2005

January 17, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Northeast Ohio American Friends Service Committee
Date of Filing:	October 12, 2005
Case Number:	TFA-0123

On October 12, 2005, the Northeast Ohio American Friends Service Committee (NOAFSC) filed an Appeal from a determination issued to it by the Office of the Inspector General of the Department of Energy (OIG) on September 8, 2005, in response to a request for documents that NOAFSC submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that OIG perform an additional search for responsive material.

I. Background

On January 12, 2005, NOAFSC submitted a FOIA request for documents maintained by OIG that relate to radiation and the Industrial Excess Landfill and /or the Kittinger Landfill in Uniontown, Ohio. NOAFSC also asked for "documents concerning a meeting with Jessie Robison, Margaret Lapham, and Mr. Walter during the summer of 2004." Letter from NOAFSC to DOE/HQ (January 12, 2005) (Request). NOAFSC added that it did not want to receive any documents that DOE had either received from or sent to the Concerned Citizens of Lake Township (CCLT). *Id*. OIG searched its files and found 46 responsive documents. OIG released seven documents with material withheld pursuant to Exemptions 6 and 7(c). Thirty-eight responsive documents related to CCLT, and those documents were withheld pursuant to NOAFSC's request. OIG also had one responsive document in its possession that originated at the Environmental Protection Agency (EPA), and OIG forwarded the document to the EPA for a determination concerning its release. *See* Determination Letter at 1. The determination letter explained that one document was created at the EPA and that the EPA "will respond directly to [AFSC] regarding the releasability of the document." Determination Letter at 2.

NOAFSC raised two issues in its appeal. First, NOAFSC contends that DOE did not respond to its original request because no documents were released concerning the summer 2004 meeting. Second, NOAFSC contends that DOE's search was inadequate because no other DOE divisions had replied to NOAFSC concerning its request. In the Appeal, NOAFSC asks OHA to direct OIG to search again for responsive information. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted OIG for information about the search. OIG responded to both of NOAFSC's arguments on appeal. First, OIG stated that there was no documentation of the summer 2004 meeting mentioned in the original request. OIG verified the absence of documentation with DOE employees who had attended the meeting. *See* Memorandum of Telephone Conversation between Ruby Len, OIG, and Valerie Vance Adeyeye, OHA (December 14, 2005). As for the second argument, OIG informed us that the original request was also referred to the Office of Environmental Management (EM), and that EM had indeed responded that the facility involved was not under EM's control. *Id.* EM referred the request to the EPA. *Id.* OIG sent us a copy of an electronic mail message from EM-1 dated April 23, 2004 stating that the facility in the request was not included in EM's program function. OIG released a copy of this email to NOAFSC as Document 4.

After reviewing the record of this case, we find that OIG conducted a search that was reasonably calculated to uncover the requested information. Further, the requester did receive notification from another DOE division (EM) that the landfills in question were not within its jurisdiction. Based on the information in the record and our communications with OIG, we are convinced that no offices other than OIG and EM are likely to have documents responsive to this request. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Northeast Ohio American Friends Service Committee on October 12, 2005, OHA Case Number TFA-0123, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in

which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 17, 2006

November 10, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Catherine Rose

Date of Filing: October 12, 2005

Case Number: TFA-0124

On October 12, 2005, Catherine Rose filed an appeal from a determination issued to her on September 8, 2005 by the Department of Energy's (DOE) Savannah River Operations Office (SR). In that determination, SR responded to a request for documents that Ms. Rose submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. SR determined that it did not have any documents responsive to Ms. Rose's request. This appeal, if granted, would require SR to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On January 13, 2005, Ms. Rose filed a request under the FOIA for "incident documents for 200-F and 200-H during the time period from 1950-1954." Letter from Lucy M. Knowles, SR, to Rose (September 8, 2005) (Determination Letter). In response to that request, SR informed Ms. Rose that it was unable to locate any responsive documents. Upon receiving the determination, Ms. Rose filed a subsequent request asking SR to perform an additional search and SR did so. After completing the second search, SR stated, "[t]he Savannah River Site (SRS) performed an additional search using the search terms 'INCIDENT' and '200' of both the UNCLASSIFIED and CLASSIFIED databases. SRS found no additional documents responsive to your request." Determination Letter. As a result, SR denied the request and Ms. Rose filed the present appeal.

In her appeal, Ms. Rose disputes SR's statement in the Determination Letter that operations began in the 200-F and 200-H areas of the SR complex in November 1954 and July 1955, respectively. Letter from Ms. Rose to OHA (October 3, 2005). Ms. Rose included in her

appeal information which she believed established that operations began in those areas prior to 1954 and 1955.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted SR to ascertain the scope of the search. SR informed us that in performing the additional search that Ms. Rose requested, it was unable to locate any documents responsive to Ms. Rose's request. According to SR, "[w]e searched for documents in both the classified and unclassified databases, using the search terms 'incident' and '200' for the years 1950 to 1954. The use of these two search terms would have located responsive documents for any incident of any type in either 200-F or 200-H Areas for those years. We were unable to locate additional responsive documents." Electronic Mail Message from Pauline Conner, SR, to Diane DeMoura, OHA (October 27, 2005). SR also explained, citing to a book outlining the history of the SR complex, that although other areas within the complex began operations prior to 1954 and 1955, the 200-F and 200-H areas did not commence operations until November 1954 and July 1955, respectively. *Id*.

SR performed a search for documents, using appropriate search terms, regarding the facilities Ms. Rose requested within the time frame she provided. Based on this information, we find that SR conducted a search reasonably calculated to reveal records responsive to Ms. Rose's initial request and, therefore, was adequate. Accordingly, Ms. Rose's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 12, 2005 by Catherine Rose, OHA Case No. TFA-0124, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 10, 2005

November 16, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Natural Resources Defense Council
Date of Filing:	October 17, 2005
Case Number:	TFA-0127

This Decision concerns an Appeal that was filed by the Natural Resources Defense Council (hereinafter referred to as "NRDC") in response to a Determination issued to it by the Director of the Department of Energy's FOIA/Privacy Act Group (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that NRDC submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the DOE conduct another search for responsive documents.

In its FOIA request, NRDC sought access to all documents regarding (i) the toxicity of perchlorate, (ii) the health or environmental effects of perchlorate, (iii) the detection of perchlorate in groundwater, soil or surface water at any DOE or contractor facilities, (iv) risk assessments for perchlorate, (v) potential drinking water or cleanup standards for perchlorate, (vi) cost estimates for any perchlorate remediation or cleanup, (vii) the National Academy of Sciences study of perchlorate, or (viii) any legislation regarding perchlorate. NRDC later limited its request to documents created during and after 1998. *See* September 16, 2005 Determination Letter from Abel Lopez, Director, FOIA/Privacy Act Group to Aaron Colangelo, NRDC.

In this Determination, the Director stated that NRDC's request was referred to the Headquarters Office of Environmental Management (EM) for a search of its files. Determination at 1. This search produced 28 documents that are responsive to NRDC's request. These documents were provided to NRDC in their entirety.

In its Appeal, NRDC contests the adequacy of the search that was performed. NRDC points out that one of the 28 documents released states that "[f]ive [DOE] sites have suspected or confirmed perchlorate contamination: the Los Alamos and Sandia National Laboratories in New Mexico; the Pantex Plant in Texas; and the Energy Technology Engineering Center and Lawrence Livermore National Laboratory Site 300 in California." NRDC Appeal, Attachment C. However, no sampling data from those sites was included in the material released to NRDC. Moreover, that same document states that "[a]t Livermore, an interim Record of Decision to clean up perchlorate contamination is

in place and cleanup is ongoing." No Record of Decision was provided to the requester. NRDC therefore argues that the search conducted was inadequate, and requests that another search be performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to obtain further information concerning the scope of the search that was performed, we contacted the Director's Office and EM. We were informed that the initial search that resulted in the location of the 28 documents that were released to NRDC encompassed only EM's headquarters offices. *See* memorandum of November 4, 2005 telephone conversation between Verlette Moore, FOIA/Privacy Act Group, and Robert Palmer of this Office. Given the information submitted by NRDC, we conclude that "a search that is reasonably calculated to uncover the sought materials," *Miller*, must in this case include DOE and contractor facilities located at the Los Alamos and Sandia National Laboratories in New Mexico, the Pantex Plant in Texas, and the Energy Technology Learning Center and the Lawrence Livermore National Laboratory Site 300 in California. In fact, we have been informed by EM that a search of these facilities is currently being conducted. *See* memorandum of November 4, 2005 telephone conversation between Joni Boone, EM, and Mr. Palmer.

We will therefore remand this matter to EM. On remand, EM should continue to search at the facilities named above for responsive documents. In addition, if there are any other locations in which such documents are likely to be located, those locations should be searched as well. Upon completion of this search, a new determination letter should be issued to NRDC in as expeditious a manner as is possible.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Natural Resources Defense Council, OHA Case Number TFA-0127, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Environmental Management for additional proceedings consistent with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 16, 2005

March 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Environmental Defense Institute

Date of Filing: October 24, 2005

Case Number: TFA-0128

On October 24, 2005, Environmental Defense Institute (the Appellant) filed an Appeal from a final determination that the Idaho Operations Office (Idaho) of the Department of Energy (DOE) issued on September 14, 2005. In the determination, Idaho released numerous documents to the Appellant responsive to the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Idaho did withhold portions of one document under Exemption 2 of the FOIA. This Appeal, if granted, would require Idaho to release the information it withheld from that document.

I. BACKGROUND

In a letter dated July 7, 2005, the Appellant submitted a FOIA request to Idaho for documents relating to the Advanced Test Reactor (ATR) and other facilities at the Reactor Technologies Complex (RTC). Request Letter dated July 7, 2005, from Chuck Broscious, Executive Director, Appellant, to FOIA Office, Idaho. Because the initial request was so broad, the Appellant was invited to narrow its request, which it did on July 28, 2005. On September 14, 2005, Idaho issued a determination on the matter. Idaho released all but two documents in full. Of the remaining two documents, one was withheld in its entirety. The second was redacted under Exemption 2 of the FOIA. This second document is at issue in this Appeal.[1/]

On October 14, 2005, the Appellant filed an Appeal of the September 14, 2005 Determination with the Office of Hearings and Appeals (OHA) of the DOE. In its Appeal, the Appellant questions the correctness of the Idaho exemption determination regarding the second document, entitled ATR Safety Analysis Report (SAR). The Appellant argues that Idaho has failed to reasonably segregate the information in the ATR SAR. Appeal Letter dated October 14, 2005, from Chuck Broscious to Director, OHA, at 2.

[1/] After this Appeal was filed, the first document was released to the Appellant.

II. ANALYSIS

Idaho withheld portions of the ATR SAR under FOIA Exemption 2. The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 2 is at issue in the present case.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho's Determination Letter indicates that it withheld portions of the ATR SAR because the information is "integral to describing potential vulnerabilities of the reactor and related systems, and the methods and measures taken to prevent or mitigate those potential problems." September 14, 2005 Determination Letter. Therefore, the release of this information could be used to identify those potential vulnerabilities and to understand how to thwart the protective and mitigative measures currently in place. Specifically, the information withheld by Idaho under Exemption 2 consists of maps, diagrams, and safety reports regarding the Advanced Test Reactor.

The information withheld is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow malefactors to identify vulnerabilities of the ATR and to understand how to thwart the protective measures currently in place. Accordingly, disclosure of the information at issue risks allowing malefactors to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Although it is obvious that this Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

The Appellant also contends that the FOIA mandates that any reasonably segregable portion of a record must be disclosed to a requestor after the redaction of the parts which are exempt. October 14, 2005 Appeal Letter at 2. We agree. We have reviewed the ATR SAR which Idaho released to the Appellant with redactions. We believe that chapter 3/4, pages 0-1 and 0-2 of the ATR SAR could be reasonably segregated and released to the Appellant. We will remand the matter to Idaho for review of those pages and issuance of a new determination either releasing the information or justifying its withholding.

III. CONCLUSION

Idaho properly withheld the redacted material, except as outlined above, under the "high two" prong of Exemption 2. Therefore, this part of the Appeal will be denied. We will remand the matter to Idaho so that it can review two pages of the withheld document and issue a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute on October 24, 2005, Case No. TFA-0128, is hereby denied, except insofar as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Idaho Operations Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 16, 2006

January 3, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eric T. Kirk

Date of Filing: October 31, 2005

Case Number: TFA-0129

This Decision concerns an Appeal that was filed by Eric T. Kirk in response to a determination that was issued to him by the Director of the Department of Energy's (DOE) Environmental Management Consolidated Business Center (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that Mr. Kirk submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Director released certain documents to Mr. Kirk, but withheld portions of those documents. This Appeal, if granted, would require that we remand this matter to the Director for another search and for the release of the withheld material.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. ' 552(b)(1) - (9); see also 10 C.F.R. ' 1004.10(b)(1) - (9).

I. Background

In his FOIA request, Mr. Kirk sought access to the following documents concerning "Mound Plant retiree medical benefits:"

> 1. The request from DOE to BWX Technologies (BWXT) requesting an evaluation of retiree medical benefits and any means to reduce the costs or like actions;
>
> 2. The acknowledgment from BWXT to DOE for the activity in 1 above including any proposed cost to conduct the evaluation;
>
> 3. The proposal(s) for any actions that could be taken from BWXT to DOE after an extensive quantity of research and evaluation was performed both by BWXT and legal firms employed by BWXT;

4. The acknowledgment by DOE of the information in 3 above and any direction on the decision made by the DOE.

In his response, the Director identified four documents as being responsive to Mr. Kirk's request. Document 1, a November 13, 2000 letter from Roland Reed of BWXT to "D. Franklin" of the DOE was provided to Mr. Kirk in its entirety. Documents 2 and 3, which are letters from "W.M. Farrell" of BWXT to Derrick J.C. Franklin of the DOE dated September 26, 2001 and March 29, 2002 respectively, were released to Mr. Kirk with portions withheld under Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). Document 4, a memorandum dated March 28, 2002 and authored by the law firm of Vorys, Sater, Seymour and Pease, was also provided to Mr. Kirk in redacted form, with portions withheld under Exemption 5. In his Appeal, Mr. Kirk challenges the adequacy of the search that the Director performed and his application of Exemption 5.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In support of his claim that the Director's search was inadequate, Mr. Kirk states that "at no time has [the Director's office] or any other DOE office provided the requested information . . . with regard to revision of EG&G retiree medical benefits . . . , although this was requested as a part of my FOIA request." Appeal at 1. However, the fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. The courts have stated that in cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted was adequate, we contacted the Director's Office. We were informed that the request was referred to the Manager of the Ohio Field Office in Miamisburg, Ohio, and that the following Miamisburg locations were searched: (i) the Manager's Office, (ii) the Contract and Procurement Office, (iii) the Office of Chief Counsel, and (iv), the offices of the DOE Miamisburg Records contact person and Industrial Relations Specialist. The request was also referred to BWXT, which conducted a search of its records, and to BWXT's law firm. *See* memorandum of December 8, 2005 telephone conversation between Robert Palmer, OHA Staff Attorney, and Marian Wilcox, DOE Environmental Management Consolidated Business Center. Mr. Kirk has not suggested, and we have been unable to discover, any other location in

which responsive documents could reasonably be expected to be located. Based on the information before us, we conclude that the search for responsive documents was adequate.

B. The Director's Application of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Coastal States*, 617 F.2d at 862 . The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker, *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988).

Mr. Kirk contends that the withheld portions contain factual material that cannot properly be withheld under Exemption 5. In general, Exemption 5 may not be used to withhold purely factual material. *Coastal States*, 617 F.2d at 867. However, the courts have recognized two exceptions to this general rule. Factual material may be withheld under Exemption 5 if it is so inextricably intertwined with deliberative matter that disclosure of the factual material would expose or cause harm to the agency's deliberations, *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971), or if the author has selected specific facts out of a larger group of facts, and this very act is deliberative in nature. *Montrose Chemical Corporation v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974).

We have carefully examined the withheld portions of the responsive documents. They consist largely of the opinions and recommendations of the authors of those documents, and factual material relied upon by the authors in reaching their conclusions. The material is clearly predecisional, and

deliberative in that it reflects the "give and take" of the decision-making process. With one exception, the factual matter withheld is either so inextricably connected to the deliberative material that it is, itself, deliberative in nature, or was selected from a larger group of facts in an act that constituted an exercise of judgement by the authors. In either instance, revealing the factual material would in effect reveal the deliberative process, and very possibly compromise the quality of agency decision making.

The one exception is located on page three of Document 4, in the first sentence under the heading "II. FACTS." This sentence describes the amount of material examined by the author in writing the memorandum, and the sources of that material. The facts in this sentence are not inextricably intertwined with deliberative material, nor are they a distillation of facts from a larger group of facts. Release of this sentence in its entirety would not expose the deliberative process of which this memorandum is a part, and it therefore cannot be withheld under the deliberative process privilege of Exemption 5.

C. The Public Interest

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, the public interest in release of the withheld material is attenuated by the fact that it consists largely of preliminary opinions and recommendations that may or may not be adopted by the agency. On the other hand, the release of predecisional, deliberative material concerning the very emotional subject of possible changes to retiree medical benefits could be misleading in that it could suggest that the DOE has reached a final decision on this issue, and it could also adversely effect the agency's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We do not believe that discretionary release of the withheld material would be in the public interest.

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*/ We have been informed that no decision has been made regarding any possible changes in retiree benefits. *See* memorandum of December 8, 2005 telephone conversation between Mr. Palmer and Ms. Wilcox.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eric T. Kirk, OHA Case Number TFA-0129, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Director of the DOE's Environmental Management Consolidated Business Center. Upon remand, the Director shall either release the first sentence under the heading "II. FACTS" on page three of Document 4 to Mr. Kirk in its entirety, or withhold that information under a different exemption.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 3, 2006

January 17, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mack Davis
Date of Filing:	October 31, 2005
Case Number:	TFA-0130

On October 31, 2005, Mack Davis (Davis) filed an Appeal from a determination issued to him by the Oak Ridge Office of the Department of Energy (Oak Ridge) on October 18, 2005, in response to a request for documents that Davis submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Oak Ridge perform an additional search for responsive material.

I. Background

On July 26, 2005, Davis submitted a FOIA request for medical records, radiation exposure records and industrial hygiene records concerning his deceased father, Steve Edward Davis. According to Davis, his father worked at the University of Tennessee (UT) Comparative Animal Research Laboratory (CARL) from 1950 to 1975. Davis contends that his father was exposed to cobalt 60 during an industrial accident at CARL. Oak Ridge searched its records and found an employment card and a security clearance card for Steve Davis. Oak Ridge sent the documents to Davis on October 15, 2005. *See* Determination Letter at 1.

Davis contends that the search was inadequate. He argues that because his father had an annual medical checkup at Oak Ridge National Laboratory (ORNL), his father's medical records and dosimeter records should be on file at ORNL. Letter from Davis to Director, OHA (October 31, 2005) (Appeal). In the Appeal, Davis asks OHA to direct Oak Ridge to search again for responsive information. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

Mr. Davis informed us that his father had been employed by UT and that UT provided Mr. Davis with his father's personnel records. *See* Memorandum of Telephone Conversation between Davis and Valerie Vance Adeyeye, OHA (January 3, 2006). However, UT did not have any medical records. *Id*. According to Davis, in his search for the medical records, Davis was told that they had been sent to Oak Ridge Institute for Science Education (ORISE). *Id.* We contacted Oak Ridge for information about the search. Oak Ridge sent us copies of correspondence and search results from ORNL, ORISE, ORAU, the DOE Records Holding Area for Archived Records, and the Department of Labor (results of their search for records in response to Davis' Energy Employees Occupational Illness Compensation Program Act (EEOICPA) claim). CARL and ORISE submitted an Employment Verification Sheet acknowledging that they searched the available records and were unable to verify the accuracy of the claimed period of employment, but had located a security clearance document from 1950. *See* Employment Verification Sheet (August 3, 2005). ORNL found no record that Davis' father had been monitored there for radiation exposure. *See* Letter from W. Gorman, ORNL, to Amy Rothrock, Oak Ridge (August 22, 2005). DOE Records Holding/Archived Records located a Personnel Clearance Master Card from 1950 and a personnel card. *See* Request Certification and Recommendation (August 23, 2005). ORNL searched but found no medical or industrial hygiene records. *See* Electronic mail message from T. Powers, ORNL, to Amy Rothrock, Oak Ridge (August 25, 2005); Electronic mail message from L. Greeley, ORNL, to Amy Rothrock, Oak Ridge (September 1, 2005). On October 31, 2005, Oak Ridge Associated Universities (ORAU) responded that they had no record of the father's employment.

After reviewing the record of this case, we find that Oak Ridge conducted a search that was reasonably calculated to uncover the requested information. This search included the locations that Davis identified (ORNL and ORISE), but recovered no further responsive material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Mack Davis on October 31, 2005, OHA Case Number TFA-0130, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 17, 2006

December 2, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Henrietta Brater

Date of Filing: November 2, 2005

Case Number: TFA-0131

On November 2, 2005, Henrietta Brater filed an appeal from a determination issued to her on October 6, 2005 by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (CBC). In that determination, CBC responded to a request for documents that Ms. Brater submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. CBC determined that it had previously provided Ms. Brater with all documents in its possession responsive to Ms. Brater's request. This appeal, if granted, would require CBC to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Ms. Brater filed a request with CBC for medical, personnel, radiation exposure, and occupational and industrial records pertaining to her late husband. Letter from Ms. Brater to OHA (October 17, 2005) (Appeal Letter). CBC located 390 pages of documents responsive to Ms. Brater's request and provided her with copies of those documents. Letter from Marian Wilcox, CBC, to Ms. Brater (October 6, 2005) (Determination Letter). Ms. Brater believed CBC did not provide her with all responsive documents available and filed the present appeal. In her appeal, Ms. Brater challenges the adequacy of the search performed by CBC. Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the

search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted CBC to ascertain the scope of the search. CBC informed us that, in responding to Ms. Brater's request, it performed a very thorough search for documents pertaining to Ms. Brater's late husband, who worked at the Fernald site from the mid-1950s to the mid-1960s. Specifically, CBC stated,

> A search was performed of the Fernald Active Records and Historical Records (ARIS and HRID) Database for personnel, medical, respirator file, accident/injury and any other available information. The Dosimetry department prepared a report including exposure files, urinanalysis [sic], etc. A search was also performed of the eDesk files for historical information (this is scanned copies of the older documents). The Subcontractor Database was also searched just to make sure that nothing would be missed. Also, as Ms. Brater requested, all documentation that has been provided to the Department of Labor and NIOSH has also been provided to Ms. Brater. This included raw data. Every location that could be reasonably expected to contain responsive records was searched and the best available copies (of the older documents) were provided in responsive [sic] to the request.

Electronic Mail Message from Marian Wilcox, CBC, to Diane DeMoura, OHA (November 23, 2005). Based on this information, we find that CBC performed an extensive search reasonably calculated to reveal records responsive to Ms. Brater's request and, therefore, the search was adequate. Furthermore, in her appeal, Ms. Brater does not provide any support for her assertion that additional responsive documents were available but not provided to her. Accordingly, Ms. Brater's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on November 2, 2005 by Henrietta Brater, OHA Case No. TFA-0131, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 2, 2005

December 9, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marilyn R. Sutton

Date of Filing: November 9, 2005

Case Number: TFA-0132

On November 9, 2005, Marilyn R. Sutton filed an appeal from a determination issued to her on October 6, 2005 by the Department of Energy's (DOE) Office of Legacy Management (LM). In that determination, LM responded to a request for documents that Ms. Sutton submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LM determined that all documents possibly responsive to the request were contained in an electronic database. LM did not provide Ms. Sutton with the documents, but provided Ms. Sutton with instructions for accessing and searching the database. This appeal, if granted, would require LM to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I.Background

On August 12, 2005, Ms. Sutton filed a request for the enclosures contained in a letter from Mr. James J. Fiore, Deputy Assistant Secretary of Energy, to Mr. William R. Augustine, Deputy Chief Programs Management Division, U.S. Army Corps of Engineers, dated October 19, 1999. Ms. Sutton included a copy of this letter in her request. The letter did not identify the titles of the enclosures. Letter from Marilyn R. Sutton to James J. Fiore, Deputy Assistant Secretary of Energy (August 12, 2005). Ms. Sutton's request was forwarded to LM for processing. Letter from Abel Lopez, Director, DOE FOIA/Privacy Act Group, to Marilyn R. Sutton (September 15, 2005). LM determined that any documents responsive to Ms. Sutton's request would be located in the "Considered Sites Database," an electronic database maintained by LM. Letter from Tony R. Carter, LM, to Marilyn R. Sutton (October 6, 2005) (Determination Letter). LM did not provide Ms. Sutton with any records; rather, LM provided Ms. Sutton with instructions for accessing and searching the specified database. *Id.*

In her appeal, Ms. Sutton questions whether LM performed a search for the requested documents prior to referring her to the database. Letter from Marilyn R. Sutton to OHA (November 3, 2005).

II.Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted LM to ascertain the scope of the search. LM informed us that it searched its electronic databases and determined that documents responsive to Ms. Sutton's request would be located in the "Considered Sites Database." LM did not conduct a search of its hardcopy, paper files. Electronic Mail Message from Sheila Dillard, LM, to Diane DeMoura, OHA, November 17, 2005. A search of this database yielded the letter mentioned by Ms. Sutton. However, since the letter did not specify the titles of the enclosures, it was impossible for Ms. Sutton to determine which, if any, of the other documents in the database were the documents she sought. After discussing this result with LM, we learned that a search of LM's hardcopy files would be necessary in order to determine which documents were the enclosures to the identified letter and whether LM had those documents. *Id.*

Accordingly, we will remand this matter to LM to perform an additional search of its paper files for the requested documents. After completing its search, LM is to provide Ms. Sutton with any responsive documents or to issue a new determination justifying the withholding of any responsive information.

It Is Therefore Ordered That:

(1) The Appeal filed on November 9, 2005 by Marilyn R. Sutton, OHA Case No. TFA-0132, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Legacy Management for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 9, 2005

April 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: November 22, 2005

Case Number: TFA-0134

Citizen Action New Mexico (Citizen Action) filed an Appeal from a determination that the National Nuclear Security Administration's Albuquerque Service Center (Service Center) issued on October 20, 2005. In that determination, the Service Center denied in part a request for information that Citizen Action had submitted on July 9, 2004, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Service Center withheld information that was responsive to Citizen Action's request after it determined that two responsive documents contained unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On July 9, 2004, Citizen Action requested the "most current and complete" inventories of hazardous waste constituents, irradiated reactor fuels, and reactor-irradiated nuclear materials which may be stored at various locations at Sandia Laboratories, Albuquerque, New Mexico. Among the documents the Service Center identified as responsive to Citizen Action's request were two documents, *Dense Pack Storage Holes Status Book* and *Monorail Storage Inventory Log,* both dated October 14, 2004. In her October 20, 2005 determination letter, the Service Center's Freedom of Information Act Officer stated that the documents contained UCNI, the disclosure of which is restricted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3 in their entirety.

The present Appeal seeks the disclosure of the two documents described above. In its Appeal, Citizen Action contends that the Service Center "has provided no explanation

whatsoever for its determination" that the documents must be withheld from disclosure. Citizen Action also points out that the FOIA process "requires agencies to review and release all 'reasonably segregable' non-exempt information from agency records" and requests appropriately redacted versions of the documents that the Service Center withheld in their entirety.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,171 (2004) (and cases cited therein). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Director of the Office of Security and Safety Performance Assurance (SSPA). Upon referral of this appeal from the Office of Hearings and Appeals, the SSPA reviewed the documents that Citizen Action requested.

According to the Deputy Director, the SSPA determined on review that, based on current DOE classification guidance, the requested documents contain UCNI. The information that the SSPA identified as UCNI could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of nuclear materials, equipment, or facilities. The SSPA also determined, however, that the majority of the documents' content is not UCNI. The Deputy Director has provided this Office with copies of the documents from which the UCNI has been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such

consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Deputy Director has now determined to be properly identified as UCNI must be withheld from disclosure. Nevertheless, the Deputy Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Director's findings, and at his suggestion, we have remanded these two documents to the Service Center for a new review, in which it must consider whether any portions of the documents that were previously identified as UCNI should now be released to Citizen Action. After completing its review, the Service Center should either release the currently redacted versions of the requested documents or issue a new determination that provides adequate justification for the withholding of any additional information from the documents it provides to Citizen Action. Citizen Action will have the opportunity to appeal that determination, if it so desires. Accordingly, Citizen Action's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Citizen Action New Mexico on November 22, 2005, Case No. TFA-0134, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration's Albuquerque Service Center shall review the redacted versions of the documents entitled *Dense Pack Storage Holes Status Book*, dated October 14, 2004, and *Monorail Storage Inventory Log*, dated October 14, 2004, bearing markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted. Upon completing its review, the National Nuclear Security Administration's Albuquerque Service Center shall either release those redacted versions in their entirety or issue a new determination that provides adequate justification for the withholding of any additional information from the copies it provides to Citizen Action New Mexico.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 24, 2006

February 24, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arlie Bryan Siebert

Date of Filing: December 20, 2005
January 9, 2006

Case Number: TFA-0137
TFA-0142

This Decision concerns two Appeals filed by Arlie Bryan Siebert from determinations issued to him by the Department of Energy's National Nuclear Safety Administration (NNSA) (TFA-0137; TFA-0142) and the Office of Security and Safety Performance Assurance (Security) (TFA-0142). These determinations were issued in response to a request for information that Mr. Siebert submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that the documents that NNSA withheld in whole or in part be released to Mr. Siebert and that Security perform a new search for responsive documents.

I. Background

In his FOIA request, Mr. Siebert requested information concerning "the name, rank, job description, promotions, promoters, punishment, level of security clearance, and retention or termination of security clearance" of DOE employees who received bogus academic degrees. Letter from Abel Lopez, DOE FOIA and Privacy Act Group, to Mr. Siebert (November 21, 2005).

In its determination, NNSA stated that it identified three NNSA employees "as receiving degrees of interest relevant to [Mr. Siebert's] inquiry," i.e., degrees from unaccredited institutions, but that it was withholding the information under Exemption 6 of the FOIA. Letter from NNSA to Mr. Siebert (November 15, 2005) (NNSA Determination Letter). NNSA stated that the relevant files were personnel files in which the individuals had a reasonable expectation of privacy. NNSA further stated that even with personal identifiers such as names, addresses and phone numbers deleted from the files, sufficient information remained so that the identities of the

individuals was ascertainable. *Id*. NNSA maintained that the public interest in disclosure did not outweigh the privacy interests of the individuals. *Id*.

The other DOE office, Security, stated that it performed a search of its files and did not locate any responsive documents. Security stated that it did not maintain records of the identities of DOE employees who may have received bogus academic degrees. Memorandum from Stephanie Grimes, Security, to Diane DeMoura, OHA (February 2, 2005).

In his Appeals, Mr. Siebert made several arguments contesting the withholding of the identities of DOE employees who received bogus academic degrees. Mr. Siebert's primary argument, made in both appeals, is that the public has an interest in knowing the identities of the employees with bogus degrees. Mr. Siebert contends that the public's interest in disclosure outweighs "the privacy of those who lied about their academic credentials and who are in sensitive positions involving national security." Letter from Mr. Siebert to OHA (December 1, 2005) (First Appeal Letter). Regarding Security's determination, Mr. Siebert contends that Security could obtain from another DOE office a list of the individuals with bogus degrees and could then search its records for responsive documents. Letter from Mr. Siebert to OHA (December 20, 2005) (Second Appeal Letter).[1]

II. Analysis

A. The NNSA Determination

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

[1] In his second appeal letter, Mr. Siebert also disputed his categorization as an "other" requester for the purpose of assessing fees for the processing of his FOIA request and requested a fee waiver. However, we have learned that Mr. Siebert had not yet been assessed any fees in connection with this request at the time of the filing of this appeal. *See* Electronic Mail Message from Joan Ogbazghi, FOIA and Privacy Act Group, to Diane DeMoura, OHA (January 13, 2006). Accordingly, this argument is not ripe for our review.

In this case, NNSA determined that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose personal information of certain individuals and potentially lead to those individuals being embarrassed, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id*.; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

In the present case, we agree that there may be a public interest in knowing whether a DOE employee has a bogus academic degree in a case where having a degree from an accredited institution was a specific condition of employment. For example, the public may have an interest in knowing whether an employee lied about an academic degree in order to secure a position with DOE or whether public funds were used to pay for that individual's education. However, we find that there is no such public interest in this case. NNSA stated that the three individuals who had degrees from unaccredited institutions did not have to meet an educational requirement as a condition of employment; each employee was hired based on their past work experience. NNSA Determination Letter. Accordingly, the release of the personnel information in question would reveal little, if anything, to the public about the workings of the government and could subject the individuals to considerable embarrassment or harassment. Therefore, after weighing the significant privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities and other personal information of the federal employees relevant to Mr. Siebert's request could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979).

In this case, the documents in question, standard personnel forms, consist mainly of exempt individual-specific information. However, in discussing this appeal with NNSA, we learned that the documents also contain some information that could be released without compromising the privacy interests identified above. Accordingly, we shall remand this matter to NNSA. On remand, NNSA must review the document and segregate and release any non-exempt

information, or issue a new determination that justifies withholding the factual portions of the document.

B. The Security Determination

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003). However, the FOIA does not require an agency to create new documents in response to an FOIA request, but merely requires the agency provide documents already in its possession. *See, e.g., Quanterra Environmental Services*, 25 DOE ¶ 80,138 (1995).

In reviewing this case, we contacted Security to discuss the initial search. Security informed us that it undertook a search of its records but that "there were no indices available to determine identities of DOE employees who may have received bogus academic degrees." Memorandum from Stephanie Grimes, Security, to Diane DeMoura, OHA (February 2, 2006). Security did not, nor does the FOIA require it to, obtain information from another DOE office in order to create a new record which would be responsive to Mr. Siebert's request. Accordingly, we find that Security performed a search that was reasonably calculated to reveal responsive records and was, therefore, adequate.

III. Conclusion

For the reasons stated above, we have determined that NNSA properly applied Exemption 6 of the FOIA in withholding information from Mr. Siebert. However, the withheld documents may contain some factual information which is reasonably segregable from the exempt portions of the documents. We have also determined that Security conducted an adequate search for responsive records. Therefore, Mr. Siebert's appeals should be granted in part and denied in part.

This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Decision and Order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeals filed on December 20, 2005 (TFA-0137) and January 9, 2006 (TFA-0142), by Arlie Bryan Siebert, are hereby granted as set forth in paragraph (2) below, and are in all other respects denied.

(2) This matter is hereby remanded to the National Nuclear Security Administration for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 24, 2006

January 9, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Bowers

Date of Filing: December 13, 2005

Case Number: TFA-0138

On December 13, 2005, Glen Bowers completed the filing an Appeal from a determination issued to him on November 16, 2005, by the Manager of the Department of Energy's Rocky Flats Project Office. This determination responded to a request for documents that Mr. Bowers submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to perform an additional search for responsive material.

I. Background

Mr. Bowers filed a request by electronic mail under the FOIA for a copy of "The Dow Corral Sub Title: The Rocky Flats Plant Crossroads: The Paper September 12, 1959." He explained in his request that the edition he sought contained a photograph and text about his father, John Bowers. By letter dated August 9, 2005, the director of the DOE's Headquarters FOIA Office informed Mr. Bowers that his request was being forwarded to the Rocky Flats Project Office, because any document responsive to his request, if it existed, would fall under the jurisdiction of that office. Rocky Flats searched for a copy of that edition of the *Dow Corral* but was unable to locate the requested document. In a November 16, 2005 determination letter sent to Mr. Bowers, the Manager of Rocky Flats informed Mr. Bowers that the only September 1959 editions of the *Dow Corral* that Rocky Flats located in its microfilm records were those dated September 4 and September 18. The Manager further stated that neither of those editions contained any mention of Mr. Bowers's father. In his Appeal, Mr. Bowers challenges the adequacy of the search, primarily on the grounds that Rocky Flats did not search for or review paper copies of the *Dow Corral*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State,* 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require

absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted Rocky Flats to ascertain the adequacy of the search. A search of the historical records of the Rocky Flats facility yielded the following information concerning the *Dow Corral*. The *Dow Corral* was an employee newsletter that appears to have been published on a biweekly basis. Microfilm records included editions published on September 4, 1959, and September 18, 1959. No records were found of any other editions of the *Dow Corral* published in September 1959. Furthermore, microfilm is the only medium on which Rocky Flats has any records of the *Dow Corral*. Paper copies of the *Dow Corral* were maintained at some point in the past, but were long ago donated to the Rocky Flats Cold War Museum, an entity completely independent of the DOE and its contractors at Rocky Flats. *See* Memorandum of Telephone Conversation between Andrea Wilson, Kaiser-Hill Records Division, and William Schwartz, Office of Hearings and Appeals (December 8, 2005). After reviewing the record in this case, we find that Rocky Flats conducted a search that was reasonably calculated to uncover the requested information. [*] Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Glen Bowers on December 13, 2005, OHA Case Number TFA-0138, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 9, 2006

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[*] In his Appeal, Mr. Bowers raises a number of questions that fall outside the scope of this decision. We will address two of them, however. Mr. Bowers asks whether Dow Chemical, a former contractor at Rocky Flats, might have copies of the *Dow Corral*. We do not know whether Dow Chemical has such records, but suggest that Mr. Bowers raise that question directly with Dow Chemical. Mr. Bowers also asks how he might obtain copies of the September 4, 1959 and September 18, 1959 editions of the *Dow Corral*. Although the proper method for requesting this information would entail submitting a new FOIA request, we have spoken to the Rocky Flats office about this new request, and they have informed us that they will, upon receipt of this Decision and Order, mail copies of those two editions to Mr. Bowers.

February 14, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nancy Mae Gminski

Date of Filing: January 3, 2006

Case Number: TFA-0139

On January 3, 2006, Nancy Mae Gminski (the Appellant), filed an Appeal from a final determination that the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE) issued on December 1, 2005. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Oak Ridge would be required to conduct a further search for responsive documents.

Background

On July 10, 2004, the Appellant submitted a FOIA request. On August 8, 2005, the initial request was narrowed to all "records on [the Appellant's] father, Arthur Gminski, from 1940 to 1970 and his association with human radiation experiments, the nuclear airplane, Pratt and Whitney, H.E. Dickerman, Chapman Valve, the Atomic Energy Commission, any list of medals on which his name appears, and documents of a scientific and technical nature, including but not limited to any blueprints or drawings bearing his name or the company H.E. Dickerman." Determination Letter dated December 1, 2005, from Amy Rothrock, Oak Ridge, DOE, to the Appellant. On December 1, 2005, Oak Ridge responded that the search of the files and facilities of Oak Ridge yielded no records relating to Mr. Gminski. *Id.*

On January 3, 2006, the Appellant appealed that determination to our Office. Appeal Letter received January 3, 2006 from Nancy Mae Gminski to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant argues that the search was conducted using an incorrect spelling of Mr. Gminski's name. Further, the Appellant asks why the request took one year to be referred to Oak Ridge. Moreover, she states that she specifically asked not to be referred to the National Archives because she had already contacted it regarding different information. Finally, the Appellant claims that Department of Defense records must be searched. *Id*.

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v.*

Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, 29 DOE ¶ _____ (Case No. TFA-0138) (January 9, 2006); *Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

We contacted Oak Ridge to determine what type of search was conducted. Oak Ridge indicated that the search was conducted using the correct spelling of Mr. Gminski's name[1] and/or his social security number. The Appellant provided a copy of Mr. Gminski's death certificate, which was then provided to the records custodians to perform the search. The searches were conducted both by hand and electronically in the DOE Archives where some personnel security clearance assurance index cards and film badge readings on former workers of some atomic weapons employers are stored. Oak Ridge indicated that it does not have any records on Chapman Valve employees. Oak Ridge also searched the Oak Ridge Associated Universities file for records on radiation accidents or incidents Mr. Gminski might have been involved in during his employment. No records were located.

Oak Ridge conducted a further search of the DOE Archives legacy files where some Chapman Valve historical declassified documents are stored. All five site offices associated with Oak Ridge were searched based on the information the Appellant provided. The site offices looked for lists of Atomic Energy Commission (AEC) employees, and for anything about medals, H.E. Dickerman, blueprints or other documents with the name Gminski. The site offices were provided copies of the Appellant's original request, with the name correctly spelled. Some sites were searched electronically and some by hand. No records were located.

As stated above, the Appellant had asked not to be referred to the National Archives and Records Administration (NARA) because she had already contacted it regarding selective service deferment ledgers for Mr. Gminski. Oak Ridge did, however, refer the Appellant to NARA not so the deferment ledgers could be searched, but because the Appellant indicated that Mr. Gminski might have been an AEC employee. The records of former federal AEC employees are stored at NARA in St. Louis. The Appellant also requested that Department of Defense records be searched. Oak Ridge did provide contact information for the DOD, so that the Appellant could make a similar request at

[1] Oak Ridge indicated that in an email sent to the Appellant, Mr. Gminski's name was misspelled, leading to the Appellant's concern. The people performing the searches used the original FOIA request to conduct the search. Electronic Mail Message from Amy Rothrock to Janet R.H. Fishman, OHA, DOE, January 19, 2006.

DOD. The FOIA only requires DOE to search its own files, not files of other agencies. The Appellant must file a separate request with DOD for information regarding Mr. Gminski. Finally, the Appellant asked why it took one year for her request to be referred to Oak Ridge. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978). In this instance, the DOE has no documents that contain information responsive to that question.

Based on the search that the Oak Ridge performed, we are convinced that it followed procedures which were reasonably calculated to uncover the material sought by the Appellant in her request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Nancy Mae Gminski, on January 3, 2006, Case No. TFA-0139, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 14, 2006

February 10, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nick Piepmeier

Date of Filing: January 3, 2006

Case Number: TFA-0140

On January 3, 2006, Nick Piepmeier filed an appeal from a determination issued to him on November 30, 2005 by the Department of Energy's (DOE) Golden Field Office (GO). In that determination, GO responded to a request for documents that Mr. Piepmeier submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. GO identified several documents responsive to Mr. Piepmeier's request. Some of those documents were released in their entirety, others were released with some deletions, and others were withheld in their entirety pursuant to Exemptions 5 and 6 of the FOIA. This appeal, if granted, would require GO to release the withheld information to Mr. Piepmeier.

I. Background

Mr. Piepmeier requested several records regarding his deceased father, a former DOE employee. Specifically, Mr. Piepmeier requested "documents relating to James M. Piepmeier's work, time logs, and medical/mental conditions during his posting to Baghdad January-February 2004 and subsequent return home," *See* Fax Submission from Mr. Piepmeier to Anna Martinez-Barnish, GO (August 7, 2005). On November 30, 2005, GO issued a determination in response to Mr. Piepmeier's request. *See* Letter from GO to Mr. Piepmeier (November 30, 2005) (Determination Letter). GO identified several documents responsive to Mr. Piepmeier's request. Of those responsive documents, 14 pages were released in their entirety, 60 pages were partially withheld pursuant to Exemption 6, and 112 pages were withheld in their entirety pursuant to Exemption 5. Determination Letter at 2. GO stated that the information withheld under Exemption 6 consisted of "individual names listed in the documents who are not key personnel." Determination Letter at 1. GO added that the documents withheld under Exemption 5 were "documents containing legal advice and decision-making regarding Mr. [James] Piepmeier's Federal employment." *Id.* at 2.

Mr. Piepmeier filed the present appeal on January 3, 2006. Letter from Mr. Piepmeier to OHA (December 28, 2005) (Appeal). In his appeal, Mr. Piepmeier argues that he is entitled to all records pertaining to his father.[1]

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The documents in question are various emails and correspondence among Human Resources personnel, supervisors, and legal counsel regarding the decision whether to terminate an employee. They contain, *inter alia*, opinions and concerns raised by various parties in meetings, discussions of decision-making procedures, and recommendations. After reviewing the

[1] The appeal contains two additional arguments. First, Mr. Piepmeier argues that there was a delay in GO's processing of his initial FOIA request. He appears to make this argument to mitigate the fact that his appeal was filed with OHA after the statutory deadline for filing lapsed. However, since OHA considers this appeal timely filed, we need not address the timeliness of GO's response. Second, Mr. Piepmeier argued that he did not understand why any part of his request was denied since he had been told that he was entitled under the Privacy Act to all records involving his deceased father. This assertion is incorrect. Privacy Act rights are personal to the individual who is the subject of the records and cannot be asserted derivatively by others. *See Shulman v. Sec'y of HHS*, No. 94 Civ. 5506, 1997 WL 68554, at **1, 3 (S.D.N.Y. Feb. 19, 1997) (Plaintiff had no standing to assert any right that might have belonged to former spouse), *aff'd*, No. 96-6140 (2d Cir. Sept. 3, 1997); *Sirmans v. Caldera*, 27 F. Supp. 2d 248, 250 (D.D.C. 1998) (plaintiffs may not object to Army's failure to correct records of other officers). Neither deceased individuals nor their executors or next-of-kin enjoy any rights under the Privacy Act. *Crumpton v. U.S.*, 843 F. Supp. 751, 756 (D.D.C. 1994) (Widow of deceased Army officer had no rights under Privacy Act because officer was dead and records were contained within systems of records retrievable by name of deceased officer or by some identifying number, symbol or other data assigned to the officer alone); *Monk v. Teeter*, 1992 WL 1681, at *2 (9th Cir. Jan. 8, 1992) ("The right to privacy does not survive one's death.").

documents, we find that they are predecisional and contain material that reflects DOE's deliberative process and are, therefore, exempt from disclosure under Exemption 5 of the FOIA.

The fact that requested information falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "to the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, we do not believe the release of the predecisional information, consisting primarily of opinions and recommendations regarding the employment status of one individual, would be in the public interest. Furthermore, release of such information could have a chilling effect on the agency's ability to obtain straightforward opinions and recommendations in the future.

Exemption 6

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

In this case, GO found that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose the identity of certain individuals. Releasing the names of the individuals, subordinates who were sharing their opinions or concerns with or making recommendations to their superiors, could allow a third party to connect the individual with a particular opinion or action raised or undertaken in conjunction with their work. This could, in turn, lead to those individuals being intimidated, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the

public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id*.; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Upon reviewing the documents in question, we find that there is little, if anything, the public would learn about the workings of the government from the release of the withheld names and identifying information. Consequently, the public interest in such information is minimal at best. Therefore, after weighing the identified privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities of federal employees could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that GO complied with the FOIA by releasing to Mr. Piepmeier all factual, non-deliberative portions of the documents.

III. Conclusion

For the reasons stated above, we have determined that GO properly applied Exemptions 5 and 6 of the FOIA in releasing information to Mr. Piepmeier. Therefore, Mr. Piepmeier's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 3, 2006, by Nick Piepmeier, OHA Case No. TFA-0140, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 10, 2006

August 3, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Washington Electric Cooperative/Downs Rachlin Martin PLLC
Date of Filing:	January 5, 2006
Case Number:	TFA-0141

On January 5, 2006, Downs Rachlin Martin PLLC (Downs) filed an Appeal from a determination issued to it by the Department of Energy's National Energy Technology Laboratory (NETL). In that determination, NETL released some documents in response to a request for information that Downs filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NETL to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

Washington Electric Cooperative (WEC) is a consumer-owned, not for profit utility in Vermont. WEC received a grant from DOE to assess the general feasibility of developing a utility scale wind generation project in Vermont ("the UPC project").[1] On July 25, 2005, Downs, a Vermont law firm, submitted a FOIA request to DOE for copies of "any and all documents in DOE's possession related to the NEPA analysis, use of funds by Washington Electric Cooperative (WEC) for the UPC (wind management) project and any correspondence between DOE and WEC and/or UPC regarding site clearing and construction at the Sheffield site prior to a final NEPA decision . . . ." Letter from NETL to Downs, November 15, 2005 (Determination Letter). NETL searched and found several responsive documents. Some documents were returned to the submitter of the information for its review and opinion concerning releasability under FOIA. NETL released two documents, the

1 UPC Vermont Wind, LLC is a consulting firm.

cooperative agreement and Modification 1, in their entirety. NETL also released copies of all documents in its possession with regard to the NEPA determination. However, some of the NEPA documents were redacted pursuant to FOIA Exemption 5, which protects the decision-making processes of government agencies and attorney work product. NETL also redacted some documents under Exemption 4, which protects trade secrets and commercial or financial information. NETL stated that it would charge Downs $200 for fees for the search and duplication of responsive documents in the determination.

In the Appeal, Downs argues that the material withheld under Exemption 4 seems to be standard expense reports that could shed light on the project, not privileged commercial information. Downs further contends that the material withheld under Exemption 5 seems to be routine correspondence that specifically describes how the project is to proceed and the justification for a no-cost time extension. Downs also requested a waiver of charges because only 70 pages were provided, "far below the 100 pages usually offered to a requestor for free." Downs finally argues that the responsive material will enable Downs to improve the public understanding of the DOE's grant-making activities and thus is in the public interest and will not be used for commercial purposes.

II. Analysis

A. Exemption 4

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Thus, in order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial or financial, obtained from a person and privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770. Information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

1. Confidential Material

Information submitted in a procurement process is considered submitted involuntarily, and thus the *National Parks* test applies in this case. *Glen M. Jameson*, 26 DOE ¶ 80,236 (1997). In response to this Appeal, NETL provided us with unredacted and redacted copies of the responsive material, along with detailed comments explaining their withholding. *See* NETL Comments (March 17, 2006). We have reviewed the material withheld under this exemption and find that the deleted information was properly withheld under the *National Parks* test. First, the information withheld was clearly commercial information. The withheld material referred to costs and plans for the UPC

project, along with marketing strategies and personnel information. Second, the information was obtained from WEC, a corporation. We have previously found that corporations are deemed "persons" for purposes of Exemption 4. *See Myers Bigel Sibley & Sajovec*, 27 DOE ¶ 80,225 (1999). Third, the exempt material is confidential. After reviewing the unredacted documents, we find that the six documents were properly considered confidential for purposes of Exemption 4 because their disclosure is likely to cause substantial harm to the competitive position of two corporations, WEC and UPC, if released. For instance, the type of information withheld (e.g., project cost and expenses, business strategy, discussions with potential teaming partners), if released, would provide competitors of WEC and UPC with information that could be used to gain unfair advantage against the two firms in future procurements.

If an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm to a person, it must state the reason for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Southern California Edison*, 28 DOE ¶ 80,177 (2001). In its determination, NETL described the six documents redacted under Exemption 4 and then stated:

> These documents contain information concerning business investments: total and itemized investments in planning, regulatory review and studies; vendors used to perform work; information about negotiations and business strategy; and strategic business planning and regulatory analysis.

Determination Letter at 2. NETL then listed a description of each type of information withheld (e.g. description of commercialization strategy, labor hour estimates, specific results of market research, proprietary product performance information) and instructions on how to appeal the determination. *Id.*

After examining unredacted copies of the six documents that were withheld under Exemption 4 as confidential, we find that NETL properly withheld the redacted information in the material released to Downs. [2] As stated above, project expenses and information concerning the submitter's business strategy were properly withheld under Exemption 4. NETL has adequately justified its reason for the withholdings and meets the requirements set forth above in *Larson.* Accordingly, we shall deny this portion of the Appeal.

2. Privileged Material

In its determination, NETL also added that Item 3, one of the six documents mentioned above, "contains information concerning WEC's legal counsel's work product and attorney-client communications which would also be protected by Exemption 5's attorney work product and attorney-client privileges." Determination Letter at 2. Item 3 is a fax cover sheet and portion of a memo from UPC's attorney to UPC. The express language of Exemption 4 and the legislative

2 We also note that NETL has properly released reasonably segregable portions of the documents to Downs pursuant to 5 U.S.C. § 552(b).

history of the FOIA provide that information submitted to the government that would normally be privileged can be withheld under Exemption 4. *See Sharyland Supply Corp. v. Block*, 755 F.2d 397, 399-400 (5th Cir. 1985); *Washington Post Co. v. Department of Health and Human Services*, 795 F.2d 205 (D.C. Cir. 1986); *Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144 (D.D.C. 1979) (withholding attorney-client privileged information under Exemption 4). The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *California Edison*, 28 DOE ¶ 80,173 (2001). *See also Charles Varnadore*, 24 DOE ¶ 80,123 (1994). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254 n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id.* at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S.Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665.

We examined Item 3, a fax cover sheet with an excerpt from a memo prepared by UPC's attorney. Item 3 specifically addresses a question for which UPC has requested a written legal opinion. This document reflects the transmission of legal advice from attorney to client. *See Miller, Anderson, Nash, Yerke & Wiener v. United States Department of Energy*, 499 F. Supp. 767, 771 (D. Or. 1980) (upholding attorney-client privilege of legal memorandum prepared for a utility company by its attorney). It is not a social, informational or procedural communication between the attorney and his client. Thus, we find that Item 3 is protected by the attorney-client privilege, and was properly withheld under Exemption 4. [3]

B. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856

3 We disagree with NETL's conclusion that Item 3 is also protected by the attorney work product privilege. This privilege does not extend to every written document generated by an attorney--it is limited to documents that reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). There is no evidence in the record that this document was prepared for trial or in anticipation of litigation. *See Charles Varnadore*, 24 DOE ¶ 80,123 at 80,556 (1994).

(D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters. Downs has appealed NETL's use of the deliberative process privilege on the argument that the withheld materials appear to be "rather routine correspondences that specifically describe how the project is to proceed and the justification for a no-cost time extension." Appeal at 1. This office has conducted a *de novo* review of the documents at issue, and we conclude that the records contain material that is clearly pre-decisional and deliberative. The withheld documents set forth the opinions of employees who appear to be team members on the UPC project. The messages contain communications regarding strategy and problem solving on the project. [4]

C. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). NETL withheld six documents (five electronic mail messages and one memorandum) under Exemption 5 in their entirety but did not address the issue of segregability in the determination. This office reviewed a sample of the material that was withheld in its entirety, and based on our review, we find that NETL should reconsider the issue of segregability as regards several of the electronic mail messages withheld under Exemption 5. For example, our review of the six documents found that the electronic mail message dated January 20, 2005 between NETL and EE contains no segregable material. However, our review concluded that the remaining documents contain one or two sentences per message that could be released to the requester without revealing the deliberative process surrounding the UPC Project. *See Radioactive Waste Management Associates*, 28 DOE at 80,620. *Mead* states that non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead*, 566 F.2d at 261. Thus, even though there is a minimal amount of non-exempt material, only five documents are involved and segregation of that material should not pose an undue burden for NETL. Accordingly, this portion of the Appeal is remanded to NETL.

D. Fee Waiver Request

DOE charged Downs $200 for the 70 pages of responsive material it sent to Downs. In the Appeal, Downs requested that DOE waive the $200 charged for search and duplication of the material because, according to Downs, "the number of copies provided (70) is substantially under the number usually provided without charge (100) and . . . the information is in the public interest . . . ." Appeal

4 We note that NETL has provided an adequate description of the withheld documents. Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The NETL determination letter contained a description of the document, date, author and recipient. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000).

at 1. Downs went on to say that the responsive material will contribute significantly to the public understanding of DOE's "grant-making activities" and will not be used commercially. *Id.* at 2. NETL responded that this request should be denied because Downs has not supplied information to substantiate its waiver request.

DOE regulations state that OHA may rule on a fee waiver only after the FOIA officer has denied the requester such a waiver. 10 C.F.R. § 1004.8 (a). NETL has not denied Downs' request for a fee waiver because NETL never received such a request. Therefore, we have no jurisdiction over this portion of the Appeal. [5]

It Is Therefore Ordered That:

(1) The Appeal filed by Downs Rachlin on January 5, 2006, OHA Case No. TFA-0141, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 3, 2006

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5 We further note that an appellant may not expand the scope of a request on appeal. *See F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992).

February 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: State of Nevada

Date of Filing: January 26, 2006

Case Number: TFA-0144

On January 26, 2006, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on December 28, 2005 by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination identified two documents as responsive to this request. ORD withheld both documents under FOIA Exemption 5. This Appeal, if granted, would require ORD to release both documents to the Appellant.

I. BACKGROUND

On November 28, 2005, the Appellant filed a Request for Information with ORD seeking two documents: "the draft License Application submitted to DOE by its contractor, Bechtel-SAIC Company, LLC, on July 26, 2004," and "the September 2004 iteration of the draft License Application." Appeal at 2. On December 28, 2005, ORD issued a determination letter (the Determination Letter) withholding both documents, in their entirety, under FOIA Exemption 5's deliberative process, attorney work product, and attorney-client privileges.[1] The ORD also asserted a fourth privilege which it has identified as "the litigation work product privilege."[2]

[1] The Determination Letter provides no justification for ORD's withholding of information under the attorney-client privilege. However, since the Appeal does not address ORD's withholdings under the attorney-client privilege, we need not address this issue.

[2] While ORD asserts that the litigation work product privilege and the attorney work product privilege constitute separate and distinct privileges, we find no support for this contention in the case law or statutes. While the Nuclear Regulatory Commission's regulations provide for a litigation work product privilege, that privilege is unavailable under the FOIA. The Supreme Court has held repeatedly that Exemption 5 exempts "those documents, and *only* those documents, normally privileged in the *civil* discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis supplied); *see FTC v. Grolier Inc.* 462 U.S. 19, 26 (1983).

On January 27, 2006, the Appellant submitted the present Appeal challenging ORD's withholding determinations under Exemption 5. Specifically, the Appellant contends that:

1. information contained in the withheld documents cannot be withheld under the litigation work product exemption,
2. the description of the withheld documents contained in the Determination Letter is inadequate,
3. ORD failed to segregate information properly withheld under the deliberative process privilege from factual information which cannot be withheld under the deliberative process privilege, and
4. ORD failed to weigh the public interest in disclosure against the harm that may result from disclosure.

Appeal at 3-4.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United*

States v. Weber Aircraft Corp., 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

The Deliberative Process Privilege

It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath*, 121 S. Ct. at 1065. The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. *See EPA v. Mink*, 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft,* 465 U.S. at 802.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, i.e. generated before the adoption of agency policy, and *deliberative*, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* The documents in question, being drafts, are generally pre-decisional and deliberative in nature and the Appeal does not contest this point. However, as the Appellant correctly contends, the deliberative process privilege only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the documents at issue in the present case, we find that the very nature of the draft license applications withheld by ORD under Exemption 5 suggests that significant portions of these documents are clearly factual. In most cases, we would remand this matter to ORD for a segregation analysis. However, in the present case we have found, as the ensuing section will elaborate, that both drafts may be withheld in their entirety under the attorney work product privilege. Therefore, requiring ORD to conduct a segregation analysis would result in a waste of administrative resources on a matter mooted by our holdings on the attorney work product privilege.

The Attorney Work-Product Privilege

The attorney work product privilege is among those privileges incorporated by the courts under Exemption 5. *Coastal States*, 617 F.2d at 862.

The attorney work product privilege protects from disclosure documents which reveal “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3); *see also*

Hickman v. Taylor, 329 U.S. 495, 511 (1947). The work product privilege, which is codified at Fed.R. Civ.P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g.*, *Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation, if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to civil proceedings, but rather extends to administrative proceedings. *See e.g., Martin v. Office of Special Counsel,* 819 F.2d 1181, 1187 (D.C. Cir. 1987); *Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

Turning to the present Appeal, it is clear that the Draft License Applications are protected by the attorney work product privilege. The Draft License Applications are preliminary drafts of a document which, once officially issued in final form, begins an adversarial and mandatory administrative litigation proceeding.

Under the Nuclear Waste Policy Act of 1992 § 114(b), DOE is required to apply to the Nuclear Regulatory Commission (NRC) for a license to construct and operate the Yucca Mountain Geological Waste Repository. 42 U.S.C. § 10101. Under the NRC's regulations, DOE's application for this license commences a mandatory and adversarial administrative litigation proceeding. 10 C.F.R. §§ 2.101(f), 2.104(a). Since the License Application is the operative document that triggers this administrative litigation, it is analogous to the complaint in a civil proceeding.

Accordingly, it is clear that the License Application is being prepared in anticipation of this litigation proceeding. The ORD is obviously in the process of preparing a License Application *because of* its desire to commence the NRC's administrative litigation process.

Release of the Draft License Applications would result in the exact type of harm that the attorney work product privilege is intended to prevent. If draft pleadings were released, opposing parties would be provided with the mental impressions, conclusions, opinions, legal strategies or legal theories being considered by DOE for use in the upcoming administrative litigation proceedings before the NRC.

Accordingly, we find that ORD properly withheld the Draft License Applications under Exemption 5's attorney work product privilege.

Adequacy of the Determination

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

The Appeal contends that the withheld documents were inadequately described. We have consistently held that determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). In the present case, the descriptions of the documents provided in the Determination Letter clearly meet each of these three requirements and therefore provide an adequate description of the withheld documents.

Public Interest in Disclosure

10 C.F.R., § 1004.1 mandates that "the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." The Appellant contends that release of the withheld information would be in the public interest. We disagree. The chilling of the deliberative process and the compromise of the DOE's ability to defend the public's interests in the administrative litigation proceedings before the NRC that would result from release of the withheld information, as we have discussed above, would not further the public interest. Nor would release of mere drafts, as opposed to information reflecting actual governmental decisions and reasoning, shed any useful light on the operations and activities of the Government.

III. CONCLUSION

For the reasons stated above, we have found that the information withheld under Exemption 5 by the Office of Repository Development was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0144, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial

review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 24, 2006

September 21, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arlie B. Siebert

Date of Filing: January 27, 2006

Case Number: TFA-0146

Arlie B. Siebert filed an Appeal from a determination that the Office of Intelligence of the Department of Energy issued on December 14, 2005. In that determination, the Office of Intelligence responded to a request for information that Mr. Siebert submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by neither confirming nor denying the existence of the records Mr. Siebert sought. This Appeal, if granted, would require the DOE to identify any document responsive to Mr. Siebert's request and release all non-exempt information to him.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The appropriateness of the type of response that the Office of Intelligence provided to Mr. Siebert has been addressed by the Federal courts. In this Decision we review the nature of the response and reach a determination that the response was proper.

I. Background

In his request dated April 27, 2004, Mr. Siebert asked the DOE for "all documents of any kind relating to the Israeli Nuclear Weapons Program." The request was forwarded to the Office of Intelligence for action. In its December 14, 2005 response, the Office of Intelligence stated that "the Department can neither confirm nor deny the existence of information on the requested subject. Such confirmation or denial of records at issue would pose a threat to national security . . . [and] could cause diplomatic tension between Israel and the United States." It stated that its response was based on Exemption 1 of the FOIA.[*] The present Appeal seeks the disclosure of responsive information. Mr. Siebert points out in his Appeal that if responsive documents contain classified information that may properly be withheld under an exemption of the FOIA, that information should be redacted from the

[*] The response also referred to Exemption 3 of the FOIA. We do not address Exemption 3 in this determination, because we have determined that the appropriate response regarding all information Mr. Siebert seeks in his request is to neither confirm nor deny its existence under Exemption 1.

documents and the remainder provided to him.

II. Analysis

Although the Department rarely responds to requests for information in this manner, the Office of Intelligence's statement that it will neither confirm nor deny the existence of records responsive to Mr. Siebert's request is not without precedent. *See, e.g., A. Victorian,* 25 DOE ¶ 80,188 (1996). This type of response is commonly called a *Glomar* response, which refers to the first instance in which the adequacy of such a response was upheld by a Federal Court. In *Phillippi v. CIA,* the agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents. *Phillippi v. CIA,* 546 F.2d 1009 (D.C. Cir. 1976). Agencies have typically used this response where the existence or non-existence of requested documents is itself a classified fact exempt from disclosure under Exemptions 1 and 3 of the FOIA, *see, e.g., id.* at 1012, or where admission that documents exist would indicate that the agency was involved in a certain issue, *Gardels v. CIA,* 689 F.2d 1100 (D.C. Cir. 1982), or that an individual is the target of investigation or surveillance, *Marrera v. Department of Justice,* 622 F. Supp. 51 (D.D.C. 1985).

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Director of the Office of Security and Safety Performance Assurance (Deputy Director). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the Office of Intelligence's response to Mr. Siebert's request for information. Based on the Deputy Director's review, we have determined that Executive Order 12958 requires the DOE to continue to neither confirm nor deny the existence of information responsive to Mr. Siebert's request. The denying official for the DOE's response on appeal is Mr. Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Although a finding of exemption from mandatory disclosure generally requires our

subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Mr. Siebert has raised additional arguments in his Appeal in support of the search for and release of responsive documents that he maintains must exist. By affirming the Office of Intelligence's *Glomar* response, we need not address these arguments, because we are not acknowledging the existence of any such documents. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Arlie B. Siebert on January 27, 2006, Case No. TFA-0146, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 21, 2006

March 10, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marilyn R. Sutton

Date of Filing: January 30, 2006

Case Number: TFA-0147

On January 30, 2006, Marilyn R. Sutton filed an appeal from a determination issued to her on January 5, 2006 by the Department of Energy's (DOE) Office of Legacy Management (LM). In that determination, LM responded to a request for documents that Ms. Sutton submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LM stated that, since it had no way of identifying the requested documents, it was unable to locate the documents and provide Ms. Sutton with the requested information. This appeal, if granted, would require LM to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On August 12, 2005, Ms. Sutton filed a request for eleven enclosures contained in a letter from Mr. James J. Fiore, Deputy Assistant Secretary of Energy, to Mr. William R. Augustine, Deputy Chief Programs Management Division, U.S. Army Corps of Engineers, dated October 19, 1999. The letter did not identify the enclosures by name. Letter from Marilyn R. Sutton to James J. Fiore, Deputy Assistant Secretary of Energy (August 12, 2005). LM issued a determination which directed Ms. Sutton to the "Considered Sites Database," an electronic database maintained by LM. Letter from Tony R. Carter, LM, to Marilyn R. Sutton (October 6, 2005) (First Determination Letter). LM determined that any information relevant to Ms. Sutton's request was contained in the database. LM did not provide Ms. Sutton with any documents; rather, the determination included instructions for accessing and searching the database. *Id*. Ms. Sutton appealed that determination stating that, although the letter she referenced in her request was available in the database, the documents she requested were not available. In processing that appeal, we learned that since the letter did not identify the titles of the requested enclosures, a search of LM's paper files was necessary to attempt to identify and locate the documents.

Accordingly, we remanded the matter to LM and directed that LM perform a search of its paper files. *See Marilyn R. Sutton*, Case No. TFA-0132 (December 9, 2005).

On January 5, 2006, LM issued a determination stating that a search of its paper files yielded no new information. Consequently, LM was again unable to identify the requested documents. LM restated that any information possibly relevant to Ms. Sutton's request was contained in the "Considered Sites Database." Letter from Tony R. Carter, LM, to Marilyn R. Sutton (January 5, 2006) (Second Determination Letter).

In the instant appeal, Ms. Sutton challenges LM's second determination letter. Ms. Sutton maintains that it is LM's responsibility to identify and provide her with the responsive records. Letter from Marilyn R. Sutton to OHA (January 21, 2006).

II. Analysis

It is well established that, in responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted LM to discuss the search for the requested records. LM informed us that it conducted a search of its paper files but was unable to locate the requested records. LM informed us that, because the letter referenced in Ms. Sutton's initial request did not identify the enclosures by name, it was impossible to identify those documents. *See* Memorandum of Telephone Conversation between Sheila Dillard, LM, and Diane DeMoura, OHA (February 6, 2006). According to LM,

> [The] search consisted of a manual review of record indexes and electronic queries of metadata in the [LM] records management system. The search consisted of all active and inactive record holdings on site and in the custody of LM in Federal Records Centers. Records personnel also queried the DOE Office of Environmental Management FUSRAP Considered Sites Database. The subject letter was found in the FUSRAP collection, but the attached list of enclosures was not present. Each document in the site collection, which is approximately [one] cubic foot in volume, was also thoroughly reviewed.

See Electronic Mail Message from Sheila Dillard to Diane DeMoura (February 27, 2006). Additionally, LM located and contacted Mr. Fiore, the original author of the letter, but his staff was also unsuccessful in locating the requested enclosures. *See* Electronic Mail Message from Sheila Dillard to Diane DeMoura (February 6, 2006).

Based on this information, we find that, despite being unsuccessful in identifying the requested documents, LM's search was extensive and reasonably calculated to reveal records responsive to Ms. Sutton's request and was, therefore, adequate. *See, e.g., National Security Archive*, 29 DOE ¶ 80,105 (2004). Accordingly, this appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 30, 2006 by Marilyn R. Sutton, OHA Case No. TFA-0147, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 10, 2006

March 16, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ed Aguilar
Date of Filing:	February 10, 2006
Case Number:	TFA-0148

This Decision concerns an Appeal that was filed by the Mr. Ed Aguilar from a determination issued to him by the Richland Operations Office (Richland) of the Department of Energy (DOE). In that determination, Richland denied a request for a document that Mr. Aguilar submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004, and the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In his Appeal, he seeks the release of the requested document.

In his FOIA/PA request, Mr. Aguilar sought access to "the complete CH2M Hill Hanford Group (CHG) sexual harassment report done by investigator Ms. Rebecca Dean." Appeal at 1. In its determination, Richland stated that under CHG's contract with the DOE, all employment-related records, including those of employee-related investigations, are the property of CHG and are therefore not subject to the FOIA or the PA. Richland therefore denied the request. In his Appeal, Mr. Aguilar contests this determination.

The FOIA generally requires that documents held by federal agencies be released to the public on request. The Act does not, however, specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *See also William H. Payne,* 27 DOE ¶ 80,125 (1998). Under the FOIA, "agency" means any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f).

The PA generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by

some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The PA adopts the FOIA definition of "agency" set forth in the preceding paragraph. 5 U.S.C. § 552a(a)(1).

During the course of our consideration of this Appeal, we contacted Richland for further information. We were informed that no document such as that requested by Mr. Aguilar was created by the DOE or has been in the possession or control of the DOE. Moreover, Mr. Aguilar does not contend, nor do we find, that CHG, a privately-owned and operated DOE contractor, is an "agency." Consequently, the document requested by Mr. Aguilar would not be an agency record for purposes of the FOIA or part of an agency system of records for purposes of the PA.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). We have examined the CHG contract. Under section I.109 of that agreement, employment-related records, such as "workers' compensation files, employee relations records, records on salary and employee benefits, drug testing records, labor negotiation records, records on ethics, employee concerns, and other employee-related investigations conducted under an expectation of confidentiality" are the property of the contractor. Therefore, records of investigations such as that requested by Mr. Aguilar are the property of CHG, and are not subject to release under the PA, the FOIA, or the DOE's records regulation. We will therefore deny Mr. Aguilar's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. Ed Aguilar, OHA Case Number TFA-0148, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 5 U.S.C. § 552a(g)(1) (PA). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 16, 2006

March 14, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	State of Nevada
Date of Filing:	February 14, 2006
Case Number:	TFA-0149

On February 14, 2006, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on January 30, 2006 by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD released material and withheld 13 documents under Freedom of Information Act (FOIA) Exemption 5. This Appeal, if granted, would require ORD to release these documents to the Appellant.

I. BACKGROUND

On May 27, 2004, the Appellant filed a request for information under the FOIA with ORD. That request sought information concerning the License Support Network database being created by the DOE in connection with its application for a license to construct the Yucca Mountain Project (YMP). On November 24, 2004, ORD issued a determination letter (the Determination Letter) releasing numerous responsive documents to the Appellant and withholding numerous responsive documents in their entirety. On January 5, 2005, the Appellant filed an appeal of that determination with this office. We issued a Decision and Order on May 24, 2005 granting the Appellant's January 5, 2005 Appeal in part. On December 5, 2005, ORD issued a new determination letter as required by our May 24, 2005 Decision and Order. The December 5, 2005 determination letter released additional documents to the Appellant, but continued to withhold documents. The Appellant and ORD entered into apparently unsuccessful negotiations concerning these remaining documents. On January 30, 2006, ORD issued a supplemental determination letter clarifying its December 5, 2005 determination letter.

On February 5, 2006, the Appellant submitted the present Appeal challenging ORD's withholding determinations concerning 13 specific documents under Exemption 5. Appeal at 11-12. Specifically, the Appellant contends that:

1. information contained in the withheld documents cannot be withheld under the litigation work product exemption,
2. the description of the withheld documents contained in the Determination Letter is inadequate, and
3. ORD failed to weigh the public interest in disclosure against the harm that may result from disclosure.

Appeal at 2-3.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). In the present case, only the attorney work product privilege is at issue. The attorney work product privilege is among those privileges incorporated by the courts in litigation under Exemption 5. *Coastal States*, 617 F.2d at 862.

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The work product privilege, which is codified at Fed.R. Civ.P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

This privilege does not extend to every written document generated by an attorney or representative of a party. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See, e.g.*, *Coastal States*, 617 F.2d at 865. A document is considered to be prepared in anticipation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice and Procedure § 2024 (1994) (emphasis added) *as cited in United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). The privilege is not limited to civil proceedings, but extends to administrative proceedings as well. *See e.g., Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987); *Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 700 (D.D.C. 1983).

Turning to the present Appeal, it is clear that the 13 withheld documents are protected by the attorney work product privilege. Under the Nuclear Waste Policy Act of 1992 § 114(b), DOE is required to apply to the Nuclear Regulatory Commission (NRC) for a license to construct and operate the Yucca Mountain Geological Waste Repository. 42 U.S.C. § 10101. Under the NRC's regulations, DOE's application for this license commences a mandatory and adversarial administrative litigation proceeding. 10 C.F.R. §§ 2.101(f), 2.104(a). In order to facilitate the efficient and fair administration of this litigation, the NRC required ORD to create a database of information relevant to this proceeding, to be known as the Licensing Support Network (LSN). Each of the 13 withheld documents concerns ORD's attempts to comply with the NRC's mandate to create the LSN and the ORD's attempts to decide which information is to be included in the LSN. Accordingly, it is clear that each of the 13 withheld documents was prepared in anticipation of this litigation proceeding. From their context, it is evident that ORD produced these documents in anticipation of and *because of* the NRC's administrative litigation process.

Moreover, the documents contain sensitive, confidential information. Release of the 13 withheld documents would result in the exact type of harm that the attorney work product privilege is intended to prevent. If this information were to be released, opposing parties would be provided with the mental impressions, conclusions, opinions, legal strategies or

legal theories being considered by DOE for use in the upcoming administrative litigation proceedings before the NRC.

Accordingly, we find that ORD properly withheld each of the 13 withheld documents under Exemption 5's attorney work product privilege.

Adequacy of the Determination

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

The Appeal contends that the 13 withheld documents were inadequately described. We do not agree. We have consistently held that determination letters must (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). In the present case, the descriptions of the documents provided in the Determination Letters clearly meet each of these three requirements and therefore provide an adequate description of the 13 withheld documents.

Public Interest in Disclosure

10 C.F.R. § 1004.1 mandates that "the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." The Appellant contends that release of the withheld information would be in the public interest. We disagree. The compromise of the DOE's ability to defend the public's interest in the administrative litigation proceedings before the NRC that would result from release of the withheld information, as we have discussed above, would not further the public interest.

III. CONCLUSION

For the reasons stated above, we have found that the information withheld under Exemption 5 by the Office of Repository Development was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0149, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial

review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director
Office of Hearings and Appeals

Date: March 14, 2006

October 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeals

Name of Petitioner: L. Daniel Glass

Date of Filing: February 27, 2006

Case Number: TFA-0150

On February 27, 2006, L. Daniel Glass (the Appellant) filed an Appeal from a final determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on January 30, 2006. BPA's determination responded to a request for a specific document that Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, BPA released the document with portions redacted. In his Appeal, the Appellant challenges BPA's redaction of the requested document. If granted, this Appeal would require BPA to produce the subject document in its entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 3, 2006, the Appellant filed a FOIA request for a "copy of Dean Landers report." Request Letter dated January 3, 2006, from Appellant to Vickie Van Zandt, BPA. Mr. Landers, a BPA employee, had prepared a report of workplace controversies at BPA brought forward by concerned employees. Determination Letter dated January 30, 2006, from Christina J. Brannon, FOIA Officer, BPA, to Appellant. In the Determination Letter, BPA withheld portions of the report under Exemptions 5 and 6 of the FOIA. In his Appeal, the Appellant claims that the material sent to him does not answer his questions and is not in the "spirit of the [FOIA] as it applies to [him]." Appeal Letter dated February 23, 2006, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

A. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

BPA has withheld portions of the requested document from the Appellant, claiming that those portions contain information that is predecisional and part of the deliberative process. We have reviewed the document and believe that the portions BPA withheld were properly withheld under Exemption 5. There is factual information in the document, but it is so intertwined as to make segregation virtually impossible. Further, the factual information in question was selected from a larger quantity of factual information such that the selection would reveal the deliberative process. The report was prepared by Mr. Landers who interviewed many individuals but only provided selected information in his report. Release of the factual information in the document would reveal Mr. Landers' thought processes.

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. Although the public does have a general interest in learning about the subject matter of the document, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order

to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See also Frank E. Isbill*, 27 DOE ¶ 80,215 (1999); *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (1999) (*Sowell*).

BPA applied Exemption 6 to the report to withhold the identities of individuals (1) who were interviewed by Mr. Landers, (2) who brought their concerns forward to management, (3) against whom allegations were made, and (4) who gave or received monetary awards. In addition, BPA withheld Mr. Landers' personal telephone number and electronic mail address. Applying these standards to the facts of this case, we believe that the individuals whom Mr. Landers interviewed and who brought their concerns to management have a significant interest in maintaining the confidentiality of their opinions and comments. It is our belief the individuals would expect such opinions to be kept confidential within the confines of the DOE and its contractors. Dissemination of their names would lead to less candor in any similar investigation in the future. *Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Therefore, we find that there is a significant privacy interest in the identities of both those individuals interviewed by Mr. Landers and those who brought their concerns to management. Similarly, the individuals against whom allegations were made and who received awards maintain a privacy interest in having their identities remain confidential. Even though these individuals were not guaranteed confidentiality, they would not want the allegations made against them or the awards they received disseminated to the general public. It is our belief that they would expect such information to be kept confidential within the confines of the DOE and its contractors. Finally, Mr. Landers has a significant expectation of privacy regarding his personal telephone number and e-mail address.

Moreover, release of this information would not further the public interest by shedding light on the operations of the federal government. Although the information might provide insight into the opinions of the Appellant's previous co-workers, the identities of those individuals who were interviewed would not further the public interest as their names would not shed light on the operations of the federal government. Also, releasing Mr. Landers' telephone number and e-mail address would not illuminate the workings of the federal government.

We find that release of the information withheld by BPA pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. There is a significant privacy interest in maintaining the confidentially of the withheld information. Further release of this information would not shed light on the operations of government. Thus, BPA correctly applied Exemption 6 in withholding this document.

III. Conclusion

BPA properly withheld the information contained in the Landers report under Exemption 5. In addition, BPA properly invoked Exemption 6 to withhold names and other personnel identifiers in the document. Based on the reasons stated above, we will denied the Appeal.[*/]

It Is Therefore Ordered That:

(1) The Appeal filed on February 27, 2006, by L. Daniel Glass, Case No. TFA-0150, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006

[*/] In his Appeal, the Appellant states that the document, which BPA released, does not answer his questions. We note that the FOIA is not a mechanism for answering questions. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

April 12, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Fulbright & Jaworski

Date of Filing: March 2, 2006

Case Number: TFA-0151

On March 2, 2006, Fulbright & Jaworski, L.L.P. (Fulbright) filed an appeal from a determination issued to it on February 3, 2006 by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA). In that determination, NNSA responded to a request for documents Fulbright submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA determined that it could locate no documents responsive to Fulbright's request. This appeal, if granted, would require NNSA to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On January 10, 2006, NNSA received Fulbright's request for "documents constituting, relating or referring to the 'review' or 'peer review' conducted in or around late 2004 by the Department of Defense (DOD), in which [NNSA] participated, involving the proposed or intended use of the Mark III [Free-Electron Laser (FEL)] (located at Duke University) by the Department of the Army and/or the University of Hawaii." Letter from Richard M. Speidel, NNSA, to Fulbright (February 3, 2006) (Determination Letter). In its determination letter, NNSA informed Fulbright that a search for information relevant to its request yielded no responsive documents. *Id*.

In its appeal, Fulbright challenges the adequacy of NNSA's search for responsive documents. In support of its argument, Fulbright maintains that NNSA "confirmed to numerous people that it participated in a 'peer review' of the University of Hawaii's proposed research with the Mark III FEL." Letter from Fulbright to OHA (March 2, 2006) (Appeal Letter). Fulbright cites several letters in which NNSA personnel inform the recipient that it "recently participated" in a review conducted by the DOD or that it "intend[ed] to conduct a peer review." *Id*. Fulbright also argues that, because the determination letter did not contain a description of the search for records, it is

unable to determine whether NNSA's search was reasonably calculated to uncover documents responsive to its request. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted NNSA to ascertain the scope of the search. NNSA informed us that it forwarded the request to the appropriate program office, Defense Programs, and learned that no documents responsive to Fulbright's request existed. According to NNSA, although it had intended to conduct a peer review focusing on the Mark III FEL, ultimately, no such review was conducted. *See* Electronic Mail Message from Richard M. Speidel, NNSA, to Diane DeMoura, OHA (March 30, 2006). Consequently, because NNSA did not perform a peer review, it generated no documents pertaining to such a review. NNSA also stated that it believed the Department of the Army was going to conduct a peer review. NNSA stated, however, that the review "turned out to be a program review that did not focus on the Mark III" but where the Mark III FEL may have been discussed. *Id*. NNSA informed us that, although a representative of NNSA was present at the review as an observer, NNSA did not formally participate in the Army's review. *Id*. NNSA added that it did not generate any documents pertaining to the Army's review. *Id*.

Based on the foregoing information, we find that NNSA's search was calculated to uncover documents responsive to Fulbright's request and, therefore, adequate. NNSA forwarded the request to the appropriate office for a search. Personnel in that office had definitive knowledge that NNSA neither conducted a review nor formally participated in the Army's review and, therefore, generated no documents relating to those reviews. Consequently, no further search was undertaken since documents were known not to exist. Had NNSA conducted a review or formally participated in another agency's review, then one might expect that NNSA would have generated documents regarding those reviews. In such a case, a more exhaustive search would be required. In this case, however, NNSA was not required to undertake a search for documents it knew with a certainty did not exist. Accordingly, NNSA's search was adequate and, therefore, Fulbright's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on March 2, 2006 by Fulbright & Jaworski, L.L.P., OHA Case No. TFA-0151, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 12, 2006

January 12, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Samuel D. Johnson
Date of Filing:	March 7, 2006 April 12, 2006
Case Number:	TFA-0152 TFA-0160

On March 7, 2006, Samuel D. Johnson (Johnson) filed an Appeal from a determination issued to him by the FOIA/Privacy Act Group (HQ) of the Department of Energy (DOE) on February 3, 2006, in response to a request for documents that Johnson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Johnson also filed an Appeal on April 12, 2006, that was combined with the previous appeal for administrative efficiency. These Appeals, if granted, would require that HQ perform an additional search for responsive material.

I. Background

Johnson made two FOIA requests to DOE/HQ, one in 2002 and one in 2005. On September 24, 2002, Johnson requested a copy of all items in his DOE personnel file. Letter from Johnson to Abel Lopez, HQ (September 24, 2002). HQ assigned the request number F2002-00490 and forwarded the request to the Office of Counterintelligence (CN) and the Office of Personnel Security (HS). HQ sent Johnson a partial response on November 28, 2003 that contained 57 documents from his file and on April 21, 2005, DOE sent Johnson a final determination letter. Along with the letter, HQ released two documents from CN, one unredacted document and one redacted document. The redacted document, a memorandum discussing a summary of information derived from a polygraph Johnson took in 2001, contained deletions pursuant to Exemption 7 of the FOIA. On June 24, 2005, Johnson appealed the April 2005 determination. OHA contacted HQ to determine if any other responsive documents could be located. HS located additional responsive material and sent that information to Johnson on August 24, 2005. HQ responded that they had provided additional documents related to Johnson's original request and that additional information could be forthcoming. In November 2005, OHA directed CN to release any additional responsive material to Johnson or issue a new determination justifying the withholding of any responsive material. *See Samuel D. Johnson,* 29 DOE ¶ 80,231 (2005) (OHA Case No. TFA-0107).

A. TFA-0152

Johnson made an additional request to HQ in May 17, 2005 for ten items and HQ forwarded that request, assigned number F2005-00275, to CN and HS. On February 3, 2006, HQ sent Johnson a determination letter. Letter from DOE to Johnson (February 3, 2006) (Determination). Of the ten items, HQ stated that six do not exist. As regards the other four items, Item 1 (a copy of a letter postponing an administrative review hearing) had been released previously to Johnson, and Item 2 (correspondence regarding an alleged interview held on January 17, 2003) was released in its entirety in the determination. HQ also stated that the two remaining items responsive to the initial request had been sent to CN and, in addition, if any further responsive material was found in the files of HS, it would be reviewed and released if not exempt. Letter from Abel Lopez, HQ to Johnson (February 3, 2006). Johnson found the response to be unacceptable and filed this Appeal on March 7, 2006. OHA assigned case number TFA-0152 to the Appeal.

A. TFA-0160

In response to F2002-00490 and F2005-00275, CN released several items to Johnson in 2006. On March 2, 2006, CN sent Johnson a letter regarding his first appeal, OHA Case No. TFA-0107. In that letter, CN released a document entitled "Summary of Polygraph Derived Information" to Johnson in its entirety. CN had previously withheld one portion of the document under FOIA Exemption 7(E), but then reconsidered the deletion and decided to release the document in its entirety. On March 14, 2006, CN sent Johnson a letter regarding polygraph material he had requested.[1] First, CN decided to withhold the video and audio tape record of the polygraph examination under FOIA Exemptions 7(A) and 7(E).[2] "[Exemption] 7(E) permits the withholding of records of information compiled for law enforcement purposes, the production of which would disclose investigative techniques and procedures for law enforcement investigations or prosecutions would disclose guidelines for law enforcement prosecution if such disclosure could reasonably be expected to risk circumvention of the law." Letter from CN to Johnson (March 14, 2006). CN stated that the Department of Defense Polygraph Institute, which oversees federal polygraphs, has ruled that any existing audio or videotapes of polygraph examinations constitute law enforcement records and qualify for exemptions 7(A) and 7(E). *Id.* Second, CN informed Johnson that there is no transcript of the statement made by the Polygraph Examiner. The video and audio tape record of the polygraph has never been transcribed and the FOIA does not compel an agency to create a record in order to satisfy a FOIA request. Third, the Polygraph Program, CN and DOE do not prepare independent determinations that assess the integrity and honesty of any polygraph examinee. Finally,

[1] Johnson had requested: (1) a copy of the video or audio recording or a transcript of the discussion between Johnson and the polygraph examiner in September 2001; and (2) a written statement from the examiner about his impressions and evaluations of Johnson's integrity and truthfulness.

[2] Exemption 7(A) applies to a pending law enforcement proceeding. Since we have no evidence that there is an ongoing investigation, we will not address Exemption 7(A).

CN stated that it does not maintain any related documents regarding Johnson's case that have been changed since his original request for information in September 24, 2002. On March 28, 2006,

Johnson sent CN a letter asking them to reconsider their findings. CN forwarded that letter to OHA, which accepted the letter as a FOIA appeal on April 12, 2006, and assigned it OHA Case No. TFA-0160.

Johnson submitted substantial information with each of his letters, and maintained that the appeals should be consolidated since he has made only one true request, that of September 24, 2002. However, due to the large volume of material that he submitted, it was not clear what material Johnson requested. In his letters, Johnson asked for a variety of information, much of it redundant. We will examine both appeals together in the interest of administrative efficiency and to minimize confusion regarding this case. After extensive review of the many letters and documents that he submitted, we asked Johnson to clarify the relief that he seeks on Appeal. In response, Johnson stated that he sought the following items: (1) an excerpt from the actual polygraph report regarding Johnson's veracity that Johnson alleges should be on file in CN's Record System; (2) a report provided to SO-2 (now HS) reporting the results of an interview with Brigadier General Haeckel in January 2002; (3) documentation of the approval of the OHA Director to extend the hearing date for his personnel security review beyond the 90 day regulatory limit; (4) documentation disclosing the name of the individual who authorized sending a copy of some contents of his file to OPM between October 2001 and January 2002; and (5) a statement that CN has improperly delayed the processing of his appeals. Electronic mail message from Johnson toValerie Vance Adeyeye, OHA (June 7, 2006).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

A. Polygraph Report

Johnson was the subject of a polygraph examination in September 2001. According to Johnson, the polygraph examiner called Johnson "the most honest person" that the examiner had ever examined and "he also volunteered the statement that it is virtually impossible for [Johnson] to lie." Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 7, 2006). Johnson also alleges

that the polygraph examiner stated that he was going to make an entry in the official report about the polygraph. Johnson insists that this statement exists in DOE Record System 15. He requests a copy of the portion of the actual polygraph record that contains these statements or, in the alternative, a brief statement from the polygraph examiner that he did in fact say those things.

CN responded to Johnson that polygraph reports are exempt under FOIA Exemptions 7(A) and (E) as law enforcement records. We agree with CN that the video of the examination was properly withheld under Exemption 7(E). Courts have endorsed withholding polygraph examinations on the basis that disclosure of their details could reduce or nullify their effectiveness. *See Hale v. Department of Justice*, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of "polygraph matters" could lessen effectiveness); *Piper v. Department of Justice*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (declaring that polygraph materials were properly withheld); *Shores v. FBI*, 185 F. Supp. 2d 77, 84 (D.D.C. 2002); *Coleman v. FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998) (holding that disclosure of details of polygraph examination would frustrate enforcement of law).[3] As regards a statement by the examiner, no such document exists in DOE's records, and the FOIA does not require an agency to create a document that does not exist.

B. Alleged Interview

Johnson also requested the record of an alleged interview conducted with Brigadier General Ronald Haeckel on or about January 2002. According to Johnson, two employees of HS interviewed Brigadier General Haeckel regarding Johnson in January 2002. Johnson contends that a report should have been created by the interviewers, and he requests a copy of the alleged report. In the alternative, if there is no report, he wants a statement from the interviewers that they did not make one, and what they would have put in a report, if they had made one. Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 8, 2006). He argues that there must be a report of that interview because DOE regulations require that interviewers submit a report summarizing the interview and that the report be placed in the individual's personnel file in DOE Record System 43.

We contacted Dave McVicker, one of the individuals alleged to have interviewed Brigadier General Haeckel. McVicker stated that there was no formal interview; rather, he had a ten minute "off the record" discussion with Haeckel in January 2002 during a routine background investigation.[4] Memorandum of Telephone Conversation between Dave McVicker and Valerie Vance Adeyeye,

[3] Nonetheless, at our request CN agreed to review the polygraph video for the information that Johnson described. The manager of the Polygraph Center performed the review and located the only remarks that could be construed as responsive. She concluded that the statements made by the polygraph examiner were actually an interrogation technique used to keep an individual talking while the individual discloses relevant data to the examiner. Electronic Mail Message from CN to Valerie Vance Adeyeye (August 2, 2006). As stated above, Exemption 7(E) protects this type of technique from disclosure to the public under the FOIA. *See Hale*, 973 F.2d at 902-903.

[4] The interview was conducted "off the record" at Haeckel's request. Memorandum of Telephone Conversation between Dave McVicker and Valerie Vance Adeyeye, OHA (December 21, 2006).

OHA (December 21, 2006). According to McVicker, there was no formal interview and therefore no report. Further, the FOIA does not require an agency to create a new document in response to a FOIA request. Regardless of Johnson's interpretation of the regulation that a responsive document was or should have been created in this situation, no such document exists.

C. Extension of Hearing Date

Johnson also requests a copy of documentation of the approval of the Director of OHA to extend the date of an administrative hearing under 10 C.F.R. Part 710.[5] In the alternative, Johnson requests a statement from the Director of OHA that he approved the extension. At our request, the Hearing Officer provided a copy of his electronic mail notification to the Director requesting an extension of the date for that hearing. We asked him to search for any record of the Director's response to this request. The Hearing Officer searched and found no such document. Electronic Mail Message from Fred Brown, OHA, to Valerie Vance Adeyeye, OHA (June 12, 2006). Thus, even though the Hearing Officer requested an extension from the Director, as the regulations require, there is no record that the Director either approved or disapproved the request. As stated previously, the FOIA does not require the agency to create a new document in response to Johnson's request for a statement from the OHA Director.

D. Transmittal to OPM

Johnson also requested a copy of the documentation that authorized the alleged transmittal of some of the contents of his personnel file to OPM. According to Johnson, he has "a letter from OPM informing [him] that this was done, so it is undeniable that it happened. This OPM letter also strongly implies that doing so was a violation of the FOI/PA . . . ." Electronic mail message from Johnson to Valerie Vance Adeyeye, OHA (June 8, 2006).

We examined the documentation surrounding this issue and conclude that Johnson has misinterpreted what occurred. DOE forwarded Johnson's FOIA request to OPM on January 14, 2003, advising OPM that DOE had located two OPM investigations relating to Johnson in DOE files. Letter from Office of Security, DOE to OPM (January 14, 2003). As is standard procedure in response to a FOIA request, the originating agency must review the documents and determine if the responsive material can be released. As regards the investigations, OPM was the originating agency. DOE did not send those documents to OPM, but rather gave OPM the investigation case numbers so that OPM could easily locate and review the files. Since no material was transmitted to OPM, there is no material responsive to the request for documentation of a transmittal.

E. CN Statement

On March 2, 2006, CN responded to Johnson regarding his appeal of OHA Case No. TFA-0107 and sent him some responsive material. On March 14, 2006, CN sent Johnson a final response. CN

[5] 10 C.F.R § 710.25 (g) requires the approval of the OHA Director for an extension of a hearing date.

directed Johnson to challenge a denial by writing directly to OHA, but Johnson instead replied to CN on March 28, 2006. On April 6, 2006, CN forwarded Johnson's response to OHA for review, stating that Johnson's letter "appears to be an appeal." Letter from CN to Director, OHA (April 6, 2006). Johnson requests a statement from OHA that CN's statement was improper and delays HQ's effort to comply with Johnson's request. Electronic mail message from Johnson to Valerie Vance Adeyeye,
OHA (June 8, 2006).

As stated previously, the purpose of the FOIA is to provide the public with access to existing documents, not to create new documents at the request of the public. Thus, we have no obligation to create the statement that Johnson requests. Further, we conclude that CN did not cause a delay in DOE's effort to comply with Johnson's request. Johnson contacted CN on March 28, and CN forwarded his letter to OHA approximately one week later. There was nothing about CN's actions that appeared improper or untimely.

III. Conclusion

After reviewing the record of this case, we find that CN, OHA and HS conducted searches that were reasonably calculated to uncover the requested information. Johnson has not provided any evidence that the items he requested exist. He has requested that DOE create new documents, a request that is outside the scope of the FOIA. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeals filed by Samuel D. Johnson on March 7, 2006 and April 12, 2006, OHA Case Numbers TFA-0152 and TFA-0160, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: January 12, 2007

April 24, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph K. Huffman

Date of Filing: March 15, 2006

Case Numbers: TFA-0153

This Decision concerns an Appeal that Joseph K. Huffman filed from a determination that was issued to him by the Manager of the Pacific Northwest Site Office (PNSO) of the Department of Energy (DOE). That determination responded to a request for information that Mr. Huffman filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, PNSO denied Mr. Huffman's request. In his Appeal, Mr. Huffman seeks the release of the withheld information, or, in the alternative, that we remand this matter to PNSO for the issuance of another determination letter.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); see also 10 C.F.R. § 1004.10(b)(1) - (9).

I. Background

In his FOIA request, Mr. Huffman sought access to "all data, code, and non-restricted documentation in machine readable format from the computer mouse biometric project known as 'Rainer.'" Determination Letter at 1. In its determination letter, PNSO stated that the "Federal agency sponsoring the project [the work product of which] you requested" considers that work product to be "Official Use Only," and that it is therefore subject to withholding under FOIA Exemption 2 (5 U.S.C. § 552(b)(2)). The letter goes on to state that the "project involves sensitive critical infrastructure information regarding systems and assets vital to the United States, and that public release of this information would have a debilitating impact on security, national economic security, and public safety." *Id.*

In his Appeal, Mr. Huffman contends that PNSO did not follow the proper procedure in processing his request. Specifically, he contends that if the requested information belongs entirely to another agency, PNSO should have referred his request to that agency for direct response to the requester, "rather than assert that agency's denial decision." Appeal at 2. Mr. Huffman therefore requests that we remand this matter to PNSO for referral to the unnamed federal agency and a direct response to

him. In the alternative, Mr. Huffman challenges the agency's withholding of the requested material under Exemption 2.

II. Analysis

When the DOE receives a FOIA request for information in its possession that is the property of another federal agency, the applicable regulations require that the request be referred to that agency. 10 C.F.R. § 1004.4(f)(1). That other agency should then process the request and respond directly to the requester. *See Rzeslawski v. United States Department of Justice*, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998); *Stone v. Defense Investigative Service*, No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992). *See also Research Information Services, Inc.*, Case No. VFA-0235 (November 27, 1997). Although it is evident that PNSO did consult with the unnamed agency, we agree with Mr. Huffman that the correct procedure in this case would have been for PNSO to formally refer this mater to the agency for direct response to the requester. We will therefore remand this matter to PNSO for referral to the unnamed agency, and for a direct response to Mr. Huffman by that agency.

Although we are remanding this matter for referral to another agency, we believe it appropriate to discuss the adequacy of PNSO's determination letter, as this is an issue that is likely to recur in future Appeals. Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). Thus, an agency withholding material under Exemption 2 must explain how that exemption was applied.

Exemption 2 exempts from mandatory public disclosure records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. 552(b)(2); 10 C.F.R.§ 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, high two information. An agency seeking to withhold information under high two must be able to show that (1) the requested information is predominantly internal, and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir.1978) (*en banc*).

The justification for withholding the requested information under Exemption 2 provided to PNSO by the unnamed agency does not adequately address either of these requirements. When used by the

DOE, the term "Official Use Only" reflects an agency determination that the information in question is protected from mandatory FOIA disclosure under one or more of eight of the exemptions set forth at 5 U.S.C. § 552(b). * *See* DOE Order 471.3, Identifying and Protecting Official Use Only Information. However, this designation by itself is insufficient as a justification for withholding information under the FOIA because it does not explain how the exemption in question was applied, thereby making it impossible for the requester to formulate a meaningful appeal, and for this Office to evaluate that appeal. In this case, the justification provided by the unnamed agency does not indicate whether the requested material is "predominantly internal," *i.e.*, whether or not it purports to regulate activities among members of the public or sets standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. *Cox v. United States Department of Justice*, 576 F.2d 1302 (8th Cir. 1978). Furthermore, although the DOE has very important statutory and regulatory obligations to protect the national security and ensure public safety, the justification does not indicate how release of the requested information would circumvent those obligations. We are therefore left to speculate as to the manner in which the unnamed agency applied Exemption 2 in withholding the requested information.

For the reasons set forth above, we will remand this matter to PNSO. On remand, PNSO should refer Mr. Huffman's request to the unnamed agency for direct response to the requester.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Joseph K. Huffman, Case Number TFA-0153, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Pacific Northwest Site Office, which shall refer Mr. Huffman's request to the agency that owns the requested information for direct response to Mr. Huffman.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 24, 2006

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*/ Exemption 1 information can never be "Official Use Only" because such information is classified by executive order.

May 25, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ronnie J. Simon

Date of Filing: March 17, 2006

Case Number: TFA-0154

On March 17, 2006, Ronnie J. Simon (Simon) filed an appeal from a determination issued to him on February 10, 2006, by the Department of Energy's (DOE) Golden Field Office (GO). In that determination, GO responded to a request for documents that Simon submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. GO identified several documents responsive to Simon's request. Some of those documents were released in their entirety and, pursuant to Exemptions 4 and 6 of the FOIA, others were released with some deletions or withheld in their entirety. Simon challenged the withholding of information and the amount of the fees he was charged in connection with the processing of his FOIA request. This appeal, if granted, would require GO to release the withheld information to Simon and reconsider the fees charged.

I. Background

Simon requested copies of all Cooperative Agreements awarded in connection with the DOE's "Controlled Hydrogen Fleet and Infrastructure Demonstration and Validation Project." See Letter from GO to Simon (February 10, 2006) (Determination Letter). According to GO, the DOE awarded a Cooperative Agreement to each of the following applicants: Chevron Texaco Technology Ventures, L.L.C.; General Motors Corporation; Ford Motor Company; and Daimler-Chrysler Corporation (hereinafter "the four award recipients"). *Id.* GO identified several documents responsive to Simon's request and requested comments from the four award recipients regarding whether the information should be released. The four award recipients requested that certain information not be released to the public because disclosure of the information could result in substantial harm to the competitive positions of the companies. On February 10, 2006, GO issued a determination in response to Simon's request. Of the responsive documents GO identified, 401 pages were released in their entirety, 91 pages were partially withheld pursuant to Exemptions 4 and 6, and 950 pages were withheld in their entirety pursuant to Exemptions 4 and 6. Determination Letter at 3. GO stated that the information withheld under Exemption 6 consisted of "individual names listed in the documents who are not key

personnel." Determination Letter at 2. GO added that the documents withheld under Exemption 4 contained "information considered to be commercial or financial information obtained from a person and privileged or confidential." *Id*. According to GO,

> The information includes data which reveals a company's labor costs, company assets, liabilities and net worth; a company's actual costs; break-even calculations; profits and profit rates; workforce data which reveals labor costs; fringe benefits; direct and indirect costs; profit margins; competitive vulnerability; selling prices; purchase activity; freight charges; purchase records; prices paid for advertising; names of consultants and subcontractors; routing systems; cost of raw materials; and pricing strategy.

Id. GO reasoned that the information was properly withheld because release of the information could result in substantial competitive harm to the submitters of the information. *Id*.

Simon filed the present appeal on March 17, 2006. Letter from Simon to OHA (March 5, 2006) (Appeal Letter).[1] In his appeal, Simon argues that GO's withholding of information pursuant to Exemption 4 was inappropriate because the withheld information was contained in cooperative agreements awarded rather than technical and business applications. Simon further argues that "if DOE and other agencies can claim that non-classified [c]ooperative [a]greements (and all other contracts with private companies), contain confidential information, then the public has no ability to know how public funds are being spent." Appeal Letter. Finally, Simon appeals the amount of fees charged for processing his request.[2]

II. Analysis

Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary

[1] Simon's initial submission of his appeal was deficient under DOE's FOIA regulations in that it did not contain a copy of the Determination Letter. See 10 C.F.R. 1004.8(b). On March 27, 2006, Simon completed the filing of the appeal by submitting a copy of the Determination Letter.

[2] Because Simon did not challenge the GO's withholding of information under Exemption 6, we will not address that matter in this decision and order.

information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, the four recipients of the Cooperative Agreements were required to submit the documents in question as part of the agency's solicitation process. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be "commercial or financial."[3] The information submitted by the four recipients of the cooperative agreements, i.e. labor costs, profit margins, company assets and liabilities, pricing strategies, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the National Parks test is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp*., 28 DOE ¶ 80,105 (2000). Each of the four recipients in this case satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." Withheld information is confidential if its release would either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the solicitation process for the project required that the information be submitted, it is unlikely that release of the information would impair DOE's ability to obtain similar information in the future.[4] The question, then, turns to whether release of the information could result in substantial competitive harm to the submitters of the information. According to GO,

> Because the intent of the program is to validate hydrogen technologies that will lead to commercially marketable hydrogen fuel cell vehicles (and their related infrastructure), there is intense confidentiality associated with actual product development data, budgets, and costs. The automotive companies and their infrastructure demonstration partners have invested literally millions of dollars of their own funds into the development of hydrogen fuel cell vehicles and infrastructure, and are competing directly with each other to produce a commercially marketable product that will ultimately be available to the public.

[3] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

[4] GO, however, argues that the recipients are "currently focused on the demonstration of 'Generation 1' hydrogen fuel cell vehicles. Their anticipated 'Generation 2' vehicles, also to be demonstrated under this award, will be even more technically advanced and commercially sensitive. If DOE divulges confidential business and financial information under FOIA with respect to the Generation 1 demonstration vehicles, there can be no doubt it will impair the agency's ability to obtain such information in the future – under this or future awards." Letter from Kimberly Graber, GO, to Diane DeMoura, OHA (April 28, 2006).

Letter from Kimberly Graber, GO, to Diane DeMoura, OHA (April 28, 2006). Given the competitive aspect of the project and the very specific nature of the commercial and financial information contained in the Cooperative Agreements, we agree with GO's assessment that the release of the information could result in substantial competitive harm to the submitters of the information.

We have also considered Simon's arguments on appeal and find them to be unpersuasive. First, Simon's attempt to draw a distinction between commercial and financial information in "technical and business applications" and the information in the Cooperative Agreements is without merit. Neither the FOIA nor the relevant case law looks to the type of document in which information is contained in determining the applicability of Exemption 4. The issue here is whether the information itself satisfies the requirements set forth in *National Parks*, not the nature of the document in which the information is presented.

Second, we find no merit in Simon's assertion that withholding commercial and financial information in non-classified documents impairs the public's ability to know how public funds are being spent. The intent of Exemption 4 is to facilitate the government's ability to obtain commercial and financial information it requires in meeting its objectives. Releasing confidential commercial and financial data could lessen any incentive for companies to continue to provide such information in the future. Furthermore, after reviewing a sample of the documents in question, we note that information in the awards of the Cooperative Agreements relating to the amount of money expended by DOE on the project was not withheld. Consequently, we fail to see how releasing the commercial and financial data of the recipients would shed any additional light on how public funds were spent.

Fees Incurred

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). The FOIA delineates three types of costs – "search costs," "duplication costs," and "review costs" – and outlines three categories of requesters, specifying the costs each category of requesters must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs, but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

Simon did not specify the grounds on which he challenged the fees he was charged in connection with the processing of his FOIA request. GO has informed us that Simon was categorized as a "commercial use" requester because GO was aware that Simon was the president of a company who unsuccessfully sought to have his company involved in the solicitation process for the awarding of the Cooperative Agreements and "he has long made known his desire to have small businesses more actively engaged in DOE's efforts to demonstrate hydrogen fuel cell vehicles." Letter from Kimberly Graber to Diane DeMoura. The DOE regulations state that a "'[c]ommercial use' request refers to a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester." 10 C.F.R.

§ 1004.2(c). The regulations also state that "when the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 10 C.F.R. § 1004.9(b)(1). We see no error in GO's categorization of Simon as a commercial use requester. Furthermore, having been informed by GO of the method of calculation and the actual amount of fees to be charged, "Simon agreed to the charges and submitted payment without challenging his requester status, categories of charges, or the calculation of fees." We see no reason to find that the amount of fees GO charged Simon was incorrect.

It Is Therefore Ordered That:

(1) The appeal filed by Ronnie J. Simon on March 17, 2006, Case No. TFA-0154, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2006

July 12, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James H. Campbell

Date of Filing: March 20, 2006

Case Number: TFA-0155

On March 20, 2006, James H. Campbell filed an Appeal from a determination issued to him on February 22, 2006, by the Department of Energy's Oak Ridge Operations Office (Oak Ridge). That determination was issued in response to a request for information that Mr. Campbell submitted under the Freedom of Information Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Mr. Campbell asks that Oak Ridge conduct an additional search for documents responsive to his request.

I. Background

Mr. Campbell requested information regarding the industrial hygiene, medical, personnel and radiation exposure records for his deceased father, Everette Campbell. In his request, Mr. Campbell indicated that his father worked for Union Carbide Corporation and Martin Marietta Energy Systems, two former contractors at the BWXT Y-12 Plant, in the 1940s. Oak Ridge conducted a search by name and Social Security number for responsive material, but was only able to locate Mr. Everette Campbell's personnel security clearance card. On March 20, 2006, Mr. Campbell filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Campbell challenges the adequacy of the search conducted by Oak Ridge and asserts that there should be additional records related to his father in the possession of DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Oak Ridge to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Campbell's request might reasonably be located. Upon receiving Mr. Campbell's request for information, Oak Ridge contacted the Oak Ridge National Laboratory, the BWXT Y-12 Plant and the K-25 Plant. Each plant searched its records by name and Social Security Number and found no records responsive to Mr. Campbell's request. *See* Record of Telephone Conversation between Leah Ann Schmidlin, Oak Ridge Operations Office, and Kimberly Jenkins-Chapman, OHA (June 8, 2006). In addition, Oak Ridge searched the DOE Records Holding Area for Archived Records where it had previously located the personnel security card of Mr. Everette Campbell. The DOE Records Holding Area for Archived Records contains archived records of individuals employed in the 1940s and earlier. *Id.* Oak Ridge informed our office that on many occasions contractors have taken their employee records with them when leaving a site. *Id.* For that reason, records of former Oak Ridge workers are far from complete. Based on the information above, we find that Oak Ridge has conducted a search reasonably calculated to uncover any records relating to Mr. Everette Campbell. Accordingly, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James H. Campbell on March 20, 2006, OHA Case No. TFA-0155, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 12, 2006

July 20, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Keep Yellowstone Nuclear Free
Date of Filing:	March 21, 2006
Case Numbers:	TFA-0156

This Decision concerns an Appeal that Keep Yellowstone Nuclear Free (KYNF) filed from a determination that was issued to it by the Department of Energy's (DOE) Idaho Operations Office (IOO). That determination responded to a request for information that KYNF filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, IOO withheld certain documents in part or in whole. KYNF's Appeal, if granted, would require the release of the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); *see also* 10 C.F.R. § 1004.10(b)(1) - (9).

I. Background

In its FOIA request, KYNF sought access to copies of documents related to the Draft Environmental Impact Statement for the Proposed Consolidation of Nuclear Operations Related to the Production of Radioisotopes Power Systems (Consolidation EIS) and the Final Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility (NI PEIS). This material pertains to the characteristics and operation of the Advanced Test Reactor (ATR), a nuclear reactor located within the boundaries of the Idaho National Engineering and Environmental Laboratory.

In its response, IOO identified 98 documents as being responsive to KYNF's request. [1] Of those 98 documents, one was completely withheld, one was determined to have been previously requested under the FOIA by KYNF's Executive Director [2], seven were released in part, and the remaining 89 were released in full. IOO determined that the withheld material was shielded from mandatory disclosure under FOIA Exemptions 2 and 5. In its Appeal, KYNF challenges IOO's application of these Exemptions.

II. Analysis

A. Exemption 2

IOO withheld Document 1 and portions of Documents 3, 5, 8, 9, 65 and 66 under Exemption 2. That Exemption allows agencies to withhold records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the Exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (*Schiller*). The information at issue in the present case involves only the second category, "high two" information.

An agency seeking to withhold information under "high two" must be able to show that (1) the requested information is predominantly internal, and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*) (*Crooker*). Information is considered to be "predominantly internal" if it "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*Cox*).

In its determination, IOO described the material withheld under Exemption 2 as "security sensitive information," and said that the "redactions were made on the basis that the information is integral to describing potential vulnerabilities of the reactor and related systems, and the methods and measures taken to prevent or mitigate those potential problems." IOO went on to state that release of the information "could enable malefactors to identify potential vulnerabilities and understand how

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1/ An unspecified number of additional documents were located at the DOE Headquarters Office of Nuclear Energy, Science and Technology and at the DOE's Oak Ridge Operations Office. Portions of KYNF's request were referred to those Offices for direct response to the requester. This Appeals concerns only the 98 documents identified as responsive by IOO.

2/ In response to this previous request, IOO determined that the document in question was generated by another DOE Office. IOO referred the request to that Office for direct response to KYNF.

to thwart the protective and mitigative measures in place." January 31, 2006 Determination Letter at 3.

In its Appeal, KYNF argues that IOO's application of Exemption 2 is not supported by the language of the Exemption or by judicial precedent. Specifically, the requester contends that the withheld material does not pertain to internal personnel rules and practices of the DOE, and that the courts have held this to be a threshold requirement for withholding information under Exemption 2. *Audubon Society v. United States Forest Service*, 104 F.3d 1201 (10th Cir. 1997); *Living Rivers v. United States Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003). Moreover, KYNF contends that the withheld material consists of engineering and safety information, and that because safety is a public concern, the material should not be considered "predominantly internal." Finally, KYNF contests IOO's finding that release of the information would aid malefactors in identifying the reactor's vulnerabilities.

KYNF correctly points out that some federal courts have adopted a narrow construction of this Exemption. However, the District of Columbia Circuit Court of Appeals, our judicial overseer, has construed Exemption 2 more broadly, stating that the scope of the Exemption is not restricted "to minor employment matters." *Crooker,* 670 F.2d at 1069. In that case, the Court upheld the withholding of a sensitive law enforcement training manual. In *Schiller*, the D.C. Circuit Court determined that litigation strategy pertaining to the Equal Access to Justice Act was properly withheld, stating that disclosure would render the information "operationally useless." *Schiller,* 964 F. 2d. at 1208. This Court has also upheld the withholding under Exemption 2 of FBI symbol numbers that were used to identify confidential informants in *Lesar v. Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980), even though the information was apparently unrelated to internal personnel rules and practices. Indeed, in *Schwaner v. Department of the Air Force,* 898 F.2d 793 (D.C. Cir. 1990), the Court acknowledged that judicial "willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty." *Id.* at 796. *See also Dirksen v. U.S. Department of Health and Human Services,* 803 F.2d 1456 (9th Cir. 1986) (withholding of claims processing guidelines under Exemption 2 upheld); *Institute for Policy Studies v. Department of the Air Force,* 676 F. Supp. 3 (D.D.C. 1987) (Security Classification Guide withheld because disclosure could reveal vulnerabilities of emergency government communications network).

It is difficult to imagine a weightier government interest than that asserted by IOO in this case. In its determination, IOO states that the information requested, which includes descriptions of the operations and vulnerabilities of the reactor and its containment facility, could be used by terrorists and other potential malefactors to aid in the planning and execution of attacks. Specifically, IOO argues that release of the information would assist terrorists in identifying vulnerabilities and devising ways of overcoming "the protective and mitigative measures in place." Determination Letter at 3. We have examined the withheld material, which consists primarily of regulation - mandated safety analyses and hazards assessments, and we conclude that they are sufficiently related to "internal personnel rules and practices" to fall within the ambit of Exemption 2. This information is used by DOE personnel in performing their mandated duties to insure the continued safe operation of the ATR. It is predominantly internal in that it does not purport to regulate activities of the public, nor does it set standards to be followed by DOE personnel in deciding whether to proceed against

or to take action directly affecting members of the public. In short, "the unreleased information is not 'secret law,' the primary target of [the FOIA's] disclosure provisions." *Cox*, 601 F.2d at 5.

Moreover, contrary to KYNF's contention, we find that release of the requested material would risk circumvention of laws or regulations. KYNF claims that because the material does not pertain to "the physical security of the ATR and the protections in place to prevent a terrorist attack," Appeal at 5, there is no risk of circumvention . This argument incorrectly presumes that this would be the only information that would be useful to a potential terrorist. Penetrating the physical security surrounding the ATR and overcoming any security countermeasures would likely only be the initial steps in a terrorist attack. A terrorist would then, in all probability, attempt to damage the reactor and its containment facility to cause a release of radioactive material, and to disable any safety systems that would prevent such a release. The withheld information, which sets forth the operational characteristics of the reactor and its containment facility and their potential vulnerabilities, could prove to be very useful to a potential malefactor in achieving these goals. We therefore conclude that release of this information would significantly risk circumvention of the DOE's statutory and regulatory duties to operate the ATR in a safe and secure manner.

In *Environmental Defense Institute*, Case No. TFA-0128 (March 16, 2006), we determined that much of the material involved here was properly withheld under Exemption 2. KYNF has not convinced us that our holding in that case was in error. Therefore, for the reasons set forth above, we find that IOO properly applied Exemption 2 in withholding the information in question.

B. Exemption 5

IOO withheld pages 8 through 18 of document 93 under Exemption 5. This Exemption shields from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears).* The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Coastal States*. The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*,

421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker. *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988).

In general, Exemption 5 may not be used to withhold purely factual material. *Coastal States*, 617 F.2d at 867. However, the courts have recognized two exceptions to this general rule. Factual material may be withheld under Exemption 5 if it is so inextricably intertwined with deliberative matter that disclosure of the factual material would expose or cause harm to the agency's deliberations, *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (*Soucie*), or if the author has selected specific facts out of a larger group of facts, and this very act is deliberative in nature. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974).

In its Appeal, KYNF argues that the withheld portions of document 93 are neither predecisional nor deliberative. Instead, the requester contends, document 93 is a final report that is not part of a deliberative process, and therefore cannot be withheld under Exemption 5.

This document, entitled "Causal Analysis Report Essential System Functionality," is the final report of a team from the DOE's Office of Independent Oversight and Performance Assurance (OA), which was assigned the duty of evaluating the functionality of the ATR's safety systems. The purpose of the evaluation was to ensure the continued safe operation of the reactor. To that end, the report included recommendations as to how some of the weaknesses identified during the evaluation could be ameliorated. Consequently, although the document is the final report of the OA team, it is still part of the larger deliberative process concerning the steps that the team believed should be taken to make the ATR safer. The document is predecisional, in that it predated any decision concerning the adoption of the OA team's suggestions, and deliberative, in that it made these recommendations and provided the team's reasons for the recommendations. We therefore conclude that portions of pages 8 through 18 of document 93 were properly withheld under Exemption 5.

However, our review of the withheld material leads us to believe that most of it is purely factual in nature, and is not "inextricably intertwined" with exempt material. *See Soucie*. Moreover, it does not appear that release of this material would compromise the deliberative process of which this document is a part. Consequently, pages 8 through 18 are not exempt from mandatory disclosure under the deliberative process privilege, with the exception of the following, which were properly withheld.

1. On page 11, the last sentence of section B;
2. On page 12, the next-to-last sentence of the second paragraph;
3. On page 13, the last two sentences of section C and the entire last paragraph;
4. All of page 14 except the first, third, fourth, fifth and sixth sentences of section E;

5. On page 15, the fourth through the seventh sentences in the first paragraph, the last sentence of the second paragraph and the second sentence of the final paragraph;

6. On page 16, the third and fourth sentences of the first paragraph, the third and fourth sentences of the second paragraph, the third and fourth sentences of the third paragraph and the last sentence of the fourth paragraph; and

7. All of page 17 except the heading and first sentence of the second paragraph.

We will therefore remand this matter to IOO. On remand, IOO should release pages 8 through 18, with the exceptions set forth above, unless it determines that this material should be withheld under a different FOIA Exemption.

Our finding that portions of this document are exempt from mandatory disclosure under Exemption 5 does not necessarily preclude release of the material to KYNF. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, the public interest in release of the material withheld from document 93 is attenuated by the fact that it consists largely of opinions and recommendations that may or may not be adopted by the agency. Furthermore, the release of this predecisional, deliberative material could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We do not believe that discretionary release of the withheld material would be in the public interest.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Keep Yellowstone Nuclear Free, Case Number TFA-0156, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Idaho Operations Office. On remand, that Office should release the portions of document 93 described in this Decision unless it determines that the material should be withheld under a different FOIA Exemption .

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 20, 2006

April 20, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arlie Bryan Siebert

Date of Filing: March 22, 2006

Case Number: TFA-0157

On March 22, 2006, Arlie Bryan Siebert filed an appeal from a determination issued to him on November 21, 2005, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In the appeal, Mr. Siebert challenged the disposition of his request for a waiver of fees incurred, the failure to provide him with an itemized accounting of fees, and the timeliness of the DOE's response in connection with a request he submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn FOI's determination and waive in full the fees associated with Mr. Siebert's request and require that FOI provide him with an itemized accounting of fees incurred in connection with the processing of his FOIA request.

I. Background

Mr. Siebert filed a request for information regarding DOE employees who attained undergraduate and graduate degrees from unaccredited institutions. Letter from Abel Lopez, FOI, to Mr. Siebert (November 21, 2005) (Determination Letter). Mr. Siebert also requested a waiver of the fees associated with processing the request but stated that, in the alternative, he would be willing to pay up to one hundred dollars in fees. Letter from Mr. Siebert to Abel Lopez (May 7, 2004).

FOI informed Mr. Siebert that it required additional information to consider his request for a fee waiver. Letter from Abel Lopez to Mr. Siebert (July 16, 2004). FOI also stated that if it did not receive the additional information by a specified date, it would consider the request for a fee waiver withdrawn and would process the request in accordance with Mr. Siebert's agreement to pay up to one hundred dollars. *Id*. Mr. Siebert did not respond to FOI's request by the specified date. Consequently, FOI considered the request for a fee waiver withdrawn and processed the request accordingly. Determination Letter. FOI informed Mr. Siebert that, while the fees incurred in processing the request exceeded the one hundred dollars Mr. Siebert agreed to pay, it

inadvertently processed the request without asking Mr. Siebert to pay the additional amount and, therefore, would only bill him the agreed upon one hundred dollars. *Id*.

In his appeal, Mr. Siebert challenges FOI's disposition of his fee waiver request. Letter from Mr. Siebert to OHA (March 12, 2006) (Appeal Letter). He also maintains that he is entitled to an itemized accounting of the fees incurred in processing his FOIA request. *Id*. Finally, he maintains that the DOE has not responded to his FOIA request in a timely fashion. *Id*.

II. Analysis

Fee Waiver

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees *only if a requester satisfies his burden* of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8) (emphasis added).

In this case, FOI requested additional information from Mr. Siebert in order to determine whether he satisfied his burden under the FOIA. FOI informed Mr. Siebert that a failure to provide the requested additional information would be considered a withdrawal of the fee waiver request. According to FOI, it informed Mr. Siebert of this requirement via certified mail and received a signed return receipt for the letter. *See* Memorandum of Telephone Conversation between Diane DeMoura, OHA, and Joan Ogbazghi, FOI (March 29, 2006); *see also* Copy of Return Receipt (July 21, 2004). Mr. Siebert himself does not argue that he did not receive the letter; rather, he concedes that, although he did not remember the letter, he "likely did receive it." Appeal Letter. Absent a showing by Mr. Siebert that he did not have notice of the requirement that he submit additional information by a specified date, we see no reason to find that FOI erred in considering Mr. Siebert's request for a fee waiver withdrawn. Given the withdrawal of the request, FOI did not make a determination on Mr. Siebert's fee waiver request. Consequently, the issue of Mr. Siebert's eligibility for a fee waiver is not ripe for our review.

Bill for Fees Incurred

Mr. Siebert also contends that he is entitled to an itemized statement of the fees associated with the processing of his FOIA request. Mr. Siebert was provided with a bill stating only that he owed "[one hundred dollars] for search time associated with processing [his] FOIA request." *See* Billing Request signed by Joan Ogbazghi (February 16, 2006).

We agree with Mr. Siebert that he is entitled to an itemized bill explaining the fees incurred in processing his FOIA request and the portion of those fees for which he was actually billed. Accordingly, we will remand this portion of Mr. Siebert's appeal to FOI with instructions that FOI provide Mr. Siebert with an itemized accounting of the fees incurred in his case.

Timeliness

Mr. Siebert also challenges the timeliness of DOE's response to his FOIA request. However, this office does not have jurisdiction to consider appeals concerning the timeliness of the agency's response to FOIA requests. 10 C.F.R. § 1004.8; *see also R.E.V. Engineering Services*, 28 DOE ¶ 80,136 (2001). Accordingly, we will dismiss the portion of Mr. Siebert's appeal concerning the timeliness of DOE's response. Under the FOIA, Mr. Siebert may seek the

It Is Therefore Ordered That:

(1) The appeal filed by Arlie Bryan Siebert on March 22, 2006, Case No. TFA-0157, is granted in part and dismissed in part as set forth in paragraphs (2) and (3) below, and in all other respects denied.

(2) The portion of the appeal concerning the bill for fees incurred in processing Mr. Siebert's FOIA request is hereby remanded for further processing in accordance with the instructions set forth in this Decision and Order.

(3) The portion of the appeal concerning the timeliness of DOE's response to Mr. Siebert's FOIA request is hereby dismissed.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 20, 2006

April 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Bobbie J. Evans
Date of Filing:	April 6, 2006
Case Number:	TFA-0158

On April 6, 2006, Bobbie J. Evans (the Appellant) filed an Appeal from a determination issued by DOE's Freedom of Information Act/Privacy Group (FOIA/PA) on March 6, 2006. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant wrote DOE requesting records pertaining to "surgical implanting of Global Positioning System or other devices" in him or other individuals. Determination Letter at 1. On March 6, 2006, FOIA/PA issued a determination letter (the determination letter) in response to this request. The determination letter states that FOIA/PA forwarded the Appellant's request to the DOE's Offices of Science and Environmental Safety and Health for a search of their respective records, which included a search of a DOE database entitled DOE-88- Epidemiologic and Other Health Studies, Surveys and Surveillances. These searches did not locate any documents responsive to the Appellant's request. On March 6, 2006, FOIA/PA informed the Appellant of its failure to identify any responsive documents. On April 6, 2006, the present Appeal was filed challenging the adequacy of DOE's search. [1]

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d

[1] The Appeal contends that "Based on proof of facts that I am under electronic surveillance under the Patriot Act, I believe that your agency do [sic] have records pertaining to me." Appeal at 1. However, the Appellant has not provided any evidence that the DOE has been, or is presently, conducting electronic surveillance of him or any other individuals.

1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

DOE clearly performed a diligent search for responsive documents. The search was directed at those locations where responsive documents were most likely to exist. Thus, we conclude that the search was reasonably calculated to uncover the records sought by the Appellant.

Since the DOE conducted an adequate search for documents responsive to the Appellant's request, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Bobbie J. Evans, Case Number TFA-0158, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 24, 2006

June 12, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Steven A. Ludsin

Date of Filing: April 11, 2006

Case Number: TFA-0159

On April 11, 2006, Steven A. Ludsin (Ludsin) filed an appeal from a determination issued to him on March 27, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI denied a request for a waiver of fees in connection with a request Ludsin submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn FOI's determination and waive in full the fees associated with his request.

I. Background

Ludsin filed a request under the FOIA for "copies of real estate appraisals of DOE properties or properties under the Department's jurisdiction." Letter from Abel Lopez, FOI, to Steven Ludsin (March 27, 2006) (Determination Letter). Ludsin planned to place the requested information on a website. *Id*.

In his FOIA request, Ludsin also requested a fee waiver for the costs associated with processing the request. In its March 27, 2006 determination letter, FOI denied the request for a waiver on the grounds that Ludsin's request "did not adequately address the criteria that is considered in a fee waiver determination." *Id*. Specifically, FOI found that Ludsin did not adequately demonstrate how he will disseminate the information to the general public. *Id*.

Ludsin filed the present appeal on April 11, 2006. Letter from Ludsin to OHA (April 2, 2006) (Appeal Letter). In his appeal, Ludsin contends that "requiring the requester to establish that the information has actually been conveyed and not merely that there has been a passive dissemination of data is a difficult threshold." *Id*. He adds, "the proof would be available after the data is disseminated on a search engine and then the data can be analyzed to measure the number of clicks connected to the data provided. In other words, establishing that the information has actually been conveyed can only happen after the data dissemination." *Id*. Ludsin submitted additional information in support of his request for a fee waiver. *See* Electronic Mail Message from Ludsin to Diane DeMoura, OHA (May 7, 2006).

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, it is undisputed that the requested information – copies of real estate appraisals of DOE properties or other properties under the agency's jurisdiction – concerns activities or operations of the government. Therefore, we find that Ludsin's request satisfies Factor A.

Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the

records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, it is unclear whether the requested information is already publicly available. However, given the nature of the information requested – information relating to the agency's real estate interests – and because we have no evidence that the information is already publicly available, we will assume that the information is not already in the public domain. Therefore, we find that Ludsin has satisfied Factor B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, it is not disputed that Ludsin intends to disseminate the requested information to the public. However, FOI determined that Ludsin did not establish his ability to disseminate the information.

We find that Ludsin has not provided adequate evidence of his ability to disseminate the requested information to the public. Ludsin contends that dissemination of the requested information will occur because he plans to place the information on a website, allowing the general public to access the information using an internet search engine. This falls short of the proof required to establish a requester's ability to disseminate responsive information to the public. We have previously held that a plan to make information available on the internet does not ensure that the information will reach the public, compared to, for example, including the information in a newsletter or in printed articles and, therefore, falls short of the showing necessary to satisfy Factor C. *See Donald R. Patterson*, 28 DOE ¶ 80,107 (2000); *see also STAND*, 27 DOE ¶ 80,250 (1999). In this case, Ludsin's argument – that a requester cannot demonstrate that the information will be disseminated to the public until after dissemination has already occurred – is not persuasive. The admittedly high burden is on the requester to demonstrate that the information will be conveyed to the public. Ludsin has failed to make the necessary showing because simply placing the information on a website is a passive method of dissemination and does not ensure that the information will, in fact, reach the general public. Consequently, we find that Ludsin has not satisfied Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or

reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it remains unclear to what extent the public's understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (*citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)).

III. Conclusion

As the foregoing indicates, Ludsin has failed to adequately demonstrate his ability to disseminate the requested information to the public. Therefore, we find that Ludsin has not shown that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. Because Ludsin has not satisfied the public-interest prong of the test set forth in the FOIA and in the DOE regulations concerning fee waivers, we need not address the commercial-interest prong of that test. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on April 11, 2006 by Steven Ludsin, OHA Case No. TFA-0159, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 12, 2006

June 28, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Judicial Watch, Inc.

Date of Filing: May 25, 2006

Case Number: TFA-0162

On May 25, 2006, Judicial Watch, Inc. (Judicial Watch) filed an appeal from a determination issued to it on February 3, 2006 by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI responded to a request for documents Judicial Watch submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOI determined that it could locate no documents responsive to Judicial Watch's request. This appeal, if granted, would require FOI to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

In a letter dated March 9, 2006, Judicial Watch requested documents related to the following:

(1) The decision to conduct a 30-day investigation and/or review of the acquisition of London-based Doncasters Group, Ltd., by Dubai International Capital (DIC) of Dubai, United Arab Emirates ("UAE");

(2) The decision to conduct a 45-day investigation and/or review of the acquisition of London-based Doncasters Group, Ltd., by DIC of Dubai, UAE as required or allowed by statute;

(3) Contracts obtained by DIC through its acquisition of Doncasters Group, Ltd., to manage and/or control and/or operate plants in Georgia and/or Massachusetts and/or Connecticut that make precision components used in engines for military aircraft and tanks.

Letter from Judicial Watch to Abel Lopez, Director, DOE FOIA/PA Division (FOI) (March 9, 2006). FOI forwarded the request to two offices it believed may have responsive documents, the Office of General Counsel (GC) and the Office of Policy and International Affairs (PIA). In its determination letter, FOI determined it did not locate any records responsive to Judicial Watch's request. Letter from Abel Lopez to Judicial Watch (April 18, 2006) (Determination Letter).

In its appeal, Judicial Watch challenges the adequacy of the searches performed by GC and PIA for responsive documents. In support of its argument, Judicial Watch states that DOE participated in the review process for a prior acquisition involving similar companies and that "it is highly likely that the DOE was consulted again on a similar matter which impact [sic] national security, in the case of the DIC acquisition of Doncasters." Letter from Judicial Watch to OHA (May 24, 2006) (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted both GC and PIA to ascertain the scope of the searches for responsive documents. GC informed us that it did not provide any legal support to any DOE element regarding the matter at issue and, consequently, generated no documents pertaining to this case. *See* Electronic Mail Message from Samuel Bradley, GC, to Diane DeMoura, OHA (June 2, 2006). PIA informed us that DOE did not participate in any review involving DIC's acquisition of Doncasters Group, Ltd. Consequently, it generated no documents regarding that case. *See* Memorandum of Telephone Conversation between Edward Rossi, PIA, and Diane DeMoura, OHA (June 21, 2006).

Based on the foregoing information, we find that searches by GC and PIA were calculated to uncover documents responsive to Judicial Watch's request and were therefore adequate. GC knew that it did not provide legal support to any DOE element in this case and, therefore, generated no documents. PIA had definitive knowledge that DOE neither was asked to participate, nor did participate, in the review process for the acquisition of Doncasters Group Ltd. by DIC. As a result, PIA generated no documents relating to any such review. Consequently, no further search was undertaken since documents were known not to exist. Had DOE participated in the review process, then one might expect that PIA or GC would have generated documents regarding that review. In such a case, a more exhaustive search would be required. In this case, however, PIA and GC were not required to undertake a search for documents they knew with a certainty did not exist. We are not persuaded by Judicial Watch's argument that DOE likely participated in the review process because it had previously

participated in a similar review. The fact that DOE may have participated in the review process in a prior acquisition involving two similar companies does not, by definition, mean that DOE participated in the review process of the acquisition at issue in this case. Accordingly, the search was adequate and, therefore, Judicial Watch's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on May 25, 2006 by Judicial Watch, Inc., OHA Case No. TFA-0162, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 28, 2006

November 15, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wayne Brunsilius

Date of Filing: September 22, 2006

Case Number: TFA-0163

This Decision concerns an Appeal Wayne Brunsilius filed in response to a determination issued to him by the Rocky Flats Project Office (hereinafter referred to as "RFPO") of the Department of Energy (DOE). In that determination, RFPO denied a request for the waiver of fees associated with its processing of Mr. Brunsilius' request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This information concerned the alleged exposure of Mr. Brunsilius and other employees to radioactive and other hazardous materials during his employment at the Rocky Flats site. Because Mr. Brunsilius did not indicate that he would be willing or able to pay the fees, RFPO suspended the processing of his request. This Appeal, if granted, would require RFPO to process Mr. Brunsilius' request and waive all applicable fees.

The FOIA generally requires that documents held by federal agencies be released to the public on request. The FOIA also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if a requester can demonstrate that disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 10C.F.R. § 1004.9(a)(8). Both of these criteria must be satisfied before a fee waiver is granted. *Id.*

The DOE regulations set forth specific guidelines that are to be used in determining whether these criteria have been met. In determining whether disclosure of the information sought is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, we are required to consider (i) the subject of the request: whether the requested records concern the operations or activities of the government; (ii) the informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of governmental activities; (iii) the contribution to an understanding by the general public of the subject likely to result from disclosure, and (iv) the significance of the contribution to public understanding: whether disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities. 10 C.F.R. § 1004.9(a)(8)(i).

In determining whether disclosure of the information is primarily in the commercial interest of the requester we must consider whether the requester has a commercial interest that would be furthered by the requested disclosure, and, if so, whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii).

Our consideration of these factors leads us to conclude that RFPO correctly determined that Mr. Brunsilius should not be granted a fee waiver. Specifically, we do not believe that disclosure of the requested records would contribute significantly to public understanding of government operations or activities. This is primarily because Mr. Brunsilius has failed to demonstrate that he will be able to disseminate any information that is released to a significant portion of the general public. He is currently an inmate at a state correctional facility in Sterling, Colorado, and has indicated that he intends to disseminate the information in an unspecified manner through unnamed "experts" who have been retained by Mr. Brunsilius' counsel. Appeal at 2. In *Tod N. Rockefeller*, Case No. VFA-0447 (October 28, 1998), we found the requester's statement that he "seeks to share [the] information about . . . his case with the public" to be insufficient to demonstrate a willingness and ability to disseminate the requested information. Mr. Brunsilius' statements in this regard are equally conclusory and generalized, and fall far short of adequately demonstrating an ability to communicate the information to a sufficiently broad audience. *See, e.g., STAND, Inc.*, Case No. VFA-0539 (December 23, 1999) (dissemination through newsletter with circulation of 2,000, through requester's own library and through news conferences and press releases held sufficient to warrant fee waiver). The inability to disseminate information, by itself, is a sufficient basis for denying a fee waiver request. *Donald R. Patterson*, Case No. VFA-0589 (August 3, 2000) (citing *Larson v. CIA*, 843 F.2d 1481 (D.C. Cir. 1988)). We therefore need not consider the issue of whether disclosure would primarily be in the commercial interest of the requester. RFPO properly denied Mr. Brunsilius' request for a fee waiver.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Wayne Brunsilius, OHA Case Number TFA-0163, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 15, 2006

August 3, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Thomas J. Beauford

Date of Filing: May 30, 2006

Case Number: TFA-0164

On May 30, 2006, Thomas J. Beauford filed an Appeal from a final determination that the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE) issued on May 4, 2006, in which Oak Ridge stated that it did not have a copy of the audiogram that Mr. Beauford was requesting pursuant to the Privacy Act, 5 U.S.C. ' 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Office does not believe that Oak Ridge has a copy of the audiogram.

I. Background

On February 14, 2006, Mr. Beauford requested, under the Privacy Act, a copy of his medical records. On April 21, 2006, Oak Ridge sent Mr. Beauford a letter indicating that it did not have a copy of his medical records and he should request those records from his employer, British Nuclear Fuels Limited (BNFL). Determination Letter dated April 21, 2006, from Amy Rothrock, Oak Ridge to Mr. Beauford. On April 29, 2006, Mr. Beauford requested, also under the Privacy Act, a copy of his audiogram. On May 4, 2006, Oak Ridge responded that it had no medical records for Mr. Beauford, and therefore, no audiogram. In this Appeal filed on May 30, 2006, Mr. Beauford states that he did have an audiogram taken. Appeal letter dated May 15, 2006, from Mr. Beauford to Director, Office of Hearings and Appeals (OHA), DOE. If granted, the Appeal would require Oak Ridge to produce a copy of the audiogram.

II. Analysis

We will examine whether Oak Ridge should have possession of Mr. Beauford=s audiogram. The Privacy Act permits individuals to gain access to records or to information pertaining to them that is contained in systems of records maintained by federal agencies. 5 U.S.C. ' 552a(d)(1). DOE regulations define a system of records as Aa group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars

assigned to the individual.@ 10 C.F.R. ' 1008.2(m). Under the Privacy Act, an agency that issues a determination to a requester must ensure that it has searched for records that are retrieved by name or other personal identifier of the requester in every relevant system of records under its control. *Diane C. Larson*, 27 DOE & 80,110 (1998).

Oak Ridge has informed us that the information Mr. Beauford is requesting is of a type held by his employer, BNFL. Thus, the initial inquiry in this case is whether BNFL, who possibly possesses the records in question, is an Aagency@ as defined in the Privacy Act. The Privacy Act adopts the definition of Aagency@ as used in the Freedom of Information Act (FOIA). 5 U.S.C. ' 552a(1). The FOIA defines the term Aagency@ to include any Aexecutive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . or any independent regulatory agency.@ 5 U.S.C. ' 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to Aextensive, detailed, and virtually day-to-day supervision.@ *Forsham v. Harris*, 445 U.S. 169, 180 & n. 11 (1980) (citing *United States v. Orleans*, 425 U.S. 807 (1976)). In the present case, although BNFL is a DOE contractor, the DOE did not conduct extensive, detailed, and day-to-day supervision of its operations. BNFL provides a service on a fixed-price basis. Electronic Mail Message dated June 15, 2006, from Linda Chapman, Oak Ridge, to Janet Fishman, OHA, DOE (June 15, 2006 Electronic Mail Message). We therefore conclude that BNFL is not an Aagency@ within the meaning of the FOIA.

However, the Privacy Act provides a specific exception for government contractors. AWhen an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system.@ 5 U.S.C. ' 552a(m)(1). Moreover, the DOE Privacy Act regulations apply to DOE contractors and their employees to the extent required by 5 U.S.C. ' 552a(m). 10 C.F.R. ' 1008.1(c). The DOE contract with BNFL does not provide for the maintenance of a system of records by BNFL to accomplish an agency function. June 15, 2006 Electronic Mail Message. Based on the foregoing, we conclude that the records sought by Mr. Beauford in his request are not contained in a system of records maintained by or for Oak Ridge. Mr. Beauford needs to request such records from BNFL, if it maintains such records.

III. Conclusion

Oak Ridge cannot produce Mr. Beauford=s audiogram because it does not have it or his other medical records. These records are not Aagency records@ nor are they in a DOE system of records that would make them subject to the Privacy Act. The Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on May 30, 2006, by Thomas J. Beauford, Case No. TFA-0164, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. ' 552a(g)(1). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 3, 2006

October 16, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Heart of America Northwest

Date of Filing: June 12, 2006

Case Number: TFA-0165

On June 12, 2006, Heart of America Northwest (HANW) filed an appeal from a determination issued to it on June 6, 2006, by the Department of Energy's (DOE) Office of River Protection (ORP). In that determination, ORP responded to a request for documents that HANW submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORP identified several documents responsive to HANW's request. Some of those documents were released in their entirety and, pursuant to Exemptions 4 and 5 of the FOIA, others were released with some deletions or withheld in their entirety. HANW challenged the withholding of information under Exemptions 4 and 5. This appeal, if granted, would require ORP to release the withheld information to HANW.

I. Background

HANW requested documents pertaining to the Waste Treatment and Immobilization Plant (WTP) at the DOE's Hanford Site in Richland, Washington. *See* Letter from Erik Olds, ORP, to Hyun Lee, HANW (May 9, 2006) (Determination Letter). ORP identified several documents responsive to HANW's request. Of those documents, several were released in their entirety, including correspondence between the DOE amd DOE contractor Bechtel National, Inc. (BNI). The documents released with deletions include the Army Corps of Engineers "Independent Review of WTP Estimate at Completion (EAC) 2005" (ORP report), the Project Estimate at Completion April 2005 prepared by BNI, and other correspondence.

ORP stated that the information withheld under Exemption 4 was provided by BNI and related to "financial strategies which [BNI] was required to submit to DOE." Determination Letter. ORP stated that release of the information was "a source of corporate intelligence about BNI and its plans, capabilities, and commitments for the future. This information could be used by competitors to the disadvantage of BNI and result in impairing the government['s] ability to

obtain this and other necessary information in the future[.]" *Id*. ORP stated that the information withheld under Exemption 5 consisted of advice, recommendations, and other information it believed should remain internal to the DOE as the agency "determines the appropriate contract strategies going forward." *Id*. ORP added that the information did not reflect a final agency position, but rather was "subject to review and action by DOE officials." *Id*.

HANW challenged ORP's withholding of information under Exemptions 4 and 5 on various grounds. Letter from Gerald Pollet, HANW, to OHA (June 9, 2006) (Appeal). HANW's arguments are discussed below.

II. Analysis

As an initial matter, HANW argues that ORP did not identify which FOIA exemption it was applying to each specific deletion. Under the FOIA, if a request for a record is denied, the denial must include "a statement of the reason for the denial, containing a reference to the specific exemption under the [FOIA] authorizing the withholding of the record and a brief explanation explaining how the exemption applies to the record withheld…" 10 C.F.R. § 1004.7(b)(1). Our review of the documents provided to HANW shows that in several of the documents ORP failed to specify which exemption it claimed for each deletion. Rather, ORP claimed both Exemptions 4 and 5 at the bottom of each page, applying both exemptions to all of the deletions on the page. This does not satisfy the requirements of the FOIA. It is our understanding, however, that ORP recently corrected this problem by providing HANW with a new set of the redacted documents in which, on pages where multiple exemptions were claimed, a FOIA exemption was claimed for each specific deletion. *See* Electronic Mail Message from Dorothy Riehle, ORP, to Diane DeMoura, OHA (September 9, 2006). Accordingly, we find that this matter has been resolved.

Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, the information withheld under Exemption 4 appears in the ORP report and the EAC. BNI was required to submit the information in question as part of a contract it held with

DOE. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be "commercial or financial."[1] The information submitted by BNI, i.e. labor costs and other expenses, procurement information and strategies, estimates, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, 28 DOE ¶ 80,105 (2000). BNI satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "privileged" or "confidential." This case concerns "confidential" information. Withheld information is confidential if its release would either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE's ability to obtain similar information in the future. The question, then, turns to whether release of the information could result in substantial competitive harm to the submitters of the information.

According to ORP, the information "could be used by competitors to the disadvantage of BNI." Determination Letter. BNI stated that the release of the withheld information could both compromise the procurement process for subcontractors and could be used unfairly by competitors. *See* [BNI's] Response to FOIA Request Related to April 2005 WTP Estimate at Completion (June 20, 2006). After reviewing the information in question, we conclude that the information is confidential because release of the information could substantially harm BNI's competitive position. Disclosure of the information could give competitors insight into BNI's estimating processes, rate development methods, labor pricing, and subcontractor procurement processes. This information could be used by competitors to undercut BNI's position on any future contract bids and also to impede BNI's ability to obtain reasonable subcontractor bids.

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears,*

[1] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

Roebuck & Co., 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The information withheld under Exemption 5 is contained in both the ORP report and in various items of correspondence from ORP to BNI. It consists primarily of comments, recommendations and opinions prepared by DOE, BNI and Army Corps of Engineers employees regarding the WTP facility. Therefore, the requested information falls within the definition of "inter-agency or intra-agency memoranda" in the FOIA.[2] In addition, the comments, recommendations, and opinions withheld are clearly predecisional and deliberative. They were generated pursuant to the DOE's review of BNI's submittal of the EAC. The withheld information does not represent a final DOE position, but rather consists of communications among DOE, BNI and the Army Corps of Engineers and recommendations regarding BNI's EAC. Accordingly, we hold that the comments, recommendations, and opinions withheld from the requested documents meet the requirements for withholding material under the deliberative process privilege of Exemption 5.

Discretionary Public Interest Disclosures

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. HANW maintains that disclosure of the withheld information would be in the public interest.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See*, e.g., *Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999).

[2] Although BNI is not a DOE entity or a federal agency, courts have found that many communications between an agency and a non-governmental entity may be considered to be "intra- or inter-agency" documents and may be withheld under Exemption 5 . *See, e.g. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001); *see also Vladeck, Waldman, Elias & Engelhard, P.C.*, 27 DOE ¶ 80,230 (1999).

Regarding the information withheld under Exemption 5, the withheld information consists primarily of advisory opinions and recommendations provided to or generated by DOE in the consultative process. We find that the release of this would have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *See Nevada Nuclear Waste Task Force, Inc.*, 28 DOE ¶ 80,160 (2001). Accordingly, we find that release of the information withheld under Exemption 5 would not be in the public interest.

Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that ORP complied with the FOIA by releasing to HANW all factual, non-deliberative portions of the documents.

It Is Therefore Ordered That:

(1) The Appeal filed on June 12, 2006, by Heart of America Northwest, OHA Case No. TFA-0165, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006

December 6, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert D. Reilly

Date of Filing: June 14, 2006

Case Number: TFA-0166

On July 14, 2006, Robert D. Reilly (Reilly) filed an Appeal from a determination that the Golden Field Office (Golden) of the Department of Energy (DOE) issued to him. The determination responded to a request for information Reilly filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the responsive information it withheld from Reilly.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On April 26, 2006, Reilly filed a FOIA request with Golden seeking (1) the composition, as of January 6, 2006, of the Merit Review Committee (MRC) of the DOE Golden Field Office; (2) a specific web site listing the names of such persons on the MRC or a copy of a document which contains the names; and (3) the positions and company affiliations of the persons on the MRC who are non-federal reviewers and the credentials qualifying them to be reviewers. *See* Determination Letter at 1. In a determination letter, Golden stated that is was unable to provide Reilly with information responsive to his FOIA request. It further stated that "agency records regarding the composition of the Merit Review Committee (MRC) of the U.S. Department of Energy's Golden Field Office . . . are exempt from disclosure" under Exemption 6. [1] In his Appeal, Reilly challenges the application of Exemption 6 to the withheld information.

1/ Also, in its Determination Letter, Golden stated that no "specific website" exists which lists the names of MRC members. Determination Letter at 2.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

Golden determined that there was a privacy interest in the identities of the MRC members, as well as their positions, company affiliations, and qualifying credentials. According to Golden, "the need to keep the [requested information] private outweighs the small public interest (if any) gained from release of such information." Determination Letter at 2. Golden further stated that "this information is of a personal nature, disclosure of which could cause the individuals in this case to be harrassed and/or result in an unwarranted invasion of their privacy. *Id.*

We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc.*, 15 DOE ¶ 80,115 at 80,537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc.*, 16 DOE ¶ 80,102 at 80,504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,120 at 80,569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,104 at 80,519 (1985). The same type of privacy interest is involved in this case. In fact, because the members of the MRC whose names are sought are non-federal members and private citizens, there is a significant privacy interest in maintaining their confidentiality. If this information were disclosed to the requester, the disclosure "would undoubtedly result in disappointed financial assistance applicants seeking similar information in order to impose uninvited and unwanted contacts on MRC members outside the selection process, seeking explanations and/or challenging the

evaluations of those merit reviewers." *See* Golden's Response at 4. Such harassment would "adversely impact deliberations and decision-making within DOE's financial assistance award process." *Id.* We have previously found the potential for harassment of individuals to be sufficient justification for withholding information under Exemption 6. *See, e.g., William Hyde*, 18 DOE ¶ 80,102 (1988). These considerations govern our determination. We therefore find a real and substantial privacy interest in the identities of the MRC members.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)).

We find that there is a minimal public interest in the release of the withheld information. Reilly has not demonstrated what public interest would be served by releasing the identifying information of the MRC . Rather, he asserts that "the composition of a committee which reviews certain public activities clearly does not fall within the ambit or scope of personnel and medical and similar files as are kept for government employees." Appeal at 1. Reilly further asserts that "the composition of federal boards and commissions and the like are usually not only disclosed, but published. Such disclosure is necessary to hold the federal government accountable to the citizens of this democratic country." *Id.* Simply alleging that similar information is usually disclosed to the public is not sufficient.

3. Balancing the Interests

As stated earlier, there is a significant privacy interest in this information. In determining whether the disclosure of the identifying information could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989). We agree with Golden and find that the minimal public interest here is outweighed by the real and identifiable privacy interests of the MRC members.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert D. Reilly on June 14, 2006, OHA Case No. TFA-0166, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 6, 2006

October 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Beveridge & Diamond, P.C.

Date of Filing: June 22, 2006

Case Number: TFA-0167

Beveridge & Diamond, P.C. filed an Appeal from a determination that the Headquarters FOIA/Privacy Act Group (FOIA/PA) of the Department of Energy issued on May 22, 2006. In that determination, FOIA/PA denied in part a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA/PA identified and released five documents that were responsive to the Appellant's request, two in their entirety and three with portions withheld. FOIA/PA determined that the withheld portions contained classified information that should be protected from disclosure under the FOIA. This Appeal, if granted, would require the DOE to release the withheld portions of the documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On September 3, 2004, the Appellant requested seven documents: Atomic Energy Commission (AEC) 384/23 through AEC 384/27 and AEC 384/29, regarding the Uranium 233 Program, and AEC 384/28, regarding production reactors and operation of production reactors for non-weapons purposes. The History and Archives Group of the Office of the Executive Secretariat conducted a review and located six of the seven requested documents.[1] On May 22, 2006, FOIA/PA responded to the request by providing the Appellant with copies of AEC 384/26 and AEC 384/28 in their entirety, and copies of AEC 384/24, AEC

[1] AEC 384/23 had been transferred to the National Archives and Records Administration (NARA). On October 6, 2004, FOIA/PA advised the Appellant to request that document directly from NARA.

384/25 and AEC 384/27 from which portions had been redacted.[2] In its determination letter, FOIA/PA explained that the withheld portions of AEC 384/24, AEC 384/25 and AEC 384/27 contained information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, therefore warranting protection from disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the documents entitled AEC 384/24, AEC 384/25 and AEC 384/27. In its Appeal, the Appellant contends that the information it seeks is "approximately 50 years old and related to a defunct program. In all likelihood, the information is long outdated and is of more historical than scientific significance." The Appellant also contends that much of this information is likely already in the public domain and therefore its disclosure is unlikely to jeopardize the common defense and security of the nation.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,267 (2006).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the responsive documents from which the DOE had withheld information.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the documents may now be released. The information that the DOE continues to withhold concerns total inventories of special nuclear material, which is currently classified as Restricted Data (RD) and is identified as "DOE b(3)" in the margin of the documents. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3.

[2] FOIA/PA notified the Appellant that AEC 384/29 fell under the jurisdiction of the Office of Naval Reactors within the DOE's National Nuclear Security Administration, and that that office would be responding directly to the Appellant concerning that document.

The denying official for the DOE's withholdings is Mr. Michael A. Kilpatrick, Deputy Chief for Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires DOE to continue withholding portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Deputy Chief has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Beveridge & Diamond, P.C., on June 22, 2006, Case No. TFA-0167, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of Atomic Energy Commission documents AEC 384/24, AEC 384/25 and AEC 384/27, regarding the Uranium 233 Program, will be provided to Beveridge & Diamond, P.C.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 24, 2006

October 12, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American-Arab Anti-Discrimination Committee

Date of Filing: July 5, 2006

Case Number: TFA-0168

This Decision concerns an Appeal that was filed by the American-Arab Anti-Discrimination Committee (ADC) in response to a determination that was issued to it by the Director of the Department of Energy's (DOE) Policy and Internal Controls Management Office (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that ADC submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Director informed ADC that the DOE's search had failed to identify any documents that were responsive to ADC's request. This Appeal, if granted, would require that we remand this matter to the Director for another search.

I. Background

In a FOIA request to the Federal Bureau of Investigation (FBI), the Department of Justice (DOJ) and the DOE, ADC asked that these agencies release

> information relating to the FBI and [DOE's] Nuclear Emergency Support Team (NEST) nuclear surveillance program. Specifically, ADC requests that it be provided with the addresses of the mosques, homes, businesses, and warehouses, and all other facilities, in the greater Washington, DC area where the nuclear surveillance program has been conducted [since] September 11, 2001 . . . .

ADC FOIA request at 1.

In his determination letter, the Director characterized ADC's request as being "for a copy of the addresses of mosques, homes, businesses, warehouses and other facilities in the greater Washington, DC area where the nuclear surveillance program" has been conducted since September 11, 2001. Determination letter at 1. The Director said that no responsive documents could be located.

In its Appeal, ADC contends that the Director improperly narrowed the scope of the search for responsive documents. The requester states that it sought access to all information about the nuclear surveillance program, and not just the names and addresses of the locations at which surveillance took place. Furthermore, ADC argues that the DOE's active involvement in the program makes it highly unlikely that an adequate search would produce no responsive documents.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, Case No. VFA-0353, 26 DOE ¶ 80,240 (1997).

In order to determine whether the search conducted was adequate, we contacted the Director's Office. We were informed that the request was referred to the Office of Emergency Response. We contacted the FOIA Officer in that Office who co-ordinated the search, and were told that, despite the wording of the Director's determination letter, the search conducted was for any information concerning the surveillance program, that all nine offices of the Office of Emergency Response were searched, and that although DOE personnel did take part in the surveillance, the operations were conducted under the auspices of the FBI, and any responsive documents were likely to be located in the facilities of that agency. *See* memorandum of October 3, 2006 telephone conversation between Robert Palmer, Staff Attorney, Office of Hearings and Appeals, and Walter Chrobak, Office of Emergency Response. Based on the information before us, we conclude that the search for responsive documents was adequate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the American-Arab Anti-Discrimination Committee, OHA Case Number TFA-0168, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date:October 12, 2006

September 21, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: July 12, 2006

Case Number: TFA-0169

On July 12, 2006, National Security Archive (NS) filed an appeal from a determination issued to it on June 13, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI responded to a request for documents that NS submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOI forwarded the request to the DOE's Office of Policy and International Affairs (PIA) for a search for responsive documents. PIA located a document responsive to the request and released the document with some deletions. This appeal, if granted, would require FOI to release the withheld portion of the document.

I. Background

NS filed a request under the FOIA for "the October 2002 publication of the Department that pertains to oil market contingency planning that was referenced by the Energy Information Administration." Letter from Abel Lopez, FOI, to Thomas Blanton, NS (June 13, 2006) (Determination Letter). FOI forwarded the request to PIA for a search. PIA located a 166-page document responsive to the request titled "October 2002, Oil Market Contingency Planning." PIA released the document but withheld under Exemption 2 of the FOIA information contained in three tabs – Tabs C, D, and P – totaling 19 pages in length.

In its Appeal, NS argues that

> Revealing the Department's planned response to an oil shortage resulting from U.S. military action overseas…would in no way undermine the Department's efforts, as the United States has already been experiencing an oil shortage and rising oil prices due to military action in the Persian Gulf…All contingency plans

> that might have been placed at risk by the release of these excised portions have already been implemented or rejected.

Letter from Thomas S. Blanton, NS, to OHA (July 11, 2006) (Appeal). NS also maintains that the document is based entirely on public data and, therefore, "its release would provide no new information to those who might attempt to violate the law and avoid detection." *Id*. Finally, NS argues that withholding of the document under Exemption 2 is inappropriate because

> All military action is carried out on behalf of the people of the United States, and, therefore, it is in the public's interest to be fully informed of the consequences…if United States involvement in the Persian Gulf causes a large enough oil shortage as to require a large-scale response by the Department of Energy, such information is by no means limited in scope to internal rules and practices, but is directly relevant to the daily lives of the American public.

Id. Therefore, NS argues, the information is not the type of "internal personnel rules and practices" to which Exemption 2 applies. *Id*.

II. Analysis

Exemption 2 exempts from mandatory public disclosure records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information) and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves the second category, high two information. An agency seeking to withhold information under high two must be able to show that (1) the requested information is predominantly internal and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

In withholding the information in Tabs C, D, and P, PIA described the withheld information as follows:

> The information deleted includes the [DOE]'s role in energy market events in the Middle East in case of oil supply disruptions. Although the information contained in Tabs C and D [is] based on case scenarios, disclosure would reveal the [DOE]'s vulnerability assessments related to response policy, possible courses of action, and pros and cons related to market reaction induced by rising oil prices. It could also lead to speculation about economic damage and its impact on the country's economy

* * *

> Tab P contains information on the Office of Public Affairs Communication Plan of the [DOE]. Release of this information would reveal the [DOE]'s strategy to conduct and implement our communication plan of oil supply disruptions.

Determination Letter.

After reviewing the withheld documents, we disagree with PIA's application of Exemption 2. PIA's principal rationale for withholding the information under Exemption 2 is that if potential terrorists or other malefactors obtained that information, they could use it to gain insight into the government's response process, identify possible targets or vulnerabilities, or develop methods to circumvent or impede the government's response to an oil supply disruption. PIA maintains that release of the information would risk circumvention of the DOE's statutory and regulatory duties to protect information that could facilitate terrorist activity against the nation's resources.

NS's argument that the document was compiled entirely of public data and that its release "would provide no new information to those who might attempt to violate the law and avoid detection" is without merit. Although some statistics and figures used in the document were derived from public data, the various strategies, estimates, and policy recommendations contained in the withheld portions of the document are not public information and, therefore, its release could provide new information to those attempting to target the nation's resources. *See* Memorandum of Telephone Conversation between Jim Hart, PIA, and Diane DeMoura, OHA (July 19, 2006).

NS's final argument – that any United States military involvement in the Persian Gulf which causes an oil shortage large enough to require a large-scale response by the DOE is not limited in scope to internal rules and practices, but rather is directly relevant to the daily lives of the American public – impliedly asserts that the application of the high two exemption to the withheld information fails the first prong of the *Crooker* test – that the information be predominantly internal. We agree with that argument.

Information is "predominantly internal" if it "does not purport to regulate activities among members of the public…[and] does [not]…set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting the members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979). In this case, the withheld information appears to include specific strategies and estimates the DOE would employ in responding to severe oil disruptions in overseas oil supplies, examples of possible domestic oil disruptions and response strategies, and a detailed public affairs communications strategy for disseminating crucial information to the public in the face of oil supply disruptions. It is unclear whether this information is merely the internal personnel rules and practices of the DOE. The withheld information appears to contain specific recommended steps for agency personnel for responding to an oil supply disruption, a situation which would clearly affect members of the public. Accordingly, we believe the application of Exemption 2 does not satisfy the requirements set forth by the court in *Crooker*.

However, our review of the withheld documents indicates that another exemption may be proper in this case. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are

"inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In this case, PIA informed us that the withheld documents contain recommendations that have not been adopted and were not finalized. *See* Memorandum of Telephone Conversation between Jim Hart, PIA, and Diane DeMoura, OHA (July 19, 2006). PIA's position, therefore, is that the documents do not represent a final agency action, policy, or interpretation. *Id*. Furthermore, PIA informed us that the estimates, strategies and recommendations are the product of subordinates engaging in discussions about possible case scenarios and responses in order to be able to make informed recommendations to higher-level supervisors should the need arise. *Id*. Accordingly, it appears to us that they may be both pre-decisional and deliberative.

As stated above, we do not believe that PIA's application of Exemption 2 was proper. However, we believe that the documents may be properly withheld under Exemption 5. Accordingly, we will remand this matter to PIA in order that it may reexamine the documents, make a determination as to whether Exemption 5 (or another exemption) applies, and either release the documents to NS or issue a new determination justifying any withholdings it makes under a different exemption of the FOIA.

It Is Therefore Ordered That:

(1) The Appeal filed on July 12, 2006, by National Security Archive, OHA Case No. TFA-0169, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Policy and International Affairs for further processing in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 21, 2006

August 25, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Shearman & Sterling, L.L.P.

Date of Filing: July 14, 2006

Case Number: TFA-0170

On July 14, 2006, Shearman & Sterling, L.L.P. (Shearman) filed an appeal from a determination issued to it on June 6, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI responded to a request for documents that Shearman submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOI determined that it did not have any documents responsive to Shearman's request. This appeal, if granted, would require FOI to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Shearman filed a request under the FOIA for "all records…relating to the origin, negotiations, and signing of the Energy Charter Treaty (ECT), including but not limited to the development of the U.S. position." Letter from John E. Thompson, Shearman, to DOE (April 7, 2006). FOI forwarded the request to the DOE's Office of Policy and International Affairs (PIA) for a search. According to FOI, the search did not produce any responsive documents. Letter from Abel Lopez, FOI, to John E. Thompson (June 6, 2006) (Determination Letter). As a result, FOI denied the request and Shearman filed the present appeal.

In its appeal, Shearman challenges the adequacy of PIA's search, arguing that "[b]ecause the Department of Energy participated in interagency discussions and discussions with the private sector regarding the [ECT] within the 1990 – 1995 period, it should possess documents regarding the ECT." Letter from John E. Thompson to OHA (July 7, 2006) (Appeal Letter). Shearman also states that documents it received from the Department of Commerce name a Mr. Hank Santiago as the individual who represented the DOE in the discussions pertaining to the ECT. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted PIA to discuss the initial search. George Kerestes of PIA informed us that Shearman's original request did not name a particular individual involved in the ECT discussions. Mr. Kerestes stated that the person involved with the ECT was an individual who had since retired, Mr. George Zigler. *See* Memorandum of Telephone Conversation between George Kerestes, PIA, and Diane DeMoura, OHA, July 17, 2006. Mr. Kerestes stated that PIA thoroughly searched Mr. Zigler's office and files, including paper files, and no documents relating to the ECT were located. Mr. Kerestes noted that in the early 1990s, electronic storage of documents was not as common as it is today and that it is possible that any paper documents that may have existed were not retained. Mr. Kerestes added that he was not aware of any involvement by Hank Santiago, also now retired, in the ECT and, therefore, Mr. Santiago's files and office were not searched.

Based on this information, we find that PIA conducted a search reasonably calculated to reveal records responsive to Shearman's initial request and the search, therefore, was adequate. However, based on new information Shearman provided in its appeal – the name of another individual possibly involved in the ECT discussions on behalf of the DOE – PIA has informed us that it is possible that responsive documents may exist. *See* Memorandum of Phone Conversation between George Kerestes and Diane DeMoura, July 17, 2006.

Accordingly, this appeal is granted and this matter is remanded to PIA to complete a new search using the additional information provided in the appeal. After completing its search, PIA is to provide Shearman with any responsive documents or to issue a new determination justifying the withholding of any responsive information.

It Is Therefore Ordered That:

(1) The Appeal filed on July 14, 2006, by Shearman & Sterling, L.L.P., OHA Case No. TFA-0170, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Policy and International Affairs for further processing in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 25, 2006

December 13, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: City of Alexandria

Date of Filing: July 25, 2006

Case Number: TFA-0171

On July 25, 2006, Schnader Harrison Segal & Lewis LLP (Schnader) filed an Appeal on behalf of its client the City of Alexandria (Alexandria) from a determination issued to it by the Department of Energy's FOIA/Privacy Act Group (DOE/HQ). In that determination, DOE/HQ released some documents in response to a request for information that Schnader filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

In August 2005, the Mirant Corporation conducted tests of the emissions of the Potomac River Generating Station (PRGS) in Alexandria, Virginia and found that the plant emissions exceeded the National Ambient Air Quality Standards of the Clean Air Act. The plant's owners ceased operations. The District of Columbia Public Service Commission then filed a petition for an emergency order asserting that the plant closure reduced the reliability of the electricity supply to the metropolitan Washington, D.C. area. In December 2005, the Secretary of Energy issued an emergency order directing that plant operations resume on a restricted basis.

On March 2, 2006, Schnader sent a FOIA request to the Council on Environmental Quality (CEQ) for copies of documents in the possession of the CEQ relating to the DOE proceeding that ordered PRGS to resume operations. *See* Letter from Schnader to CEQ (March 2, 2006) (Request). Schnader also requested documents relating to CEQ consultations with other government agencies, documents pertaining to all instances between 2003 and 2006 that CEQ has invoked the provision for alternative arrangements because of a declared emergency, documents relating to guidelines for implementation

of alternative arrangements, and documents relating to guidelines for determining and evaluating emergency situations.[1] Request at 1-2. On April 4, 2006, the CEQ sent an initial response consisting of 33 documents released in their entirety and 10 released with redactions. Of the 10 redacted documents, five had originated in or were of special interest to DOE. CEQ sent those five documents, along with 14 additional responsive documents, to DOE for a final determination. DOE/HQ forwarded the request to the Office of Environment, Safety and Health (DOE/EH).[2] After consulting with the Office of the General Counsel, DOE/EH returned the responsive material to DOE/HQ for release to Schnader. On June 21, 2006, DOE/HQ sent its final response to Schnader. Letter from DOE/HQ to Schnader (June 21, 2006) (Determination). Eight of the documents were redacted and 12 were withheld in their entirety under the executive or deliberative process privilege of Exemption 5. [3]

On July 25, 2006, Schnader filed this Appeal. As an initial matter, Schnader contends that DOE applied Exemption 5 to the documents in error. Schnader argues that because all of the redacted documents (and possibly all of the withheld documents) were dated after December 20, 2005, they are "post-decisional" and Exemption 5 does not apply.[4] However if, in the alternative, Exemption 5 does apply, Schnader submits that DOE has not provided a sufficient description of the responsive material to allow Schnader to determine why the items were withheld, thus violating the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (1973) (stating that an agency must identify the withheld documents with enough detail to justify its determination to withhold). Schnader also contends that there is a public interest in the material that justifies its release to the public. The public, Schnader insists, has a vital interest in knowing the basis for the Emergency Order and in understanding the reasons for the measures taken to implement the Order. Finally, Schnader alleges that DOE did not adequately determine the segregability of factual and deliberative portions of the redacted and withheld documents. Schnader asserts that a segregability analysis of the 12 documents that were withheld in their entirety would not constitute an "inordinate burden" for the agency. *Lead Industries Ass'n v. Occup. S. and H. Admin*, 610 F.2d 70, 86 (2d Cir. 1979) (stating that an agency may only withhold an entire document when the non-exempt information "is so interspersed with exempt material that separation by the agency, and policing of this by the courts, would impose an inordinate burden"). In summary, Schnader contends that if Exemption 5 applies, DOE has failed to (1) adequately describe the redactions and the withheld documents, (2) make the requisite showing as to why there are no segregable portions of the material, and (3) consider the public interest in the documents. Schnader therefore asks OHA to order the release of the withheld information.

[1] "When emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with [CEQ] about *alternative arrangements*." 40 C.F.R. §1506.11 (emphasis added).
[2] The offices that were previously a part of DOE/EH are now contained in the Office of Health, Safety, and Security (DOE/HSS), which was officially established on August 30, 2006.
[3] Even though CEQ stated that it sent 19 documents to DOE for review, DOE made reference to 20 responsive documents in its determination letter.
[4] The Emergency Order was issued on December 20, 2005.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

(1) Applicability of Exemption 5

Schnader argues that because some of the documents were created after December 20, 2005, when the Executive Order was issued, those documents are "post-decisional" and Exemption 5 does not apply. Appeal at 1-2. Schnader states that communications made after the decision and designed to explain it are not privileged. "The exemption is to be applied as narrowly as consistent with efficient government operation." *Id.* at 2.

We must look to the purpose of Exemption 5 for a response to Schnader's argument. Exemption 5 protects documents that would reveal the decision-making process that results in a final agency decision. Thus, we focus our analysis on the effect that release of the responsive material would have on the process of arriving at an agency final decision. *Schell v. HHS*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that in an Exemption 5 case, courts now focus less on the material sought and more on the effect of the release of the material). The ultimate issue in evaluating any deliberative process privilege claim is "whether the materials bear on the formulation or exercise of agency policy-oriented judgment." *City of Virginia Beach, Va. v. Department of Commerce*, 995 F.2d 1247,1254 (4th Cir. 1993).

This office has conducted a *de novo* review of the documents at issue, and we conclude that the records contain material that is clearly pre-decisional and deliberative. The responsive material contains copies of electronic mail messages between agency employees working to craft a document intended for publication in the Federal Register, drafts of the Federal Register notice that documented DOE's response to the emergency, and drafts of letters that document meetings between DOE and CEQ about the DOE response to the emergency. Release would clearly reveal the thought process that the DOE employees used to arrive at the order and the Federal Register Notice. The employees are using the emergency order as a guide or reference to arrive at a new policy document. Our review of the material shows that a member of the public who reads these documents in chronological order could easily ascertain how DOE employees arrived at the emergency order and

the final notice in the Federal Register.[5] Thus, release of this information could have a chilling effect on employees who are tasked to create a response to an environmental emergency in the future. Even though the emergency order is a final agency decision and many of the documents in question were created after it was issued on December 20, 2005, the documents are deliberative in content and subject to the protection of Exemption 5 because they were used in the preparation of the Federal Register Notice, which was not published until January 2006.

In summary, we find that DOE properly applied the protection of Exemption 5 to the responsive material. The documents in question are communications between employees who contributed to the agency response to the emergency situation at PRGS. The material is not intended to explain the order, but instead documents the discussions and analysis that transpired during the creation of the policy. Therefore, based on the content of the documents, we find that the material is deliberative and exempt from disclosure under Exemption 5.

(2) Description of Withheld Material

Schnader contends that DOE did not adequately describe the material that was withheld from release. In the Determination, 12 documents were withheld in their entirety and 10 were listed in an attachment, all described in a similar fashion:

9. CEQ 3 – Information withheld in its entirety under Exemption 5. 4 pages. (F2006-00189).

Determination at 3. [6]

We agree with Schnader that this is an insufficient description. There is no way that either the requester or the appellate authority can derive from this index a clear explanation of why each document was withheld. We have found in the past that in general a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available , the date on which the document was produced, its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000). *See also Dorsett v. Department of the Treasury*, 307 F. Supp. 2d 28, 34 (D.D.C. 2004) (describing adequate *Vaughn* index).

B. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). DOE/HQ withheld 12 documents in their entirety but did not address the issue of segregability in the determination. This office reviewed all of the material that was withheld

[5] The Notice of Emergency Action was published in the Federal Register on January 20, 2006. *See* 71 FR 3279 (2006).
[6] Documents CEQ6 and CEQ19 were not on the list and no explanation was given for their omission.

in its entirety, and based on our review, we find that DOE/HSS should reconsider the issue of segregability in several of the documents withheld under Exemption 5. Our review concluded that the documents contain some factual, segregable material that could be released to the requester without revealing the deliberative process. *See Radioactive Waste Management Associates,* 28 DOE at 80,620. For example, CEQ 3 contains some factual and segregable information in the "Summary" and the "Procedural Background," CEQ 18 has some material that appears to be factual, and CEQ 37 may contain some factual information in the "Summary" and "Supplemental Information" sections. Our review found other documents that appear to contain non-exempt material. Non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). We agree with Schnader that "a segregability analysis of 12 documents does not constitute an inordinate burden to the agency." Appeal at 3. Thus, even though there is a minimal amount of non-exempt material, only 12 documents are involved and segregation of that material should not pose an undue burden for DOE/HSS. Accordingly, this portion of the Appeal is remanded to DOE/HSS.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, 29 DOE ¶ 80,271 (2006).

It Is Therefore Ordered That:

(1) The Appeal filed by City of Alexandria on July 25, 2006, OHA Case No. TFA-0171, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Health, Safety and Security of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review) pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 13, 2006

March 2, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tom Purcell

Date of Filing: August 2, 2006

Case Number: TFA-0172

On August 2, 2006, Tom Purcell appealed a determination issued by the Office of Human Capital Management (OHCM) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his appeal, Mr. Purcell contends that OHCM failed to conduct an adequate search for documents that were responsive to a FOIA request he filed. For the reasons detailed below, we find that OHCM conducted an adequate search for responsive documents and will deny the appeal filed by Mr. Purcell.

I. Background

Mr. Purcell filed a request in which he sought the following: (1) employment roster(s) (or similar documents) containing the name of any and all DOE employees, DOE contractor employees and/or subcontractor employees stationed at Amchitka, Island, AK, at any point prior to 1974; (2) employee roster(s) (or similar documents) containing the name of any and all atomic weapons employees (DOE, DOE Contractor, and/or subcontractor employees) working within the Linde Ceramics Plant, Tonawanda, NY, at any point from 1942-1947 and (3) employment roster(s) (or similar documents) containing the name of any and all atomic weapons employees (DOE, DOE Contractor, and/or subcontractor employees) who worked within the Uranium Division of the Mallinckrodt Chemical Works Destrehan Street Facility (St. Louis, MO) at any point from 1942-1957. *See* Determination Letter at 1. OHCM issued a determination which stated that "the Department of Energy was established in October 1977, therefore this office has no records pertaining to employees (contractor or federal) prior to 1977." *Id.* at 1. In his Appeal, Mr. Purcell challenges the adequacy of the search conducted by OHCM.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable,

not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted officials in OHCM to ascertain the extent of the search that had been performed. The OHCM officials informed us that the Atomic Energy Commission (AEC) existed before the establishment of the Department of Energy in 1977. However, OHCM has no method of tracking employees (contractor or federal) from the AEC unless the requester has a specific name of an employee. If a specific name is provided, records may then be searched at the National Personnel Records Center located in St. Louis, Missouri. *See* Record of Telephone Conversations between Theresa Heinicke, OHCM, and Kimberly Jenkins-Chapman, OHA (December 21, 2006 and February 22, 2007). Given the facts presented to us, we are convinced that OHCM conducted an adequate search that was reasonably calculated to uncover documents responsive to Mr. Purcell's request. Accordingly, Mr. Purcell's Appeal should be denied.

DOE Headquarters' FOIA office has informed us that when it forwarded Mr. Purcell's request to OHCM, it also forwarded his request to other DOE offices, including the National Nuclear Security Administration Service Center in Nevada and the Oak Ridge Operations Office, to search for documents responsive to his request. Those offices were asked to respond directly to Mr. Purcell. It is possible that those offices may provide Mr. Purcell with the documents he seeks. If, however, Mr. Purcell is unsatisfied with the responses he receives from the other offices asked to perform searches, he may appeal those determinations to our office.

It Is Therefore Ordered That:

(1) The Appeal filed by Tom Purcell, OHA Case No. TFA-0172, on August 2, 2006, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Offical
Office of Hearings and Appeals

Date: March 2, 2007

March 29, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of Nevada

Date of Filing: August 22, 2006

Case Number: TFA-0173

This Decision concerns an Appeal that was filed by the State of Nevada in response to a determination that was issued to it by the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (OCRWM). In that determination, OCRWM replied to a request for documents that Nevada submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OCRWM released certain documents to Nevada, but withheld others either in whole or in part. This Appeal, if granted, would require that we remand this matter to OCRWM for another search and for the release of the withheld material.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); see also 10 C.F.R. § 1004.10(b)(1)-(9).

I. Background

In its original FOIA request, Nevada sought access to all Employee Concerns Program (ECP) documents concerning the Yucca Mountain Project (YMP), including, but not limited to,

1. Reports or complaints made by employees pursuant to the ECP of either DOE or its contractors and subcontractors at YMP;

2. All correspondence among or between DOE and any contractor or subcontractor or employee of any of them, regarding any ECP complaint or report;

3. All reports of, transcripts of, or summaries of any witness interview created in connection with any report or complaint made pursuant to the ECP of DOE or a contractor or subcontractor of DOE;

4. All investigation reports prepared by DOE or its contractors or subcontractors reporting or containing the results and/or findings and/or recommendations with respect to any ECP report or complaint made at YMP; and

5. All documents recording corrective actions taken by DOE or its contractors or subcontractors to minimize, correct, or prevent the recurrence of any situation which precipitated a valid concern.

At the request of OCRWM, Nevada later narrowed the scope of its request. Specifically, Nevada agreed to seek only documents generated during the period from January 1, 1995 to May 6, 2005 concerning "everything material to DOE's site characterization of the Yucca Mountain site, its scientific analysis of the viability of that site and the waste container, its calculations, modeling, and preparation of documentary materials, such as AMRs, Technical Basis Reports, and KTI analyses and responses, and the License Application and all its component parts and supporting materials and any safety concerns." OCRWM's July 19, 2006 Determination Letter, *citing* Nevada's June 10, 2005 letter to OCRWM.

In response to this revised request, OCRWM searched its ECP files and identified 1,662 pages of responsive documents. Of this material, OCRWM released 297 pages in their entirety and 158 pages with exempt material withheld. In its Determination Letter, OCRWM divided the responsive documents into two categories: documents created or collected by the DOE as part of its ECP that are received and maintained as confidential and identify a "protected person" (*i.e.*, a person reporting a concern or allegation, a person interviewed during the course of investigating a concern or allegation, or a person against whom a concern or allegation is made); and documents that do not identify protected persons.

OCRWM withheld all of the documents in the first category in their entirety under FOIA Exemptions 5 and 6 (5 U.S.C. § 552(b)(5) and (b)(6)), taking the position that segregation and release of any non-exempt material was not required under the relevant case law. Determination Letter at 2-3. In the alternative, OCRWM argued that any non-exempt material in these documents is "inextricably intertwined" with exempt material and would consist only of meaningless words and phrases, and therefore need not be released. Determination Letter at 3-4. This category includes 1,207 of the 1,662 pages of responsive documents. *Id.* at 4.

The balance of the responsive material consists generally of documents that do not identify protected persons. *Id.* Of these documents, OCRWM determined that four "Safety Conscious Work Environment Surveys" were exempt from mandatory disclosure in their entirety under Exemptions 4 and 5. Specifically, OCRWM concluded that the survey questions were "of a business proprietary nature," and therefore exempt pursuant to Exemption 4. They claimed that the responses to the questions "are meaningless, numerical data" that are useless without knowing the questions, and that the analysis of the answers is exempt from mandatory disclosure under Exemption 5. These four documents were therefore withheld in their entirety. Finally, OCRWM stated that another document, while apparently found in the ECP files, was in fact the property of the Nuclear Regulatory Commission (NRC), and that Nevada should request that document from the NRC.

In its Appeal, Nevada contests the adequacy of the search that was performed and OCRWM's application of Exemptions 4, 5 and 6. In addition, Nevada argues that OCRWM's identification of the NRC document is so vague as to be useless in requesting the document from the NRC.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (December 13, 1995) (Case No. VFA-0098). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In its Appeal, Nevada claims that there are a large number of agency documents that OCRWM has failed to locate or identify as responsive. In support of this contention, Nevada points out that in OCRWM's "Concerns Program Guide," staff Concerns Analysts are instructed to create a chronological log for each concern received "in which all events and communications pertinent to the concern are recorded with the date of the occurrence and the author of the information." Appeal at 4 (quoting the Concerns Program Guide). In addition, the Guide describes specific documents that are anticipated to be created during the process of handling an employee concern, including a "concern statement," created at the time of receipt of the concern, a "concern investigation plan," documentation of each interview conducted during the investigation, an investigation report, and a "concern response letter" for transmittal to the concerned individual. Consequently, Nevada contends that each of these documents should exist for every employee concern received. Nevada further contends that "in a PowerPoint presentation given by OCRWM Concerns Program Manager Nancy Voltura on July 31, 2002, she reported that the Concerns Program received 263 concerns during 2001" and 47 more during the first half of 2002. Appeal at 6. Based on these figures, Nevada estimates that the number of concerns that should have been received during the ten year period covered by its revised FOIA request "is well in excess of" one thousand. *Id.* Given the number of documents for each concern that are described in the Guide, Nevada suggests that a much greater volume than the 1,662 pages of documents identified as responsive in OCRWM's Determination Letter should have been located.

On November 15, 2006, OCRWM filed its response to Nevada's Appeal. In this Response, OCRWM proposes to provide Nevada with a copy of a log listing all of the concerns covered by Nevada's FOIA request. From this log, Nevada would then select specific files for production by OCRWM, subject to any applicable FOIA exemptions. OCRWM Response at 1. OCRWM has provided us with several pages of the listing of concerns that it proposes to provide to Nevada. Based on the submissions of OCRWM and Nevada, we believe that there is a substantial likelihood that the procedure suggested by OCRWM will result in the identification of additional responsive

documents. We will therefore remand this matter to OCRWM for implementation of the procedure described above.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In its Determination Letter, OCRWM found that the questions set forth in the four Safety Conscious Work Environment Surveys that were identified as responsive "are protected by copyright held by International Survey Research LLC," and the answers to those questions, without the questions themselves, would be nothing but "meaningless numerical data." Determination Letter at 5. OCRWM therefore withheld all of this material under Exemption 4. However, in its Response, OCRWM states that upon further review, it "discovered that [the surveys] were marked as copyrighted, but because they were prepared for the government's use they should not have been marked as such." OCRWM therefore proposes that it release these documents to Nevada after the redaction of any material that is subject to any other FOIA exemption. We agree. Therefore, on remand OCRWM will review the four surveys and the answers to those surveys and release them to Nevada unless it determines that the material is subject to some other FOIA exemption.

C. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). However, it is clear that these are not the only privileges recognized under Exemption 5. The U.S. Supreme Court has concluded that the coverage of this Exemption is quite broad, encompassing both statutory privileges and those commonly recognized by case law. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984). Accordingly, the District of Columbia Circuit Court of Appeals, our judicial overseer, has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into" Exemption 5. *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (*Martin*).

In its Determination Letter, OCRWM concluded that the ECP documents that identify protected persons are exempt from mandatory disclosure in their entirety pursuant to the discovery privilege recognized by the District of Columbia Circuit Court of Appeals in *Machin v. Zukert*, 316 F.2d 336 (1963) (hereinafter referred to as "the *Machin* privilege"). In that case, the court found that

confidential statements made to personnel investigating the crash of a United States Air Force plane were not subject to discovery in a lawsuit filed against the manufacturer of the aircraft. In addition, OCRWM cites the language of Exemption 5 and states that the documents that identify protected persons are documents that Nevada "could not discover in litigation with the" DOE, and therefore may be withheld in their entirety under that Exemption.

The "litigation" referred to by OCRWM is an administrative proceeding before the Nuclear Regulatory Commission (NRC) concerning the DOE's efforts to establish a nuclear waste repository at Yucca Mountain in Nevada. In order to decide questions arising during the period of time prior to the DOE's filing of a license application with the NRC, including the dissemination of relevant documents to the prospective parties and other interested persons, the NRC formed a Pre-License Application Presiding Officer (PAPO) Board. The PAPO Board determined that information identifying protected persons could be withheld by the DOE during the current stage of the proceeding. OCRWM contends that, under the PAPO Board's determination, ECP documents from which identifying information is redacted are also not available, except "upon a special showing of need and subject to the terms of a protective order." Determination Letter at 3. [1] OCRWM then cites *Martin* for the proposition that documents subject to such a qualified privilege are fully exempt from mandatory disclosure under the FOIA.

In its Appeal, Nevada claims that Exemption 5 is completely inapplicable to the ECP documents in question because they are not subject to any cognizable discovery privilege. Specifically, the state contends that *Machin* is inapplicable because the information in that case is different from that contained in the ECP documents. Moreover, Nevada argues that the PAPO Board decision cannot be used as a basis for invoking Exemption 5 because the Board did not find any type of privilege to be applicable to the ECP documents.

At the outset, it is clear that the documents in question meet the "inter-agency or intra-agency" threshold of the exemption. Some of these documents are communications between DOE employees relating to employee concerns, and are therefore plainly intra-agency memorandums or letters. Others include employee concerns and witness statements from contractor employees. However, the federal courts have held that some documents generated outside of an agency but created through agency initiative may be considered "inter-agency or intra-agency memorandums or letters" for purposes of Exemption 5. In *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the Court said that "Congress apparently did not intend 'inter agency or intra-agency' to be rigidly exclusive terms, but rather to include [nearly any record] that is part of the deliberative process." *Id.* at 790. This can include witness statements from contractor employees. *See Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 n.2 (D.D.C. 2003). The ECP documents that originated outside of the DOE were created in response to the DOE's initiative that contractor employees should feel free to raise

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1/ Nevada disagrees, contending that in order to obtain the redacted documents, "nothing more than an email request by a party to the DOE is required." Appeal at 10.

safety and employment-related concerns without fear of retaliation. The ECP documents are "inter-agency or intra-agency memorandums or letters" within the meaning of Exemption 5.

Next, we must determine whether the documents are of a type that is "normally privileged in the civil discovery context," *Sears*, 421 U.S. at 149. For the reasons that follow, we conclude that the documents are subject to the *Machin* privilege, but that the PAPO Board proceeding did not create a civil discovery privilege that is cognizable for Exemption 5 purposes.

In *Machin*, a party involved in civil litigation against a third party attempted to obtain from the U.S. Air Force a report concerning the crash of an Air Force plane. This Aircraft Accident Investigative Report set forth the results of the Air Force's investigation of the crash, including witness statements and mechanics' reports. The purpose of the Report was to determine the likely cause of the crash, with the ultimate goal of improving the safety of Air Force operations. Witnesses were interviewed with promises that their statements would remain confidential. *Machin*, 316 F.2d at 339. In *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984) (*Weber*), the Supreme Court held that documents subject to the *Machin* privilege are shielded from mandatory release pursuant to Exemption 5. That case also involved efforts to obtain, this time through the FOIA, a report of a safety investigation following an airplane crash. As in *Machin*, witnesses were assured of confidentiality.

The ECP documents are sufficiently similar to those at issue in these two cases to warrant protection under the *Machin* privilege. The Employee Concerns personnel conduct investigations into allegations, like the investigations in *Machin* and *Weber*, for the "purpose of taking corrective action in the interest of accident prevention." *Weber*, 465 U.S. at 795. Moreover, like the investigative programs in *Weber* and *Machin*, the promises of confidentiality given to complainants and witnesses are critical to the effectiveness of the investigations. As the Court stated in *Machin*, "We agree . . . that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program . . ., the reports should be considered privileged." The Court then went on to narrow the scope of the privilege, stating that it applied to the "testimony of private parties who participated in the investigation," and "any conclusions that might be based in any fashion on such privileged information." 316 F.2d at 339. The ECP witness interviews and the Concerns themselves are the functional equivalent of the "testimony of private parties who participated in the investigation" mentioned in *Machin*. Accordingly, OCRWM correctly withheld these documents in their entirety under Exemption 5, along with any conclusions based on that material.

We reach a different conclusion, however, regarding OCRWM's contention that the PAPO Board's treatment of these ECP documents creates a recognizable discovery privilege for purposes of Exemption 5.

In support of its position, OCRWM argues that in *Weber, Martin* and other cases, the federal courts have repeatedly stated that the FOIA should not be construed as allowing a requester to use the Act as a supplement to civil discovery. *See, e.g., Weber*, 465 U.S. at 804; *Martin*, 819 F.2d at 1186. However, these cases have uniformly referred to discovery privileges created by, or recognized in, duly-constituted courts of law. None of them speaks authoritatively to the issue of whether the order of an administrative body, like the PAPO Board, restricting the dissemination of documents can form an appropriate basis for withholding those documents under Exemption 5.

The federal courts have held, however, that a protective order issued by an administrative law judge in a federal agency's administrative proceedings does not prohibit the agency from disclosing records under the FOIA. *See, e.g., General Electric Company v. NRC*, 750 F.2d 1394, 1396, 1400 (7th Cir. 1984). Moreover, it must be noted that federal courts do not uniformly recognize even other judicial entities' privileges in the context of FOIA. For example, privileges extended by a state court do not necessarily fall within the purview of Exemption 5. *See Sneirson v. Chemical Bank*, 108 F.R.D. 159, 162 (D. Del. 1985) (The mere fact that a particular privilege has been recognized by state law will not necessarily mean that it will be recognized by a federal court). Finally, Exemption 5, like all FOIA exemptions, is to be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (*citing Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970)). *See also State of Nevada*, 29 DOE ¶ 80,216 (Case No. TFA-0098) (May 23, 2005). Given these considerations, we do not believe that the PAPO Board's order forms a sufficient basis for withholding documents under Exemption 5. Therefore, on remand OCRWM will review the ECP documents for releasability in light of our determinations regarding the *Machin* privilege and the PAPO Board's order.

D. Exemption 6

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the

document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis,* 746 F.2d at 3.

In its Appeal, Nevada claims that the ECP documents are not part of "personnel and medical files and similar files," and are therefore not protected from mandatory disclosure by Exemption 6. In the alternative, Nevada claims that the disclosure of the fact that someone filed a concern would not constitute a clearly unwarranted invasion of that person's privacy.

The Supreme Court addressed the scope of this Exemption in *Washington Post.* The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." 456 U.S. at 601. Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. *Id.* at 602. *See also Mary Fields Jarvis,* 26 DOE ¶ 80,190 (May 29, 1997) (Case No. VFA-0292).

Much of the information in the ECP documents applies to "particular individual[s]." It includes descriptions of various conditions relating to their employment and the very fact of their participation in the Employee Concerns Program. Nevada correctly points out that the disclosure of the fact that someone filed a concern may not, in and of itself, constitute a clearly unwarranted invasion of that person's privacy. However, when that disclosure could lead to harassment, embarrassment, intimidation or retaliation against an ECP participant, the information may be withheld under Exemption 6 unless release would further the public interest in learning about the operations of the government, and this interest outweighs the privacy interest involved. *See, e.g., Kevin D. Leary,* 29 DOE ¶ 80,235 (November 18, 2005) (Case No. TFA-0118); *William H. Payne,* 26 DOE ¶ 80,161 (February 20, 1997) (Case No. VFA-0262).

We have examined a sampling of the withheld material, and we find that significant privacy interests would be compromised by releasing information identifying protected persons. Some of these concerns allege inappropriate or unsafe behavior by individuals or organizations. Releasing the identities of the people who filed these concerns could subject them to harassment, retaliation or intimidation. Witnesses interviewed during the investigation of these concerns could face similar adverse consequences. Finally, identification of the subjects of these allegations could lead to undue embarrassment and unjustified damage to their personal and professional reputations.

In contrast to the substantial privacy interests involved, we find the public interest in release of material identifying protected persons to be negligible. This is because release of this information would shed little or no light on the operations of government, especially in light of the voluminous amount of information that DOE is to make available about the YMP through the NRC's Licensing Support Network. In short, Nevada has not suggested, nor can we discern, any useful purpose that would be served by disclosure of material identifying protected persons.

It is therefore clear that the public interest in disclosure is outweighed by the privacy interests of the sources and subjects of these Concerns, and the witnesses interviewed during the ensuing investigations. In fact, we conclude that the public is best served by maintaining the confidentiality of these individuals. Future employees might be reluctant to raise safety or efficiency-related concerns if they knew that their identities would be subject to routine disclosure. Moreover, investigations of these concerns would be hampered if witnesses could not be assured of confidentiality. Release of information identifying protected persons would therefore result in a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6.

E. Segregability of Non-Exempt Material

As we have previously stated, the Employee Concerns and the witness interviews are subject to the *Machin* privilege and shielded from mandatory disclosure in their entirety under Exemption 5. However, the withheld material includes other documents that contain exempt and non-exempt material. The mere fact that documents contain material that is exempt from mandatory release under the FOIA does not necessarily mean that those documents can be withheld in their entirety. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *See also Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). OCRWM contends that under *Machin*, the ECP documents that identify protected persons are exempt from mandatory disclosure in their entirety, and may therefore be completely withheld. [2]

We do not believe that *Machin* supports such a result. In its opinion, the District of Columbia Circuit Court of Appeals said that "the parties . . . have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed . . . however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations." The Court was specifically referring to the factual findings of Air Force mechanics. 316 F.2d at 339-40. This conclusion is consistent with our holdings in previous cases that factual material is generally not exempt from mandatory disclosure under Exemption 5 and must be released unless it is "inextricably intertwined" with exempt material such that release of the factual material would expose or cause harm to the agency's deliberations. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). The fact that information in the ECP documents that identify protected persons is subject to the *Machin* privilege does not relieve OCRWM of its obligation to segregate and release any non-exempt material from those documents.

In the alternative, OCRWM contends that any non-exempt material is, in fact, inextricably intertwined with exempt material. From the sampling of withheld material that we have examined,

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2/ OCRWM also cites the PAPO Board's document access order as support for this position. However, as previously stated, we do not believe that this order adequately justifies the withholding of documents under FOIA.

however, it appears that certain factual material could be released without causing harm to the interests that are protected by Exemptions 5 and 6. For example, in "Investigation Report No. 04-024," the following material could be released without revealing the identities of, or personal information about, protected persons: (i) the first two sentences of the first full paragraph on page three; and (ii) the first and third sentences of the second paragraph on page 4, including the "bullets" with the sub-headings "1.1" and "1.2." From Appendix 3 with the heading "Office of Civilian Radioactive Waste Management Non-Investigative Resolution Form," OCP Number 04-072, the eighth and ninth sentences of the shaded section with the heading "Method of resolving the CI's Issue" could also be released, as could an article authored by John H. Sass of the U.S. Geological Survey entitled "Thermal Tracking of Water Flow Under Yucca Mountain," an attached map paginated as "OECP46-12," and attached charts paginated as "OECP46-13" and "OECP46-14."

F. Conclusion

For the reasons set forth above, we will remand this matter to OCRWM. On remand, OCRWM should implement the procedure described in section II.A of this decision to identify additional responsive documents, release the four surveys that it withheld under Exemption 4 unless it determines that they should be withheld in whole or in part under another Exemption, and conduct a new review of the withheld material for any non-exempt material that can be released to Nevada.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the State of Nevada, OHA Case Number TFA-0173, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Civilian Radioactive Waste Management for further action consistent with this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz

Senior FOIA Official

Office of Hearings and Appeals

Date: March 29, 2007

October 16, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gloria C. Jacobs

Date of Filing: September 15, 2006

Case Number: TFA-0174

On September 15, 2006, Gloria C. Jacobs filed an appeal from a determination issued to her on August 18, 2006 by the Department of Energy's (DOE) Oak Ridge Office (ORO). In that determination, ORO responded to a request for documents that Ms. Jacobs submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORO determined that it could not locate any records responsive to Ms. Jacobs' request. This appeal, if granted, would require ORO to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Ms. Jacobs filed a request with ORO for personnel security records pertaining to her late husband. Letter from Ms. Jacobs to ORO (undated). Specifically, Ms. Jacobs requested records regarding a security clearance obtained by her late husband in 1956-1957 to work for a contractor to the Massachusetts Institute of Technology (MIT) during the Manhattan Project. *Id*. In its determination letter, ORO stated that "a search was conducted of the files of the Oak Ridge facilities and its contractor repositories for the requested records. However, no records could be located." Letter from Amy L. Rothrock, ORO, to Ms. Jacobs (August 18, 2006) (Determination Letter). Ms. Jacobs filed the present appeal challenging the adequacy of the search performed by ORO. Letter from Gloria C. Jacobs to OHA (August 25, 2006) (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials."

Miller v. United States Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted ORO to ascertain the scope of the search. ORO informed us that, in responding to Ms. Jacobs' request, it performed a very thorough search for documents pertaining to Ms. Jacobs' late husband. Specifically, Amy Rothrock of ORO stated,

> We conducted a search of the files of the DOE Records Holding Area (RHA) in Oak Ridge based on our corporate knowledge and experience with requests for personnel security and similar information generated by former Manhattan Project and Atomic Energy Commission (AEC) atomic weapons employers from the 1940's through the mid 1950's. The search was conducted both electronically and by hand search of paper file folders and finding aids at the DOE RHA. We used [Ms. Jacobs' late husband's] identifiers to search for any records regarding him. However, no records, including but not limited to personnel security clearance records, could be located regarding [Ms. Jacobs' late husband].
>
> There were also some historical AEC film badge records collected… for [National Institute for Occupational Safety and Health (NIOSH)] epidemiology studies and sent to the DOE RHA. These records were also searched electronically by me using copies of CD-ROMS furnished to me by NIOSH. Only one of the files on the CD-ROM pertained to MIT. I checked each page in that MIT file and could not locate [Ms. Jacob's late husband's] name or identifiers in the file.

Electronic Mail Message from Amy Rothrock, ORO, to Diane DeMoura, OHA (September 20, 2006). Based on this information, we find that ORO performed an extensive search reasonably calculated to reveal records responsive to Ms. Jacobs' request and, therefore, the search was adequate. Accordingly, Ms. Jacobs' appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 15, 2006 by Gloria C. Jacobs, OHA Case No. TFA-0174, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006

February 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeremy Bigwood

Date of Filing: September 20, 2006

Case Number: TFA-0175

On September 20, 2006, Jeremy Bigwood filed an Appeal from a determination issued to him on August 24, 2006, by the Office of Policy and International Affairs (OPIA) of the Department of Energy (DOE). */ That determination concerned a request for information that Mr. Bigwood submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the information withheld and to search for additional responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Mr. Bigwood filed a FOIA request seeking documents that pertain to Hugo Chavez, President of Venezuela, and documents pertaining to Venezuela as a petroleum supplying country and OPEC member. *See* Appeal Letter at 1. On August 24, 2006, OPIA issued a determination which stated that it conducted a search of its files for responsive documents. According to OPIA, that search located 66 responsive documents. Thirty-five of those documents were provided to Mr. Bigwood in their entirety and 31 were provided with deletions pursuant to Exemption 5 of the FOIA. The Determination Letter stated that the withheld material is "pre-decisional" and "deliberative." *See* Determination Letter (August 24, 2006) at 1.

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* The FOIA and Privacy Act Group of the DOE served the administrative function of providing Mr. Bigwood a response that identified OPIA as the office that conducted a search for responsive documents.

On September 20, 2006, Mr. Bigwood filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Bigwood challenges OPIA's determination, asserts that material was improperly withheld under Exemption 5 and asserts that DOE failed to perform an adequate search. *See* Appeal Letter at 3-5. For these reasons, Mr. Bigwood requests that OHA direct OPIA to release the requested information.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from Mr. Bigwood, OPIA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested documents at issue, we have concluded that the determination made by OPIA in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Mr. Bigwood consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use. The information requested in this case properly falls within the definition of "intra-agency memoranda" in the FOIA. The comments, recommendations and opinions contained in the material are clearly predecisional and deliberative. They discuss proposed actions in hypothetical scenarios about oil production and contain recommendations for items to discuss at meetings related to Venezuela. In addition, the comments and recommendations reflect draft opinions on issues related to action by Venezuela. These comments and recommendations were subject to further agency review and do not represent final agency position. Accordingly, we hold that the comments, recommendations and opinions

withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Adequacy of Search

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Circ. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003); *David G. Swanson*, 27 DOE ¶ 80,178 (1999).

In the present case, Mr. Bigwood asserts that the search was inadequate and that there are several documents missing from the material. He further asserts that "there are no documents concerning the April 2002 coup against President Chavez, which DOE surely noticed even though it took place over a weekend." Appeal Letter at 1. He requests that DOE "search through your archives again paying special attention to any DOE documents or any other media produced during April 2002, which I believe you must have." *Id.* In response to Mr. Bigwood's Appeal, we contacted the FOIA and Privacy Group of DOE (FOIA Group) to determine the scope of the search. The FOIA Group referred us to the OPIA because that office conducted the search and it is the office most likely to contain responsive material. *See* Record of Telephone Conversation between Abel Lopez, FOIA Group, and Kimberly Jenkins-Chapman, OHA (December 21, 2006). The OPIA informed us that it conducted a very long, extensive search of all of the files related to Mr. Bigwood's request. It stated that it located information Mr. Bigwood sought in his request, but that information was among the material identified in the Determination Letter as exempt under Exemption 5. In addition, the OPIA stated that no other relevant responsive material exists that was not addressed in its

Determination Letter. *See* Record of Telephone Conversation between Andrea Lockwood, OPIA, and Kimberly Jenkins-Chapman, OHA (January18, 2007).

Given the facts presented to us, we find that the OPIA conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Bigwood's request. Accordingly, Mr. Bigwood's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeremy Bigwood, OHA Case No. TFA-0175, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: February 8, 2007

December 13, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Environmental Defense Institute

Date of Filing: September 18, 2006

Case Number: TFA-0177

On September 18, 2006, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) agreed to consider as an appeal, and to process as an appeal, an unsigned electronic mail message attachment submitted by the Environmental Defense Institute (the Appellant). The Appellant also attached to that electronic mail message a copy of a determination that DOE's Idaho Operations Office (Idaho) issued on December 5, 2005. In the Determination Letter, Idaho released to the Appellant several documents in full that were responsive to its request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Idaho also redacted portions of two other documents, pursuant to Exemption 5 of the FOIA. This Appeal, if granted, would require Idaho to release the information it withheld from those documents and to release additional documents that the Appellant claims that Idaho has not released in response to the Appellant's FOIA requests dated July 7, 2005, and September 21, 2005.

I. BACKGROUND

In letters dated July 7, 2005, and September 21, 2005, the Appellant submitted FOIA requests to Idaho for documents relating to the Advanced Test Reactor (ATR) and other facilities at the Reactor Technologies Complex (RTC). Request Letters dated July 7, 2005, and September 21, 2005, from Chuck Broscious, Executive Director, Appellant, to FOIA Office, Idaho. In response to the Appellant's July 7, 2005 request, Idaho issued determinations on August 26, 2005, and September 14, 2005, in which it released numerous documents in full to the Appellant. In its September 14, 2005 Determination, it also stated that it was withholding portions of one document under Exemption 2 of the FOIA. On October 24, 2005, the Appellant filed with OHA an Appeal from Idaho's September 14, 2005 Determination. In a Decision and Order dated March 16, 2006, OHA concluded that Idaho had properly withheld the redacted material and denied the appeal with the exception of two pages. OHA remanded to Idaho for issuance of a new determination either releasing the information or justifying its withholding. *Environmental Defense Institute*, Case No. TFA-0128, (March 16, 2006).

After the Appellant filed its Appeal on October 24, 2005, Idaho responded to the Appellant's September 21, 2005 request by releasing additional documents in full to the Appellant, and releasing portions of other documents. In one of its responses, on December 5, 2005, Idaho released several documents to the Appellant. Two of those documents were released after redacting portions pursuant to Exemption 5 of the FOIA.

On December 17, 2005, the Appellant sent an electronic mail message to Janet R. H. Fishman, Staff Attorney, OHA, titled "FOIA Case TFA-0128". Electronic Mail Message dated December 17, 2005, from Chuck Broscious to Janet R. H. Fishman, OHA. The December 17, 2005 electronic mail message had two attachments. One was a copy of Idaho's December 5, 2005 determination. The second attachment was an unsigned letter dated December 16, 2005, and addressed to Mrs. Fishman. The heading on the first page of the letter stated "Sent via U.S. Certified Mail and email." OHA has no record of ever having received the letter by U.S. mail. DOE's FOIA regulations require that a FOIA appeal to OHA must be addressed to the Director of OHA and that the envelope and letter must be clearly marked "Freedom of Information Appeal." 10 C.F.R. § 1004.8(b). This electronic mail message failed to comply with those requirements. First, it was not addressed to the OHA Director. Secondly, it was not clearly marked as a FOIA Appeal. In a court pleading filed on August 8, 2006, the Appellant characterized that unsigned electronic mail message attachment as a supplement to its Appeal. In view of the Appellant's characterization of its unsigned electronic mail message attachment as a supplement to its Appeal, OHA, in a spirit of cooperation, agreed on September 18, 2006, to consider the attachment as a FOIA Appeal and to process it despite its failure to conform to the requirements of DOE's FOIA regulations. Herein we will denote that letter as the Appeal Letter from Chuck Broscious to Janet R. H. Fishman.

In that Appeal, the Appellant states that the

> issue of DOE / ID redaction of requested FOIA documents now includes (due to additional document releases) . . . the following reports:
>
> 1. Upgraded Final Safety Analysis Report for the Advanced Test Reactor (SAR-153)
>   a. Chapter 1 (one page redacted)
>   b. Chapter 2 (two pages redacted)
>   c. Chapter 3 (25 pages redacted)
>   d. Chapter 3 Appendix A (all pages have portions redacted)
>   e. Chapter 4 (16 pages redacted)
>   f. Chapter 15 (completely redacted)
>   g. Chapter 16 (completely redacted)

2. Engineering Design File EDF-5622 (Interim Seismic Probabilistic Risk Assessment for the Advance Test Reactor[)] has 9 pages redacted.

3. Interoffice Memorandum, FOIA Item #49 Appendix A, has 9 pages redacted.

4. On December 14, 2005, we received from DOE/ID, additional documents responsive to our requests. However, several more documents had been substantially redacted, and we therefore hereby appeal to your office and ask that the redacted documents, identified herein, also be released in full.

5. U.S. Government Memorandum, Idaho Operations Office, March 19, 2004, Advanced Test Reactor Continued [O]perations Planning Assessment Report (TPO-TRA-04-026) FOIA Item No. 41, has every page partially redacted and Office of Independent Oversight and Performance Assurance report is missing.

6. ATR Planning Assessment Team Report 2/13/04, FOIA Item Number 43, has portions or total pages redacted.

7. There remain about nine documents that are either being "processed" by DOE/ID and/or are being "transferred [to] HQ for response directly to requestor" (see list below). The final release disposition of these documents must be finalized in a timely [manner].

a. Item #37: OA-2003-ESH-6
b. Item #38: OA-2003-ESH-7
c. Item #39: OA-2003-ESH-8
d. Item #40: OA-2003-ESH-9
e. Item 43; Rice Report
f. Item # 58; Survey Seismic Evaluation of the Emergency Surveys for Nuclear Safety Culture classes at TRA (TRC) and associated final reports.
g. Item #59; 1993 (or later) Seismic Probabilistic Risk Assessment for EBR-II Reactor Building (767) at MFC formerly ANL-W.
h. Item #60; 1993 (or later) Seismic Probabilistic Risk Assessment for Fuel Manufacturing Facility Building 704 at MFC formally ANL-W.

i. Item #44; All Un-reviewed Safety Question (USQ) ATR, RTC and MFC reports for 2004 and 2005 not listed in "DOE Summary Report Lists sent August 25, 2005."

Appeal Letter dated December 16, 2005, from Chuck Broscious to Janet R. H. Fishman, OHA. We will deal with each item separately.

II. ANALYSIS

Item 1–Upgraded Final Safety Analysis Report for the ATR

This document was dealt with in our decision dated March 16, 2006, where we upheld the redactions made by Idaho with one exception and returned the matter to Idaho for a determination on that matter. We ordered Idaho to review chapter 3/4, pages 0-1 and 0-2 of the ATR SAR to determine if any of the information could be reasonably segregated and released to the Appellant. Idaho released these pages without deletions to the Appellant by letter dated November 20, 2006, in order to be certain that the Appellant received them. Determination Letter dated November 20, 2006, from Nicole Brooks, Idaho, to Appellant.

Item 2–Engineering Design File EDF-5622

The Appellant claims that this document was released with nine pages redacted. The determination letter dated December 5, 2005, indicates that the document was released in full to the Appellant. We contacted Idaho to confirm that the document was released in full. Idaho confirmed that it re-released the document in its entirety to the Appellant on September 7, 2006. Electronic Mail Message dated November 2, 2006, from Nicole Brooks, Idaho, to Janet R. H. Fishman, Attorney-Examiner, OHA. We have been provided with a copy of the letter releasing the document to the Appellant. Attachment to electronic Mail Message dated November 2, 2006, from Nicole Brooks, Idaho, to Janet R. H. Fishman, OHA.

Item 3–Interoffice Memorandum

The Appellant claims that this document was also released with nine pages redacted. As was done with Item 2, Idaho has re-released the document to the Appellant in full. Idaho confirmed that it re-released the document to the Appellant on November 14, 2006. Letter dated November 14, 2006, from Nicole Brooks to Appellant.

Item 4–Additional documents

December 14, 2005, was the date on which the Appellant received Idaho's December 5, 2005 determination. The Appellant asks that the documents it received on that date be released

in full. However, all the documents that were not released in full by Idaho are specifically addressed in the Appeal Letter. Therefore, Item 4 appears to be an introduction to Items which follow in the Appellant's letter. We have addressed two of the documents listed as Items 2 and 3. We will address the remainder of the Items below.

Item 5–Memorandum
Item 6–ATR Planning Assessment Team Report
Item 7f–Survey Seismic Evaluation of the Emergency Surveys for Nuclear Safety Culture classes at TRA (TRC)and any associated final reports

Idaho withheld portions of these three documents under FOIA Exemption 5. The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency has a substantial burden to justify the withholding. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States*, 617 F.2d at 862. The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

The deliberative process privilege also permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the

process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. at 87 (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional material and factual material that is not otherwise exempt from release, the factual material must be segregated and released to the requester.

In its determination letter dated December 5, 2005, Idaho withheld portions of the documents in Items 5 and 6 from the Appellant, claiming that those portions contain information that is predecisional and part of the deliberative process. We have reviewed these documents and believe that the portions Idaho withheld were properly withheld under Exemption 5. The purpose of the Report (Item 6) is stated to "[p]rovide the Team conclusions and recommendations resulting from the February 2-13, 2004, independent assessment of the Advanced Test Reactor." Report dated February 13, 2004, from ATR Planning Assessment Team to Elizabeth D. Sellers, Manager, Idaho. The Memorandum, Item 5 in the Appeal Letter, communicates the core observations of the Report. Memorandum dated March 19, 2004, from Elizabeth D. Sellers to William D. Magwood, IV, Director, Office of Nuclear Energy, Science and Technology. Both documents contain recommendations and opinions relating to the ATR continued operations. The Report contains specific recommendations and opinions regarding the future operation of the ATR

and how management and oversight of the ATR should be structured. The Report provides DOE's Idaho Operations Manager with an independent assessment of the ATR at her request; the results of the assessment reflect the opinions, recommendations, and findings of the Planning Assessment Team, and do not reflect final agency decisions. The Memorandum summarizes recommendations and opinions contained in the Report. Both opinion and facts were withheld from the documents by Idaho. The factual information in question was selected from a larger quantity of factual information in a manner such that release of the selection would tend to reveal the deliberative process of the manager and the Team in formulating their respective documents. This factual information meets the standard for non-disclosure set forth in *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987).

In a determination letter dated January 23, 2006, Idaho withheld portions of Item 7f from the Appellant, stating that those portions contain information that reflects the opinions and recommendations obtained from employees. Furthermore, the survey results and raw data were obtained from employees under a promise of confidentiality. These results are used to make recommendations to management on how to fashion policies. We have reviewed these documents and believe that the portions Idaho withheld were properly withheld under Exemption 5. Release of this information would inhibit Idaho's ability to obtain candidly expressed opinions in the future. Additionally, because these opinions and recommendations were made at an early stage of the process by Idaho employees, not by decision makers themselves, they may not accurately reflect Idaho's opinions or current practices.

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. Although the public does have a general interest in learning about the subject matter of Items 5, 6, and 7f, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

Item 7–Nine documents being processed as of December 16, 2005

As of December 16, 2005, the Appellant identified nine documents that had been identified as responsive to its request that were still being processed or had been transferred to DOE headquarters for a response. First, regarding Items 7a-d, Idaho explained in a

determination letter dated October 27, 2005, that those items were generated at DOE Headquarters in Washington, DC, and had therefore been forwarded for processing to Mr. Abel Lopez, who is Director of FOIA / Privacy Act Group in Washington, DC. Determination Letter dated October 27, 2005, from Nicole Brooks, Idaho, to Appellant. Mr. Lopez released documents responsive to those items on November 21, 2006. Determination Letter dated November 21, 2006, from Abel Lopez, Director, FOIA / Privacy Act Group, DOE Headquarters, to Appellant. As explained in that letter, it was determined that those four items do not reflect four separate reports or documents, but rather reflect four separate findings of a DOE inspection. Those findings were part of a document that had already been provided to the Appellant by Idaho in its determination letter dated August 26, 2005, and that had been listed as item 16 on the index of that determination letter. In addition, DOE's search in Washington, DC, identified three other documents responsive to those four items. Those responsive documents were released in their entirety with the determination letter dated November 21, 2006.

Second, Item 7e, which is the same as Item 6, was released to the Appellant with redactions by letter dated December 5, 2005, and is addressed previously in this Decision. Third, Item 7f was released to the Appellant with redactions by letter dated January 23, 2006, and is also addressed in this Decision above. Fourth, Items 7g and 7h were released to the Appellant in full on January 23, 2006. Determination Letter dated January 23, 2006 from Nicole Brooks, Idaho, to Appellant.

Finally, Idaho explained in its determination letter dated January 23, 2006, that it had conducted a thorough search of its files for information in response to Item 7i, which the Appellant had clarified to be "All Un-reviewed Safety Questions (USQ) reports for 2004 related to Pu^{238}", but that no such reports exist. Determination Letter dated January 23, 2006, from Nicole Brooks, Idaho, to Appellant. In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, January 9, 2006 (Case No. TFA-0138); *Doris M. Harthun*, April 8, 2003, (Case No. TFA-0015).

Idaho's original search was based on a computer query of all Unreviewed Safety Question (USQ) ATR, RTC, and Material and Fuels Complex Summary Reports for the year 2000 to present, as originally requested by the Appellant. If an issue is raised and given a USQ tracking number, a USQ screen is completed. If the determination is positive, then a USQ determination is completed and added to the USQ summary report. The USQ summary report does not include all USQ screens because a negative screen is not a safety issue and

no further action is necessary. In this situation, a report would not be created because it would be deemed unnecessary and that USQ screen would not be included on the USQ Summary Report list. For this reason, there are gaps in the ascension numbers on the Summary Report Lists which were noted by EDI in its September 21, 2005 request. We have confirmed with Idaho that the USQ Summary Report lists that were sent to the Appellant in response to their FOIA requests are comprehensive and complete compilations of all USQ reports. Therefore, there are no additional USQ reports that were "not listed in DOE Summary Report lists sent August 25, 2005" as requested in Item 7i of this Appeal.

III. CONCLUSION

A number of the items in the Appellant's Appeal have been dealt with previously. Item 1 was addressed by our decision of March 16, 2006. Items 2, 3, 7a-d, 7g and 7h have been released to the Appellant in full. Item 4 does not refer to a specific document, but appears to be an introduction to subsequent Items in the Appeal. Idaho properly withheld the redacted material from Items 5, 6 (which is identical to Item 7e), and 7f under Exemption 5. Idaho could not find any documents responsive to Item 7i. For the reasons set forth above, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute on September 18, 2006, Case No. TFA-0177, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 13, 2006

November 17, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Diane C. Larson

Date of Filing: October 18, 2006

Case Number: TFA-0178

On October 18, 2006, Diane C. Larson filed an appeal from a determination issued to her on September 15, 2006 by the Department of Energy's (DOE) FOIA/Privacy Act Group (FOIA/PA). In that determination, FOIA/PA responded to a request for documents that Ms. Larson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would require FOIA/PA to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On May 2, 2006, Ms. Larson filed a request with FOIA/PA for the following documents:

(1) Classified documents provided to the defendant that were not provided to her or her attorney during her litigation.

(2) All documents DOE provided to the Central Intelligence Agency (CIA). In this item of her request, Ms. Larson specifically refers to an October 6, 2003 letter from FOIA/PA stating that "the CIA identified a responsive document that originated at the DOE Headquarters." Ms. Larson then states, "Please provide me a copy of that responsive document . . . ."

(3) All information and reports from 1992 to date that implied criminal activity generated by the DOE Headquarters or the DOE Richland Operations Office, which may include Ed Curran, John Wagoner, James Dover, Len Marzetti, Lyle Gilk, Dennis Sieraki, James Spracklen, Bob Roselli, Notra Trulock, Ray Semko, or DOE contractors Westinghouse (Ron Rush, Jim Stowe, Mike Duncan, David Palmer, Craig Walton), Boeing, Lockheed Martin, Babcock & Wilcox, and Battelle. Also in this item of her request, Ms. Larson requested "information in my FOIA request 10/13/2000 not previously provided to me that can now be declassified."

(4) Information that James Spracklen, DOE Richland Operations Office, provided to Clark Trapp and Phil Gasiewicz, U.S. Investigations, in 1989 and 1999 regarding Ms. Larson's finances.

(5) All information provded by DOE Headquaters and the Richland Operations Office (Mary Jack, Robert Hubbard, Dennis Sieraki) to Dr. Montgomery regarding Ms. Larson's mental health and the reason that she was sent for an evaluation.

(6) Global Technologies employment records regarding Ms. Larson (1999-2000) that were acquired by DOE.

(7) Police or Hanford Patrol reports filed on Ms. Larson from false information "being provided to/by Global or anyone else."

(8) A copy of Ms. Larson's security clearance information as it appears "on the DOE database file" and "a copy of my SCI file."

Letter from Diane Larson to FOIA/PA (April 21, 2006).

FOIA/PA determined that any documents responsive to Ms. Larson's request would be located at either the DOE's Richland Operations Office (DOE/RL) or the Office of Security and Safety Performance Assurance at DOE Headquarters (DOE/SA), and therefore referred the request to these two offices.

DOE/RL conducted a search of its Office of Chief Counsel, Safeguards and Security Office, and the offices of the DOE contractor Fluor Hanford, Inc., which has oversight of the Hanford Patrol. DOE/RL also searched a database that lists archived employment records for any records regarding Ms. Larson's employment with Global Technologies. DOE/RL described the aforementioned locations as those "that would most likely have responsive records." DOE/RL searched these locations using Ms. Larson's name and Social Security Number, and found no documents responsive to her request. Electronic mail from Dorothy Riehle, DOE/RL, to Steven Goering, Office of Hearings and Appeals (November 2, 2006).

DOE/SA conducted a search of

> Ms. Larson's Personnel Security File (PSF) and the Central Personnel Clearance Index (CPCI), both of which are part of the DOE-43 "Personnel Security Files", our system of record. Ms. Larson's PSF and CPCI were examined as the information she requested would have been contained in those locations if it existed.

Memorandum from Stephanie Grimes, Director, Office of Personnel Security, to Steven Goering, OHA (October 31, 2006). DOE/SA located documents responsive to items 2, 5, and 8 of Ms. Larson's request.

In its determination letter, FOIA/PA informed Ms. Larson of the results of DOE/SA's search, released the responsive documents to Ms. Larson in their entirety, and explained that she had the right to appeal the adequacy of the search to the Office of Hearings and Appeals. Letter from Abel Lopez, FOIA/PA, to Ms. Larson (September 15, 2006) (Determination Letter).

Ms. Larson then filed the present appeal, in which she states, "Please review information and records to provide me ALL the information and answer the questions for the 11 items that I requested . . . . I challenge the adequacy of this search for responsive documents . . . . Information has been withheld." Appeal at 1.[1] More specifically, Ms. Larson contends that the DOE should now release information that was withheld from her by the DOE's Office of Inspector General (DOE/IG) in 2003 in response to a previous FOIA request she filed. She also notes that one of the documents released to her, a letter, refers to attachments, but that FOIA/PA did not release to her any attachments. Finally, she states that FOIA/PA should search other DOE locations for responsive documents.

The issue before us is whether, in light of FOIA/PA's search for responsive documents as described above, the search was adequate under the requirements of the FOIA.[2] In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

II. Analysis

In the present case, we find that FOIA/PA's search was adequate under the requirements of the FOIA. First, based upon the request received, FOIA/PA made a reasonable determination that documents responsive to Ms. Larson's request would most likely be located at DOE/RL or DOE/SA at DOE Headquarters, because her request references DOE/RL, DOE Headquarters, and, more specifically, security clearance information. Similarly, DOE/RL and DOE/SA searched those locations within its purview where documents were most likely to be found.

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[1] Three of the 11 items in Ms. Larson's request were questions (e.g., "Why was I put on an indices list and tracked as a non-US citizen?"), rather than requests for documents. However, the FOIA is not a mechanism for answering questions. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

[2] Because the only responsive documents ultimately located by FOIA/PA were contained in a Privacy Act system of records (DOE-43, "Personnel Security Files"), FOIA/PA proceeded to process Ms. Larson's request under the Privacy Act. This treatment of the request minimized the possibility that any information would need to be withheld from the requester, and all of the responsive documents located were released in their entirety. However, Ms. Larson stated in her request that she was filing the request under the FOIA, and FOIA/PA's search, as described above, was not limited to a particular Privacy Act system of records. We therefore will analyze the adequacy of the FOIA/PA's search under the requirements of the FOIA. *See Diane C. Larson*, 27 DOE ¶`80,110 (1998) (analysis of the adequacy of a Privacy Act search "using principles that we have developed under the FOIA").

Nonetheless, Ms. Larson has identified documents that were not identified or released to her by FOIA/PA in its September 15, 2006 determination. First, Ms. Larson correctly notes that attachments to one of the documents released in FOIA/PA's determination, a letter from Robert Hubbard to Frederick Montgomery, were not provided with the September 15 determination. Second, her request specifically identifies documents from which information was previously withheld as classified in response to a request she submitted in 2000. Third, in her appeal, Ms. Larson identifies two documents from which information was withheld by DOE/IG in October 2003 in response to an earlier request she filed. All of these documents appear to be within the scope of Ms. Larson's May 2, 2006 request.

Regarding the attachments referenced in one of the documents provided to Ms. Larson, we have been informed that the attachments, and in fact the letter itself, have already been released to Ms. Larson in a November 8, 2000 response to a request she previously filed. Electronic mail from Audrey Dixon, Office of Personnel Security, to Steven Goering, OHA (November 14, 2008). The DOE is not required to release to a FOIA requester the same documents previously released to that requester under the FOIA.

However, Ms. Larson is entitled to request again information that previously has been withheld from her, specifically any classified information not released in response to her October 2000 request, and the information withheld by DOE/IG in its October 2003 determination. We will therefore remand this matter to FOIA/PA so that Ms. Larson's request can be referred to the appropriate offices within DOE for a new determination regarding the previously withheld information.

Finally, though we conclude that FOIA/PA's search for documents responsive to Ms. Larson's request was adequate given the information available at the time, FOIA/PA should consider on remand whether there are additional locations where responsive documents may be located. For example, Ms. Larson requested "a copy of my SCI file." DOE/SA has informed us that the "SCI" is an abbreviation of "Sensitive Compartmented Information," and that such information is maintained by a DOE Headquarters element other than DOE/SA. We also suggest that FOIA/PA consider asking Ms. Larson for information in support of her contention that responsive documents may be located at other DOE locations. In all other respects, we will deny the present appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on October 18, 2006 by Diane C. Larson, OHA Case No. TFA-0178, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the FOIA/Privacy Act Group of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 17, 2006

November 7, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ed Donegan

Date of Filing: October 12, 2006

Case Number: TFA-0179

On October 12, 2006, Ed Donegan filed an appeal from a determination issued to him on September 28, 2006 by the Department of Energy's (DOE) FOIA/Privacy Group (FOIA/PA). In that determination, FOIA/PA responded to a request for documents that Mr. Donegan submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOIA/PA determined that it could not locate any records responsive to Mr. Donegan's request. This appeal, if granted, would require FOIA/PA to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Mr. Donegan filed a request with FOIA/PA for documents regarding the Human Genome Project (HGP), a 13-year effort coordinated by the DOE and the National Institutes of Health (NIH). Specifically, Mr. Donegan sought documents related to (1) why the Human Genome Project (HGP) has "stonewalled" him on "requests for direction and assistance in writing grant requests"; (2) changes made to HGP documentation as a result of contacts from Mr. Donegan. Electronic mail from Ed Donegan to FOIA/PA (July 25, 2006).

FOIA/PA referred Mr. Donegan's request to the DOE's Office of Science. The Office of Science consulted Daniel Drell, Ph.D., a Program Manager in the Life and Medical Sciences Division of the Office of Science. According to Dr. Drell, while he may have previously been copied on an email Mr. Donegan sent to the NIH, he did not retain any such email, and is aware of no documents in the possession of the DOE that would be responsive to Mr. Donegan's request. In its determination letter, FOIA/PA informed Mr. Donegan that its search did not locate any documents responsive to his request and that he had the right to appeal the adequacy of the search to the Office of Hearings and Appeals. Letter from Abel Lopez, FOIA/PA, to Mr. Donegan (September 28, 2006) (Determination Letter).

Mr. Donegan then filed the present appeal, in which he states, "According to the typical empty letter I got in response to [my request], you never even bothered looking at NIH for any

documents, and you never made any effort to even look at my request about what to look for." The issue before us is whether, in light of FOIA/PA's search for responsive documents as described above, the search was adequate under the requirements of the FOIA.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

II. Analysis

As an initial matter, it is clear from Mr. Donegan's appeal that the documents he is seeking may be in the possession of the NIH. However, the appellant is incorrect in implying that the FOIA requires the DOE to search for documents in another federal agency. If Mr. Donegan wishes to obtain documents from the NIH, he will need to file a FOIA request with the NIH directly. Information on filing such a request can be found at http://www.nih.gov/icd/od/foia/.

Regarding any documents responsive to Mr. Donegan's request that may be in the possession of the DOE, we note that the appellant identifies no specific contacts that he made with the DOE. Nevertheless, the Office of Science has informed us that, if Mr. Donegan had contacted the DOE regarding the HGP, the person he most likely would have contacted would have been Dr. Drell, the DOE official to whom Office of Science referred Mr. Donegan's request. Electronic mail from Daniel Drell, Ph.D., Program Manager, Life and Medical Sciences Division, Office of Science, to Steven Goering, Office of Hearings and Appeals (October 25, 2006).

By referring Mr. Donegan's request to the DOE's Office of Science, which consulted Dr. Drell as to his knowledge of any documents responsive to Mr. Donegan's request, FOIA/PA has performed a search of the location where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Mr. Donegan sought. Accordingly, the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 12, 2006 by Ed Donegan, OHA Case No. TFA-0179, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2006

January 22, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Betty N. Stair

Date of Filing: November 22, 2006

Case Number: TFA-0180

On November 22, 2006, Betty N. Stair filed an appeal from a determination issued to her on October 23, 2006 by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA). In that determination, NNSA responded to a request for documents Ms. Stair submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA determined that it could locate no documents responsive to Ms. Stair's request. This appeal, if granted, would require NNSA to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On August 11, 2006, Ms. Stair filed a FOIA request for records pertaining to her husband, Mr. Edward Stair. Specifically, Ms. Stair requested a copy of his personnel record from the Y-12 plant and any radiation exposure records pertaining to Mr. Stair. Letter from Carolyn Becknell, NNSA, to Betty N. Stair (October 23, 2006) (Determination Letter). In its determination letter, NNSA determined that it did not locate any records responsive to Ms. Stair's request. *Id*.

Ms. Stair appealed the NNSA determination to the DOE's Office of Hearings and Appeals (OHA). In her appeal, she challenges the adequacy of the search performed by NNSA for responsive documents. Letter from Ms. Stair to OHA (November 22, 2006) (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials."

Miller v. United States Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted NNSA to ascertain the scope of the search for responsive documents. NNSA informed us that when it received Ms. Stair's request it determined that any responsive records would be located at the Y-12 plant. NNSA forwarded Ms. Stair's request to the Y-12 plant for a search for records. *See* Electronic Mail Message from Terry Martin Apodaca, NNSA, to Diane DeMoura, OHA (December 5, 2006). The Y-12 plant informed NNSA that it did not locate any responsive records. As a result, NNSA issued a determination letter to Ms. Stair informing her that no responsive records were located. *Id*. In response to this appeal, NNSA contacted Y-12 to discuss the original search for responsive documents. NNSA now believes that the initial search was inadequate. See Electronic Mail Message from Terry Martin Apodaca to Diane DeMoura (January 16, 2007). Based on the foregoing information, NNSA has requested that we remand this appeal so that it may conduct an additional search for documents responsive to Ms. Stair's request. *Id*.

Accordingly, this appeal should be granted and the matter remanded to NNSA for an additional search. After completing its search, NNSA is to provide Ms. Stair with any responsive documents or to issue a new determination justifying the withholding of any responsive information.

It Is Therefore Ordered That:

(1) The Appeal filed on November 22, 2006 by Betty N. Stair, OHA Case No. TFA-0180, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, Albuquerque, for further processing in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: January 22, 2007

January 30, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William J. Lueckel, Jr.

Date of Filing: December 7, 2006

Case Number: TFA-0182

On December 7, 2006, William J. Lueckel, Jr., filed an appeal from a determination issued to him on November 2, 2006 by the Department of Energy's (DOE) Golden Field Office (Golden). In that determination, Golden responded to a request for documents that Dr. Lueckel submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would require Golden to release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On October 26, 2006, Dr. Lueckel filed a request with Golden for "a copy of the non-proprietary Summary/Abstract of each of the proposals submitted to DOE in response to topics 2, 3, and 4" of a Financial Assistance Funding Opportunity Announcement (FOA) issued on January 24, 2006. Electronic Mail from Dr. Lueckel to Golden (October 26, 2006). On November 2, 2006, Golden responded to Dr. Lueckel's request, stating in pertinent part,

> We are unable to provide you with the information responsive to your FOIA request . . . . Please be advised that under the FOIA, DOE only releases information related to applications that receive an award. DOE's protection of FOA proposals is justified under FOIA Exemption 5, which covers documents that contain pre-decisional information regarding the deliberative processes of the government, and FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

Letter from Golden to Dr. Lueckel (November 2, 2006).

Dr. Lueckel then filed the present appeal. In the appeal, addressing Golden's stated rationale for the application of Exemption 4, he notes that the FOA in question states with regard to summary/abstracts, "This document must not include any proprietary or sensitive business information as the Department may make it available to the public." Appeal at 1-2; Financial Assistance Funding Opportunity Announcement, Research and Development of Fuel Cell Technology for the Hydrogen Economy, Funding Opportunity Number: DE-PS36-06GO96017 (January 24, 2006) [hereinafter January 24 FOA].

On January 10, 2007, Golden submitted a response to Dr. Lueckel's appeal. In its response, Golden states, "Because the summary/abstracts are not supposed to contain confidential commercial or financial information, DOE is at this time withdrawing its reliance on Exemption 4 as a basis for withholding the summary/abstracts." Letter from Kimberly J. Graber, Legal Counsel, Golden, to Steven J. Goering, Office of Hearings and Appeals (January 9, 2007) [hereinafter Golden Response].[1] The issue before us, then, is whether the summary/abstracts submitted in response to the FOA may be withheld under either FOIA Exemption 5.

II. Analysis

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). "[T]he first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 532 U.S at 9.

Because we find, as explained below, that the summary/abstracts are not inter-agency or intra-agency communications, they may not be withheld under FOIA Exemption 5. Golden cites a previous decision of our office in which we stated that "'[w]hen documents have been created outside of an agency but pursuant to agency initiative, courts have held that such documents are intra-agency documents' for purposes of FOIA Exemption 5." Golden Response at 5 (quoting *William H. Payne*, 26 DOE ¶ 80,161 (1997) (citing *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971))). However, subsequent to our 1997 decision in *Payne*, in 2001 the Supreme Court issued its decision in *Klamath*, cited above, and the holding of the Court in that case does not support Golden's withholding of the documents at issue.

In *Klamath*, the Court considered the application of Exemption 5 to communications between the Bureau of Indian Affairs and certain Indian tribes. *Klamath*, 532 U.S. at 6. The Court noted that some lower courts had "held that the exemption extends to communications between Government agencies and outside consultants hired by them." *Id.* at 10. Assuming, without deciding, that such communications qualify as intra-agency under Exemption 5, the Court found that the "intra-agency condition . . . rules out application of Exemption 5 to tribal communications on analogy to consultants' reports." *Id.* at 12. The Court reasoned

[1] Golden also states in its response that it believes the documents may be withheld under FOIA Exemption 3, though it did not cite this exemption in its original determination in response to Dr. Lueckel's request. Golden Response at 3-4. Because, as explained below, we are remanding this case to Golden for a new determination, Golden will have an opportunity to set forth in that determination its basis for any withholding under FOIA Exemption 3.

> [C]onsultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency's own personnel to justify calling their communications "intra-agency." The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.

Id. Thus, "the intra-agency condition excludes, at the least, communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Id.* at 12 n.4.

The distinction drawn by the Court in *Klamath* could hardly be more applicable here. The documents at issue in this case were not submitted by consultants that "had not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." *Id.* at 12. Instead, the summary/abstracts provided in response to the FOA were submitted by "interested part[ies] seeking a Government benefit at the expense of other applicants." *Id.* Applying the holding of the Court in *Klamath* to the present case, the summary/abstracts may not be withheld under Exemption 5.

III. Conclusion

Because we disagree with Golden as to the application of FOIA Exemption 5 to the documents requested by Dr. Lueckel, we will remand this matter to Golden for the issuance of a new determination either releasing those documents or providing a justification for their withholding that is consistent with the analysis set forth above.[2]

It Is Therefore Ordered That:

(1) The Appeal filed on December 7, 2007 by William J. Lueckel, Jr., OHA Case No. TFA-0182, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Golden Field Office for the issuance of a new determination in accordance with the instructions set forth above.

[2] Golden notes in its response, and we agree, that the DOE FOIA regulations require Golden to "consider the submitter's views . . . in making its determination." Golden Response at 1; 10 C.F.R. § 1004.11.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Specialist
Office of Hearings and Appeals

Date: January 30, 2007

January 25, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William K. Lane

Date of Filing: January 10, 2007

Case Number: TFA-0183

On January 10, 2007, William K. Lane (the Appellant), filed an Appeal from a final determination that the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE) issued on December 18, 2006. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Oak Ridge would be required to conduct a further search for responsive documents.

Background

On June 14, 2006, the Appellant submitted a FOIA request for all documents on George Alexander Lane, his father, who worked for E. I. duPont De Nemours at Oak Ridge during World War II. He provided his father's approximate year of birth and the year of his death to aid the search. On December 18, 2006, Oak Ridge responded that the search of the files of Oak Ridge and its contractor and facility site located only George Alexander Lane's personnel clearance data card. Determination Letter dated December 18, 2006, from Amy Rothrock, Authorizing Official, Oak Ridge, to William K. Lane. On January 10, 2007, the Appellant appealed that determination to our Office. Appeal Letter dated December 30, 2006, from William K. Lane, to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant asks that more information be located. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, 29 DOE ¶ 80,240, Case No. TFA-0138 (January 9, 2006); *Doris M. Harthun*, 28 DOE ¶ 80,282, Case No. TFA-0015 (April 8, 2003).

We have contacted Oak Ridge in response to the Appellant's request to determine what type of search was conducted. Unfortunately, the Appellant does not know his father's social security number, an important tool for searching through personnel records at Oak Ridge. The DOE Records Holding Area, which stores Oak Ridge's archived records, performed a computer database search and a manual search for records about the Appellant's father. For former employees who worked for contractors and subcontractors in the 1940's during the Manhattan Project, it is not unusual to find only a copy of the person's personnel clearance data card. Electronic Mail Message sent January 11, 2007, from Leah Ann Schmidlin, Oak Ridge, to Janet Fishman, OHA. This was found and provided to the Appellant. For the most part, contractors at Oak Ridge in the 1940s retained all personnel information other than the personnel clearance data card. Electronic Mail Message sent January 22, 2007 from Leah Ann Schmidlin, Oak Ridge, to Janet Fishman, OHA. Therefore, it is possible that information may be in the possession of E. I. duPont De Nemours, the Appellant's father's employer. Oak Ridge also stated that it is very difficult to locate any documentation about an individual without that person's social security number.[*/] *Id.*

Based on the search that Oak Ridge performed, we are convinced that it followed procedures which were reasonably calculated to uncover the material sought by the Appellant in his request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by William K. Lane, on January 10, 2007, Case No. TFA-0183, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: January 25, 2007

[*/] Oak Ridge indicated to us that it attempted to find a social security number for the Appellant's father. It searched a database that could possibly have contained social security numbers of people who had died. Oak Ridge was unsuccessful in finding the number. Electronic Mail Message sent January 11, 2007, from Leah Ann Schmidlin, Oak Ridge, to Janet Fishman, OHA.

February 8, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Raymond W. Stephens

Date of Filing: January 18, 2007

Case Number: TFA-0185

On January 18, 2007, Raymond W. Stephens filed an appeal from a determination issued to him on December 18, 2006 by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (CBC). In that determination, CBC responded to a request for documents that Mr. Stephens submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. CBC provided Mr. Stephens with some documents responsive to his request, but determined that it could not locate the remaining requested records. This appeal, if granted, would require CBC to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Mr. Stephens filed a request with CBC for several documents regarding a former DOE sub-contractor and its operations concerning a particular piece of equipment. *See* Letter from Jack R. Craig, CBC, to Raymond W. Stephens (December 18, 2006) (Determination Letter). In its determination letter, CBC located and provided in their entirety two of the requested documents. CBC added that a thorough search for the remaining documents was conducted, but no documents were located. *Id*. CBC outlined its search for responsive records as follows:

1. Two boxes of hard copy correspondence were recalled from the Federal Records Center and searched for specific correspondence numbers relating to the subject matter.

2. Hummingbird database was searched for any subject-related information.

3. Environmental Records Database (ERD) was searched for subject-related information.

4. Records Management Database (RMDB) was searched for subject-related information.

5. Procurement personnel were contacted. Any records that may have been responsive to this request have been destroyed in accordance with DOE Administrative Records Schedule 3: Procurement, Supply, and Grant Records. Subcontract records are retained for 6 ¼ years after subcontract is complete. No records exist based on the dates of the documents requested.

Id. Mr. Stephens filed the present appeal challenging the adequacy of the search performed by CBC. Letter from Raymond W. Stephens to OHA (January 18, 2007) (Appeal Letter). In his appeal letter, Mr. Stephens maintains that he "find[s] it very hard to believe" that CBC has "exhausted every avenue" in conducting its search. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted CBC to discuss the search. CBC informed us that, in responding to Mr. Stephens' request, it performed a thorough search for documents utilizing all appropriate search terms and methods, as outlined in the determination letter. *See* Memorandum of Telephone Conversation between Simon Lipstein, CBC, and Diane DeMoura, OHA (January 30, 2007). CBC stated that it has a specific procedure for searching for records responsive to FOIA requests and that procedure was followed in processing Mr. Stephens' request. *Id*. Contrary to Mr. Stephens' argument, the agency is not required to exhaust every avenue, but rather must undertake a search reasonably calculated to uncover records responsive to his request. In this case, CBC searched paper records and three electronic databases. It also contacted appropriate personnel to obtain relevant information. Moreover, Mr. Stephens has not produced any evidence that the documents he seeks currently exist at CBC. Based on this information, we find that CBC performed an extensive search reasonably calculated to reveal records responsive to Mr. Stephens' request. The search was, therefore, adequate. Accordingly, Mr. Stephens' appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 18, 2007, by Raymond W. Stephens, OHA Case No. TFA-0185, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: February 8, 2007

January 26, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Fred R. McCarroll

Date of Filing: January 18, 2007

Case Number: TFA-0186

This Decision concerns an Appeal that Fred R. McCarroll filed in response to a determination that was issued to him by the Department of Energy's (DOE) Oak Ridge Operations Office (hereinafter referred to as "Oak Ridge"). In that determination, Oak Ridge replied to a request for documents that Mr. McCarroll submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1008. Oak Ridge informed Mr. McCarroll that its search had failed to identify any documents that were responsive to his request. This Appeal, if granted, would require that we remand this matter to Oak Ridge for another search.

The PA generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

Mr. McCarroll is an employee of BWXT Y-12, which operates the DOE's Y-12 plant in Oak Ridge, Tennessee. In his request, Mr. McCarroll sought copies of records of any psychological evaluations that he has undergone during his tenure at the Y-12 plant. In its determination letter, Oak Ridge informed Mr. McCarroll that it had been unable to locate any such records at any of its facilities. However, Oak Ridge stated that it had forwarded his request to the National Nuclear Security Administration (NNSA) in Albuquerque, which has jurisdiction over the Y-12 plant. Oak Ridge further stated that the NNSA would respond directly to Mr. McCarroll with the results of its search. Determination Letter at 1.

In his Appeal, Mr. McCarroll cites a letter from two psychologists as evidence that the requested records do exist. However, the letter indicates that the records are in the possession of the NNSA. It states, in pertinent part, that "we have recently processed the records request for psychological records which you made on behalf of Mr. Fred R. McCarroll. These records will be sent shortly

through the NNSA Albuquerque Service Center to you." November 28, 2006 letter from Drs. Linda Shissler and Russ Reynolds to William Allen, Counsel for Mr. McCarroll (italics added).

We have often reviewed the adequacy of a search conducted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. A PA request requires only a search of systems of records, rather than a search of all agency records, as is required under the FOIA. Nevertheless, the standard of sufficiency that we demand of a PA search is no less rigorous than that of a FOIA search. Therefore, we will analyze the adequacy of the search conducted by Oak Ridge in the case at hand using principles that we have developed under the FOIA. *See, e.g., Stephen A. Jarvis,* 28 DOE ¶ 80,246 (2002).

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.,* 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy,* 26 DOE ¶ 80,240 (1997).

In order to determine whether the search conducted was adequate, we contacted Oak Ridge. We were informed that the request was referred to the local personnel security office, which informed the Oak Ridge analyst assigned to the request that Mr. McCarroll's personnel security file had been transferred to NNSA in Albuquerque and that no psychological records could be found at the local office. Oak Ridge further informed us that Mr. McCarroll's personnel security file, which is currently in the possession of NNSA, is the only place where the requested records are likely to be found. *See* memorandum of January 19, 2007 telephone conversation between Robert Palmer, OHA Staff Attorney, and Amy Rothrock, Oak Ridge. Based on the information before us, we conclude that Oak Ridge's search for responsive documents was adequate, and that Mr. McCarroll's Appeal should therefore be denied. Of course, Mr. McCarroll remains free to appeal NNSA's determination once he receives it, if he does not receive the documents that he seeks.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by Fred R. McCarroll, OHA Case Number TFA-0186, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: January 26, 2007

March 5, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Eugenie Reich
Date of Filing:	January 22, 2007
Case Number:	TFA-0187

On January 22, 2007, Eugenie S. Reich (Reich) filed an Appeal from a determination issued to her by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) on December 18, 2006, in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of Reich's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On December 11, 2006, Reich filed a request for "any record that shows the names of the panel members who formed part of the external investigation panel convened by Jim Roberto of ORNL to investigate fraud and research misconduct allegations made through the journal Nature against researchers in the group of Dr. Steve Pennycook (Pennycook) of ORNL during the summer or 2006." Electronic mail message from Reich to DOE/HQ (December 11, 2006). Reich described herself as a journalist and requested a fee waiver. She also requested expedited processing "because of a compelling need for this record, so as to assist with informing the public concerning federal activity in the form of alleged wrong-doing committed by Pennycook and other ORNL researchers using DOE funding." *Id*. Reich stated that the Boston Globe, Knoxville Sentinel and Nature Magazine published articles in December 2006 that revealed the alleged misrepresentation of data by Pennycook and others who worked with him. She voiced suspicion about the panel that investigated Pennycook because the panel members have not been identified, and argued that they may have conflicts of interest. According to Reich, there is the possibility of significant harm to the public interest through the expenditure of tax dollars on fraudulent research. *Id.* at 2. Further, there is a danger that other researchers are relying on Pennycook's allegedly fraudulent data.

On December 18, 2006, the Director of DOE/HQ denied Reich's requests, stating that she had not submitted enough information to support her request for a fee waiver. Letter from Abel Lopez,

Director, DO/HQ, to Reich (December 18, 2006). The office asked her to submit additional information by January 8, 2007. DOE/HQ also denied her request for expedited processing because the Director found that she did not adequately address the requirements for expedited processing. He found that Reich did not establish any threat to the life or safety of an individual that would justify expeditious processing. Further, he concluded that she did not identify any particular urgency that requires the provision of the requested information in an expedited manner.

Reich submitted the requested information and DOE/HQ then granted her request for a fee waiver. On January 22, 2007, Reich submitted this appeal of HQ's denial of expedited processing. Reich asks that OHA order DOE/HQ to expedite the processing of her FOIA request.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the federal government. 5 U.S.C. § 552 (a)(6)(E)(v).

Courts have found sufficient exigency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See e.g., Washington Post v. Department of Homeland Security,* 459 F. Supp. 2d 61 (D.D.C. 2006) (granting expedited processing based on public need for requested material to inform voters prior to upcoming election); *Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress). *See also Edward A. Slavin, Jr.*, 27 DOE ¶ 80,279 n.2 (2000) (discussing request to expedite documents for upcoming administrative hearing). Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester's failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Department of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of "current exigency").

We contacted Reich to secure additional information regarding her request for expedited processing. She contends that her initial request explained that the research costs to the taxpayer are ongoing,

and total approximately $100,000 per month. Electronic mail message from Reich to Valerie Vance Adeyeye, OHA (February 15, 2007). In addition, Reich argues that United States scientists are relying on fraudulent research. *Id.* She informed this office that she needs the information in order to prepare an article for publication prior to a March 6, 2007 meeting of the American Physical Society (APS). Memorandum of Telephone Conversation between Reich and Valerie Vance Adeyeye, OHA (February 15, 2007). At that meeting, Dr. Pennycook will be presenting information to a group of scientists, and according to Reich she has an urgent need to disseminate the information regarding the investigation to the general public prior to the meeting.

After reviewing the record of this case, we find that Reich has not established a compelling need for expedited processing of her request. Reich has not made clear that the requested information, if it exists, will not be useful to her if processed within the timeframe of a normal FOIA request. Neither the recent newspaper articles nor the upcoming public address at the APS meeting demonstrate the requisite urgency to endow this request for information with a compelling need for expedited processing. The scientists whom Reich suggests will be the victims of Dr. Pennycook's allegedly fraudulent research are also the citizens most likely to be already familiar with the controversy surrounding his work. Thus we find that Reich has not established any urgency for the release of the material she requested. Accordingly, her Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eugenie S. Reich on January 22, 2007, OHA Case Number TFA-0187, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: March 5, 2007

March 5, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kathleen J. Long

Date of Filing: January 29, 2007

Case Number: TFA-0188

On January 29, 2007, Kathleen J. Long filed an appeal from a determination issued to her on January 16, 2007 by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA). In that determination, NNSA responded to a request for documents that Ms. Long submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA determined that it could not locate records responsive to Ms. Long's request. This appeal, if granted, would require NNSA to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Ms. Long initially filed a request with the DOE's Oak Ridge Office (ORO) for records pertaining to her late father, a former K-25 employee. *See* Letter from NNSA to Kathleen J. Long (January 16, 2007) (Determination Letter). Specifically, Ms. Long requested her father's medical records, personnel records, radiation exposure and industrial hygiene records, and personnel security file. *Id.* After issuing a response to Ms. Long's request, ORO forwarded the request to NNSA for a search. According to ORO, it "send[s] requests for records on former K-25 employees to NNSA to also conduct a search at Y-12 because most official files on former K-25 employees were transferred to Y-12 in 1998 for management and storage." *See* Electronic Mail Message from Amy Rothrock, ORO, to Diane DeMoura, OHA (February 1, 2007). In its determination letter, NNSA stated that it contacted the Y-12 Site Office to request a search for records. *See* Determination Letter. According to NNSA, the search yielded no documents responsive to Ms. Long's request. *Id*.

Ms. Long filed the present appeal challenging the adequacy of the search performed by NNSA. Letter from Kathleen J. Long to OHA (January 20, 2007) (Appeal Letter). In her appeal, Ms. Long states that she "find[s] it hard to believe that these records, which would be vital to

maintaining accurate data from any government organization, would somehow just be missing." *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted NNSA to discuss the search. NNSA informed us that, in responding to Ms. Long's request, it forwarded the request for records to the Y-12 site and "all organizations searched current and archived records for [records pertaining to Ms. Long's late father] and no records were located. His employment history shows that he never worked at the Y-12 site. Even if [his] records were transferred from K-25 to Y-12, they would have been located by these organizations." Electronic Mail Message from Terry Apodaca, NNSA, to Diane DeMoura, OHA (February 15, 2007).

According to a representative from the Y-12 site, Y-12 searched for records "in the medical, personnel, [industrial hygiene], RadCon, and Plant Records organizations." Electronic Mail Message from Janet Wood, Y-12, to Diane DeMoura, OHA (February 27, 2007). Regarding the requested medical records, Y-12 searched medical databases and "the actual filed records" and no records were found. *Id*.

> Since [Ms. Long's late father was] a former [K-25] employee, the active medical records were checked to verify if [Y-12's medical office] still had the record or if it had been send to Plant Records…Since Plant Records responded that they did not have the record, Medical further investigated by checking a spreadsheet listing medical records that have been transferred to [Oak Ridge National Laboratory], K-25, or Wackenhut. An old Access database that lists medical records sent to the vault was also checked and no records were located.

Id. Y-12 searched "actual filed [personnel] records" but did not locate any records responsive to Ms. Long's request. *Id*. Y-12 searched for industrial hygiene records in "the Comprehensive Tracking System and [by searching] several manual lists of non-digitized records for evidence of personal monitoring records" but did not locate any responsive documents. *Id*. Finally, Y-12 searched several radiation exposure records—monitoring data from years prior to 1992, external monitoring data prior to 1997, extremity monitoring data prior to 1997, and complete incident reports including radiological workplace restrictions—but did not locate any documents responsive to Ms. Long's request. *Id.*

Based on this information, we find that NNSA performed an extensive search reasonably calculated to reveal records responsive to Ms. Long's request. The search was, therefore, adequate. Accordingly, Ms. Long's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 29, 2007, by Kathleen J. Long, OHA Case No. TFA-0188, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: March 5, 2007

March 26, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: March 1, 2007

Case Number: TFA-0190

On March 1, 2007, the National Security Archive (the Appellant) filed an Appeal from a February 13, 2007 final determination issued pursuant to the Freedom of Information Act (FOIA). In that Determination, the Office of Policy and International Affairs (Denying Office) of the Department of Energy (DOE) partially denied the Appellant's request for information submitted under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the Denying Office to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a letter dated June 7, 2004, the Appellant submitted a FOIA request to the Denying Office for "[a]ll documents referencing Iraq written, signed, or received, in whole or in part, by James E. Hart, senior oil market advisor within the U.S. Department of Energy Office of Policy and International Affairs, dated from February to April, 2003." Request Letter dated June 7, 2004, from Barbara Elias, FOI Coordinator, Appellant, to Abel Lopez, Director, FOIA / PA Division, DOE (Request Letter). On February 13, 2007, the Denying Office responded that it had identified 16 documents as responsive to the Appellant's request. Determination Letter dated February 13, 2007, from Abel Lopez, to Barbara Elias. (Determination Letter). It released three documents in full and withheld the other 13 in their entirety. *Id.* The Denying Office withheld the 13 documents under the deliberative process privilege pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5).

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues Exemption 5 was applied too broadly to these documents.

Appeal Letter dated March 1, 2007, from Roger Strother, Appellant, to Director, Office of Hearings and Appeals. In addition, the Appellant asserts that, even if the reports can be withheld under Exemption 5, the factual portions of the documents should have been segregated and released. *Id.*

II. Analysis

Exemption 5 protects "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink,* 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).[*/]

[*/]The Appellant argues that DOE must be able to identify a specific agency decision, and the role those documents played in the agency's arrival at that final decision, in order to withhold a document under the deliberative process privilege and under Exemption 5. Appeal Letter. The Appellant relies on *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984), which actually advises that "[t]o ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed." *Paisley*, 712 F.2d at 698 (emphasis added). Initially, we note that the requested documents may point to a policy that DOE has concerning the subject matter of the documents. Despite the Appellant's argument to the contrary, *Paisley* does not require that a specific agency decision be identified. We believe that *Sears*, which does not require a specific agency decision to be identified, still controls in matters relating to Exemption 5. *Sears*, 421 U.S. at 151 n.18.

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Id; see also Schell v. HHS, 843 F.2d 933, 941 (6th Cir. 1988); *Hamilton Sec. Group, Inc., v. HUD*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000), *aff'd*, 2001 WL 238162 (D.C. Cir. Feb 23, 2001); *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3 (D.D.C. 1998); *Hunt v. United States Marine Corps*, 935 F. Supp. 46, 51 (D.D.C. 1996) .

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Denying Office has listed 13 documents that it withheld in their entirety because they contain information that is predecisional and part of the deliberative process. We have been provided with copies of these documents. We have reviewed these documents and believe that documents 6, 9, 10, 11, 13, 14, and 15 were properly withheld under Exemption 5. The factual information contained in these documents is so intertwined as to make segregation virtually impossible. Further, the factual information contained in these documents was selected from a larger quantity of factual information so that the selection is part of the deliberative process. These documents were prepared by an advisor who reviewed many facts but relied on only selected facts for these documents.

However, in regard to documents 4, 5, 7, 8, 12, and 16, we believe that there is factual information contained therein that could be segregated and released. As an example, the first sentence of document 4 states, "[t]he strike in Venezuela began on December 2, with Venezuelan oil production having ground nearly to a halt over the following two weeks." This information is available on the Internet through a simple search. *Venezuela Strike Worsens Oil Situation*, www.usatoday.com / news / world / 2002-12-17-venezuela-strike-oil_x. htm, accessed March 14, 2007. Furthermore, some of the information contained in this

document and documents 7 and 8 looks strikingly similar to information found in documents 1 and 3, which were released to the Appellant.

Document 5 contains copies of two news articles published by Reuters. Through another simple Internet search, both of these articles are also available to the public. Furthermore, these articles are not part of the predecisional deliberative process. The authors are not DOE employees, but rather members of the news media. The fact that they were included in a paper prepared for someone else within the DOE does not exempt them from disclosure under Exemption 5. In addition to the news articles, there appears to be other releasable, factual information, such as the title of the document and the first two paragraphs. The information contained therein is public and available to people outside of the DOE, such as those who participated in the summit referred to in the document.

Finally, we believe that documents 12 and 16 also contain facts that could be segregated and released to the Appellant.

III. The Public Interest

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. In this case, no public interest would be served by release of the comments and opinions contained in the documents withheld in their entirety, which consist solely of advisory opinions and recommendations. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were reluctant to provide information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions, which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987); *Newhouse News Service*, 28 DOE ¶ 80,241 (September 4, 2002) (Case No. VFA-0758).

IV. Conclusion

The Denying Office properly withheld documents 6, 9, 10, 11, 13, 14, and 15 under the Exemption 5 deliberative process privilege. We believe that portions of documents 4, 5, 7, 8, 12, and 16 contain factual information that could be segregated and released to the Appellant. We will remand the matter to the Denying Office for a further consideration

of those documents listed above to determine what information can be segregated and released. Therefore, the Appeal will be denied in part and granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive on March 7, 2003, Case No. TFA-0190, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Policy and International Affairs of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: March 26, 2007

May 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Dynamac Corporation
Date of Filing:	March 2, 2007
Case Number:	TFA-0191

On March 2, 2007, Dynamac Corporation (Dynamac) filed an Appeal from a determination issued to it on January 29, 2007, by the Department of Energy=s Office of Legacy Management. That determination was issued in response to a request for information that Dynamac submitted under the Freedom of Information Act, 5 U.S.C. ' 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Dynamac asks that the DOE conduct an additional search for documents responsive to its request.

I. Background

On December 13, 2006, Dynamac filed a request in which it sought documents related to the former Harshaw Chemical Site located in Cleveland, Ohio. On January 29, 2007, the Office of Legacy Management issued a determination letter in which it stated that it conducted a search of its records but was unable to locate any responsive documents. On March 2, 2007, Dynamac filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Dynamac challenges the adequacy of the search conducted by the Office of Legacy Management and asserts that there should be records related to the Harshaw Chemical Site.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must Aconduct a search reasonably calculated to uncover all relevant documents.@ *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). AThe standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.@ *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not

hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE & 80,282 (April 8, 2003) (Case No. TFA-0015).*

We contacted the Office of Legacy Management to ascertain the extent of the search that was performed and to determine whether any documents responsive to Dynamac=s request might reasonably be located. Upon receiving Dynamac=s request for information, the Office of Legacy Management conducted a search in its Hummingbird database, which includes the CERCLA Environmental Database, using the keywords AHarshaw Chemical Site@ and AHarshaw.@ This database is a central electronic database that would be the most likely location of responsive information if any existed. Paper documents are no longer kept. *See* Record of Telephone Conversation between Sheila Dillard, Office of Legacy Management, and Kimberly Jenkins-Chapman, OHA (April 24, 2007). This search did not locate any responsive documents. Based on the information above, we find that the Office of Legacy Management has conducted a search reasonably calculated to uncover any records relating to the former Harshaw Chemical Site. Accordingly, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dynamac Corporation on March 2, 2007, OHA Case No. TFA-0191, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: May 8, 2007

* All OHA FOIA decisions may be accessed at htttp://www.oha.doe.gov/foia1.asp.

May 18, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Marty D. Davidson
Date of Filing:	March 6, 2007 April 23, 2007
Case Number:	TFA-0192 TFA-0201

This Decision concerns two Appeals filed by Marty D. Davidson from determinations issued to him by the Department of Energy's (DOE) Oak Ridge Office (ORO) (Case No. TFA-0192) and the DOE's National Nuclear Security Administration Service Center, Albuquerque (NNSA) (Case No. TFA-0201). In those determinations, ORO and NNSA responded to a request for documents that Mr. Davidson submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Both ORO and NNSA located some documents responsive to Mr. Davidson's request; however, neither ORO nor NNSA located all of the requested records. This appeal, if granted, would require ORO and NNSA to perform additional searches and release any newly discovered responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

Mr. Davidson filed a request under the Privacy Act with ORO for records pertaining to his employment at DOE's Oak Ridge Site. *See* Letter from ORO to Marty D. Davidson (January 29, 2007). Specifically, Mr. Davidson requested copies of his "medical records, personnel records, radiation exposure records, chest x-rays, training records, industrial hygiene records, personnel security file, and OPM background investigation." *Id*. In its final response, ORO provided Mr. Davidson with some records but informed him that "no medical records, personnel records, chest x-rays, training records or industrial hygiene records were found." *Id*. ORO also stated that no personnel security file or OPM background investigation records were located because they were destroyed pursuant to the timelines in the National Archives and Records Administration General Records Schedules. *Id.* Finally, ORO stated that it forwarded Mr. Davidson's Privacy Act request to NNSA because NNSA now has jurisdiction over records located at one of the DOE's facilities at Oak Ridge, the Y-12 site. *Id; see also* Letter from ORO to Marty D. Davidson

(March 24, 2006). In its response, NNSA stated that it contacted the Y-12 Site Office to request a search for records. *See* Letter from NNSA to Marty Davidson (May 31, 2006). NNSA stated that, although it located some responsive records and provided copies of those records to Mr. Davidson, it could not locate all of the requested records. *Id*.

Mr. Davidson filed the present appeals challenging the adequacy of the searches performed by ORO and NNSA. Letters from Marty D. Davidson to OHA (March 6, 2007 and April 23, 2007) (Appeal Letters). In his appeals, Mr. Davidson contends that his records must exist because he had various exposures to radiation and underwent several medical procedures that he knows were documented. *Id*.

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, 28 DOE ¶ 80,251 (2002). Accordingly, in analyzing the adequacy of the searches conducted by ORO and NNSA in this case, we are guided by the principles we have applied in similar cases under the FOIA.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted both ORO and NNSA to discuss the searches conducted in response to Mr. Davidson's requests.

ORO informed us that it "conducted a search of the K25 site, Oak Ridge Associated Universities, the DOE Records Holding Area (legacy records), the Oak Ridge National Laboratory, and the DOE Personnel Security Clearance Division." E-mail from Amy Rothrock, ORO, to Diane DeMoura, OHA (April 24, 2007). ORO stated that it searched those sites for "medical records, personnel records, radiation exposure records, chest x-rays, training records and industrial hygiene records" using Mr. Davidson's "social security number, name, date of birth and badge number." E-mail from Leah Ann Schmidlin, ORO, to Diane DeMoura, OHA (May 10, 2007). ORO stated that the only records it was able to locate were "18 pages of radiation exposure records found at the K25 site in a shared database containing radiation exposure records of employees from several sites, not just K25." *Id*. ORO added that Mr. Davidson "was a RUST

Engineering employee which indicated that Y-12 would have the majority of his records, if not all, based on our past experience in locating RUST employee records at Y-12." *Id.*

NNSA informed us that, in responding to Mr. Davidson's request, it searched for records in several databases using Mr. Davidson's name, social security number, date of birth, and badge number. E-mail from Terry Apodaca, NNSA, to Diane DeMoura, OHA (April 30, 2007). According to NNSA, the databases include "Plant Records, Personnel, Medical, Industrial Hygiene and Radcon (radiation contamination)" and contain all references to any paper copies of records that the site has. E-mail from Terry Apodaca, NNSA, to Diane DeMoura, OHA (April 25, 2007). According to NNSA, it located, and provided to Mr. Davidson, all records it located including 20 pages of Personnel records, 22 pages of Medical records, and 12 pages of Radcon records. *Id*. NNSA noted that since Mr. Davidson was a RUST Engineering employee, and not employed by Y-12, "the balance of his records would be at the company that he was employed." *Id*. NNSA added that it has had "several subcontractors that have worked at [Y-12] during the years, but those companies maintain [their] own records." *Id*. NNSA stated that it provided all the records it could find and that Mr. Davidson should contact RUST Engineering to request additional records. *Id*.

Based on this information, we find that ORO and NNSA performed extensive searches reasonably calculated to reveal records responsive to Mr. Davidson's request. The searches were, therefore, adequate. Accordingly, Mr. Davidson's appeals should be denied.

It Is Therefore Ordered That:

(1) The Appeals filed on March 6, 2007 and April 23, 2007, by Marty D. Davidson, OHA Case Nos. TFA-0192 and TFA-0201, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: May 18, 2007

June 15, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Columbia Research Corporation
Date of Filing:	March 20, 2007
Case Number:	TFA-0193

On March 20, 2007, Columbia Research Corporation (CRC) filed an Appeal from a determination issued to it by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA released some documents and withheld some information in response to a request for information that CRC filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On January 30, 2007, CRC sent a FOIA request to BPA for documents relating to contracts between BPA and Washington2 Advocates since January 1, 2005.[1] BPA conducted a search and found 157 pages of responsive material. On February 23, 2007, BPA released some information to CRC along with a determination letter. Letter from BPA to CRC, February 23, 2007 (Determination Letter). BPA withheld some information under Exemption 6 and also withheld two items in their entirety under the deliberative process privilege of Exemption 5, but did not give any further information about the withheld items.[2] BPA released 9 pages in their entirety. On March 20, 2007, CRC filed this appeal of BPA's decision to withhold information under Exemption 5.

We asked BPA for comments on CRC's appeal. In response, BPA acknowledged an error in the initial processing of the request and released 96 additional pages in their entirety to CRC. Letter from BPA to CRC (April 23, 2007). However, on April 27, 2007, CRC notified OHA that BPA

[1] Washington2 Advocates is a consultant that provides strategic counsel (including advice, opinions and written reports) to BPA on national and Northwestern energy issues.
[2] The information withheld under Exemption 6 is not the subject of this appeal.

continued to withhold non-exempt material, specifically (1) redacted emails, (2) attachments to emails, and (3) redacted statements of work describing the activities that the consultant performed in prior months. CRC asked OHA to determine whether BPA properly withheld these documents under Exemption 5. CRC argues that some of the material withheld under Exemption 5 is factual and non-deliberative and therefore not exempt from release under the FOIA. CRC also argues that there is a significant public interest in releasing the unredacted statements of work because of the amount of the monthly payments that BPA makes to the consultant for interacting with Congress on matters of public importance.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

CRC argued in its Appeal that the documents are not exempt from protection because many were not created by the agency. However, federal courts have held that some documents generated outside of an agency but created through agency initiative may be considered "inter-agency or intra-agency memoranda" or letters for Exemption 5 purposes. *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). *See also State of Nevada*, 29 DOE ¶ 80,292 (2007). The agency can apply Exemption 5 to a document that is generated as part of the continuing process of agency decision-making. "Congress apparently did not intend 'inter-agency or intra-agency' to be rigidly exclusive terms but rather to include [nearly any record] that is part of the deliberative process." *Ryan*, 617 F.2d at 790. Thus we conclude that the material falls under the purview of Exemption 5.

This office has conducted a *de novo* review of the documents including those pages that CRC mentioned specifically in its appeal. Our review found that the following documents contained deliberative material. First, pages 6, 7, 10, and 16 of the statements of work contain information about projects, advice and recommendations that appear to be part of the agency deliberative process. The documents include recommendations to the agency about how possible court rulings or legislation could affect agency policies. There is a similar basis for withholding on pages 24, 103-113, 125 and 156. The document on page 111 sets forth advice and opinions from the consultant to BPA about an issue of importance to BPA. Pages 115 to 122 contain draft documents. The email on page 142 concerns a proposed meeting to be conducted during a meal. The contents of that

document contain some material that could be considered part of the deliberative process. The emails on pages 145 and 146 offer advice and opinions about items under consideration by the Congress that are of interest to BPA. Finally, page 157 contains a discussion of the contents of a draft document. We find that this material was exempt from disclosure.[3]

Nonetheless, it is not clear why BPA withheld other portions of the responsive material. *See*, e.g., pages 12, 13 and 15 of the statements of work. This material does not appear deliberative. The Determination Letter does not contain an adequate description of the exempt material that could assist CRC and this office in understanding why certain items on those pages were withheld.[4] In addition, no descriptions were provided for documents that were withheld in their entirety. On remand, such descriptions must be provided.

Finally, BPA did not release any information contained in the attachments to the emails. The attachments are also considered documents, and any non-exempt material in these attachments should be released to the requester immediately.

B. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242 (C.A.D.C. 1977) states that non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead*, 566 F.2d at 261.

BPA did not address the issue of segregability in the determination. This office reviewed a sample of the material that was withheld in its entirety, and based on our review, we find that there is some non-exempt, factual material in the responsive documents; namely the information in pages 6, 7, 11, 14, and 15 (bullet 3). Bullet 3 of Page 11 contains some material that may be factual or non-deliberative. Bullet 1 of Page 14 also contains material that may be factual. Our review also found some factual material on pages 111-113 and page 144. Thus, there is a minimal amount of non-exempt material involved and segregation of that material should not pose an undue burden for BPA.

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[3] CRC also asked OHA to identify the specific action or policy that BPA was contemplating for which it sought the consultant's advice. Letter from CRC to OHA (April 25, 2007) at 3. Again turning to the federal courts for guidance, we find that the agency is not required to identify a specific decision. *Coastal States*, 617 F. 2d at 868. Rather, the agency must establish what deliberative process is involved and the role played by the responsive material in the course of that process.

[4] Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000).

This material can be released to the requester without revealing the deliberative process surrounding the work of the consultant. *See Radioactive Waste Management Associates,* 28 DOE at ¶ 80,620.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the properly withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the properly withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the possible chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, 29 DOE ¶ 80,271 (2006).

It Is Therefore Ordered That:

(1) The Appeal filed by Columbia Research Corporation on March 20, 2007, OHA Case No. TFA-0193, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: June 15, 2007

May 1 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Business Week Magazine

Date of Filing: March 21, 2007

Case Number: TFA-0197

This Decision concerns an Appeal that Business Week Magazine (Business Week) filed in response to a determination that was issued to it by the Department of Energy's (DOE) Western Area Power Administration (Western). In that determination, Western replied to a request for documents that Business Week submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Western released certain documents to Business Week in their entirety, but withheld a portion of one document. This Appeal, if granted, would require that Western release the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); see also 10 C.F.R. § 1004.10(b)(1)-(9).

In its FOIA request, Business Week sought access to all contracts for Renewable Energy Certificates (RECs) procured by Western on behalf of government agencies on or after January 1, 2002. [1] In its response, Western provided copies of all of these contracts in their entirety except one, from which pricing information was deleted. Western cited FOIA Exemption 4 as its justification for withholding the pricing information. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4).

1/ RECs are commodities that represent the environmental attributes of the power produced by renewable energy sources such as solar, geothermal or wind power. These Certificates can be used by certain energy purchasers to satisfy legislative or regulatory requirements that a percentage of their energy purchases come from suppliers of renewable energy.

Western's determination letter did not, however, adequately explain the manner in which it applied this Exemption.[2] In order to obtain this explanation, we contacted Western. We were informed that Western withheld the pricing information at the request of another federal entity on the ground that revealing the price at which that entity was purchasing RECs could put it at a disadvantage in future negotiations. *See* Memorandum of April 20, 2007 telephone conversation between Penny Casey, Western, and Robert Palmer, OHA Staff Attorney. In its Appeal, Business Week contests Western's application of this Exemption.

As previously stated, Exemption 4 shields from mandatory disclosure information that is "obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g., Stone v. Export-Import Bank*, 552 F.2d 132, 137 (5th Cir. 1977); *Nadler v. FDIC*, 92 F.2d 93, 95 (2nd Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, 27 DOE ¶ 80,225 (August 31, 1999) (Case No. VFA-0517). This Exemption serves to protect submitters of commercial or financial information to the federal government from the adverse effects of unwarranted public disclosure of that information, and it correspondingly provides the federal government with an assurance that such information will be reliable. However, federal entities themselves are not "persons" for purposes of Exemption 4, and any commercial information of the federal government is not shielded from mandatory disclosure by this Exemption. *See, e.g., Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404; *Nadler v. FDIC*, 92 F.3d 93, 95 (2d. Cir. 1996) (term "person" includes "an individual, partnership, corporation, association, or public or private organization *other than an agency*" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2000)) (italics added)).

We therefore conclude that Western incorrectly applied Exemption 4 in withholding the pricing information. Consequently, we will remand this matter to Western. On remand, Western should issue a new determination letter either releasing the information to Business Week or providing a new justification for withholding it. Any such justification must include a complete explanation of how the FOIA Exemption cited was applied by Western.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Business Week Magazine, OHA Case Number TFA-0197, is hereby granted as set forth in paragraph (2) below.

2/ Within the context of this case, an adequate explanation would have included the identity of the party whose interests Western was seeking to protect, and whether the information withheld was "privileged" or "confidential." *See, e.g., BP Exploration, Inc.*, 27 DOE ¶ 80,197 (April 8, 1999) (Case No. VFA-0482). All OHA FOIA decisions may be accessed at http://www.oha.doe.gov/foia1.asp.

(2) This matter is hereby remanded to the Western Area Power Administration. On remand, Western shall issue a new determination letter either releasing the withheld information or providing a new and adequate explanation for withholding it.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: May 1, 2007

PALMER_____

April 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	William H. Payne
Date of Filing:	March 23, 2007
Case Number:	TFA-0198

On March 23, 2007, William H. Payne (Appellant) filed an Appeal from a determination issued by the Department of Energy's (DOE) National Nuclear Security Administration Service Center (NNSASC) in Albuquerque, New Mexico. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. If granted, NNSASC would be required to respond to the Appellant's request.[*/]

I. Background

In an electronic mail message sent February 2, 2007, the Appellant sent a letter to NNSASC which stated:

> I ask that your office sees that Sandia National Laboratories and [DOE] complies with my original FOIA/PA request and send me documents alluded to in the Gilbert letter and seen at docket entry #3 at CIV-92-1452-JC.
>
> * * *
>
> I ask that you send me a copy of
>
> > ((9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

[*/] All OHA decisions may be accessed at http://www.oha.doe.gov/foia1.asp.

> (10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;
>
> procedures 9 and 10 for Sandia National Laboratories and the [DOE].

Request dated February 2, 2007.

On February 21, 2007, NNSASC sent a letter to the Appellant. Letter dated February 21, 2007, from Carolyn Becknell, FOIA Officer, NNSASC, to William H. Payne (February 21, 2007 Letter). NNSASC first stated that it was

> unable to identify what specific records you are requesting from the information that you have supplied. As to your request for a copy of the procedures relating to what you have referenced as "(9) and (10)", [DOE] regulations, . . . , provide rules and procedures that are followed in responding to FOIA and Privacy Act requests.

February 21, 2007 Letter at 1. NNSASC then informed the Appellant that it had reviewed its records and found no pending request that he had filed. *Id.* It continued that it would take no further action at this time. *Id.*

On March 23, 2007, the Appellant appealed NNSASC's February 21, 2007 letter, contending that the documents he is seeking are clearly identified in "Mr. Gilbert of the FBI recently declassified letter [that] has identified the documents sent to the FBI by Sandia National [L]aboratories and Mr. Goslar's AFFIDAVIT." March 23, 2007 Appeal Letter. The Appellant continued that he explained "this in my Wednesday February 28, 2007 10:43 email to Bucknell." *Id.*

II. Analysis

A. Adequacy of The Appellant's Description of Documents Requested

The Appellant asks that NNSASC comply with his original FOIA / PA request and send documents alluded to in another letter, which was not included with his February 2, 2007 request. Secondly, he asks that NNSA send him a copy of procedures (9) and (10), and appears to quote them, but he does not give a citation for them or indicate what they refer to.

We understand the position NNSASC expressed in its February 21, 2007 response to be that it was unable to identify what specific records the Appellant is requesting from the information that he supplied. For example, NNSASC had no idea what the Appellant meant by "original FOIA / PA request." The Appellant has made numerous FOIA requests to NNSASC over many years. None of them is currently pending, so the Appellant could have been referring to any of his earlier requests, or none of them. In addition, it is not clear what the Appellant is requesting by asking for a copy of "(9) and (10)." Even a request for a broad scope of documents must be clear enough for the agency to determine what documents are being requested. *Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding valid request encompassing over 1,000,000 computerized records: "The linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested.'" (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974)).

Nevertheless, DOE regulations require that the

> [r]equest must be in writing and for reasonably described records. A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester.

10 C.F.R. § 1004.4(b). As it is currently stated, the Appellant's request does not reasonably describe the records he is requesting. He did not provide specific information regarding dates, titles, and other information so that NNSASC might identify the information he was requesting. He provided nothing but the statement that he was requesting what was in his original request or "copies of (9) and (10)." NNSASC cannot be expected to know what the Appellant wanted or to search through past requests to try to determine which, if any, he intended by referring to his "original request." Further, it should not be required to do the research necessary to determine the identify of the document named at "docket entry #3 at CIV-92-1452-JC." The Appellant must also clearly identify "(9) and (10)."

B. NNSASC's Response

DOE Regulations require an office assist a requester in restating a request that it does not understand.

> Assistance in reformulating a non-conforming request. If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section, and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by

> reformulation or by agreeing on an orderly procedure for the production of the records.

10 C.F.R. §1004.4(c)(2). NNSASC did not contact the Appellant to have him explain his request. Thus, on remand, NNSASC should offer the Appellant the opportunity to clarify what documents he is requesting. We have reached this conclusion previously in a similar situation. *Barbara Schwarz*, 27 DOE ¶ 80,245 (December 2, 1999) (Case No. VFA-0536) (http://www.oha.doe.gov/cases/foia/vfa0536.htm).

III. Conclusion

For the reasons explained above, we will remand this matter to NNSASC to contact the Appellant for a further explanation of what he is requesting. Therefore, we will grant the Appellant's Appeal in part.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne, Case No. TFA-0198, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: April 19, 2007

April 18, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: MGT Technical Consulting

Date of Filing: April 4, 2007

Case Number: TFA-0199

On April 4, 2007, MGT Technical Consulting (the Appellant) filed an Appeal from a final determination issued by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. Idaho released responsive documents but withheld one name from one of the documents under FOIA Exemption 6. This Appeal, if granted, would require Idaho to release that name.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In an electronic mail message dated November 1, 2006, the Appellant submitted a FOIA request to Idaho for "copies of the abstracts accompanying the proposals [Funding Opportunity DE-PS07-05ID14711,] and for any other non-privileged information that summarizes the subjects, nature and scope of the winning grant proposals." Electronic Mail Message Request dated November 1, 2006, from Luca Gratton, General Manager, MGT Technical Consulting to Nicole Brooks, Idaho. On February 6, 2007, Idaho released an abstract submitted by H-Z Technology, Inc., and stated that it would release other abstracts by Teledyne Energy Systems and Pratt and Whitney Rocketdyne (PWR) by February 26, 2007. On February 22, 2007, Idaho released the abstracts by Teledyne and PWR. Determination Letter dated February 22, 2007, from Nicole Brooks, FOIA Officer,

Idaho, to Luca Gratton (Determination Letter). In releasing the abstracts, Idaho withheld the name of only one individual in all the documents it released. That name was withheld pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6) at the request of PWR. *Id.*

In its Appeal, the Appellant disputes the withholding of information under Exemption 6. The Appellant argues that "any application submission to the cooperative agreement is a de facto authorization by the submitter for the government to collect the information and subject that information to routine uses that are clearly identified in the abbreviated grants notice announcement." Appeal Letter dated March 24, 2007, from Luca Gratton to Director, Office of Hearings and Appeals (OHA), DOE. The Appellant continues that the forms "clearly advise against the submission of privileged or proprietary information." *Id.*

II. Analysis

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Frank E. Isbill*, 27 DOE ¶ 80,215 (1999); *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (1999).

A. The Privacy Interest

Idaho determined that there was a privacy interest in the identify of the contractor employee. We agree that a substantial privacy interest exists in the identity of private citizens due to the great potential that a commercial entity could misappropriate a name for commercial purposes. The courts have also reached this conclusion. *See Sheet Metal Workers v. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names,

social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identity of this contractor employee.

B. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *See Marlene Flor*, 26 DOE ¶ 80,104 at 80, 511 (1996). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We find that there is a minimal public interest in release of the withheld information. The Appellant has not demonstrated how the disclosure of the name of the non-federal employee will reveal anything of importance regarding the DOE or how it would serve the public interest. Also, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with Idaho and find that there is a minimal public interest in the disclosure of the name withheld pursuant to Exemption 6.[*/]

C. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of name of the contractor employee. Therefore, we find that the public interest in disclosure of the name withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the named individual.

III. Conclusion

Idaho properly withheld the name of the contractor employee from the PWR abstract under Exemption 6 of the FOIA. Therefore, the Appeal will be denied.

[*/] In its Appeal, the Appellant states that release of the withheld information is required by statute. We were unable to determine what statute he was referring to. The statute he cited did not stand for this proposition.

It Is Therefore Ordered That:

(1) The Appeal filed by MGT Technical Consulting on April 4, 2007, Case No. TFA-0199, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: April 18, 2007

June 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Center for Investigative Reporting

Date of Filing: April 20, 2007

Case Number: TFA-0200

On April 20, 2007, Mr. Will Evans on behalf of the Center for Investigative Reporting (CIR) filed an Appeal from a determination issued to CIR by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) on April 6, 2007, in response to a request for documents that CIR submitted under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of Mr. Evans' FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

Mr. Evans filed a request for records related to all requests for earmarks between December 1, 2006 and the present. Mr. Evans described himself as a professional reporter and requested expedited processing because CIR is "primarily engaged in disseminating information and can demonstrate that there is an urgency to inform the public concerning actual or alleged Federal Government activity." Appeal at 1.

On April 6, 2007, the Director of DOE/HQ denied Mr. Evans' request for expedited processing because the Director found that he did not adequately address the requirements for expedited processing. He found that Mr. Evans did not establish any threat to the life or safety of an individual that would justify expedited processing. Further, the Director concluded that Mr.

Evans did not identify any particular urgency that requires the provision of the requested information in an expedited manner.

On April 20, 2007, Mr. Evans submitted this appeal of DOE/HQ's denial of expedited processing. Mr. Evans asks that OHA order DOE/HQ to expedite the processing of his FOIA request.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v).

Courts have found sufficient exigency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See e.g.*, *Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006) (granting expedited processing based on public need for requested material to inform voters prior to upcoming election); *Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress). *See also Edward A. Slavin, Jr.*, 27 DOE ¶ 80,279 n.2 (2000) (discussing request to expedite documents for upcoming administrative hearing). Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester's failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Department of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of "current exigency").

In his appeal, Mr. Evans explains his request for records concerning earmark requests for the budget of FY 2007. He states that on February 15, 2007, President Bush signed a resolution providing funding for the Department of Energy's programs through the remainder of FY 2007. Appeal at 2. Mr. Evans further states that the Department's process for allocating funding is already underway and that the process to evaluate continued earmarks is a federal government activity, which meets one of the criteria for expedited FOIA processing. Mr. Evans also contends that there "has been extensive coverage of earmarks by the press and widespread concern about earmarks from members of the public and citizen advocacy group." *Id.* In addition, Mr. Evans states that "informed members of the public might voice opinions on earmark reform and earmark requests potentially affecting the 2007 budget if they had additional

information on requests for earmarks." *Id.* Mr. Evans concludes that the decision-making on this matter is occurring "right now" and that "any delay in processing this request would deprive the public of its ability to make known its views in a timely manner." Finally, Mr. Evans asserts that there is an urgency to inform the public since the value of the information will be lost if not disseminated quickly. *Id.*

After reviewing the record of this case, we find that Mr. Evans has not established a compelling need for expedited processing of his request. Although he states that there is a debate occurring now on earmark requests and reform, he has still not established an urgency for the release of the material requested. A generalized public interest in the information is simply not enough to grant expedited processing of a FOIA request. *Long*, 436 F. Supp. 2d at 43-44. Accordingly, his Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Center for Investigative Reporting on April 20, 2007, OHA Case Number TFA-0200, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: June 8, 2007

July 6, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citizen Action New Mexico
Date of Filing:	May 2, 2007
Case Number:	TFA-0203

On May 2, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on April 4, 2007, by the National Nuclear Security Administration of the Department of Energy in Albuquerque, New Mexico (DOE/AL) in response to a request for documents that CANM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/AL perform an additional search for responsive material and provide further identification of two released documents.

I. Background

On October 2, 2006, CANM filed a FOIA request with DOE/AL for the following information: (1) the site-wide ground water surveillance monitoring plan prepared by Sandia National Laboratories (SNL), New Mexico; (2) a copy of the status report submitted to comply with a DOE Executive Order, DOE O 450.1; (3) all other documents used in conjunction with the monitoring plan and the status report; (4) any document that was provided to the New Mexico Environment Department for compliance with requirements of DOE O 450.1; and (5) documents which show the funding mechanisms for the surveillance monitoring plan on an annual basis as specific budgetary items. Letter from DOE/AL to CANM (April 4, 2007) (Determination Letter).[1] In its response to the request, DOE/AL asserted that there was no requirement in DOE O 450.1 for a "site-wide groundwater monitoring plan" or a written status report, and thus none was prepared. Nonetheless, DOE/AL released in their entirety two documents that dealt with similar subject matter, namely: (1) the SNL Environmental Monitoring and Surveillance Plan, undated, and (2) the SNL Groundwater Protection Program Plan for FY 2007, dated September 2006. DOE/AL explained that because the status report and groundwater monitoring plan were not required, there were no responsive records in its possession in response to Items 2, 3, 4, and 5. *Id.* In the Appeal, CANM challenged the adequacy of the search, the agency's failure to respond within time limits, insufficient identification of documents and the alleged withholding of a "controlled document." Letter from CANM to Director, OHA (May 2, 2007) (Appeal).

[1] DOE Order 450.1 was created " to implement sound stewardship practices that are protective of the . . . natural and cultural resources impacted by DOE operations. . . ." DOE O 450.1. This objective is accomplished by implementing Environmental Management Systems (EMSs), activities to achieve environmental goals, at DOE sites. EMSs must be part of Integrated Safety Management systems (ISMSs). *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must Aconduct a search reasonably calculated to uncover all relevant documents.@ *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). AThe standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.@ *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Doris M. Harthun*, 28 DOE & 80,282 (January 7, 2003) (Case No.TFA-0015).

We contacted DOE/AL for information regarding its search for responsive information. DOE/AL told us that it searched all records in its possession and released all responsive material to CANM along with the determination letter. DOE/AL also provided replies to the four issues raised in this appeal.

A. Adequacy of Search for Status Report

CANM argues in its Appeal that DOE O 450.1 requires SNL to submit a status report by December 31, 2005. As authority, it cites DOE O 450.1 chg 2, dated December 7, 2005. DOE/AL refutes that argument and contends that SNL's Environmental Programs and Assurance Department reviewed the order, but was unable to identify the requirement CANM stated in its request. According to SNL, it has never prepared a "site-wide ground water surveillance monitoring plan." Letter from Juanita Evans, Corporate Contract & Policy Management, SNL, to Andrea Leal, DOE/NNSA (May 9, 2007). Nonetheless, SNL did release two internal monitoring planning documents that deal with the same subject area, "SNL Environmental Monitoring and Surveillance Plan" and "SNL Groundwater Protection Program Plan for Fiscal Year 2007." *Id.*

We reviewed the order, and found that it contains several references to December 31, 2005, as a deadline by which all sites should have implemented the management system requirements of the order. Section 5(d)(1) states that operations, field or site office managers must report to the Cognizant Secretarial Officer the status regarding whether the EMS requirements of the order have been integrated into the ISMSs by site contractors. However, the order does not specify that field managers must submit a written report confirming the status of their environmental activities. Therefore, we find that SNL's response was reasonable.

B. Failure to Respond Within Time Limits

CANM challenges the timeliness of DOE/AL's response to his FOIA request. However, this office does not have jurisdiction to consider appeals concerning the timeliness of the agency's response to FOIA requests. 10 C.F.R. § 1004.8; *see also Arlie Bryan Siebert*, 29 DOE ¶ 80,258 (April 20, 2006) (Case No. TFA-0157); *R.E.V. Engineering Services*, 28 DOE ¶ 80,136 (January 10, 2001) (Case No.

VFA-0636). Accordingly, we will dismiss the portion of the appeal concerning the timeliness of DOE's response. [2]

C. Insufficient Identification

CANM contends that the Environmental Monitoring and Surveillance Plan was not signed, dated, or identified as a status report created to comply with DOE O 450.1. In response to our inquiry, SNL explained that according to its interpretation of the order, there are no "compliance directives" in DOE O 450.1. Memorandum from Andrea Leal, DOE/NNSA, to Carolyn Becknell, NNSA FOIA Officer, DOE/AL (May 17, 2007). Nonetheless, the program plan that was submitted to comply with CANM's request for a "site-wide groundwater monitoring plan" sets forth the implementation of a site-wide approach for groundwater protection, and thus is responsive to CANM's request. As stated previously, there is no explicit requirement for a written status report. Because the responsive document was not created as a status report to comply with DOE O 450.1, it cannot be identified as such.

D. Controlled Document

The NNSA FOIA Officer released to CANM a copy of the program plan with the following statement at the bottom of each page: "Printed copies of this document are uncontrolled. The controlled copy is at http://www-irn.sandia.gov/esh/c docs/prg.htm."

SNL explains that "controlled document" is synonymous with version control. The web version is the latest revision. Employees may print the web document, but their printed copies are not tracked (or controlled). Employees must refer to the web to verify that they have the latest version. The NNSA FOIA Officer sent CANM the latest revision. Letter from Juanita Evans, SNL, to Andrea Leal, DOE/NNSA (May 15, 2007).

CANM also contends that there were empty pages in the document. We contacted DOE/AL, and they informed us that there were no redactions made to the information released to CANM. Electronic mail message from Carolyn Becknell, NNSA FOIA Officer, DOE/AL, to Valerie Vance Adeyeye, OHA (June 8, 2007). Any blank spaces in the documents are due to format, and all new sections begin on a new page. *Id.*

III. Conclusion

After reviewing the record of this case, we find that DOE/AL conducted a search that was reasonably calculated to uncover the requested information. DOE/AL has reasonably explained why the status

[2] SNL explained that the delay in responding was due to a backlog of FOIA requests and the requirement that all FOIA materials that are not available in the public domain must first be reviewed by the SNL Classifications Department. Memorandum from Andrea Leal, NNSA, to Carolyn Becknell, NNSA FOIA Officer (May 17, 2007).

report that CANM requested does not exist, and released other responsive material to the requester. DOE/AL also explained that the document referred to by CANM as a "controlled document" was released to CANM in its latest version. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on May 2, 2007, OHA Case Number TFA-0203, is hereby denied except as set forth in Paragraph (2) below.

(2) The portion of the appeal concerning the timeliness of DOE's response to CANM's FOIA request is hereby dismissed.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 6, 2007

July 25, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: May 7, 2007

Case Number: TFA-0204

This Decision concerns an Appeal that was filed by Terry M. Apodaca in response to a determination that was issued to her by the Director of the Department of Energy's (DOE) Headquarters Policy and Internal Controls Management office (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that Ms. Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Director released certain documents to Ms. Apodaca in their entirety, but withheld other documents. This Appeal, if granted, would require that the Director release the withheld information, and respond to portions of Ms. Apodaca's request that she claims were not addressed in the determination.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); *see also* 10 C.F.R. § 1004.10(b)(1)-(9).

I. BACKGROUND

In her FOIA request, Ms. Apodaca sought access to Position Descriptions, lists of job duties, training records, Performance Appraisal performance objectives and performance award amounts pertaining to certain specified DOE employees, all documents pertaining to Ms. Apodaca's work performance during FY 2006, and all documents pertaining to "the Six Sigma review of the FOIA/PA programs" and to the "Violence-in-Workplace incident that occurred in OPA last May 2006." *See* Ms Apodaca's February 12, 2007 request at 2.

In his response, the Director released the position descriptions, eight of the nine requested Performance Appraisal performance objectives with social security numbers and ratings deleted, training records, e-mails concerning the "Six Sigma Review of the FOIA and Privacy Act programs," and a copy of a Threat Incident Form pertaining to the "Violence-In-Workplace"

incident. The Director withheld the performance award amounts and social security numbers under FOIA Exemption 6.

In her Appeal, Ms. Apodaca challenges the Director's application of Exemption 6 and claims that the determination did not address her request for lists of job duties or for performance award amounts granted to Office of Public Affairs employees during the last five years. She also contends that the Threat Incident Form provided to her had been improperly altered, that she was not provided a "copy of [Person #1]'s (the aggressor) nor [Person #2]'s (the witness) statements" concerning the Violence-In-Workplace incident, and that she was not given any documents describing any disciplinary action taken against [Person #1]. Appeal at 2.

II. ANALYSIS

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982) (*Washington Post*).

In her Appeal, Ms. Apodaca argues that the salaries of federal employees are not exempt from mandatory release under the FOIA, and that the amounts of performance awards should similarly be released. As support for this position, she cites 5 C.F.R. § 293.311, which provides that "Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, . . . ," are to be made available to the public. 5 U.S.C. § 293.311(a)(4). In his determination, the Director found that the employees' performance ratings were protected from mandatory disclosure pursuant to Exemption 6 because their release would constitute a clearly unwarranted invasion of the employees' personal privacy, and that releasing the amounts of their performance awards would, in effect, release the employees' performance ratings. In order to determine whether the Director properly applied Exemption 6, we must first consider the validity of these findings.

In determining whether the performance ratings may be withheld under Exemption 6, we must undertake a three-step analysis. First, we must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the ratings may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, we must determine whether release of the information would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, we must balance the identified privacy interests against the public interest in order to determine whether release of the information would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

We find that substantial privacy interests would be implicated by the release of the employees' performance ratings. The humiliation of an employee that could result from the release of mediocre

or poor ratings is apparent. However, the release of even favorable ratings can cause embarrassment, as well as jealousy and possible harassment from employees who receive lesser ratings. On the other hand, release of the ratings would further the public interest to some extent by shedding light on the way in which the government evaluates its employees. We believe that this interest is outweighed, though, by the deleterious effects that disclosure could have on employee morale and workplace efficiency. As the District of Columbia Circuit Court of Appeals stated in *Ripskis*, "Disclosure will be likely to spur unhealthy comparisons among . . . employees and thus breed discord in the workplace," and "chill candor in the evaluation process as well." 746 F.2d at 3. In that case, the Court upheld the decision of a lower court that the names of employees were properly redacted under Exemption 6 from personnel evaluation forms provided to a requester. We find that the Director properly determined that the personnel ratings are exempt from mandatory disclosure pursuant to Exemption 6.

Next, we must determine whether the Director correctly found that release of the performance bonuses would, in effect, release the ratings. In making this determination, we contacted the NNSA Service Center at which the employees in question work. We were informed that the performance appraisal system used ties the amount of awards directly to performance appraisals. For example, if an employee was given an award equal to 6 percent of that employee's salary, it would indicate a rating of "Significantly Exceeds Expectations."If the employee received a 3 percent award, that would mean that a rating of "Fully Meets Expectations" had been given. According to the Service Center, it had no discretion as to the amount of the award, given a particular employee's rating. *See* June 4, 2007 e-mail from Ron O'Dowd, NNSA Albuquerque Service Center, to Robert Palmer, OHA Staff Attorney. Given these facts, and the general availability of federal salary information, it is apparent that release of the award amounts would be tantamount to releasing the performance ratings.

Contrary to Ms. Apodaca's position, 5 C.F.R. § 293.311 does not mandate the release of the award amounts. That regulation provides, in pertinent part, that the DOE "will generally not disclose" salary, performance award or other similar information when that information

> Is selected in such a way that would reveal more about the employee on whom information is sought than [that employee's name and present and past position titles and descriptions, performance standards, grades, salaries and duty stations], the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 C.F.R. § 293.311(b)(1). In this case, the disclosure of the performance award amounts would also reveal the employees' performance ratings, which would constitute a clearly unwarranted invasion of their personal privacy. The Director properly concluded that the performance award amounts should be withheld under Exemption 6. *See, e.g., Robert J. Ylimaki,* 28 DOE ¶ 80,154 (March 23,

2001) (Case No. VFA-0651). (All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp) [1]

As previously stated, Ms. Apodaca also challenged the adequacy of the Director's response to her FOIA request. Specifically, she alleges that the determination letter did not address her requests for performance award amounts for Office of Public Affairs employees for the last five years and for lists of job duties, that a document provided to her had been "falsified," and that three documents that she should have received were not provided to her.

Contrary to her allegations, the Director's response did address Ms. Apodaca's requests for "all performance award amounts granted to any Office of Public Affairs employee for the last five years" (Item 7 of the FOIA request), and for lists of job duties. On page two of the determination letter, the Director stated that "In reference to Item 7, the requested amounts are withheld in their entirety pursuant to Exemption 6 of the FOIA as described above." The job duties "are detailed in the specific Position Descriptions [Ms. Apodaca] requested and received. Since the job duties were provided, they were not mentioned in the determination letter since she was given what she requested without redaction." June 4, 2007 e-mail from Mr. O'Dowd to Mr. Palmer.

Ms. Apodaca's claim that she was provided a "falsified" document is based upon the fact that the document differs from one that she provided to NNSA personnel. This document pertains to an incident that occurred involving Ms. Apodaca and [Person #1], which was witnessed by a third NNSA employee. As part of an investigation of this incident, the three employees were asked to submit written statements setting forth their versions of the events that transpired. Ms. Apodaca's statement, which was submitted as a "Threat Incident Form," is apparently one of the documents that she was expecting to receive in response to her request for "all documentation concerning" the incident in question. FOIA Request at 2. However, upon receiving statements from Ms. Apodaca, [Person #1] and the witness, the Manager of the Office of Public Affairs reviewed them and combined them into a single form for submission to Employee Relations. It is this combined form that was provided to Ms. Apodaca. *Id.* We were further informed that the individual statements, which included two documents requested by Ms. Apodaca, were then destroyed, and that the Threat Incident Form was not falsified, but is a true copy of the Form currently on file with the NNSA.

Finally, Ms. Apodaca contends that she was not provided with certain documents responsive to her request. As stated above, two of the documents Ms. Apodaca contends she should have been

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1/ Ms. Apodaca requests, in the alternative, that she be provided with a listing of the performance awards granted by a named individual for the last three years, without the names of the employees to whom the awards were granted. However, there is no indication that such a document currently exists, and the FOIA does not require that documents be created to satisfy a request. 10 C.F.R. § 1004.4(d)(1). Moreover, we have been informed that, given the limited number of employees in question and the fact that each has a publicly available salary that differs from the others in the group, it would not be difficult to attribute a particular award amount to a particular employee. *See* June 29, 2007 e-mail from Mr. O'Dowd to Mr. Palmer.

provided were the statements made by [Person #1] and [Person #2] concerning the incident between Ms. Apodaca and [Person #1]. In addition, Ms. Apodaca requested, but did not receive, any documents describing any disciplinary action taken against [Person #1]. In effect, she is challenging the adequacy of the search that was conducted.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (December 13, 1995) (Case No. VFA-0098). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, 26 DOE ¶ 80,240 (December 19, 1997) (Case No. VFA-0353).

During our communications with the NNSA Service Center, we were informed that Ms. Apodaca's request was referred to the Manager of the Office of Public Affairs and to the human resources office, where the relevant files were searched. As explained above, [Person #1]'s and [Person #2]'s statements do not exist because they were destroyed, along with Ms. Apodaca's, after the Office of Public Affairs combined their contents into a single document for submission to Employee Relations. Regarding any evidence of disciplinary action taken against [Person #1], the Office of Public Affairs has stated that no documentation exists other than a notation on the Threat Incident Form already provided to Ms. Apodaca. Based on this information, we find that the search was reasonably calculated to uncover the sought materials, and was therefore adequate. [2]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Terry Apodaca, OHA Case Number TFA-0204, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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2/ Although it is not relevant to our evaluation of the search that was performed, we note that had any documents pertaining to any disciplinary action taken against [Person #1] been located, it is possible, if not likely, that such documents would have been withheld in whole or in part under Exemption 6.

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 25, 2007

July 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	William J. Lueckel, Jr.
Date of Filing:	May 8, 2007
Case Number:	TFA-0205

On May 8, 2007, William J. Lueckel, Jr. (Appellant) filed an Appeal from a determination issued by the Department of Energy's (DOE) Golden Field Office (Golden) in Golden, Colorado. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. If the Appeal were granted, Golden would be required to release the information it withheld in 11 documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 26, 2006, the Appellant filed a request with Golden for "a copy of the non-proprietary Summary / Abstract of each of the proposals submitted to DOE in response to topics 2, 3, and 4" of a Financial Assistance Funding Opportunity Announcements (FOA) issued on January 24, 2006. Electronic Mail Message from William J. Lueckel, Jr., to Golden (October 26, 2006). On November 2, 2006, Golden denied the Appellant's request under Exemptions 4 and 5 of the FOIA regarding all the summaries. On December 7, 2006, the Appellant filed an appeal with the Office of Hearings and Appeals (OHA), stating that the FOA informs the applicants that the Summary / Abstract may be made available to the public. Appeal Letter dated November 28, 2006, from Appellant to Director, OHA, DOE,

at 1-2. [1/] On January 30, 2007, OHA remanded the matter to Golden. OHA found that Exemption 5 did not apply under these circumstances, because the documents were submitted by "interested part[ies] seeking a [g]overnment benefit at the expense of other applicants." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 n.4 (2001). On remand, Golden sent letters to the submitters requesting review of the summary each had submitted. Upon receiving responses from the submitters, Golden recognized that some of the information submitted in the summaries was proprietary information and believed that under 10 C.F.R. § 1004.11 it had a duty to withhold that information. Golden then issued a second determination, in which it released 67 of the summary / abstracts in full and 11 with redactions. The redactions were made under Exemptions 4 and 6. Letter dated April 9, 2007, from Christine A. Phoebe, Assistant Manager, Office of Management and Administration, Golden, to Appellant.

On May 8, 2007, the Appellant appealed, contending that the documents he is seeking are clearly public documents. He states that the submitters are notified that the summaries may be released to the public and should not contain any proprietary or sensitive business information. Letter dated April 26, 2007, from Appellant, to Director, OHA.

II. Analysis

Golden relied on Exemptions 4 and 6 to withhold those portions of the 11 documents which were redacted.

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a

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[1/] In its original determination, Golden relied on Exemptions 4 and 5 to withhold all the summaries. Prior to OHA's January 30, 2007 Decision, Golden withdrew its reliance on Exemption 4. In withdrawing that reliance, it did state that "[i]n the event Golden is required to provide any of these documents in response to [the Appellant's] FOIA request, however, DOE's FOIA regulations still require that they be provided to the submitters for review and input regarding the applicability of Exemption 4 protected information and potential redaction." Response Letter dated January 9, 2007, from Kimberly J. Graber, Attorney, Golden, to Steven J. Goering, OHA.

significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499.[2/]

1. The Privacy Interest

Golden determined that there was a privacy interest in the identity of the submitters' employees. We agree that a substantial privacy interest exists in the identity of private citizens due to the great potential that a commercial entity could tempt away an integral employee. The courts have also reached this conclusion. *See Sheet Metal Workers v. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identity of the submitters' employees.

Golden also determined that there was a privacy interest in the identity of the submitters' corporate business partners. We disagree. We do not believe that a "business entity" has a privacy interest in its name or location. For that reason, we have determined that the names of business entities may not be withheld under Exemption 6.

2. The Public Interest

Having established the existence of a privacy interest in the names of submitters' employees, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see Marlene Flor*, 26 DOE ¶ 80,104 at 80, 511 (August 5,

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

1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). The Appellant has not demonstrated how the disclosure of the names of non-federal employees will reveal anything of importance regarding the DOE or how it would serve the public interest. Also, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with Golden and find that there is a no public interest in the disclosure of the names withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee,* 489 U.S. at 762; *SafeCard Service v. SEC,* 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a substantial privacy interest at stake in this case. Moreover, we found that there is no public interest in the release of names of the submitters' employees. Therefore, we find that the public interest in disclosure of the names withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the named individuals.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, the agency must engage in a more complex analysis, as set forth in *National Parks.*

Under the *National Parks* test, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290 (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank,* 464 F. Supp. 804, 806 (D.D.C. 1979). The information Golden withheld is both commercial and obtained from a person.

In order to determine whether the information is "confidential," the agency must first decide whether the information was voluntarily or involuntarily submitted. In this case, the submitters presented the requested information to the DOE on an involuntary basis, because it was required by the grant program. Where the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

Golden alleges that release of the withheld information is likely to cause substantial competitive harm to the submitter. April 19, 2007 Determination at 3. We agree. We have reviewed the submitter's comments and the information Golden redacted in response to those comments. The information concerns either technical information regarding the project or names of business partners of the submitters. In addition, the names of some individuals have been withheld under Exemption 6. The technical information is of a confidential nature that appears to be unique to the submitter in the way it was proposed and presented in the FOA. The disclosure of names of the business entities would allow competitors to attempt to negotiate those partners away from the submitter. Release of the information that Golden withheld would result in competitive harm to the submitter.

C. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g.*, *Martin Becker*, 28 DOE ¶ 80,222 (May 2, 2002) (Case No. VFA-0710). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.[3/]

D. Appellant's Argument

As the Appellant points out, the FOA cautions submitters that the summary may be made available to the public. Submitters are further warned not to include any proprietary or sensitive business information. *Financial Assistance Funding Opportunity Announcement*,

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[3/] Nor is such inquiry necessary with respect to information withheld under Exemption 6, because our analysis has already determined that there is no public interest in it.

Research and Development of Fuel Cell Technology for the Hydrogen Economy Funding Opportunity Number: DE-PS36-06GO96017 (issued January 24, 2006). For this reason, we are hesitant to allow withholding of the information under Exemptions 4 and 6. However, because Golden requested submitters' comments and because we have found that the deleted information satisfies the standards for withholding under Exemptions 4 and 6, we find, in this case, that Golden had a duty to withhold the information.

III. Conclusion

Golden requested and reviewed submitters' comments regarding information submitted with knowledge that it may be made public. Under these circumstances, we find it properly withheld the redacted business information, including the identities of corporate business partners, under Exemption 4. In addition, Golden properly withheld the names of submitters' employees under Exemption 6. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William J. Lueckel, Jr., Case No. TFA-0205, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 19, 2007

May 15, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: May 9, 2007

Case Number: TFA-0206

On April 23, 2007, Terry M. Apodaca (Appellant) filed an Appeal from a determination issued to her by the National Nuclear Security Administration Service Center (NNSA/SC) on April 11, 2007, in regard to a request for documents that Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of the Appellant's FOIA request.[1]

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On April 10, 2007, the Appellant filed a request for documents relating to incidents involving the unauthorized release of personally identifiable information (PII) at the NNSA/SC. Also included was a request for documents detailing information related to personnel disciplinary actions taken against NNSA/SC employees for the unauthorized release of PII. April 10, 2007 FOIA Request from Appellant to Carolyn A. Becknell, FOIA Officer, NNSA/SC (FOIA Request) at 1. The Appellant

[1] On May 8, 2007, the Office of Hearings and Appeals received a second FOIA appeal from the Appellant. In that submission, the Appellant challenges the withholding of certain information from documents she received from the NNSA Service Center (Case No. TFA-0204). On the basis of her May 8 submission, we mistakenly assumed she had received the determination for which she had sought expedited processing, rendering moot her appeal regarding expedited processing. Consequently, in a letter dated May 8, 2007, we dismissed her appeal of NNSA/SC's denial of expedited processing for her FOIA request (Case No. TFA-0202). We have since been informed that the determination the Appellant is appealing in Case No. TFA-0204 is distinct from the request for which she had sought expedited processing. Consequently, her appeal of NNSA/SC's denial of her request for expedited processing is not in fact moot. Accordingly, we will rescind the dismissal of Case No. TFA-0202 and address the merits of her appeal concerning the denial of her request for expedited processing in this Decision (Case No. TFA-0206).

requested expedited processing of this FOIA request so that she could use the information to assist her in making a decision regarding "whether or not to accept a disciplinary action concerning violation of PII." FOIA Request at 1.[2] The Appellant also stated that the disciplinary action could include loss of pay and that her inability to make an informed decision regarding the disciplinary action could pose an imminent threat to the health and safety of her daughter given the fact that the Appellant is the sole means of support for their family. FOIA Request at 1-2.

In a April 11, 2007 letter the FOIA Officer denied the Appellant's request for expedited processing because she found that the information provided in the Appellant's FOIA request did not demonstrate the "compelling need" required for NNSA/SC to grant her request for expedited processing.

On April 23, 2007, the Appellant submitted this appeal of NNSA/SC's denial of expedited processing. The Appellant asks that OHA order NNSA/SC to expedite the processing of her FOIA request. In her Appeal letter, the Appellant argues that the possible loss of pay that a disciplinary action may entail would impact her ability to care for her daughter. She also argues that NNSA/SC has, in the past, granted expedited processing to requesters citing the same justification. Appeal at 1.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the federal government. 5 U.S.C. § 552 (a)(6)(E)(v).[3]

The Appellant believes her request merits expedited processing under the "imminent threat to life or physical safety" criterion of the FOIA's expedited processing provision. We must reluctantly reject her argument. We have recently contacted the Appellant and she has not formally been given disciplinary action. *See* April 26, 2007 Memorandum of Telephone conversation between the

[2] The Appellant states that she had been involved in an "inadvertent release of PII" and had been told that she would be "served a disciplinary action." Appeal at 1.

[3] As noted above, the FOIA also provides that agencies may provide expedited processing "in other cases determined by the agency." 5 U.S.C. § 552 (a)(6)(E)(i)(II). As of the date of this decision DOE has not promulgated regulations providing for other grounds justifying expedited processing of FOIA requests.

Appellant and Richard Cronin, Assistant Director, OHA (April 26 Memorandum) at 1. Based on the information provided to us, it is not at all certain at this time that the Appellant will indeed face disciplinary action involving loss of income. Further, even if we assume this is the case, the harm that would be presented to her family from a reduction of income would not be "imminent." The Appellant's child does not have any special needs other than general support. *See* April 26 Memorandum at 1. While we recognize the potential impact from a reduction of any family's income, we cannot find that the harm would immediately endanger the life or physical safety of an individual. Thus we conclude that the Appellant has not established sufficient grounds to justify expedited processing of her request under the FOIA.

We must also reject the Appellant's other argument that NNSA/SC must provide expedited processing because it has previously provided such processing to other requesters. The sole standard by which an agency *must* provide expedited processing is given by the requirements of 5 U.S.C. § 552(a)(6)(E)(i). As discussed above, the Appellant's current situation does not mandate expedited processing under the FOIA. Accordingly, the Appellant's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Office of Hearings and Appeals May 8, 2007 determination dismissing the Freedom of Information Act Appeal filed by Terry M. Apodaca on April 23, 2007, OHA Case No. TFA-0202, is rescinded.

(2) The Freedom of Information Act Appeal filed by Terry M. Apodaca, OHA Case Number TFA-0206, is hereby denied.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: May 15, 2007

June 29, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Bernice G. Moore

Date of Filing: June 5, 2007

Case Number: TFA-0209

This Decision concerns an Appeal filed by Bernice G. Moore from determinations issued to her by the Department of Energy's (DOE) Oak Ridge Office (ORO) and the DOE's National Nuclear Security Administration Service Center, Albuquerque (NNSA). In those determinations, ORO and NNSA responded to a request for documents that Ms. Moore submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Neither ORO nor NNSA located any documents responsive to Ms. Moore's request. This appeal, if granted, would require ORO and NNSA to perform additional searches and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Ms. Moore filed a request under the Privacy Act with ORO for "copies of [her] personnel records, radiation exposure records, payroll records, personnel security file, OPM Background Investigation and employment verification with Basic Construction Concepts, a former contracting company owned by [her late husband] Charles E. Moore." *See* Letter from ORO to Bernice G. Moore (March 19, 2007). In its final response, ORO determined that it could not locate any records responsive to Ms. Moore's request. *Id*. ORO also stated that it forwarded Ms. Moore's Privacy Act request to NNSA because NNSA now has jurisdiction over records located at one of the DOE's facilities at Oak Ridge, the Y-12 site. *Id*. In its response, NNSA stated that it contacted the Y-12 Site Office to request a search for records. *See* Letter from NNSA to Bernice G. Moore (October 13, 2006). NNSA stated that the search yielded no records responsive to Ms. Moore's request. *Id*.

Ms. Moore filed the present appeal challenging the adequacy of the searches performed by ORO and NNSA. Appeal Letter (June 5, 2007); *see also* Memorandum of Telephone Conversation between Bernice G. Moore and Diane DeMoura, OHA (June 6, 2007).

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, 28 DOE ¶ 80,251 (November 27, 2002) (Case No. VFA-0763).[*] Accordingly, in analyzing the adequacy of the searches conducted by ORO and NNSA in this case, we are guided by the principles we have applied in similar cases under the FOIA.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (April 8, 2003) (Case No. TFA-0015).

In reviewing this appeal, we contacted both ORO and NNSA to discuss the searches conducted in response to Ms. Moore's request.

ORO informed us that in conducting Privacy Act searches, "computer database searches are done by name, social security number, date of birth and badge number." E-mail from Leah Ann Schmidlin, ORO, to Diane DeMoura, OHA (June 8, 2007). ORO stated,

> An action was sent on July 27, 2006, to the East Tennessee Technology Park [(ETTP)] (former K-25 Plant) and the Oak Ridge National Laboratory (ORNL) to request the payroll, personnel and radiation exposure records on Ms. Bernice G. Moore. [ETTP] found no payroll, personnel or radiation exposure records. ORNL found no personnel or radiation exposure records. An action was also sent on July 27, 2006, to our DOE Access Authorization Branch to request the personnel security file on Ms. Moore. No documents were located by her name or social security number.

Id. Additional searches were done both at ETTP and Oak Ridge Associated Universities for a work history report on Ms. Moore and any information available for the company, Basic Construction Concepts. Finally, ORO also "manually looked at [its] index card files on contracts and subcontracts for any information on Basic Construction Concepts under Charles E. Moore Contracts. No information was found on this company." *Id.* ORO informed us that Basic Construction Concepts "did subcontracting work for the [main contractors at the Oak Ridge site] Rust Engineering Company and Martin Marietta Energy Systems (MMES) at the Oak Ridge

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

Plants in the 1980s." *Id*. Consequently, it is likely that the records pertaining to the company are located with those contractors.

NNSA informed us that, in responding to Ms. Moore's request, it searched for records in several databases using Ms. Moore's name, social security number and date of birth. E-mail from Carolyn Becknell, NNSA, to Diane DeMoura, OHA (June 22, 2007). According to NNSA, the databases searched include Plant Records, Personnel, and Radcon (radiation contamination). No responsive records were located. *Id*. NNSA stated that its Personnel Security Department also performed a search for records pertaining to Ms. Moore, but did not locate any responsive records. According to NNSA, when ORO turned over jurisdiction of its Y-12 records, the NNSA Personnel Security Department "received files related to current [Y-12] employees but … did not receive files related to employees that are retired or are no longer employed at Oak Ridge." *Id*.

Based on this information, it is clear that both ORO and NNSA searched the available databases using Ms. Moore's personal information in an attempt to locate any responsive documents. We find that ORO and NNSA performed extensive searches reasonably calculated to reveal records responsive to Ms. Moore's request. Therefore, despite yielding no records responsive to Ms. Moore's request, the searches were adequate. Accordingly, Ms. Moore's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on June 5, 2007, by Bernice G. Moore, OHA Case No. TFA-0209, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: June 29, 2007

September 4, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citizen Action New Mexico
Date of Filing:	June 21, 2007
Case Number:	TFA-0211

On June 21, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on June 5, 2007, by the National Nuclear Security Administration (NNSA) of the Department of Energy in Albuquerque, New Mexico (DOE/AL) in response to a request for documents that CANM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/AL perform an additional search for responsive material.

I. Background

On May 3, 2007, CANM filed a FOIA request with DOE/AL for "full and complete copies of documents in any form, whether from correspondence, memoranda, tape recordings, electronic or hand written communications, notes or handouts . . . attachments, maps, graphs and references to those documents . . ." regarding the Interim Status Storage Unit (ISSU) that operated at the Sandia National Laboratories (SNL) Mixed Waste Landfill. Letter from NNSA to CANM, June 5, 2007 (Determination). CANM listed 12 items in its request. DOE/AL did not release any responsive documents, stating that some of the information did not exist and that the rest was publicly available from the New Mexico Environment Department (NMED). CANM appealed the determination and asked OHA to order NNSA to release the responsive documents. Electronic mail message from CANM to OHA (June 19, 2007) (Appeal).

II. Analysis

CANM contends that the Agency's final response does not comply with 5 U.S.C. §552(a)(3)(A). This section of the FOIA requires that in response to a proper request, the agency "shall make the records promptly available to any person." According to CANM, "[i]f the responsive documents are in the possession and control of NNSA/DOE/SNL and are determined to be releasable, the FOIA duty is to provide them. . . . No documents have been supplied for any of the items of the FOIA request although the documents are in the possession of NNSA/DOE/SNL." Appeal.

We contacted DOE/AL for further information regarding its Determination. DOE/AL told us that all of the responsive documents are available at the DOE FOIA Reading Room, located at the

Zimmerman Library, a University of New Mexico Government Information Reading Room. According to its website, the Zimmerman Library is ". . . a Regional Federal Depository Library coordinated by the U.S. Government Printing Office. Collections in the reading room have been developed outside the Depository program with the cooperation of federal agencies to enhance the library's collection in local areas of interest." *See* http://library.unm.edu/doe. Both CANM and the library are located in Albuquerque, New Mexico. The DOE/AL FOIA office also informed us that the documents that are the subject of CANM's current request were the subject of an earlier request by the former executive director of CANM. Electronic mail message from DOE/AL FOIA officer to Valerie Vance Adeyeye, OHA (August 8, 2007). After the records were released to the former executive director, DOE placed the boxes of records in the Reading Room in anticipation of subsequent requests for the same records. *Id.*

It is true that section (a)(3) requires an agency to release records promptly to a requester. However, subsection (a)(2)(D) provides an exception and states that the agency shall make available for public inspection and copying:

> "copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records . . . ."

5 U.S.C. § 552 (a)(2)(D).

Thus, the responsive material in this case falls within the purview of subsection (a)(2)(D). The records were released in an earlier request and then placed in the Reading Room for the convenience of future requesters. DOE/AL had no duty to release to CANM any material that was already disclosed under subsection (a)(3) and that was accessible in the public reading room. *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 152 (1999) (stating that under FOIA subsection (a)(3), an agency need not make available materials that have already been disclosed under subsections (a)(1) and (a)(2)).

We note that the Determination informed the requester that ". . . all the requested documentation is publicly available from the New Mexico Environment Department (NMED) unless otherwise stated." Determination at 2. DOE/AL did not tell the requester that the responsive material was available for public access at the Zimmerman Library, its local public reading room. We have informed the requester that the records are in the DOE FOIA public reading room, and recommend that DOE/AL do the same in the future. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on May 2, 2007, OHA Case Number TFA-0211, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: September 4, 2007

November 13, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Eugenie Reich
Date of Filing:	July 11, 2007
Case Number:	TFA-0213

On July 11, 2007, Eugenie Reich (Reich) filed an Appeal from a determination issued to her on June 6, 2007, by the FOIA and Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ release responsive material.

I. Background

In December 2006, Reich filed a FOIA request with DOE/HQ for (1) any records that identify the members of a panel convened by James Roberto of the Oak Ridge National Laboratory (ORNL) to investigate fraud and research misconduct allegations made through the journal *Nature* against researchers in the Stephen Pennycook research group of ORNL during the summer of 2006, and (2) the final investigation report from the panel. Electronic mail message from Reich to OHA, December 9, 2006.[1] DOE/HQ informed Reich that the DOE Office of Science (DOE/OS) determined that the records in question are records owned by a contactor, in this case the management and operating contractor of Oak Ridge, UT-Battelle. Letter from DOE/HQ to Reich, June 6, 2007 (Determination Letter). According to DOE/HQ, the contract between DOE and UT-Battelle has designated all records that concern employee-related investigations as the property of the contractor and not subject to the provisions of the FOIA. DOE/HQ went on to state that the creator of the record, UT-Battelle, provided the document to the Office of Science "in accordance with the contract in which [UT-Battelle] retained control of the document." Determination Letter at 1. Reich appealed the determination and asked OHA to order DOE/HQ to release the responsive documents. Letter from Reich to OHA (July 11, 2007) (Appeal). [2]

[1] These are the same documents that were the subject of the request that led to an appeal in OHA Case No. TFA-0187, *Eugenie Reich*, 29 DOE ¶ 80,289 (2007).

[2] Reich informed this office that she would supplement her Appeal at a later date, and OHA received the additional material, dated October 10, 2007, on October 16, 2007. In the supplemental submission, the appellant raises a number of issues concerning both the matters under consideration in this proceeding and those examined in Case No. TFA-0187, a decision regarding an earlier appeal she filed. In that earlier proceeding, Reich appealed a denial of her request for expedited processing of her request for the information under consideration here. Among her arguments with respect to Case No. TFA-0187, the appellant asserts that OHA failed to consider the justifications for expedited processing she

II. Analysis

DOE/OS argues that the final report of the ORNL investigation is a contractor-owned record and not subject to FOIA. DOE/OS bases its argument on the following clause from the contract between UT-Battelle and DOE:

> (b) Contractor-owned records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) of this clause.
>
> > (1) Employment-related records (such as worker's compensation files; employee relations records, records of salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other *employee-related investigations conducted under an expectation of confidentiality* ; . . .

Contract DE-AC05-00OR22725, Clause I-141. 970.5204-79 Access to and Ownership of Records. (emphasis added).

The report of investigation, an employee-related investigation conducted under an expectation of confidentiality, was not considered an agency record under the UT-Battelle contract. Reich argues that notwithstanding the contract clause cited above, the report is an agency record because it was provided to the agency and then used by DOE to fulfill its responsibilities under the research misconduct policy.

A. Whether the Report is an Agency Record

Our threshold inquiry in this case is whether the documents in question are agency records and thus subject to the FOIA under the criteria set out by the federal courts. The statutory language of the FOIA does not define an agency record, but merely lists examples of the types of information that agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the court for determining whether documents created by non-federal organizations such as UT-Battelle are subject to the FOIA. *See, e.g. Dallas Register*, 28 DOE ¶ 80,207 (March 1, 2002) (Case No. VFA-0711); *Dr. Nicolas Dominguez*, 27 DOE ¶ 80,117 (March 10, 1998) (Case Nos. VFA-0377, VFA-0378, VFA-0379).[3] That analysis involves a

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provided and reworded them in such a manner that their import was diminished. I have considered those contentions as well as the others she raised regarding that decision, and find that none of them dictates that modification of the decision in Case No. TFA-0187 is necessary. Regarding the current proceeding, the appellant requests that, if OHA overturns the initial determination, her request for expedited processing now be granted or her right to judicial review be reaffirmed. Because I have determined that the decision in Case No. TFA-0187 should stand, the appellant may seek judicial review as set forth in the ordering paragraphs of that decision.

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

determination of (1) whether the organization is an "agency" for purposes of the FOIA and, if not, (2) whether the requested material is nonetheless an "agency record." *See Dallas Register, 28* DOE ¶ 80,207 (March 1, 2002) (Case No. VFA-0711). A private organization must be considered a federal agency if its daily operations are supervised by the federal government. *Forsham v. Harris*, 445 U.S. 169, 180 (1980). DOE does not supervise the daily operations of UT-Battelle, and we therefore conclude that UT-Battelle is not an agency subject to the FOIA. Nonetheless, after completing the second step of the analysis, we find that the report of investigation is an agency record and thus subject to the FOIA.

In *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989), the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *See also Qwest/GSD*, 28 DOE ¶ 80,224 (May 8, 2002) (Case No. VFA-0739). The report of investigation meets the first test because, according to the Determination Letter and our conversation with DOE/OS, UT-Battelle provided a copy of the report to DOE/OS. Determination Letter at 1. As explained below, we also find that the report was under agency control at the time of Reich's request.

B. Whether the Report was Within DOE Control at the Time of the Request

Courts have identified four relevant factors for an agency to consider when determining whether the agency has control over a document: (1) the intent of the record's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the extent to which the record was integrated into the agency's recordkeeping system or files. *Consumer Federation of America v. USDA*, 455 F.3d 283, 288 n.7 (D.C. Cir. 2006). We contacted DOE/HQ for further information regarding its determination, and that office directed us to the Office of General Counsel (DOE/OGC). DOE/OGC concluded that three of the four factors in the *Consumer Federation* test weighed against a finding of agency control over the report of investigation. Electronic mail message from Jocelyn Richards, DOE Office of General Counsel, to Valerie Vance Adeyeye, OHA (September 5, 2007). According to DOE/OGC, UT-Battelle created and intended to retain control over the responsive document, as indicated in the contract between DOE and the contractor. DOE/OGC also stated that DOE/OS contends that it was not able to use or dispose of the record at will, and that the record was not integrated into DOE recordkeeping systems or files. *Id.*

Reich argues that the report was under agency control because DOE/OS required the report in order to establish UT-Battelle's compliance with the federal agency research misconduct policy. She states that "[t]hese policies require that Dr. Dehmer or the responsible DOE official receive the investigation report, and that she or DOE provide oversight of the misconduct investigation as part of fulfilling a responsibility to provide oversight of federally funded research." Appeal at 3.

We contacted the Office of Science to determine the extent to which that office read or relied on the investigative report, the third factor in the *Consumer Federation* analysis. DOE/OS contends that they had access to the report "only to provide oversight on the investigation." Electronic Mail

Message from Veronica Angulo, DOE/OS to Valerie Vance Adeyeye (September 10, 2007). According to DOE/OS, ORNL followed the steps outlined in the research misconduct procedure: inquiry, investigation and finally adjudication. Memorandum of Telephone Conversation between Helen Kerch, Harriet Kung and Veronica Angulo, DOE/OS, and Valerie Vance Adeyeye, OHA (October 12, 2007). ORNL informed DOE when the inquiry became an investigation. In order to begin the investigation, ORNL established a panel of scientists, none of whom are employed by ORNL. The panel made a finding of "no misconduct." At the conclusion of the investigation, ORNL did show DOE/OS copies of the report, all contained in binders marked "Do Not Duplicate." *Id.* The research institution met with DOE and presented those copies in order to show DOE/OS that it had conducted a sound investigation, following the procedure outlined in the research misconduct policy. This meeting allowed DOE/OS to review the process that the panel used to arrive at its findings.[4] It was very important to DOE/OS to confirm, as it did, that the panel was objective and composed of experts who did not work at ORNL. At the conclusion of the review, ORNL then took all of the copies back. *Id.* However, someone at ORNL sent a copy of the report via electronic mail to Dr. Patricia Dehmer of DOE/OS. *Id.* There is no indication that DOE used this report for any other purpose.

DOE/OS alleges that the report was not used for any purpose other than to confirm the procedural accuracy of the investigation and to present the conclusion of the panel. Nonetheless, we find that the report of investigation is an agency record because it was obtained by DOE and was under the control of DOE at the time of the request. *Tax Analysts*, 492 U.S. at 144-145. As directed by *Consumer Federation*, we considered the four relevant factors that determine if an agency has control over a document. First, we find that UT-Battelle, through its ownership of records clause, clearly intended to retain control over the report of investigation. As regards the second factor, UT-Battelle stamped copies of the report with "Do Not Duplicate" and retrieved those copies immediately after the meeting between DOE/OS and ORNL, thereby restricting the ability of the agency to use and dispose of the report as it sees fit. The front page of the emailed copy of the report also contains a statement that the document is not to be copied or disclosed without written authorization from UT-Battelle. However, in considering the third factor, we conclude that DOE personnel relied upon the report to determine that the investigation was conducted appropriately. With respect to the fourth factor, DOE/OS stated that a copy had been provided to its office via electronic mail and that copy has been retained in the office archives. Thus, an analysis of the four factors supports a decision that the report of investigation is an agency record.

Moreover, according to *Tax Analysts*, a record is within the control of an agency when "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 146. The use of the record described above meets the *Tax Analysts* requirement for agency control of the record because the report was obtained by DOE and was an element of DOE's official oversight of the investigation. Therefore, for the reasons set forth above, we find that the report of investigation is an agency record and subject to release under the FOIA.[5]

[4] The panel did not participate in the adjudication.

[5] DOE/OS has not stated that it ever obtained any other record that identifies the members of the investigation panel, the second record requested by Reich. DOE/OS did not have such a record in its possession and control at the time of the

Accordingly, this Appeal is granted. The Office of Science shall either release the report of investigation or issue a new determination to justify its withholding of any portion of the report.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eugenie Reich on July 11, 2007, OHA Case Number TFA-0213, is hereby granted.

(2) The Office of Science shall either release the final report of investigation of the panel convened by James Roberto of ORNL to investigate fraud and research misconduct allegations made through the journal *Nature* against researchers in the Stephen Pennycook research group of ORNL during the summer of 2006 or issue a new determination to justify its withholding of any portion of the report.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: November 13, 2007

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request, nor is it required to create one.

August 9, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marie Panzarella

Date of Filing: July 13, 2007

Case Number: TFA-0214

This Decision concerns an Appeal filed by Marie Panzarella from a determination issued to her by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (EMCBC). In that determination, EMCBC responded to a request for documents that Ms. Panzarella submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. EMCBC was unable to locate any documents responsive to Ms. Panzarella's request. This appeal, if granted, would require EMCBC to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Ms. Panzarella filed a FOIA request with EMCBC for "all records, contracts, and any other information that the West Valley Demonstration Project [(WVDP)] has on Occidental Chemical Corporation, including any information under Occidental's 'subnames, titles and associations' in regards to the former town of Amherst dump site on Hopkins Rd[.], Amherst, New York; the waste disposal at the Dann Lake, Williamsville, New York; as well as the waste disposal in Ellicot Creek, Amherst, New York between 1950 and 2000." *See* Letter from EMCBC to Marie Panzarella (June 5, 2007) (Determination Letter). In its final response, EMCBC stated that a thorough search was performed for documents responsive to Ms. Panzarella's request. *Id*. EMCBC described the search as follows:

> [The] search included an extensive computer search of the WVDP files. The following search terms were used in conducting a keyword search of the files: Occidental; Erie County; Amherst; Williamsville; Dann Lake; Millersport Highway; Ellicott Creek; Hopkins Road; Dump; 2801 Long Road; Grand Island; and the zip code: 14072. Furthermore, the West Valley Nuclear Service Company conducted searches of the WVDP's purchase order, credit card, and

> document/archive electronic systems for Occidental Chemical or Hooker Chemical.

Id. EMCBC stated that the search yielded no records responsive to Ms. Panzarella's request. *Id*.

Ms. Panzarella filed the present appeal challenging the adequacy of the search performed by EMCBC. Letter from Marie Panzarella to OHA (dated July 4, 2007) (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted EMCBC to ascertain the scope of the search. EMCBC stated,

> [T]he records checked were the Correspondence Tracking and Records Management electronic system. All correspondence ingoing or outgoing is given a tracking number and entered into the electronic system. Records existing prior to the institution of the electronic system were entered into the system when the system was instituted…the system [was] searched based on the keywords as identified in the original FOIA…all records contained in [the Contracting Officer's] official contract files [were searched]. These records comprise five [four-drawer] file cabinets, again by keyword.

Electronic Mail Message from Scott Lucarelli, EMCBC, to Diane DeMoura, OHA (July 23, 2007). EMCBC also stated that WVDP was established in 1982. Prior to 1982, the West Valley site was maintained by New York State. Therefore, according to EMCBC, pre-1982 records need to be sought through New York State's Freedom of Information process because the DOE is not in possession of those records. *Id*.

EMCBC searched the electronic database which contains a record of all correspondence since 1982 for the West Valley Demonstration Project by several relevant keywords derived from Ms. Panzarella's request. In addition, all of the Contracting Officer's official contract files were searched, again by keyword. According to the Determination Letter, additional searches of the West Valley Demonstration Project's purchase order, credit card, and document/archive electronic systems for Occidental Chemical and Hooker Chemical were also performed. Based on this information, we find that EMCBC performed an extensive search reasonably calculated to reveal records responsive to Ms. Panzarella's request. Therefore, despite the fact that it

yielded no responsive records, the search was adequate. Accordingly, Ms. Panzarella's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on July 13, 2007, by Marie Panzarella, OHA Case No. TFA-0214, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: August 9, 2007

January 31, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Citizen Action New Mexico

Date of Filing: July 16, 2007

Case Number: TFA-0215

This Decision concerns a Motion for Reconsideration that was filed by Citizen Action New Mexico (hereinafter referred to as "CANM" or "the Movant"). In its Motion, CANM requests that we modify a Decision and Order that we issued in response to a Freedom of Information Act (FOIA) Appeal filed by CANM. *See Citizen Action New Mexico*, Case No. TFA-0203 (July 6, 2007) (*Citizen Action*).

I. BACKGROUND

The FOIA generally requires that documents held by federal agencies be released to the public on request. In its FOIA request, CANM sought access to: the "site-wide ground water surveillance monitoring plan prepared by Sandia National Laboratories, New Mexico (SNL)," the status report concerning this plan that was required by DOE Order 450.1, "all attachments, maps, graphs and references used in conjunction with both the monitoring plan and the status report," any document that was provided to the New Mexico Environment Department pursuant to the DOE Order, and documents showing the funding mechanisms for the surveillance monitoring plan. CANM Appeal at 1.

Upon receipt of this request, the Department of Energy's (DOE) National Nuclear Security Administration Albuquerque Service Center (NNSA) referred it to SNL, which conducted a search and identified two responsive documents. The first was identified as SNL "Environmental Monitoring and Surveillance Plan (PG470247), Undated, 29 pages," and the second as SNL "Groundwater Protection Program Plan for Fiscal Year 2007 (PG470234), dated September 2006, 32 pages." Both of these documents were determined to be responsive to that part of the request concerning the "site-wide ground water surveillance monitoring plan," and both were released to CANM in their entirety. NNSA inquired of SNL as to why no documents responsive to the other portions of CANM's request could be located. *See* April 4, 2007, letter from Carolyn Becknell, NNSA FOIA Officer, to David McCoy, Director, CANM (Determination Letter) at 1. SNL replied that the other documents requested by CANM do not exist because DOE Order 450.1 does not require them. Specifically, SNL draws a distinction between the "site-wide ground water surveillance

monitoring plan" that the Movant contends is required by the Order, and the terms of the "Contractor Requirements Document (CRD)," which sets forth the requirements of the Order that apply to contractors. The CRD states, in pertinent part, that contractors must "[c]onsider . . . for inclusion as applicable" into their Integrated Safety Management Systems "implementation of a site-wide approach for groundwater protection." DOE Order 450.1, Appendix 2 at 1-2. SNL contends that the Order does not require the creation of the "site-wide groundwater surveillance monitoring plan" requested by CANM, and that the "Groundwater Protection Program Plan for Fiscal Year 2007" that was provided to the Movant details the implementation of a site-wide approach for groundwater protection, and therefore satisfies the requirements of the CRD. *See* November 21, 2007, e-mail from Shirley Peterson, NNSA, to Robert Palmer and William Schwartz, Office of Hearings and Appeals. With regard to the remainder of CANM's request, SNL replied that the only "status report" referred to in DOE Order 450.1 would be an internal DOE document, that there were no documents provided to the New Mexico Environmental Department pursuant to the provisions of the Order, and that since there was no "site-wide groundwater surveillance monitoring plan," and no status report in its possession, it also had no "attachments, maps, graphs and references" to or in these documents, and no funding mechanisms for such a plan. Determination Letter at 2.

CANM appealed this Determination. In its Appeal, the Movant contended that NNSA's search for responsive documents was inadequate, that the Determination Letter was untimely, and that the documents that CANM received "were insufficiently identified as to demonstrate the necessary compliance with DOE Order 450.1." Appeal at 1. In our Decision, we concluded that NNSA's search for responsive documents was adequate and that we did not have jurisdiction to address CANM's contention that NNSA did not issue its Determination in a timely fashion. We further rejected the Movant's contention that the documents received were insufficiently identified. *See Citizen Action.*

In its Motion for Reconsideration, CANM states that "[u]pon information and belief," a written status report was filed concerning the environmental protection program at Los Alamos National Laboratories (LANL) "to comply with DOE O 450.1 by December 31, 2005 as part of implementing DOE 450.1." Motion for Reconsideration at 1. Accordingly, CANM argues that a similar report should exist concerning SNL, and requests that we inquire of SNL as to whether a written status report exists or whether a written memorialization of an oral status report exists. Motion at 1-2, 4. CANM further contends that it should have been provided with two communications cited in our Decision, a May 9, 2007, letter from Juanita Evans, SNL, to Andrea Leal, DOE Sandia Site Office and a May 17, 2007, memorandum from Ms. Leal to Carolyn Becknell, NNSA FOIA Officer, and should have been given an opportunity to comment on those documents before the issuance of our Decision in *Citizen Action*. The Movant requests access to these communications. [*]

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*/ CANM also points out that our Decision did not address NNSA's failure to provide "documents which show the funding mechanisms for the surveillance monitoring plan on an annual basis as specific budgetary items." Motion at 4. As set forth above, NNSA stated in its Determination that "since there is no 'site-wide monitoring plan,' there is no funding mechanism for the plan." Determination Letter at 2. In previous cases, we have applied a standard of reasonableness in evaluating FOIA searches, and have not required that those searches result in absolute exhaustion of the files. *See, e.g., Stephen A. Jarvis*, Case No. VFA-0764, October 23, 2002. Given NNSA's statement that there is no "site-wide monitoring plan," it was reasonable for it to conclude that there are no documents concerning a funding mechanism for such a plan.

II. ANALYSIS

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have exercised our discretion to consider Motions for Reconsideration where circumstances warrant. *Nathaniel Hendricks*, 25 DOE ¶ 80,173 (1996). In the past, we have looked to the standards contained in OHA's procedural regulations for guidance as to the appropriate substantive standards for use in this type of case. *See, e.g.*, *Nevada Desert Experience,* 28 DOE ¶ 80,184 (August 28, 2001) (Case No. VFA-0688). Those regulations indicate that a Motion for Reconsideration should be granted only upon a showing of "significantly changed circumstances." 10 C.F.R. § 1003.55. "Significantly changed circumstances" include the discovery of material facts that were not known at the time of the initial proceeding. 10 C.F.R. § 1003.55(b)(2)(i). In this case, CANM states that a status report was prepared concerning DOE facilities operated by a similarly-situated DOE contractor, LANL. When coupled with the requirement in DOE Order 450.1 that DOE Site Office Managers file a status report concerning the compliance of site contractors with the Order by December 31, 2005, DOE Order 450.1(5)(d)(1), this led us to believe that such a report may exist, and justifies reconsideration of our Decision in *Citizen Action*.

Accordingly, we contacted NNSA and inquired as to whether an oral status report had been given by the Sandia Office Site Manager to the "Cognizant Secretarial Officer," as that term is used in the Order, and if so, whether a written memorialization of that report existed. Our inquiry apparently triggered another search, and a document that appears to be the status report requested by CANM was identified. The document is a December 22, 2005, memorandum from Patty Wagner, Sandia Site Office Manager, to Thomas D'Agostino, Deputy Administrator for Defense Programs. *See* November 21, 2007, e-mail from Shirley Peterson, NNSA, to Robert Palmer, OHA Staff Attorney, and William Schwartz, OHA Senior FOIA Official, forwarding the November 19, 2007, e-mail from Ms. Leal to Ms. Becknell. We will direct that NNSA review this document as expeditiously as possible for potential release to CANM.

In the November 19th e-mail, Ms. Leal also states that SNL "provided a disk that had the backup information as mentioned in" the Wagner memorandum. This information would appear to be responsive to CANM's request for "maps, graphs and references used in conjunction with . . . the status report," and we will also instruct NNSA to review this material for potential release to the Movant.

The Movant's final contentions concern the May 9, 2007, Evans letter and the May 17, 2007, Leal memorandum that were referenced in our Decision in *Citizen Action*. Specifically, CANM argues that it should have been provided with these communications and with an opportunity to comment on them prior to the issuance of our Decision. CANM also requests copies of these documents. As an initial matter, we note that unlike other areas of our jurisdiction (*i.e.*, personnel security and "whistleblower" proceedings, which are quasi-judicial in nature), there are no provisions in the FOIA regulations prohibiting *ex parte* contacts. *See, e.g., City of Federal Way*, 27 DOE ¶ 80,191 (March 10, 1999) (Case No. VFA-0472). Moreover, allowing FOIA appellants to comment on every communication that we receive would make it exceedingly difficult in many cases to process FOIA appeals within 20 working days, as required by Section 1004.8(d) of the FOIA regulations. We therefore reject the Movant's argument that it should have been provided with copies of these documents and an opportunity to respond to them prior to our Decision in *Citizen Action*. In addition, in previous cases we have not permitted FOIA appellants to broaden their document requests in the context of an appeal. *See, e.g., Cox Newspapers*, 22 DOE ¶ 80,106 (February 10, 1992) (Case No. LFA-0180) ; *Bernard Hanft*, 21 DOE ¶ 80,134 (June 20, 1991) (Case No. LFA-0126). CANM has not persuaded us to depart from this policy. Accordingly, the Movant should file another FOIA request if it wishes to have the DOE review and consider releasing these documents.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Citizen Action New Mexico, OHA Case Number TFA-0215, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the National Nuclear Security Administration's Albuquerque Service Center. On remand, NNSA should review the December 22, 2005, memorandum from Patty Wagner, Sandia Site Office Manager, to Thomas D'Agostino, Deputy Administrator for Defense Programs, and the supporting documentation provided by SNL as expeditiously as possible and issue a new determination releasing the documents or justifying the withholding of any portions of them.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 31, 2008

September 14, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Deborah L. Huettel

Date of Filing: July 18, 2007

Case Number: TFA-0216

This Decision concerns an Appeal filed by Deborah L. Huettel from a determination issued to her by the Department of Energy's (DOE) Oak Ridge Office (ORO). In that determination, ORO responded to a request for documents that Ms. Huettel submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORO located, and released, some documents responsive to Ms. Huettel's request. This appeal, if granted, would require ORO to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Ms. Huettel filed a FOIA request with ORO for records pertaining to her father. Specifically, Ms. Huettel requested her father's medical records, personnel records, radiation exposure records, chest x-rays, Oak Ridge Institute for Nuclear Studies (ORINS) Hospital file, beryllium records, industrial hygiene records, personnel security file, Office of Personnel Management (OPM) background investigation, payroll records, and training records. *See* Letter from Deborah L. Huettel to Privacy Act Officer, ORO (March 15, 2007). In its determination letter, ORO provided Ms. Huettel with "copies of [her father's] payroll, personnel, and radiation exposure records from the [DOE's] Oak Ridge Office facilities." *See* Letter from Amy Rothrock, ORO, to Deborah Huettel (June 5, 2007) (Determination Letter). The Determination Letter also stated that ORO could not locate any "medical records, chest x-rays, ORINS hospital file, beryllium records, industrial hygiene records, or training records." *Id*. The Determination Letter further indicated that the requested personnel security file and OPM background investigation were unavailable because they were "destroyed in accordance with the National Archives and Records Administration [NARA] General Records Schedules." *Id*. Finally, the Determination Letter stated that ORO also forwarded Ms. Huettel's request to the DOE's National Nuclear Security

Administration (NNSA) because NNSA now has jurisdiction over records located at one of the DOE's facilities at Oak Ridge, the Y-12 site.[1] *Id.*

Ms. Huettel filed the present appeal challenging the adequacy of the search performed by ORO. Letter from Deborah L. Huettel to OHA (dated June 12, 2007) (Appeal Letter). In her appeal, Ms. Huettel stated that she had documentation indicating that some records pertaining to former employees of Rust Engineering, her father's former employer, were located at the Federal Records Center in Atlanta, Georgia, maintained by NARA. Ms. Heuttel questioned whether ORO's search for records included records stored at the Federal Records Center. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[2]

In reviewing this appeal, we contacted ORO to ascertain the scope of the search. ORO informed us that it performed a search for records and located some, but not all, documents responsive to Ms. Huettel's request. E-mail from Amy Rothrock, ORO, to Diane DeMoura, OHA (August 1, 2007). ORO provided Ms. Huettel with a work history report located at Oak Ridge Associated Universities (ORAU), personnel security clearance assurance index card file data located at "the DOE Records Holding Area where legacy records on some employees, including Rust [Engineering] employees, go back to 1943, and some radiation exposure records located at the K-25 site and Oak Ridge National Laboratory (ORNL)." *Id.*

ORO also discussed the remaining requested records which could not be located. Regarding the requested ORINS hospital file, ORO stated that "only cancer patients undergoing treatments at … the ORINS Hospital would have medical and radiation exposure records from ORAU … Very few employees were treated at the ORINS Hospital. ORAU did not find any ORINS hospital records on [Ms. Huettel's father] because he was not a cancer patient at their facility." *Id.* ORO also stated that ORAU "has beryllium records on many employees since [ORAU] conducted a beryllium worker study…and administered a program for … testing for chronic berylliosis desease (CBD)." *Id.* According to ORO, ORAU searched for, but could not locate, any records responsive to Ms. Huettel's request. Additionally, ORO stated that "some plants keep separate [industrial hygiene] records from [industrial hygiene] information collected in medical files. Any [industrial hygiene] data on [Ms. Huettel's father] would be contained in his medical file and/or [industrial hygiene] file if one was created." *Id.* According to ORO, these records are under the purview of the Y-12 site and, therefore, under the jurisdiction of

[1] Ms. Huettel filed this appeal before receiving a final response from NNSA regarding its search. Consequently, the NNSA search is not within the scope of this appeal.

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

NNSA. *Id*. Finally, regarding Ms. Huettel's inquiry about records maintained at the Federal Records Center in Atlanta, Georgia, ORO stated that some Rust Engineering records are located at that facility, but that those records are under the jurisdiction of NNSA and the Y-12 site. According to ORO, Y-12 site personnel generally search the records held in the records centers in response to FOIA and Privacy Act requests. *Id*.

Although Ms. Huettel did not include the NNSA determination in her appeal, we contacted NNSA to determine which, if any, records were provided to Ms. Heuttel and to determine whether the DOE Federal Records Center in Atlanta, Georgia, was included in the scope of the search for documents. According to NNSA, the Y-12 site and all of the DOE records centers, including NARA sites, were searched for responsive documents. The search was performed using Ms. Huettel's father's name and social security number. *See* Memorandum of Telephone Conversation between Carolyn Becknell, NNSA, and Diane DeMoura, OHA (August 8, 2007). NNSA informed us that it located and provided to Ms. Huettel two medical files, a personnel file, radiation exposure records, industrial hygiene records, and x-rays. E-mail from Carolyn Becknell, NNSA, to Diane DeMoura, OHA (September 5, 2007).

Based on this information, we find that ORO performed an extensive search reasonably calculated to reveal records responsive to Ms. Huettel's request. Therefore, the search was adequate. Accordingly, Ms. Huettel's appeal should be denied. Because NNSA's response was not included in the scope of this appeal, Ms. Huettel may appeal that determination separately if she was not satisfied with NNSA's response regarding the Y-12 site records.

It Is Therefore Ordered That:

(1) The Appeal filed on July 18, 2007, by Deborah L. Huettel, OHA Case No. TFA-0216, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: September 14, 2007

August 16, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Rogelio Gloria

Date of Filing: July 23, 2007

Case Number: TFA-0217

On July 23, 2007, Rogelio Gloria (the Appellant) filed an Appeal from a final determination that the Freedom of Information Act / Privacy Act Group (FOI / PA) issued on June 29, 2007, on behalf of the Energy Information Administration (EIA) of the Department of Energy (DOE). That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, EIA would be required to conduct a further search for responsive documents.

Background

On May 23, 2007, the Appellant submitted a FOIA request for a "record of sale of oil from property in Long Beach, [California], and chemical composition." Electronic mail message dated May 23, 2007, from Appellant to FOI / PA. On June 29, 2007, FOI / PA responded that EIA "conducted a search of its files and found no documents responsive to the request." Determination Letter dated June 29, 2007, from Abel Lopez, Director, FOI / PA, to Appellant. On July 23, 2007, the Appellant appealed that determination to our Office. Appeal Letter dated July 23, 2007, from Rogelio Gloria, to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant states that he is surprised that the information is not readily available. He continues that "[m]ost of the information is spread out over several databases." *Id.* He claims that the information he is requesting is needed "to run the country." *Id.* The Appellant suggests that DOE ask various federal and state agencies and other entities for information that would allow DOE to formulate the information he is requesting. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard

of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.,Glen Bowers*, 29 DOE ¶ 80,240 (January 9, 2006) (Case No. TFA-0138); *Doris M. Harthun*, 28 DOE ¶ 80,282 (April 8, 2003) (Case No. TFA-0015).[1/]

We contacted EIA in response to the Appellant's request to determine what type of search was conducted. EIA responded that it contacted its only office that deals with crude oil sales data, the Dallas Field Office. The Dallas Field Office indicated that it does not collect or have detailed oil or natural gas sales information by person or property, such as was requested by the Appellant. EIA only monitors oil and natural gas fields that produce at least 400,000 barrels of crude oil or 2 billion cubic feet of gas annually. EIA asked the lead analyst, the most knowledgeable person in the Dallas Field Office, if the information the Appellant was requesting was available. After full consideration of the request, the lead analyst stated that the office does not collect or have detailed records of oil or natural gas sales by person or property, as the Appellant requested. EIA's search of the Dallas Field Office was reasonably calculated to uncover any information relevant to the Appellant's request. EIA asked the person with the most knowledge whether it maintains the information the Appellant was requesting. He stated that EIA does not maintain that information. Electronic Mail Messages sent August 1 and 3, 2007, from Jay Casselberry, Executive Assistant to the Administrator and Deputy Administrator, EIA, to Janet Fishman, OHA.

In his Appeal, the Appellant suggests that DOE search other agencies and entities for the information he seeks. The FOIA does not mandate that an agency conduct such a search.[2/] Moreover, the FOIA does not require that documents be created in response to a request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2).

In evaluating the search EIA conducted, the only applicable standard is whether the agency conducted "a search reasonably calculated to uncover all relevant documents." *Truitt*. We find that the search EIA conducted met that standard. EIA searched the only DOE office that might possess the requested information. Consequently, we find that EIA's search was adequate under the FOIA. Accordingly, the Appeal should be denied.

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

[2/]To the extent the Appellant believes relevant documents are in the possession of other federal agencies, he may contact these agencies and make a FOIA request.

It Is Therefore Ordered That:

(1) The Appeal filed by Rogelio Gloria, on July 23, 2007, Case No. TFA-0217, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: August 16, 2007

November 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: July 25, 2007

Case Number: TFA-0218

On July 25, 2007, Citizen Action New Mexico (the Appellant) filed an Appeal from a final determination that the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) issued on June 25, 2007. In that determination, NNSA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NNSA=s determination identified one document as responsive to this request and withheld portions of it under Exemptions 2 and 5 of the FOIA. This Appeal, if granted, would require NNSA to release the information withheld under Exemptions 2 and 5 to the Appellant.

I. Background

In a letter dated September 27, 2006, the Appellant submitted a FOIA request to NNSA for a copy of the Ten-Year Comprehensive Site Plan FY 2007-2016 prepared by Sandia National Laboratories, New Mexico (Ten-Year Plan). On June 25, 2007, NNSA issued a determination on the matter. NNSA searched and located the requested document, redacted portions of the document under Exemptions 2 and 5 of the FOIA, and released the redacted version to the Appellant.

On July 25, 2007, the Appellant filed an Appeal of the June 25, 2007 determination with the Office of Hearings and Appeals (OHA) of the DOE. In its Appeal, the Appellant challenges the withholding of information under Exemptions 2 and 5. Specifically, the Appellant asserts that the redactions made under both exemptions were not adequately explained in the determination letter. The Appellant also asserts that factual material in the responsive document was not reasonably segregated and released. *See* Appeal Letter. For these reasons, the Appellant requests that OHA direct NNSA to release the requested information.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. ' 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. ' 1004.10(b)(1)-(9). The DOE

regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. ' 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). AAn agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.@ *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency=s burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are Arelated solely to the internal personnel rules and practices of an agency.@ 5 U.S.C. ' 552 (b)(2); 10 C.F.R. ' 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (Alow two@ information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (Ahigh two@ information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, Ahigh two@ information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the Ahigh two@ category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under Ahigh two@ must be able to show that (1) the requested information is Apredominantly internal,@ and (2) its disclosure Asignificantly risks circumvention of agency regulations or statutes.@ *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

NNSA=s Determination Letter indicates that it withheld portions of the Ten-Year Plan because it Apertains to the scale and scope of work to be accomplished in support of, as well as the identification and location of, critical operations of SNL.@ Determination Letter at 2. NNSA=s determination letter also stated that charts were withheld in their entirety Aas they detailed NNSA Mission-Essential Facilities and Infrastructure information which included the identification, as well as condition, of these buildings/facilities where operations are performed.@ *Id.* Therefore, the release of this information could Abenefit adversaries by helping them identify possible program impacts and vulnerabilities, as well as provide them the opportunity to target these facilities.@ *Id.*

The information withheld is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which Adoes not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.@ *Cox v. Dep=t of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

In addition, the information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statue to properly invoke the Ahigh two@ exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case would allow adversaries to identify program vulnerabilities and enable them to understand how to thwart protective measures currently in place. Accordingly, disclosure of the information at issue risks allowing adversaries to circumvent DOE=s efforts to comply with its regulatory mandate to provide secure and safe stewardship of its nuclear weapons complex. Although it is obvious that this Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the Ahigh two@ prong of Exemption 2.

The Appellant also contends that the FOIA mandates that any reasonably segregable portion of a record must be disclosed and released to a requester after the redaction of the parts which are exempt. Appeal Letter. We agree and have reviewed both the redacted and the unredacted versions of the Ten-Year Plan. We find that NNSA reasonably segregated factual material with respect to Exemption 2, including the headings, titles and page numbers, and it is clear that other factual material that was not disclosed was Ainextricably intertwined@ with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. ' 552(b)(5); 10 C.F.R. ' 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States*, 617 F.2d at 862. In withholding portions of documents from the Appellant, NNSA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations composing part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making

governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the responsive document at issue, we have concluded that NNSA=s application of Exemption 5 was correct and consistent with the principles outlined above. The information withheld from the Appellant consists of recommendations and proposed policies prepared by DOE employees and intended only for internal DOE use only. The information withheld in this case properly falls within the definition of "intra-agency memoranda" in the FOIA in that the recommendations, proposed policies, and preliminary budget cost estimates contained in the material are clearly predecisional and deliberative. This planning information is subject to further agency review and does not represent final agency position. Accordingly, we hold that the recommendations, proposed policies and preliminary budget cost estimates withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude its release to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. ' 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. ' 1004.1. Regarding the information withheld under Exemption 2, disclosing the information deleted from the responsive document is not in the public interest as this information could render DOE facilities vulnerable to attack. With respect to the information withheld under Exemption 5, no public interest would be served by release of that material, which consists solely of recommendations, proposed policies and preliminary budget cost estimates provided to DOE in the consultative process and the release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing recommendations and proposed policies, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE & 80,122 at 80,560 (1987).

It Is Therefore Ordered That:

(1) The Appeal filed by Citizen Action New Mexico, OHA Case No. TFA-0218, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: November 8, 2007

September 24, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Moran

Date of Filing: August 13, 2007

Case Number: TFA-0220

On August 13, 2007, Barbara Moran filed an Appeal from a final determination that the National Nuclear Security Administration Service Center (NNSA) of the Department of Energy (DOE) issued on July 24, 2007. That determination concerned a request for information that Ms. Moran filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, NNSA would be required to conduct a further search for responsive documents.

Background

Ms. Moran submitted a FOIA request for "twelve DOE documents concerning the radiological monitoring of Palomares, Spain." Letter from Ms. Moran to NNSA, October 26, 2006. NNSA responded that they could find "no records responsive to [Ms. Moran's] request." Determination Letter, July 24, 2007.[1] Ms. Moran appealed that determination to the Office of Hearings and Appeals (OHA). Appeal Letter, received August 13, 2007. In her Appeal, Ms. Moran states that, "I do not believe that [NNSA] conducted a thorough search [for the documents I requested], and would like to appeal their inability to locate the records." *Id*.

Analysis

In responding to a request for information filed under the FOIA, it is well-established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search

[1] NNSA did state that it found a videotape regarding the Palomares incident and provided it to Ms. Moran, although Ms. Moran had not included the videotape in her original document request. *See* Determination Letter.

conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[2] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

In response to Ms. Moran's Appeal, we contacted NNSA to evaluate its search. NNSA stated that it determined that Sandia National Laboratories (Sandia) was the only location likely to have the information that Ms. Moran requested. NNSA informed us that Sandia searched the electronic databases for four data collections that might reasonably contain responsive information: 1) Corporate Archives, 2) Technology Library, 3) Inactive Records, and 4) Nuclear Safety Information Center. Sandia searched using the documents' titles, dates, and major subject words (such as "Palomares"). *See* E-mail from Shirley Peterson, NNSA, to David M. Petrush, OHA, September 10, 2007, and Memorandum of Telephone Conversation among Shirley Peterson, David M. Petrush, and others, September 10, 2007.

NNSA's search meets *Truitt* and *Miller*'s "reasonableness" standard because in searching its electronic databases, Sandia performed a thorough search at the only location likely to have the documents Ms. Moran sought. Therefore, we find that NNSA's search was adequate under the FOIA. Accordingly, Ms. Moran's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Moran, on August 13, 2007, Case No. TFA-0220, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: September 24, 2007

[2] All OHAdecisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

January 9, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Federation of American Scientists

Date of Filing: August 15, 2007

Case Number: TFA-0221

The Federation of American Scientists (FAS) filed an Appeal from a determination that the Office of Policy & Internal Controls Management (OPICM) of the Department of Energy (DOE) issued on July 11, 2007. In that determination, OPICM denied in part a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OPICM released a redacted version of a document to FAS after determining that the original document contained classified information that should be protected from disclosure under the FOIA. This Appeal, if granted, would require the DOE to review the withheld portions of the document again for possible release. [*]

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On July 6, 2005, FAS requested a copy of the National Hydro Test Plan and a chronology of all hydro tests, including date, location, weapon system, and event name from the DOE's National Nuclear Security Administration (NNSA). NNSA identified a draft of the FY 2006 National Hydro Test Plan as responsive to the request, and forwarded this document to DOE Headquarters for a declassification review. On July 11, 2007, OPICM provided FAS with a redacted draft of the FY 2006 National Hydro Test Plan. In its determination letter, OPICM explained that the withheld portions of the Plan contained information properly classified as Restricted Data or Formerly Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C.

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[*] Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine at http://www.oha.doe.gov/search.htm .

§§ 2161-2166, therefore warranting protection from disclosure under Exemption 3 of the FOIA

The present Appeal seeks a re-evaluation of the withheld material. Specifically, FAS contends that some sections of the document have been "block-deleted to an extent that suggest[s] some unclassified information may have been inadvertently withheld," and that other deletions indicate that information has been withheld simply because it pertains to nuclear weapons, without any finding that the information is currently and properly classified. Appeal at 1. FAS also contends that item 2 of its request, in which it sought a chronology of all hydro tests, was not addressed by OPICM. Consequently, FAS also asks us to instruct NNSA to conduct a search for the requested chronology.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive,* Case No. TFA-0115 (2006).

The Director of the Office of Security, has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of a reorganization within the Department, this function is now the responsibility of the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the responsive document from which the DOE had withheld information.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold consists of Restricted Data (RD) and Formerly Restricted Data (FRD) that concerns the design or utilization of nuclear weapons. RD and FRD are forms of classified information the withholding of which is required under Atomic Energy Act of 1954, and are therefore exempt from mandatory disclosure under Exemption 3.

The denying official for the DOE's withholdings is Mr. Michael A. Kilpatrick, Deputy

Chief for Operations, Office of Health, Safety and Security, Department of Energy. Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires DOE to continue withholding portions of the draft FY 2006 National Hydro Test Plan.

Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the document that the Deputy Chief has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations. We will provide a copy of the newly redacted document to FAS.

With regard to FAS' other contention, the determination letter does not appear to address FAS' request for a chronology of all hydro tests. However, we have contacted NNSA, and have been informed that such a chronology does not exist. *See* December 30, 2008 e-mail from Helmut Filacchione, Stockpile Research and Development Branch, NNSA, to Robert B. Palmer, Senior Staff Attorney, OHA. The FOIA does not require an agency to create a document in response to a FOIA request, *see, e.g., Samuel D. Johnson*, Case Nos. TFA-0152, TFA-0160 (2006), and to instruct NNSA to search for a document that we have been reliably informed does not exist would be fruitless. Consequently, we will deny this portion of FAS' Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by the Federation of American Scientists on August 15, 2007, Case No. TFA-0221, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the FY 2006 National Hydro Test Plan will be provided to the Federation of American Scientists.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Date: January 9, 2009

Poli A. Marmolejos
Director
Office of Hearings and Appeals

October 9, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Bowers

Dates of Filing: August 21, 2007
September 7, 2007

Case Numbers: TFA-0222
TFA-0223

On August 21, 2007, Glen Bowers filed an appeal from a determination issued to him on May 29, 2007 and July 18, 2007 by the National Nuclear Security Administration (NNSA) Service Center and the Department of Energy's (DOE) Office of Health, Safety and Security (HSS), respectively. In addition, on September 7, 2007, Mr. Bowers filed an appeal from a determination that DOE's Oak Ridge Operations Office (ORO) issued on July 25, 2007.[1] In those determinations, NNSA, HSS and ORO responded to a request for documents Mr. Bowers submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Both NNSA and HSS determined that they did not locate any documents responsive to Mr. Bowers' request. ORO located and released some documents responsive to Mr. Bowers' request. These appeals, if granted, would require NNSA, HSS and ORO to perform additional searches and either release any newly discovered responsive documents or issue new determinations justifying the withholding of any portions of those documents.

I. Background

Mr. Bowers filed a FOIA request for the employment records of his deceased father, Mr. John Wyley Bowers, who was employed with the Atomic Energy Commission from 1951 until 1970. *See* Letter from Glen Bowers to Freedom of Information Act Officer, DOE (April 12, 2007).[2] Mr. Bowers requested that the information include his father's "Q"

[1] Mr. Bowers' appeals have been consolidated for the purpose of this decision.

[2] In his request, Mr. Bowers also states that his father was employed during the same time period by Department of Defense union contractors throughout the United States of America. *See* Letter from Glen Bowers to Freedom of Information Act Officer, DOE (April 12, 2007). Since Mr. Bowers identified the

clearance number, location of job sites where he worked, names of the top secret and non-secret projects in which he was involved, job titles and duties, awards, written documents, photographs, news letters and all information pertaining to his father that he could receive under the Freedom of Information Act. *Id.* In a telephone conversation with the DOE Freedom of Information/Privacy Act Group (DOE/FOI), Mr. Bowers indicated that his father had worked at the Paducah, Kentucky and Portsmouth, Ohio sites and at the Los Alamos National Laboratory (LANL). *See* Facsimile of original request received from DOE/FOI. DOE/FOI forwarded the request to the following three offices it believed might have responsive documents: HSS, NNSA, and ORO.

In its determination letter, DOE/FOI determined HSS conducted a reasonable search and did not locate any records responsive to Mr. Bowers' request. *See* Letter from Abel Lopez, DOE/FOI, to Glen Bowers (July 18, 2007) (HQ Determination Letter). Additionally, NNSA determined it did not locate any records responsive to his request. *See* Letter from Carolyn Becknell, NNSA, to Glen Bowers (May 29, 2007) (NNSA Determination Letter). However, ORO was able to locate responsive documents. ORO provided Mr. Bowers with index cards that show that his father held security clearances for those time frames in which he was employed by subcontractors at DOE's Portsmouth, Ohio facility. *See* Letter from Amy Rothrock, ORO, to Glen Bowers (July 25, 2007) (ORO Determination Letter).

In his appeals, Mr. Bowers stated that he had documentation indicating that his father worked at the Portsmouth Gaseous Diffusion Plant in 1954, 1955 and 1963 as an employee of Grinnell Corporation, located in Portsmouth, OH, and C & I Girdler Construction Co., located in Cincinnati, OH. *See* Letter from Glen Bowers to OHA (received September 7, 2007) (ORO Appeal Letter). Mr. Bowers further stated that his father worked for the Atomic Energy Commission from 1951 until 1970. *Id.* Mr. Bowers challenges the adequacy of the search for responsive documents, performed by HSS, NNSA and ORO. *See* Letter from Glen Bowers to OHA (received August 21, 2007) (HSS/NNSA Appeal Letter). *See also* ORO Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand

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Department of Defense (DOD) as a potential employer for his father, NNSA referred him to the FOIA officer at DOD. *See* NNSA Determination Letter. We suggest that Mr. Bowers contact the DOD FOIA officer to make a proper FOIA request with that department regarding his father's employment records, if he has not yet done so.

a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760).[3]

In reviewing these appeals, we contacted HSS to ascertain the scope of its search for responsive documents. HSS informed us that it performed a search and identified no records responsive to Mr. Bowers' request. HSS conducted an electronic search of indices for access authorizations using Mr. Bowers' father's name and social security number. *See* Memorandum of Privacy Act Request from Stephanie Scott Grimes, HSS to Abel Lopez, DOE/FOI (June 28, 2007). According to HSS, the absence of a record for Mr. Bowers' father may mean that he worked for the DOE or a DOE predecessor or contractor in a position that did not required an access authorization. *Id.*

We next contacted NNSA to ascertain the scope of its search for responsive documents. According to NNSA, the employment records database and medical records at LANL were searched for responsive documents and no records responsive to Mr. Bowers' request were identified. *See* Memorandum of Freedom of Information Act Request from Office of Counsel to Carolyn Becknell, NNSA (May 22, 2007). The electronic, microfiche and paper searches were performed using Mr. Bowers' father's name and social security number. *Id.*

Finally, we contacted ORO to ascertain the scope of its search for responsive documents. ORO performed a search for records and located some documents responsive to Mr. Bowers' request. *See* ORO Determination Letter. ORO informed us that it performed both electronic and paper searches of finding aids, databases and document collections at each of its sites in Portsmouth, K-25, Oak Ridge Associated Universities, and the DOE Records Holding Area (RHA). *Id.* The search was performed using Mr. Bowers' father's name, social security number and date of birth. Using this information, no records could be located at any site except the RHA. *Id.*

ORO provided Mr. Bowers with copies of index cards from the RHA that show that his father held security clearances at Portsmouth for subcontractors Grinnell, FH McGraw, Kellogg and Peter Kiewet, which were confirmed subcontractors at Portsmouth. However, because subcontractors took their records with them when they left Portsmouth, no additional personnel, medical and similar files could be located where the searches were conducted. Finally, ORO did not search Oak Ridge National Laboratory, since his father did not work there and it is thus not likely that his employment records would exist there.

Based on the foregoing information, we find that HSS, NNSA and ORO performed searches reasonably calculated to reveal documents responsive to Mr. Bowers' request. Accordingly, the searches were adequate and, therefore, Mr. Bowers' appeals should be denied.

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

In the course of processing these appeals, Mr. Bowers sent us additional information regarding his father's employment record. It appears that Mr. Bowers' father may have been employed by contractors at various DOE sites. We are forwarding this new information to DOE/FOI to determine if a new search should be conducted.

It Is Therefore Ordered That:

(1) The Appeal filed on August 21, 2007 by Glen Bowers, OHA Case No. TFA-0222, is hereby denied.

(2) The Appeal filed on September 7, 2007 by Glen Bowers, OHA Case No. TFA-0223, is hereby denied.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: October 9, 2007

October 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citizen Action New Mexico
Date of Filing:	September 11, 2007
Case Number:	TFA-0224

On September 11, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on June 5, 2007, by the National Nuclear Security Administration (NNSA) Service Center of the Department of Energy in Albuquerque, New Mexico (NNSA/SC) in response to a request for documents that CANM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that NNSA/SC release additional information to CANM and perform an additional search for documents responsive to its request.

I. Background

On May 3, 2007, CANM filed a FOIA request with NNSA/SC for, among other things, "all documents, electronic or written, that furnish information as to the inspections, reviews, visits performed by the New Mexico Environment Department, the Department of Energy and/or Sandia National Laboratories during the period of construction activities at the Mixed Waste Landfill (MWL) from July 2006 to the present," and "all documents, electronic or written, generated by any Quality Control Engineer for the MWL." Appeal at 1; Letter from NNSA/SC to CANM, August 16, 2007 (Determination). NNSA/SC responded by releasing documents responsive to CANM's request, but withheld portions of the documents pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). In its Appeal, CANM challenges NNSA/SC's withholdings as well as the adequacy of its search for responsive documents. Appeal at 1 -4.

II. Analysis

A. Withholding under FOIA Exemption 6

NNSA/SC withheld names, titles, and initials of contractor employees from the documents it released to CANM. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest

would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499); *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510).[1]

1. The Privacy Interest

NNSA/SC determined that there was a privacy interest in the identity of contractor employees whose names, titles, and initials it withheld, stating that its release "will cause inevitable harassment and unwarranted solicitation." Determination at 3. CANM argues in its Appeal that the information withheld does "not reveal personal information or records about the individuals" and "there is no evidence that the redacted initials and signatures would not be those of federal SNL [Sandia National Laboratories] employees, not private contractors."

First, SNL is a government-owned/contractor operated (GOCO) facility. Sandia Corporation, a Lockheed Martin company, manages Sandia for the NNSA. Thus, employees of SNL are contractor employees, not federal employees; the latter have no expectation of privacy concerning their names, titles and similar information. *See* 5 C.F.R. § 293.311.

We agree with NNSA/SC that a substantial privacy interest exists in the identity of private contractor employees due to the great potential that a commercial entity could misappropriate a name for commercial purposes. The courts have also reached this conclusion. *See Sheet Metal Workers v. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identity of these contractor employees.

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (August 5, 1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We find that there is no public interest in release of the withheld information. The Appellant has

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

not demonstrated how the disclosure of the names, titles or initials of non-federal employees will reveal anything of importance regarding the DOE nor how it would serve the public interest. Revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with NNSA/SC, and find that there is no public interest in the disclosure of the names, titles, and initials withheld pursuant to Exemption 6.

3. **The Balancing Test**

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a substantial privacy interest at stake in this case. Moreover, we found that there is no public interest in the release of identifying information of private contractor employees. Therefore, we find that the public interest in disclosure of the information withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the individuals whose identities were protected.[2]

B. Adequacy of NNSA/SC's Search for Responsive Documents

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 22, 2002) (Case No. VFA-0760).

We contacted NNSA/SC for information regarding its search for responsive documents. We were informed that construction activities at the Mixed Waste Landfill are being performed by subcontractors of the prime DOE contractor Sandia Corporation. As a result, NNSA/SC referred the request to Sandia. The individual responsible for responding to FOIA requests at Sandia identified two organizations within the company where documents responsive to the request would most likely be found, Transportation and Environmental Safety, and Environmental Programs and Assurance. These two organizations conducted searches and located the documents that were released to the Appellant. Memorandum of telephone conversation between Shirley Peterson, NNSA/SC, and Steve Goering, Office of Hearings and Appeals (October 15, 2007) (conference call included official from Sandia) .

In its Appeal, CANM notes that an attachment to one of the documents provided in NNSA/SC's determination, the "MWL Cover Construction Quality Assurance Plan," contains blank Inspection Checklist and Construction Inspection forms and other documents. CANM asserts that the completed

[2] CANM claims in its Appeal that NNSA/SC inconsistently applied Exemption 6 to the documents in question, noting that one of the documents released revealed the author's name. However, the release of this name appears to have been inadvertent. Letter from Sandia attorney (September 17, 2007). Such an inadvertent release clearly does not provide a basis for the intentional release of further information subject to Exemption 6.

versions of these forms should have been provided in response to its request. After the filing of the present Appeal, Sandia informed us that certain of these documents were not available from the subcontractor at the time of CANM's request but are now available to Sandia. Letter from Sandia official to Andrea Leal, NNSA/SC (October 10, 2007). These documents, which include "Testing Inspection Forms, Construction Inspection Forms, Soil/Aggregate Forms, Field Density Forms & Lift Maps 1 through 12," have been provided to NNSA/SC, which will issue a new determination regarding their release. Electronic mail from Shirley Peterson, NNSA/SC, to Steve Goering, Office of Hearings and Appeals (October 15, 2007).

Based upon the information above, we find that NNSA/SC's search was reasonably calculated to locate the documents sought by CANM, in that it extended to the DOE prime contractor responsible for the MWL and in particular to those organizations within the contractor where documents responsive to the particular request at issue were most likely to be located.[3] We therefore find NNSA/SC's search met the adequacy requirements of the FOIA.

Having found that NNSA/SC properly withheld identifying information regarding contractor employees from the documents it released to CANM, and that its search for documents responsive to CANM's request was adequate, we will deny the present Appeal.

Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on September 11, 2007, OHA Case Number TFA-0224, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: October 19, 2007

[3] Sandia stated in its response that it "cannot speak to or address any data that may have been collected by the DOE or the NMED during" the dates relevant to the request. Letter from Sandia official to Andrea Leal, NNSA/SC (October 10, 2007). However, the head of the Transportation and Environmental Safety organization at Sandia stated that he was not aware of the collection of data at the MWL by any DOE official. Memorandum of telephone conversation between Shirley Peterson, NNSA/SC, and Steve Goering, Office of Hearings and Appeals (October 15, 2007).

October 19, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Geneva Jones

Date of Filing: September 26, 2007

Case Number: TFA-0225

This Decision concerns Geneva Jones' Appeal from a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to her on August 24, 2007. In that determination, ORO responded to Ms. Jones' document request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. ORO did not locate the documents Ms. Jones requested. This Appeal, if granted, would require ORO to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Ms. Jones filed a FOIA request with ORO for records pertaining to her father. Specifically, Ms. Jones requested her father's "personnel and medical records." Determination Letter. In response, ORO simply stated that it could not find those records. ORO also forwarded Ms. Jones' request to the National Nuclear Security Administration (NNSA). ORO believed that NNSA might have responsive documents because it maintains documents from the Y-12 facility, where Ms. Jones' father worked. *Id*.; Appeal Letter dated September 17, 2007. Ms. Jones filed the present Appeal, challenging the adequacy of ORO's search.[1] Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*,

[1] Ms. Jones filed this Appeal before receiving a determination letter from NNSA. Therefore, this decision does not address NNSA's search. Ms. Jones may separately appeal NNSA's determination.

897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[2] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

In response to Ms. Jones' Appeal, we contacted ORO to evaluate its search. ORO stated that it searched ORO's personnel and medical files (both paper and electronic), the only ORO files likely to have the documents Ms. Jones requested. ORO searched its records by various combinations of Ms. Jones' father's name, social security number, and date of birth. E-mails between Elizabeth Dillon, ORO, and David M. Petrush, Office of Hearings and Appeals (OHA) (October 1 and 3, 2007).

ORO's search meets *Truitt* and *Miller*'s "reasonableness" standard because ORO performed a thorough search in the only ORO files likely to have the documents Ms. Jones requested. Therefore, we find that ORO's search was adequate. Accordingly, Ms. Jones' Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal that Geneva Jones filed on September 26, 2007, OHA Case No. TFA-0225, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: October 19, 2007

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

November 7, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Bowers

Date of Filing: October 10, 2007

Case Numbers: TFA-0226

On October 10, 2007, Glen Bowers filed an appeal from a determination issued to him on September 7, 2007 by the Department of Energy's (DOE) Office of Legacy Management (OLM). This determination responded to a request for information Mr. Bowers submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OLM was unable to locate documents responsive to Mr. Bowers' request. This appeal, if granted, would require OLM to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Mr. Bowers filed a FOIA request for a copy of the Atomic Energy Commission Newsletter entitled "Rocky Flats Plant Crossroad: The Paper," dated September 12, 1959, Volumes 18 and 19. *See* Letter from Glen Bowers to DOE Office of Freedom of Information Act (April 12, 2007). Mr. Bowers indicated that this newsletter contained articles and photographs of his father, John Wyley Bowers, during the time that he performed work for the Atomic Energy Commission. *See* Letter from Glen Bowers to OHA (received August 10, 2007) (Appeal Letter). By a letter dated April 26, 2007, the Director of DOE's Headquarters FOIA Office (DOE/FOI) informed Mr. Bowers that his request was being forwarded to OLM because any document responsive to his request, if it existed, would fall under the jurisdiction of that office. OLM then forwarded the request to the Rocky Flats Project Office (Rocky Flats) to conduct the search. Rocky Flats searched its records for newsletters from that time period but was unable to locate the requested document. In a September 7, 2007 determination letter sent to Mr. Bowers, the Director of OLM informed Mr. Bowers that the only September 1959 editions of any newsletter that Rocky Flats located in its microfilm records were those entitled *Dow*

Corral and dated September 4, 1959 and September 18, 1959.[1] *See* Letter from Michael W. Owen, OLM, to Glen Bowers (September 7, 2007) (Determination Letter). The Director further stated that the editions that Rocky Flats located were incomplete and contained no mention of Mr. Bowers' father. *Id.* In his Appeal, Mr. Bowers challenges the adequacy of the search, primarily on the grounds that it was not the *Dow Corral* that he requested, but the Atomic Energy Commission Newsletter. *See* Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760).[2]

In reviewing this appeal, we contacted Rocky Flats to ascertain the scope of its search for responsive documents and were informed that the *Dow Corral* was the only agency newsletter published or disseminated at Rocky Flats during September 1959. *See* Email from Pamela Watson, OLM to Avery Webster, OHA (Received October 24, 2007) (Email). A search of the historical records of the Rocky Flats facility yielded the following information concerning the *Dow Corral*. The *Dow Corral* was an employee newsletter that was published on a biweekly basis and microfilm records included editions published on September 4, 1959 and September 18, 1959. *See* Determination Letter. The September 4, 1959 issue is "Number 18" and the September 18, 1959 issue is "Number 19," confirming that there was no issue dated September 12, 1959. *Id.* In addition, a search was conducted for a "September 12" issue of the Dow Corral for any year which yielded no responsive records. *See* Email. Further, no records were found of any other editions of the Dow Corral published in September 1959. *Id.*

Rocky Flats informed us that it performed a search of the microfilm records and all available electronic resources using Mr. Bowers' father's name and identified no records responsive to Mr. Bowers' request. *See* Memorandum of Telephone Conversation between Pamela Watson, OLM, Andrea Wilson, Source One at Rocky Flats, and Avery Webster, OHA (October 16, 2007). Further, a search conducted of Rocky Flats Photography Department's photographs and corresponding logs produced no records responsive to Mr. Bowers' request. *See* Email.

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[1] In response to his request, OLM provided Mr. Bowers copies of the September 4, 1959 and September 18, 1959 editions. *See* Determination Letter.

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

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that OLM performed an extensive search reasonably calculated to reveal documents responsive to Mr. Bowers' request. Accordingly, the search was adequate under the FOIA and, therefore, Mr. Bowers' appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 10, 2007 by Glen Bowers, OHA Case No. TFA-0226, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: November 7, 2007

November 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael Ravnitzky

Date of Filing: October 18, 2007

Case Number: TFA-0227

Michael Ravnitzky filed an Appeal from a determination issued by the Office of the Inspector General (IG) of the Department of Energy on September 26, 2007. In that determination, the IG denied in part a request for information that the Appellant had submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Mr. Ravnitzky is appealing the determination with respect to one of the documents the IG withheld in part. With respect to that document, the IG determined that the portions that were not released to Mr. Ravnitzky contained classified information. This Appeal, if granted, would require the DOE to release that document in its entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 14, 2006, Mr. Ravnitzky requested several IG audit reports. The IG released a number of the requested documents to Mr. Ravnitzky, but referred the remainder to the Office of Classification, Office of Health, Safety and Security, to determine whether the remaining documents, or any portions of them, needed to be withheld from disclosure due to their classified nature. After receiving the results of the Office of Classification's review, the IG issued a determination letter on September 26, 2007, in which it explained that it was withholding portions of seven of the requested documents pursuant to Exemptions 1, 2, and 3 of the FOIA. The IG explained in its determination letter that it invoked Exemption 1 to withhold information from public disclosure that is properly classified as National Security Information pursuant to Executive Order 12958, as amended.

On October 17, 2007, Mr. Ravnitzky filed an Appeal of the IG's determination letter with

this office, which was deemed perfected on October 18, 2007, when we obtained a copy of the determination letter. Mr. Ravnitzky limited the scope of his Appeal to those portions of a document entitled Audit Report: Control of Classified Matter at Paducah, dated July 2001 (DOE/IG-0515), that the IG had withheld under Exemption 1 of the FOIA.

In his Appeal, Mr. Ravnitzky contends that many of the portions redacted from the version provided to him concerned past events and their disclosure "would not cause serious harm to the national security"; moreover, "their release would inform the public of the activities of government." He concludes, therefore, that "[c]ontinued classification, redaction and withholding on this report is not only wrong but legally improper." Appeal Letter.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord,* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this Appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed DOE/IG-0515, the subject of this Appeal.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE originally withheld from the document may now be released. The Deputy Chief has informed this Office that the information the DOE continues to withhold concerns programs for safeguarding nuclear facilities or materials, and vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism, which is currently classified as National Security Information (NSI) under sections 1.4(f) and (g) of Executive Order 12958, as amended by Executive Order 13292. That information is identified as "DOE b(1)" in the margin of a redacted version of this document, which will be provided to the Appellant under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA.

The denying official for the DOE's withholdings is Mr. Michael A. Kilpatrick, Deputy Chief for Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 12958 requires DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Therefore, those portions of the document that the Deputy Chief has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael Ravnitzky on October 18, 2007, Case No. TFA-0227, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the Audit Report: Control of Classified Matter at Paducah, dated July 2001 (DOE/IG-0515), will be provided to Mr. Ravnitzky.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 6, 2008

December 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: October 31, 2007

Case Number: TFA-0229

This Decision concerns Terry M. Apodaca's Appeal from a determination that the Department of Energy's (DOE) NNSA Service Center (NNSA) issued to her on August 3, 2007. In that determination, NNSA responded to Ms. Apodaca's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.[1]

I. Background

Ms. Apodaca filed a FOIA request with NNSA for documents regarding unauthorized release of personally identifiable information (PII) at the NNSA Service Center. Apodaca Request. Ms. Apodaca limited the scope of her request to the years between 2000 and the present. The NNSA provided Ms. Apodaca 34 documents. The NNSA stated that in processing Ms. Apodaca's request, it contacted the Office of Human Capital Management Services, the Information Technology Department, the Facility Security Officer, the Inquiry Official, and Program Manager for Incidents of Security Concern. None found responsive documents. Determination Letter.

Ms. Apodaca filed this Appeal, challenging the adequacy of the NNSA's search. Specifically, Ms. Apodaca appealed:

(i) The NNSA's determination that it could not locate documents at the above-referenced NNSA offices;

(ii) The NNSA's failure to process her request at the Cyber Security Site Manager's Office (CSSM), as she had requested after filing her FOIA request;

[1] William M. Schwartz, OHA Senior FOIA Official, recused himself from this case.

(iii) The NNSA's failure to process her request at the Y-12 facility, which Ms. Apodaca claims experienced a March 2007 PII breach; and

(iv) The NNSA's failure to produce documents regarding a PII breach "a few years back" that "affected over 1,500 NNSA employees."

Appeal Letter.

II. Discussion

1. Applicable Authority

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[2] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

A FOIA appellant must file their appeal within thirty days of receiving the determination. 10 C.F.R. § 1004.8(a). OHA reserves the discretion to accept an untimely appeal to promote administrative efficiency, if, upon consulting the determination issuer, review remains practicable, given the determination issuer's possible file relocations, staffing changes, or other circumstances. *See, e.g., Nevaire S. Rich*, 27 DOE ¶ 89,241 (1999) (Case No. VFA-0523); *Int'l Bhd of Elec. Workers*, 27 DOE ¶ 80,152 (1998) (Case No. VFA-0421).

2. Analysis

a. *Search at Several NNSA Offices and the CSSM*

Ms. Apodaca appealed the adequacy of the NNSA's search because it could not locate responsive documents at the NNSA offices listed above.

We contacted the NNSA to evaluate its search. The NNSA issued its determination to Ms. Apodaca on August 3, 2007. Ms. Apodaca filed her Appeal on October 31, 2007 – nearly two months past her 30-day regulatory deadline. As a result, reviewing the NNSA's search is now impracticable; NNSA officials cannot recall the exact searches that they performed for Ms.

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

Apodaca's request. E-mail from Carolyn Becknell, NNSA, to David M. Petrush, OHA, December 4, 2007. Therefore, we will deny this portion of Ms. Apodaca's Appeal.

Ms. Apodaca appealed the adequacy of the NNSA's search due to the apparent fact that it did not conduct searches at the CSSM. In fact, the NNSA did contact the CSSM and the search that CSSM conducted produced no responsive documents. E-mail between Carolyn Becknell, NNSA, and David M. Petrush, OHA, November 7, 2007. However, just as with the several offices listed above, it is now impracticable to evaluate NNSA's search at the CSSM. Therefore, we will also deny this portion of Ms. Apodaca's Appeal.

b. *The NNSA's Failure to Search the Y-12 Facility*

Ms. Apodaca appealed the adequacy of the NNSA's search because the NNSA did not search the Y-12 facility.

The NNSA contacted every source in its experience that is likely to have records regarding unauthorized PII releases and broadened its search according to their suggestions. None suggested that the NNSA search the Y-12 facility. E-mail from Carolyn Becknell, NNSA, to David M. Petrush, OHA, November 7, 2007; Memorandum of telephone conversation between Carolyn Becknell, NNSA, and David M. Petrush, OHA, November 28, 2007.

We find that the NNSA's search was adequate. Under *Miller*, the NNSA need not have exhausted every search possibility. Instead, its search was reasonable because it contacted those individuals and offices that it believed most likely to have the records Ms. Apodaca requested. Therefore, we will deny this portion of Ms. Apodaca's Appeal.

c. *Failure to Produce Documents Involving a Breach of PII that Affected Over 1,500 NNSA Employees*

Ms. Apodaca appealed the adequacy of the NNSA's search because the NNSA did not produce documents regarding "a breach of PII . . . that affected over 1,500 NNSA employees . . ." that occurred "[a] few years back. . . ." Appeal Letter. The NNSA has agreed to conduct a search for responsive documents regarding this incident. Memorandum of telephone conversation between Carolyn Becknell, NNSA, and David M. Petrush, OHA, December 14, 2007. Therefore, we will remand this portion of Ms. Apodaca's Appeal to the NNSA.

It Is Therefore Ordered That:

(1) The Appeal that Terry M. Apodaca filed on October 31, 2007, OHA Case No. TFA-0229, is granted in part, as specified in paragraph (2) below, and denied in all other respects.

(2) This matter is remanded to the NNSA to conduct a search for documents regarding a breach of PII that affected over 1,500 NNSA employees as described in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred Brown
Associate Director
Office of Hearings and Appeals

Date: December 19, 2007

December 18, 2007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry Martin Apodaca

Date of Filing: December 4, 2007

Case Number: TFA-0231

On December 4, 2007, Terry Martin Apodaca filed an appeal from a determination issued to her on November 20, 2007 by the National Nuclear Security Administration (NNSA) Service Center. This determination responded to a request for information that Ms. Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA was able to locate some, but not all documents responsive to Ms. Apodaca's request. This Appeal, if granted, would require NNSA to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On April 11, 2007, Ms. Apodaca filed a FOIA request asking for the following documents: (1) personnel actions, and associated paperwork, for all Office of Public Affairs (OPA) employees from January 1, 2000 to the present; and (2) the title and grade of eight named OPA employees. *See* Letter from Terry Martin Apodaca to Carolyn A. Becknell, FOIA Officer, OPA (April 11, 2007) (FOIA Request). NNSA provided a partial response to Ms. Apodaca's FOIA request on September 20, 2007, when it released the Notification of Personnel Actions or Standard Form 50 (hereinafter SF-50) and the title and grade for the eight named employees, including Carolyn Becknell and Tracy Loughead.[1] *See* Letter from Carolyn Becknell, NNSA to Terry Martin Apodaca (September 20, 2007) (Partial Determination Letter).

[1] Due to the budget imposed by Ms. Apodaca, the NNSA was unable to provide all of the requested documents. Therefore, the NNSA issued a partial response to Ms. Apodaca's April 11, 2007 FOIA request. *See* FOIA Request.

Ms. Apodaca then filed an Appeal[2] of the partial response (1st FOIA Appeal) with the Office of Hearings and Appeals (OHA), challenging the adequacy of the NNSA's search that resulted in its Partial Determination. *See* Letter from Terry Martin Apodaca to OHA (received October 31, 2007) (1st Appeal Letter). In her 1st FOIA Appeal, Ms. Apodaca asserted that the NNSA did not provide her with the Request for Personnel Action or Standard Form 52 (hereinafter SF-52) and justification for each personnel action. *Id.* During the pendency of the 1st FOIA Appeal, Ms. Apodaca narrowed the scope of her FOIA request to only the SF-52s and the associated justifications for the following personnel actions: 1) Group Cash Award of $200.00 effective August 10, 2006, for Carolyn Becknell (Becknell Award); 2) "Irregular" Performance Pay Quality Step Increase (QSI) effective March 4, 2007, for Carolyn Becknell (Becknell QSI); 3) Change to Lower Grade effective April 17, 2000, for Tracy Loughead (Loughead Grade Change); and 4) Special Act or Service Award effective August 27, 2000, for Tracy Loughead (Loughead Award). *Id.*

In response to Ms. Apodaca's 1st FOIA Appeal, the NNSA told OHA that it would send Ms. Apodaca the SF-52s. *See* Electronic Mail Message from Shirley Peterson, NNSA to David Petrush, OHA (November 10, 2007) (November 2007 Email). The NNSA later informed OHA that it would provide Ms. Apodaca with three of the four SF-52s because the fourth document no longer existed. *See* Memorandum of Telephone Conversation between Shirley Peterson, NNSA, and David Petrush, OHA (November 28, 2007) (Peterson Telephone Memo).

In a Final Determination Letter sent to Ms. Apodaca, NNSA provided Ms. Apodaca with three documents: 1) the SF-50 for the Becknell Award; 2) the SF-52 for the Becknell QSI; and 3) the SF-52 for the Loughead Grade Change. *See* Letter from Carolyn Becknell, NNSA, to Terry Martin Apodaca (November 20, 2007) (Final Determination Letter). As regards to the fourth document relating to the Loughead Award, the NNSA stated that the SF-50 had been released to Ms. Apodaca in September 2007 and that the SF-52 relating to the Loughead Award was destroyed when it became two years old, in accordance with the agency's record retention policy. *Id.*; *see* Partial Determination Letter.

On December 4, 2007, Ms. Apodaca filed this Appeal (2nd FOIA Appeal) of the Final Determination Letter issued by NNSA. *See* Letter from Terry Martin Apodaca to OHA (received December 4, 2007) (2nd Appeal Letter). In the 2nd FOIA Appeal, Ms. Apodaca challenges the adequacy of the search that was conducted with regard to her request for the SF-52 and the award justification relating to the Loughead Award. *Id.* In her pending Appeal, Ms. Apodaca argues that "if all copies of the SF-52 have been destroyed…, [NNSA should've included]…the date of destruction, destruction official's name, as well as a copy of the certificate of destruction." *Id.* In this Appeal, Ms. Apodaca is requesting that the NNSA provide her with: (1) the SF-52 and the justification for the Loughead Award; (2) the SF-52 for the Becknell Award and (3) the justification for the Becknell QSI. *Id.*

[2] This Appeal has been designated OHA Case No. TFA-0230.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760).[3]

In reviewing this appeal, we contacted the NNSA to ascertain the scope of its search for responsive documents. *See* Memorandum of Telephone Conversation between Carolyn Becknell, NNSA, and Avery Webster, OHA (December 5, 2007) (Becknell Telephone Memo). In response to Ms. Apodaca's request for the SF-52 with the award justification for the Loughead Award, NNSA contacted its Human Resources Department, which provided the following information. *See* November 2007 Email. In each employee's Official Personnel File (OPF), the SF-52 is prepared before the SF-50. *Id*. The SF-52 is placed on the left side of the file and contains the justification for the SF-50. *Id.* The SF-52 is purged every two years, or when an employee retires or leaves the agency. *Id.*; *see also* Becknell Telephone Memo. The SF-50 is the notification to the employee that this action has been taken. *See* November 2007 Email. SF-50s are placed on the right side of the employee's OPF and are permanent records. *Id.*

Ms. Apodaca requested the SF-52 created over seven years ago for the Loughead Award. *See* December 4, 2007 Appeal Letter. After conducting a search, the NNSA could not locate this document because, in accordance with the agency's record retention policy, it had been destroyed. *See* Becknell Telephone Memo. If the SF-52 was destroyed, Ms. Apodaca requested that the NNSA provide her with the date of destruction, destruction official's name, or a copy of the certificate of destruction relating to this document. *See* December 4, 2007 Appeal Letter. A search of records of the NNSA's Human Resources Department yielded no records responsive to Ms. Apodaca's request. *See* Becknell Telephone Memo.

With regard to the SF-52 relating to the Becknell Award, the NNSA informed us that it conducted a search for the document and identified no records responsive to Ms. Apodaca's request. *Id.* Because this group award was created via nomination form[4], no SF-52 was generated. *Id.* Thus, the NNSA was unable to provide Ms. Apodaca with the SF-52 because it does not exist. *Id.*

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

[4] NNSA provided Ms. Apodaca with a copy of the group nomination form for her review. *See* Becknell Telephone Memo.

As for the documentation relating to the Becknell QSI, the NNSA advised that it searched its records and found that no justification document exists[5]. *Id*. According to the NNSA, a further search of the Human Resources official personnel files and Ms. Becknell's supervisor's official personnel files, produced no records responsive to Ms. Apodaca's request. *Id*.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that NNSA performed an extensive search reasonably calculated to reveal documents responsive to Ms. Apodaca's request. Accordingly, the search was adequate under the FOIA and, therefore, Ms. Apodaca's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on December 5, 2007 by Terry Martin Apodaca, OHA Case No. TFA-0231, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred L. Brown
Associate Director
Office of Hearings and Appeals

Date: December 18, 2007

[5] Ms. Apodaca asserts that the justification document regarding the Becknell QSI should exist. *See* Memorandum of Telephone Conversation between Terry Martin Apodaca and Avery Webster, OHA (dated December 12, 2007). However, based on conversations with the NNSA, I am satisfied that this documentation is not located within the agency records.

February 12, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David E. Hoffman

Date of Filing: December 11, 2007

Case Number: TFA-0232

On December 11, 2007, David E. Hoffman filed an Appeal from a determination that the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) issued to him on October 23, 2007. In that determination, the NNSA responded to the request that Mr. Hoffman filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. The NNSA identified five documents responsive to Mr. Hoffman's request. However, the NNSA withheld all five in their entirety under 5 U.S.C. § 552(b)(5), known as Exemption 5. This Appeal, if granted, would require the NNSA to release the documents that it withheld from Mr. Hoffman.

I. Background

Mr. Hoffman submitted a FOIA request to DOE for documents regarding the Material Protection Control & Accounting program (MPC&A) with Russia and other former Soviet Union republics. DOE submitted the request to the NNSA, which found five responsive documents. They are:

1) MPC&A Talking Points for Ambassador Goodby.

2) NSC Meeting on MPC&A and SSD Delegation Membership dated, March 9, 1994.

3) Nunn-Lugar Budget Estimates for MPC&A Assistance to Russia, dated February 1, 1994.

4) Agreement between the Department of Defense of the United States of America and the Ministry of the Russian Federation for Atomic Energy concerning Control, Accounting and Physical Protection of Nuclear Material to promote the prevention of Nuclear Weapons Proliferation from the Federation, dated December 8, 1992.

5) Analysis of Ukrainian Requirements for U.S. Assistance of Material Control and Accounting and Physical Protection, dated August 11, 1992.

Determination Letter.

The NNSA withheld these documents in their entirety from Mr. Hoffman based on Exemption 5. The NNSA explained that Exemption 5 "protects those documents normally privileged in the civil discovery context, such as pre-decisional, deliberative process documents." Lastly, the NNSA stated that despite Exemption 5, DOE regulations allow the NNSA to release documents to Mr. Hoffman when "disclosure is in the public interest." The NNSA stated that disclosure to Mr. Hoffman is not in the public interest. *Id*.

Mr. Hoffman appealed the NNSA's withholding of four of the five responsive documents to the Office of Hearings and Appeals (OHA). Appeal Letter. In particular, Mr. Hoffman did not appeal the withholding of Document #2. Mr. Hoffman stated brief reasons why releasing Documents #1, #3 and #5 is in the public interest. Mr. Hoffman also stated that because Document #3 is thirteen years old and Document #5 describes a "situation" fifteen years old, they cannot today be protected under Exemption 5. Lastly, Mr. Hoffman stated that Document #4 was improperly withheld under Exemption 5 because it "is not an internal document, but a formal agreement between the United States and another country." *Id*.

II. Analysis

A. Exemption 5's Deliberative Process Privilege

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that "reflect advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated." *Sears*, 421 U.S. at 150 (citation omitted). The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, "reflect[ing] the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically "reflect the personal opinions of the writer rather than

the final policy of the agency." *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974); *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 768, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that, "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

We have carefully reviewed the documents and find that the NNSA properly withheld them from Mr. Hoffman under Exemption 5. As a threshold matter, Mr. Hoffman argues that Exemption 5 does not apply to Document #4 because it is not a document addressed between two different agencies or between members of the same agency. We note that Document #4 is labeled "draft." A single office necessarily reviews and considers a "draft" that it produces. Therefore, Document #4 is an "intra-agency" document within Exemption 5's statutory definition.

The documents that the NNSA withheld from Mr. Hoffman are all similar in that they consist of the authors' MPC&A opinions and recommendations, and factual material that the authors relied upon in forming those opinions and recommendations. The material is clearly predecisional, and deliberative in that it reflects the "give and take" of the decision-making process. With one exception, the factual information is either inextricably intertwined with the deliberative material, or was selected from a larger group of facts in an act that constituted the authors' exercise of judgment. In either instance, revealing the factual material would in effect reveal the agency's deliberative process.

That one exception is in Document #3, which appears to contain segregable information. In particular, the document consists of an issue statement, objectives, a summary of the existing MPC&A agreement, a section addressing expanded cooperation, and finally a funding profile for the existing and expanded cooperation. We believe that the issue statement, objectives, and summary of the existing MPC&A agreement may contain factual statements that are not agency deliberations and therefore the NNSA cannot withhold them from Mr. Hoffman under Exemption 5. Accordingly, we will remand for a determination on this issue. (By contrast, the remaining sections addressing expanded cooperation and the funding profile are deliberative –

they weigh various methods of achieving the program's objectives at three possible funding levels.)

Lastly, Mr. Hoffman argues that because Document #3 and #5 are more than a decade old, the FOIA cannot exempt them from disclosure. Since the FOIA does not set a timetable for when Exemption 5 expires, OHA declines to read one into it. In fact, one court interpreted Exemption 5 to have a "longer life" than other FOIA exemptions. *Africa Fund v. Mosbacher*, No. 92 CIV. 289 (JFK) (S.D.N.Y. May 26, 1993) (stating, "*Except* perhaps for FOIA Exemption 5, the above [FOIA] exemptions do not permanently preclude release of these documents to the public . . ." (emphasis added)).

B. Public Interest Determination

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that, "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. To determine if disclosure is in the public interest, OHA balances the benefit from disclosing the records with the "chilling effect" that disclosure "would have on the willingness of DOE employees to make open and honest recommendations on policy matters." *L. Daniel Glass*, 29 DOE ¶ 80,271 (Case No. TFA-0150) (October 16, 2006).

In the present case, we note that Mr. Hoffman claims that the MPC&A is one of the most successful and important non-proliferation programs of the post-Soviet era. Mr. Hoffman quotes Presidents George W. Bush, Bill Clinton, and George H. W. Bush, who all state that preventing the spread of nuclear, chemical, and biological materials is one of our highest national priorities. E-mail between David E. Hoffman and David M. Petrush, OHA, January 16, 2008. Thus, disclosing documents that illuminate the MPC&A may arguably allow the public to discuss and evaluate this historically important program.

Second, Mr. Hoffman shows that he is preparing a serious and comprehensive book to inform the public about the MPC&A, which Doubleday will publish in 2009. Mr. Hoffman's book is based on his work as a reporter for The Washington Post, which has included over 200 interviews with direct MPC&A participants and numerous site visits in Russia and Ukraine, from the 1990's through August 2007. He contends that to date, no book is supported by as much detail and research. *Id.*

Third, the fact that all of the documents were created a half generation ago may mitigate their potential chilling effect on future NNSA decision-making. The particular situations and decisions described in these documents are long past. Meanwhile, the fact that non-proliferation – and the attendant need for public information evaluating our government's historical efforts – continues to be vital to our national security, may tip our balance in favor of public disclosure.

In light of the above, we believe it is important to gain the NNSA's perspective on this matter. We will therefore remand this case for the NNSA to make a determination whether disclosing Documents #1, #3, #4, and #5 to Mr. Hoffman is in the public interest.

It Is Therefore Ordered That:

(1) The Appeal that David E. Hoffman filed on December 11, 2007, OHA Case No. TFA-0232, is remanded for the NNSA to make a determination whether releasing Documents #1, #3, #4, and #5 to Mr. Hoffman is in the public interest.

(2) If the NNSA determines that releasing Document #3 to Mr. Hoffman is not in the public interest, the NNSA shall issue a determination stating whether Document #3's issue statement, objectives, and summary contain segregable factual information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 12, 2008

January 11, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Western Resource Advocates

Date of Filing: December 6, 2007

Case Number: TFA-0233

This Decision concerns Western Resource Advocates' (WRA) Appeal from a determination that the Department of Energy's (DOE) Western Area Power Administration (WAPA) issued to it on November 7, 2007. In that determination, WAPA partially denied WRA's request for a fee waiver in conjunction with a request WRA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. WAPA partially denied WRA's fee waiver request because certain documents WRA requested exist in the public domain. This Appeal, if granted, would require WAPA to either (i) issue a new determination letter describing where in the public domain the requested documents reside and if the documents have "met a threshold level of public dissemination;" or, in the alternative (ii) issue a new determination letter with a fee waiver decision based upon the DOE's regulatory fee waiver factors that WAPA did not address in its initial determination.

I. Background

The Eastern Plains Transmission Project (EPTP) is a construction project for hundreds of miles of power lines over several Great Plains states. The Tri-State Generation and Transmission Association (Tri-State), a WAPA contractor, is one of the EPTP's builders. Memorandum of telephone conversation between Patricia Land, WAPA, and David M. Petrush, OHA, December 20, 2007. WRA filed a FOIA request for numerous records regarding the EPTP. In particular, WRA sought records regarding Tri-State's EPTP "Integrated Resource Plan," WAPA's annual reports to Congress, and correspondence and memoranda on numerous EPTP-related topics. WRA requested a complete fee waiver. Request Letter, dated June 29, 2007.

In correspondence with WAPA, WRA explained that WAPA is a government agency, and the documents pertain to its EPTP-related energy development activities in the West. WRA explained that the public is generally unfamiliar with the EPTP and the WAPA's role in its planning and development. WRA stated that it will disseminate the requested information through its website, newsletter, public forums, and interaction with government and interested

organizations. WRA stated that the information is not publicly available in any agency library or reading room and that as a non-profit organization, disclosure is not in WRA's commercial interest. Letter from WRA to WAPA, dated August 3, 2007.

WAPA partially denied WRA's fee waiver request because "documents and other information [WRA is] requesting already exists in the public domain and therefore[] does not contribute significantly to the public understanding of the operations or activities of the government." WAPA estimated that processing WRA's request would cost approximately $80,955.66. Determination Letter, dated November 7, 2007 (italics removed). However, without explanation, WAPA offered to absorb 40% of the $80,955.66 processing costs. Letter from WAPA to WRA, dated August 30, 2007.

WRA filed the present Appeal, challenging WAPA's partial denial of WRA's fee waiver request. Namely, WRA complains that the "determination . . . does not identify which records are in the public domain, nor where they can be found." Also, WRA "appeals WAPA's failure to provide a rationale that makes sense for its estimated $80,000 cost to provide the requested documents and information." Appeal Letter, dated November 28, 2007.

Subsequent to WRA's Appeal, WAPA explained to OHA that 20-30% of the information WRA requests is available on the WAPA website. A WAPA-conducted Google search showed that the Tri-State website and a host of other websites contain additional information. Memorandum of telephone conversation between Patricia Land, WAPA, and David M. Petrush, OHA, December 20, 2007; E-mail from Patricia Land, WAPA, to David M. Petrush, OHA, December 20, 2007.

II. Analysis

"Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed . . . the Freedom of Information Act requires federal agencies to disclose information upon request. . . ." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (citation and quotations omitted).

The FOIA generally requires document requesters to pay for search and duplication costs. *See* 5 U.S.C. § 552(a)(4)(A)(i). However, each agency has promulgated regulations explaining when a requester is entitled[1] to receive documents at no charge or reduced charge. DOE regulations set forth "two basic requirements, both of which must be satisfied before fees will be waived or reduced." 10 C.F.R. § 1004.9(a)(8); *see also* 5 U.S.C. § 552(a)(4)(A)(iii) (providing authorization for the DOE fee waiver regulations). First, a requester must show that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 10 C.F.R. § 1004.9(a)(8)(i) (internal quotations omitted). This is known as the "public interest" requirement. Second, a requester must show that "disclosure of the information is not primarily in the commercial

[1] The regulations state, "When these requirements are satisfied . . . the waiver or reduction of a FOIA fee *will be* granted." 10 C.F.R. § 1004.9(a)(8) (emphasis added).

interest of the requester." 10 C.F.R. § 1004.9(a)(8)(ii) (internal quotations omitted). This is known as the "commercial interest" requirement.

The public interest requirement and commercial interest requirement each have non-exclusive factors to show when they are met. A FOIA officer should address the following factors to determine if a requester meets the public interest requirement:

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i)(A)-(D) (internal quotations omitted).

A FOIA officer should address the following factors to determine if a requester meets the commercial interest requirement:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B) (internal quotations omitted).

"[F]ee waiver requests must be made with 'reasonable specificity' . . . and [be] based on more than 'conclusory allegations.'" *Rossotti*, 326 F.3d at 1312 (citations omitted). "Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." *Id*. (citation and quotations omitted).

Factor B

OHA has held that, "If the information is already publicly available, release . . . would not contribute to public understanding [i.e., release would not have informative value] and a fee waiver may not be appropriate." *James Salsman*, 29 DOE ¶ 80,223 (Case No. TFA-0114) (Sept. 7, 2005) (citation omitted).

Courts have adopted a test to show when a fee waiver is inappropriate because the requested documents are already in the public domain. When "material . . . has met a threshold level of public dissemination," disclosure "will not further 'public understanding' within the meaning of the fee waiver provisions." *Campbell v. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) (citation omitted). Lastly, to justify a FOIA fee waiver denial because the documents are in the public domain, the agency must "explain[] where in the 'public domain' th[e] materials reside." *Id*.

In *Campbell*, a requester sought Federal Bureau of Investigation (FBI) records about an activist. *Campbell*, 164 F.3d at 26. The FBI partially denied the requester's fee waiver because a portion of the requested documents existed in the public domain. *Id*. at 35. However, the FBI never explained to the requester where in the public domain the requested documents resided. *Id*. at 36.

The court held that the FBI must explain where the documents reside in the public domain.[2] The court reasoned that, "[T]he mere fact that the material resides in the public domain does not justify denying a fee waiver. . . ." "[O]nly material that has met a threshold level of public dissemination will not further 'public understanding' within the meaning of the fee waiver provisions." *Id*. (citation omitted).

Campbell's analysis assumes that explaining where the documents reside is integral to determining the threshold level of public dissemination at which they further public understanding. Because the FBI did not describe where in the public domain the requested documents resided, the court did not reach the issue of whether the requested documents "met a threshold level of public dissemination."

In this case, WAPA partially denied WRA's fee waiver request, stating that, "[D]ocuments and other information [WRA is] requesting already exists in the public domain and therefore[] does not contribute significantly to the public understanding of the operations and activities of the government."[3] Determination Letter, dated November 7, 2007 (italics removed).

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[2] *See also Carney v. Dep't of Justice*, 19 F.3d 807, 815-16 (2d Cir. 1994) (explaining that "[the agency] merely stated that the records . . . requested had been released . . . without explaining how these records were already available to the public. Accordingly, [the requester's] requests for fee waivers should not have been rejected for this reason . . ."); *Citizens for Responsibility & Ethics in Washington v. Dep't of Health & Human Serv.*, 481 F. Supp. 2d 99, 111 (D.D.C. 2006) (citing *Campbell*, *Carney*, and others, and stating, "[T]hese cases suggest that an agency asserting that the requested documents are already publicly available must do more than merely make that assertion").

[3] WAPA partially denied WRA's fee waiver based on only one of DOE's four public interest requirement factors. WAPA did not base its partial fee waiver denial on the other three public interest requirement factors or the

Under *Campbell*, this simple statement is an insufficient basis on which to deny WRA's fee waiver request. Just as in *Campbell*, WAPA partially denied WRA a fee waiver, based on the fact that certain of the documents that WRA requested already exist in the public domain. *Campbell* required the WAPA to explain to WRA where the documents in the public domain reside. Indeed, the "public domain" rationale for denying a fee waiver request has no meaning if the requester cannot locate the documents. Stating that the documents exist in the public domain without explaining where they are defeats the FOIA's purpose, which is to provide the requester access to the government's files.

Note, however, that as in *Campbell*, this Decision does not evaluate whether the information that WAPA states is in the public domain reaches a "threshold level of dissemination." That analysis is not yet necessary. The bare fact that WAPA stated that the documents WRA requested are in the public domain (without explaining where) is sufficient grounds to remand the case under *Campbell*.

This Decision is in accord with OHA cases addressing similar issues. In *Gov't Accountability Project*, a DOE office denied a requester a fee waiver without reason and without conducting a search for responsive documents. OHA remanded the case to the office for a determination on the fee waiver issue after it identified and reviewed the documents responsive to the request. *Gov't Accountability Project*, 23 DOE ¶ 80,139 (Case No. LFA-0312) (Aug. 27, 1993); *see also James L. Schwab*, 21 DOE ¶ 80,154 (Case No. LFA-0152) (Oct. 17, 1991) (remanding a fee waiver denial "to the FOI Officer, who should wait until the search for responsive documents is complete and it has been determined what information can be released to Schwab").

Here, similar to *Gov't Accountability Project* and *Schwab*, WAPA can not possibly determine which requested documents (or how many) are in the public domain without conducting a search and reviewing the responsive documents.

III. Conclusion

WAPA partially denied WRA's fee waiver request under "Factor B" because certain of the documents WRA requested exist in the public domain. As the foregoing indicates, WAPA has failed to identify where in the public domain those documents reside, and if they have "met a threshold level of public dissemination," as *Campbell* requires. Accordingly, WRA's Appeal should be granted.

Because we will remand to WAPA to issue WRA a new determination on its fee waiver request, we do not reach WRA's remaining Appeal argument regarding WAPA's fee estimate.

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commercial interest factors. Therefore, although no one factor is dispositive, this Decision does not address those other factors.

It Is Therefore Ordered That:

(1) The Appeal that Western Resource Advocates filed on December 6, 2007, OHA Case No. TFA-0233, is granted. Western Resource Advocates' fee waiver request is remanded to the Western Area Power Administration.

(2) The Western Area Power Administration shall issue a new determination. If it wishes to deny WRA's fee waiver request based on "Factor B," then WAPA should determine which documents WRA requests exist in the public domain, if any, and where they are located. WAPA should also decide if those documents have "met a threshold level of public dissemination." It should then issue a new determination based on that information. In the alternative, WAPA may base its new determination on analysis considering the "public interest" and "commercial interest" factors (cited above) that it left unaddressed in its initial determination.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 11, 2008

January 17, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: WTAE-TV

Date of Filing: December 18, 2007

Case Number: TFA-0234

On December 18, 2007, WTAE-TV (WTAE) filed an Appeal from a determination issued to it by the Department of Energy's Pittsburgh Naval Reactors Office (PNRO). In that determination, PNRO withheld documents in response to a request for information that WTAE filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require PNRO to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On November 2, 2007, WTAE sent a FOIA request to the FOIA Office at DOE Headquarters, for the two most recent annual performance evaluations conducted by the National Nuclear Security Administration (NNSA) of the Bechtel-Bettis plant in West Mifflin, Pennsylvania. *See* Electronic Mail Message from WTAE to DOE (November 2, 2007). On November 6, 2007, the request was forwarded to the Office of Naval Reactors at DOE Headquarters because any document responsive to the request, if it existed, would fall under the jurisdiction of that office. The Office of Naval Reactors then forwarded the request to PNRO to conduct the search.

PNRO conducted a search and located documents responsive to WTAE's request. In its determination letter dated November 27, 2007, PNRO withheld the documents in their entirety under the deliberative process privilege of Exemption 5, claiming that the responsive material is interim contractor performance evaluations that are designated as "source selection information"[1] created to

[1] "Source Selection Information" means information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly. 41 U.S.C.A. § 423(f)(2). PNRO claims that pursuant to subpart 42.15 of the Federal Acquisition Requisition (FAR), contractor performance evaluations are designated "Source Selection Information," and only releasable three years after completion of contract performance. *See* Determination Letter.

support future contract award decisions. *See* Letter from PNRO to WTAE, November 27, 2007 (Determination Letter). In withholding the documents, PNRO asserts that the subject evaluations are pre-decisional and deliberative, and as such, fall within the deliberative process privilege covered by Exemption 5 of the FOIA. *Id.* On December 18, 2007, WTAE filed this appeal of PNRO's decision to withhold information under Exemption 5.

II. Analysis

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). The deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). The privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to the general rule that the deliberative process privilege does not protect factual information. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In its determination letter dated November 27, 2007, PNRO withheld the evaluations in their entirety from WTAE, claiming that the documents contain information that is predecisional and part of the deliberative process. We have reviewed these documents and believe that PNRO improperly withheld them under Exemption 5.

PNRO argues that the primary function of these evaluations is "to support future contract award decisions" and as such, these documents are predecisional in nature. *See* Determination Letter. We disagree. Performance evaluations are systematic determinations of merit, worth or significance. The primary purpose of performance evaluations is to provide the subject with feedback for performance and recommendations for improvement.

Our office conducted a *de novo* review of the documents PNRO withheld from WTAE in their entirety. Each evaluation expresses the evaluator's opinion of the contractor's performance at the time the evaluation was conducted. PNRO informed us that although the interim evaluations may be eventually used to award future contracts or contract extensions, the evaluations are not drafts. *See* Memorandum of Telephone Conversation between Clifford Nunn, PNRO, and Avery Webster, OHA (January 11, 2008). They reflect final agency positions that are not subject to review or revision. *Id.*

We do not believe that Exemption 5 should be applied so broadly as to withhold final agency documents that may ultimately feed into a larger evaluation process. Where interim performance evaluations reflect the agency's final decision, the documents are not predecisional and cannot be shielded by the deliberative process privilege.

Accordingly, we shall remand this matter to PNRO. On remand, PNRO must review the responsive material and issue a new determination that either releases that material or justifies the withholding of any portions of the documents. If PNRO determines that withholding is appropriate, it should memorialize its consideration of segregation of non-exempt material pursuant to 10 C.F.R. § 1004.7(b) and the public interest pursuant to 10 C.F.R. § 1004.1.

It Is Therefore Ordered That:

(1) The Appeal filed by WTAE-TV on December 18, 2007, OHA Case No. TFA-0234, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Pittsburgh Naval Reactors Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 17, 2008

January 23, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	The Florida Times-Union
Date of Filing:	December 19, 2007
Case Number:	TFA-0235

On December 19, 2007, the Florida Times-Union (Times-Union) filed an Appeal from a determination issued to it by the Department of Energy's Office of the Executive Secretariat (OES). In that determination, OES responded to a request for information that the Times-Union filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OES to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 15, 2007, the Times-Union sent a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for "any records relating to a presentation by Under Secretary Robert Card on July 24, 2003 to the International Energy Advisory Council." *See* Letter from Florida Times-Union to FOIA Officer, U.S. Department of Energy (October 15, 2007) (Request Letter). DOE/FOIA forwarded the request to OES because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

OES conducted a search of the electronic Document Online Coordination System (eDOCS) which yielded no documents responsive to the Times-Union's request. *See* Letter from Carolyn Matthews, OES, to Florida Times-Union (November 1, 2007). On December 18, 2007, the Times-Union filed this Appeal challenging the adequacy of the search conducted for responsive documents. *See* Letter from Florida Times-Union to OHA (received December 19, 2007). In its Appeal, the Times-Union also provided additional information to assist the Department in locating responsive material. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact

inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).*

In reviewing this Appeal, we contacted OES to ascertain the scope of its search for responsive documents. *See* Email from Avery Webster, OHA, to Carolyn Matthews, OES (December 20, 2007). OES informed us that it conducted a search of only the eDOCS database. See Email from Carolyn Matthews, OES, to Avery Webster, OHA (December 26, 2007). OES did not conduct a search for responsive documents of any other agency records.

During the pendency of this Appeal, OES recognized that it should have conducted a broader search for responsive documents. OES has indicated to us that it is now conducting a new search of its records. In light of this information, we will remand this matter to DOE/FOIA to oversee OES's new search for the documents that the Times-Union has requested. Any additional responsive documents that are located will be identified and released to the Times-Union, or the basis for their withholding will be explained in a new determination letter, with specific reference to one or more FOIA exemptions.

It Is Therefore Ordered That:

(1) The Appeal filed by the Florida Times-Union on December 18, 2007, OHA Case No. TFA-0235, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the FOIA and Privacy Act Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 23, 2008

* All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

January 28, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Terry M. Apodaca

Date of Filing: December 21, 2007

Case Number: TFA-0237

This Decision concerns a Motion for Reconsideration of a Decision and Order that the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) issued to Terry M. Apodaca on Dec. 19, 2007, in case TFA-0229. In that case, Ms. Apodaca filed a Freedom of Information Act (FOIA) Request with the National Nuclear Security Administration (NNSA). The NNSA issued her a determination. Ms. Apodaca appealed the determination to OHA, challenging the adequacy of the NNSA's search. OHA denied Ms. Apodaca's appeal in part because she filed her appeal nearly two months past her regulatory filing deadline. If this Motion for Reconsideration were granted, OHA would review the adequacy of the NNSA's search.

I. Background

On April 10, 2007, Ms. Apodaca filed a FOIA request with the NNSA for documents regarding personally identifiable information (PII) breaches. The NNSA provided Ms. Apodaca documents. *See Terry M. Apodaca* (Case No. TFA-0229) (Dec. 19, 2007).[1] Ms. Apodaca challenged the adequacy of the NNSA's search. In particular, Ms. Apodaca appealed:

(i) The NNSA's determination that it could not locate documents at the Office of Human Capital Management Services, the Information Technology Department, the Facility Security Officer, the Inquiry Official, and Program Manager for Incidents of Security Concern;

(ii) The NNSA's failure to process her request at the Cyber Security Site Manager's Office (CSSM), as she had requested after filing her FOIA request;

(iii) The NNSA's failure to process her request at the Y-12 facility, which Ms. Apodaca claims experienced a March 2007 PII breach; and

[1] The Federal Energy Guidelines reporter has not yet assigned this Decision volume and section numbers.

(iv) The NNSA's failure to produce documents regarding a PII breach "a few years back" that "affected over 1,500 NNSA employees."

OHA denied Ms. Apodaca's appeal regarding (i) and (ii) because she filed her appeal on Oct. 31, 2007, nearly two months past her 30-day regulatory deadline of Sept. 3, 2007.[2] OHA found that the NNSA's search regarding (iii) was adequate: the NNSA had contacted every source in its experience that was likely to have responsive records, and none had suggested searching the Y-12 facility. OHA remanded Ms. Apodaca's appeal regarding (iv) because the NNSA agreed to conduct that search. *Id*.

Ms. Apodaca filed the present Motion for Reconsideration on Dec. 21, 2007. Ms. Apodaca argues that OHA should reconsider its Decision regarding (i)-(iii) for two reasons. First, her appeal was in fact timely. Shortly after receiving the NNSA's determination dated Aug. 3, 2007, she contacted the NNSA to informally resolve her concerns. Ms. Apodaca's Motion included an e-mail showing that she contacted the NNSA on Aug. 31, 2007 regarding (iii) (the NNSA search at the Y-12 facility) and (iv) (the "hacker incident"). Motion for Reconsideration, received Dec. 21, 2007.

Second, Ms. Apocada asks OHA to reconsider its Decision regarding (iii) because the NNSA employee who processed Ms. Apodaca's FOIA request for information on breaches is a member of the office that resolved the breach described in (iii). Ms. Apodaca knows this because she processed the FOIA request that started the breach. Meanwhile, NNSA employees who processed Ms. Apodaca's FOIA request for information on breaches earlier provided Ms. Apodaca documents regarding the breach described in item (iii). *Id*.

Ms. Apodaca raises two additional issues in her Motion for Reconsideration. She asks OHA to require the NNSA to conduct "additional processing"[3] regarding (i)-(iii) because she is "being treated with less respect and credibility than the other [FOIA requesters]. . . ." Lastly, she states that OHA "did not address that portion of my appeal pertaining to Mr. Dick Speidel not responding to my request. . . . [The NNSA Service Center] has also not responded to me about this." *Id*.

[2] OHA reserves the discretion to accept an untimely appeal to promote administrative efficiency, if, upon consulting the determination issuer, review remains practicable, given the determination issuer's possible file relocations, staffing changes, or other circumstances. *See, e.g.*, *Nevaire S. Rich*, 27 DOE ¶ 89,241 (1999) (Case No. VFA-0523); *Int'l Bhd. of Elec. Workers*, 27 DOE ¶ 80,152 (1998) (Case No. VFA-0421). In case TFA-0229, OHA declined to accept Ms. Apodaca's appeal because NNSA employees who conducted the searches could not recall the search details.

[3] Ms. Apodaca actually asks OHA to "reverse the decision made and remand my appeal in total for additional processing" (emphasis added). Motion for Reconsideration, received Dec. 21, 2007. However, since OHA's Decision already remanded (iv), OHA understands Ms. Apodaca's Motion for Reconsideration to address (i)-(iii).

II. Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g.*, *Dallas D. Register*, 28 DOE ¶ 80,218 (2002). In reviewing such requests for reconsideration, we may look to Subpart E of 10 C.F.R. Part 1003, OHA's general administrative rules regarding modification or rescission of its orders. *See, e.g.*, *Ron Vader*, 23 DOE ¶ 80,183 (1994). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application demonstrates that it is based on significantly changed circumstances, defined in pertinent part as "a substantial change in the facts or circumstances upon which an outstanding . . . order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such an order and the date of the application and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R. §§ 1003.55(b)(1), (b)(2)(iii).

Relevant here, "significantly changed circumstances" includes "the discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based. . . ." 10 C.F.R. § 1003.55(b)(2)(i); *see also Econ. Regulatory Admin.*, 14 DOE ¶ 82,502 (Mar. 10, 1986) (*ERA*) (denying a motion for reconsideration where the appellant provided material information in its motion that it had at the time of appeal).

A FOIA appeal must be in writing, addressed to the OHA director, and OHA must receive the appeal within thirty days after the requester receives the determination. 10 C.F.R. §§ 1004.8(a)-(c).

OHA addresses in turn the issues that Ms. Apodaca raises in her Motion. First, OHA appreciates that Ms. Apodaca contacted the NNSA to resolve her concerns informally. However, that does not save her appeal from being untimely. The regulations required her to submit her appeal within thirty days of receiving the determination. The regulations simply do not allow for the flexibility that Ms. Apodaca seeks. Even if they did allow for that flexibility, Ms. Apodaca's Aug. 31, 2007 e-mail speaks to (iii) and (iv). Ms. Apodaca's appeal regarding (i) and (ii) was denied because her appeal was untimely. The NNSA's search regarding (iii) was upheld on appeal, and OHA remanded the case to the NNSA so that it could conduct a search regarding (iv). Therefore, Ms. Apodaca does not present a material fact that shows significantly changed circumstances that can lead us to modify our Decision that her appeal regarding (i) and (ii) was untimely.

Next, Ms. Apodaca asks OHA to modify or rescind its Decision that the NNSA's search regarding (iii) was adequate. Ms. Apodaca states that the NNSA employees who processed Ms. Apodaca's FOIA request for information on breaches earlier provided Ms. Apodaca documents regarding the breach described in (iii). However, following *ERA*, because Ms. Apodaca knew this fact but did not present it to OHA at the time of her appeal, this fact is not a basis for OHA to reconsider its Decision.

Ms. Apodaca also asks OHA to remand portions of her case "in total for additional processing" because she is "being treated with less respect and credibility than other [FOIA requesters]. . . ." However, this is not a basis upon which OHA may grant Ms. Apodaca's Motion for Reconsideration.

Lastly, Ms. Apodaca states that OHA and the NNSA Service Center failed to address the portion of her appeal pertaining to Mr. Speidel not responding to her FOIA request. 10 C.F.R. Part 1004 does not allow OHA to review the timeliness of the determination issuer's response. If Ms. Apodaca properly submitted a FOIA request to an authorizing official who did not respond within the statutory deadline, she has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

It Is Therefore Ordered That:

(1) The Motion for Reconsideration that Ms. Apodaca filed on December 21, 2007, OHA Case No. TFA-0237, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred L. Brown
Associate Director
Office of Hearings and Appeals

Date: January 28, 2008

February 1, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mary B. Guillory
Date of Filing:	January 3, 2008
Case Number:	TFA-0238

On January 3, 2008, Mary B. Guillory (Ms. Guillory) filed an Appeal from a determination issued to her by the Department of Energy's Office of Fossil Energy (FE). In that determination, FE withheld documents in response to a request for information that Ms. Guillory filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require FE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On September 17, 2007, Ms. Guillory filed a FOIA request with DOE's Headquarters FOIA Office (DOE/FOI) seeking documents relating to an Office of Inspector General's (IG) investigation case file. *See* Electronic Mail Message from Mary Guillory to DOE (September 17, 2007) (FOIA Request). Specifically, Ms. Guillory requested a DOE IG's referral memorandum sent to the program officer and the program officer's response. *Id.* In a letter dated September 18, 2007, the Director of the DOE/FOI informed Ms. Guillory that her request was being forwarded to IG and FE because any documents responsive to her request, if they existed, would fall under the jurisdiction of those offices.[1]

[1] FE forwarded Ms. Guillory's FOIA request to the National Energy Technology Laboratory (NETL) to determine if it had responsive documents within its records. NETL conducted a search of its records and determined that it had no documents responsive to Ms. Guillory's request. In response to this Appeal, however, NETL informed us that it conducted an additional search of its records. *See* Electronic Mail Message from Thomas Russial, NETL to Avery Webster, OHA (January 25, 2008). NETL discovered a draft report from Penn State University under its purchase order from NETL which relates peripherally to the subject matter of Ms. Guillory's request. Although this document is marked "draft", it was accepted by DOE as the final report. While it may not be responsive to Ms. Guillory's request, NETL has agreed to provide Ms. Guillory with a copy of this document.

FE conducted a search of its records and located one responsive document. In its determination letter dated December 13, 2007, FE withheld the document in its entirety under the deliberative process privilege of Exemption 5, claiming that the responsive material is predecisional and deliberative because it sets forth opinions and recommendations concerning an IG investigation. *See* Letter from FE to Mary Guillory, December 13, 2007 (Determination Letter).

On January 3, 2008, Ms. Guillory filed the present Appeal[2] with the Office of Hearings and Appeals (OHA). *See* Letter from Mary Guillory to OHA (January 3, 2008) (Appeal Letter). In her Appeal, Ms. Guillory challenges FE's determination and asserts that material was improperly withheld under Exemption 5 of the FOIA.[3] *Id.* For this reason, Ms. Guillory requests that OHA direct FE to release the requested information.[4]

II. Analysis

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from Ms. Guillory, FE relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising

[2] The determination issued by the Office of Inspector General is not the subject of this Appeal.

[3] On Appeal, Ms. Guillory requests additional information that she did not request in her FOIA request. Specifically, she requests information in DOE's possession "detailing the kind of mercury and [providing] an exact list of the materials, especially the toxins and hazardous materials and ph that was conducted or contracted out by PSU and DOE labs." Under the FOIA, agencies are required only to release non-exempt documents that are responsive to a request for information. If Ms. Guillory seeks additional information, she must file a new FOIA request requesting documents that may provide this information.

[4] Ms. Guillory also argues that the information should be provided to her pursuant to OSHA regulations. However, OHA's jurisdiction is limited to deciding whether DOE properly withheld the documents under the FOIA.

part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested documents at issue, we have concluded that the determination made by FE in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Ms. Guillory is a program office's response to an IG inquiry and consists of comments, recommendations and opinions. The comments, recommendations and opinions contained in the memorandum are clearly predecisional and deliberative. The memorandum was drafted to assist the IG in developing a policy determination regarding the validity of Ms. Guillory's complaint of alleged exposure to toxic material. The memorandum was generated prior to any finding concerning the allegations Ms. Guillory raised in the investigation. In addition, the document reflects the opinions and recommendations of the investigator and other individuals regarding an agency investigation. These comments, recommendations and opinions were subject to further agency review and do not represent the final agency position. Accordingly, we hold that the comments, recommendations and opinions withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

B. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). In the case at hand, the majority of the material withheld under Exemption 5 is nonfactual in nature and is composed of the preliminary opinions of the individuals concerned as to the validity of the allegations or to the future course of the investigation. Any factual information contained in this document is so intertwined as to make segregation virtually impossible.

C. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue,

which consist of comments, opinions and recommendations provided to the IG during the course of an internal investigation. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080).

III. Conclusion

Given the facts presented to us, we find that FE properly withheld the responsive document pursuant to the deliberative process privilege of Exemption 5. Accordingly, Ms. Guillory's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mary B. Guillory, OHA Case No. TFA-0238, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 1, 2008

February 5, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: FOIA Group, Inc.

Date of Filing: December 21, 2007

Case Number: TFA-0239

On December 21, 2007, FOIA Group, Inc. (FG) filed an appeal from a determination issued to it on November 29, 2007, by the Department of Energy's (DOE) Office of Headquarters Procurement Services (HPS). In that determination, HPS responded to a request for documents that FG submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. HPS identified a number of documents responsive to FG's request. Some of those documents were released in their entirety and, pursuant to Exemption 4 of the FOIA, others were released with some deletions. FG has challenged the withholding of information under Exemption 4. This appeal, if granted, would require HPS to release the withheld information to FG.

I. Background

FG requested copies of various documents relating to Task Order DE-AT01-03IM0002, including the contract, all modifications that changed the statement of work associated with this task order, all of the recent monthly and yearly reports related to this order and the last three award fee letters.[1] *See* November 29, 2007 Determination Letter from HPS to Jeff Stachewicz, FG.

HPS identified several documents responsive to FG's request. Of those documents, a number were released in their entirety. However, in the remaining documents, award fee scores, award fee amounts, award fee percentages, discount terms, labor rates, discount hours, dollar amounts of individual labor elements, subcontractor names, a key employee name, the ceiling price, the government site discount percentage and all references to a particular RSIS methodology used in the contract were withheld. The documents from which this information was withheld consist of three letters to RSIS from the DOE's Office of the Associate Chief Information Officer, dated

[1] Task Order DE-AT01-03IM0002 is a contract with RS Information Systems, Inc. (RSIS) to provide Information Systems Engineering services to the DOE.

April 5, 2005, December 22, 2006 and December 14, 2005 (Letters), along with a document entitled "U.S. Department of Energy Order for Supplies and Services" (contract).

HPS stated in its November 29, 2007 determination letter that the information was withheld pursuant to Exemption 4 of the FOIA. The determination letter explained that the withheld information was commercial or financial information related to RSIS business activities. Further, HPS explained that release of this information would give RSIS' competitors an unfair advantage in future competitions for business by revealing the resources available to RSIS and by revealing RSIS strategy in constructing bids for future solicitations. HPS also asserted in the determination letter that Exemption 4 protects the interests of both the government and the submitters of voluntary information since it encourages submitters to voluntarily furnish useful and reliable commercial information to the government without fear of its disclosure.

FG challenged HPS's withholding of information under Exemption 4. Letter from Jeff Stachewicz, FG, to OHA (December 21, 2007) (Appeal). FG argues that HPS' reasons for denial are "illogical" under the Federal Acquisition Regulations (FAR) and the Competition in Contracting Act (CICA) and would defeat the underlying principles of those enactments. Specifically, FG argues that allowing RSIS to keep the withheld information to itself would in fact disadvantage its competitors in future competitions since RSIS, and not its competitors, would already know a winning combination of financial and other information. FG also challenges HPS's characterization of RSIS' information as being "voluntarily" submitted because, in negotiated procurement, submissions are in fact mandatory.

II. Analysis

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

As discussed below, we find that almost all of the information withheld by HPS under Exemption 4 was properly withheld. FG's argument concerning the general intent of the FAR and CICA do not supersede the FOIA statute and the associated case law that has developed interpreting the FOIA. The FAR itself expressly prohibits the release of an offeror's "cost breakdown, profit, overhead rates, trade secrets . . . or other confidential business information be disclosed to any other offeror." 48 C.F.R. § 15.503(b)(1)(v). Further, the CICA, 41 U.S.C. § 453, has no explicit provision requiring disclosure of winning offers. With regard to FG's

argument as to whether the information was voluntarily submitted, as explained below, the fact that the withheld information was, in fact, required to be supplied to the government does not necessarily defeat Exemption 4 protection for such documents.

A. Information Withheld in the Contract

With regard to the information withheld in the contract, RSIS was required by DOE to submit the information in question. *See* Memorandum of Conversation between Craig Ashline, Frederick Dann, HPS and Richard Cronin, OHA (January 17, 2008). Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper with regard to the information withheld in the contract, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be "commercial or financial."[2] The information submitted by RSIS in the contract, i.e. award fee percentages, discount terms, labor rates, discount hours, dollar amounts of individual labor elements, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power CHPS*, 28 DOE ¶ 80,105 (July 31, 2000) (Case No. VFA-0591). All of the information withheld in the contract came from RSIS, a corporation.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "privileged" or "confidential." This case concerns "confidential" information. Withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE's ability to obtain similar information in the future.

After reviewing the information in question, we conclude that virtually all of the information is confidential because release of the information could substantially harm RSIS' competitive position. Disclosure of the information could give competitors insight into RSIS' estimating processes, rate development methods, labor pricing, and procurement processes as well as its strategy regarding level of effort in various contract tasks. Disclosure of the key employee's identity could allow competitors to try to hire the person away from RSIS as well as give competitors insight as to the skills RSIS deemed necessary to fulfill the contract. Disclosure of the award fee percentage and the government site discount agreed to by RSIS could enable other competitors to gain an unfair advantage in future government contract solicitations. In sum, almost all of this information could be used by competitors to undercut RSIS' position to obtain future contracts. Nevertheless, the amount of the total ceiling price (in each of the Attachment J-

[2] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

8 tables) does not appear to be withholdable since release of this figure would reveal nothing as to the individual price elements that make up this sum. We will remand this matter to HPS to either release the total ceiling price for each of the Attachment J-8 tables or issue another determination letter to FG justifying the continued withholding of the information under the FOIA.

B. Information Withheld in the Letters

In the Letters, information such as DOE Contract Performance Evaluation Committee scores regarding RSIS' contract performance, numeric statistics related to RSIS' performance of the contract and the name and a description of an RSIS methodology used in the performance of the contract, were withheld under Exemption 4.

As an initial matter, we find that the withheld scores and statistics, such as number of hours worked, percentage change of hours, RSIS' DOE contact performance scores rating Quality, Timeliness and Cost and the amount of RSIS' award fee for a particular period originated with the DOE. Consequently, such information cannot be said to have been obtained from a "person" and thus cannot be protected under Exemption 4. Consequently we will remand this matter back to HPS. On remand, HPS may choose to release the RSIS scores and contract statistics in these letters or issue another determination letter withholding this information under another FOIA exemption.

With regard to the withheld name and description of the RSIS methodology used in its performance of the contract, we find that this information originated with RSIS and thus, the information for Exemption 4 purposes was obtained from a person. Because the contract was completed several years ago, HPS was not able to inform us whether the RSIS methodology was voluntarily submitted or was submitted as a requirement of the contract and thus involuntarily submitted. We need not make a finding on this issue because even under the stricter "involuntary submitted" standard, this information would be properly withheld. Specifically, the description of the methodology is clearly commercial information. Release of the description of the methodology could significantly harm RSIS' competitive position by allowing competitors to obtain a vital tool RSIS used to fulfill the contract. Consequently, this information was properly withheld under Exemption 4.

It is not immediately apparent, however, that release of the name of the methodology could cause competitive harm to RSIS. The name itself only very generally alludes to the technique used in the methodology. On remand, HPS should either release the name of the methodology or, if it seeks to withhold the name under Exemption 4, determine whether the name of the RSIS methodology was either voluntarily or involuntarily submitted to HPS. If the name was voluntarily submitted, it may withhold the name under Exemption 4 if the name is such information that the submitter would not customarily release to the public. If the name was involuntarily submitted, and HPS seeks to withhold the name under Exemption 4, it should provide a more detailed explanation of the harm to RSIS that would result from release of the name, as required by *National Parks*. If HPS determines that Exemption 4 does not apply, it should release the name or justify withholding the name under another exemption in its new determination letter to the requester.

C. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (April 9, 1999) (Case No. VFA-0484).

D. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). We find that HPS complied with the FOIA by releasing to FG virtually all portions of the documents not withholdable under Exemption 4, with the possible exception of the small portion of the documents to be reexamined on remand.

It Is Therefore Ordered That:

(1) The Appeal filed on December 21, 2007, by FOIA Group, Inc., OHA Case No. TFA-0239, is hereby granted in part.

(2) This matter is hereby remanded to the Office of Headquarters Procurement Services, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 5, 2008

February 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Marc A. Wendling
Date of Filing:	January 8, 2008
Case Number:	TFA-0241

This Decision concerns an Appeal that was filed by Bruce A. Spanner, on behalf of his client Marc A. Wendling, from a determination issued to him by the Richland Operations Office (Richland) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

I. Background

In an October 15, 2007 request to Richland, Mr. Spanner sought, "Documents submitted by or on behalf of Eberline Services, and all responses or other documents prepared by or at the request of the Department of Energy or any of its contractors thereto concerning the denial of access to Hanford to Marc Wendling." Electronic FOIA Request Confirmation, Request Number 20071015012803 (October 15, 2007). In a subsequent telephone conversation with Richland, Mr. Spanner requested a copy of Mr. Wendling's DOE Personnel Security File (PSF). Appeal at 1.

On December 3, 2007, Richland issued a determination letter to Mr. Spanner, with which it provided a copy of those documents in Mr. Wendling's PSF that originated within DOE. Letter from Dorothy Riehle, Privacy Act Officer, Richland, to Bruce A. Spanner, Miller, Mertens, Spanner & Comfort, PLLC (December 3, 2007) (Determination Letter) at 1.[1] Richland also stated that "records in the possession of Eberline Services, Inc., a [DOE subcontractor], are not considered agency records and therefore, not subject to FOIA or the [Privacy Act]." Determination Letter at 1.

[1] In its determination, Richland informed Mr. Spanner that it could not release documents in Mr. Wendling's PSF that were created by the U.S. Office of Personnel Management (OPM). Determination Letter at 1. Richland therefore forwarded a copy of the request to OPM, so that it could respond to Mr. Spanner directly. *Id.*

In his appeal, Mr. Spanner states,

> Mr. Wendling was denied access to Hanford under the security protocols administered by the [DOE]. . . . However, and inexplicably, Mr. Wendling's [PSF] contains no reference at all to the denial of access or to the reversal thereof. I have been advised that a denial of access is initiated by correspondence from a contractor to the [DOE]. I would have expected this letter and all other related correspondence to have been produced by the [DOE].

Appeal at 1.

Below, we address the two issues pertinent to the present Appeal. The first issue is whether Richland performed an adequate search for documents responsive to Mr. Spanner's request. The second is whether certain of the documents located by Richland are subject to release under the FOIA statute, the Privacy Act, or DOE regulations.

II. Analysis

A. Adequacy of Richland's Search for Responsive Documents

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted).[2] "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).

In reviewing this Appeal, we contacted Richland to ascertain the scope of its search for responsive documents. Richland informed us that it searched its Security and Emergency Services Division. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 9, 2008). That search located Mr. Wendling's PSF. *Id.* Richland believed that other responsive documents might be in the possession of Mr. Wendling's former employer, Eberline Services Hanford, Inc. (ESHI), a DOE subcontractor. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 17, 2008). However, Richland determined that the only responsive documents in the possession of ESHI were in Mr. Wendling's personnel file, and therefore were not subject to release under the FOIA, the Privacy Act, or the DOE FOIA regulations. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 9, 2008). We address the determination as to the status of the documents in Mr. Wendling's personnel file separately in section II.B below.

[2] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g.*, Carla Mink, 28 DOE ¶ 80,251 (November 27, 2002) (Case No. VFA-0763).

We find that Richland's search for documents responsive to Mr. Wendling's request was reasonably calculated to uncover the documents he was seeking, in that Richland conducted its search in the locations where documents responsive to the request would most likely be found, based on the information available to Richland at the time of the request. We note here that, with the present Appeal, Mr. Spanner provided a document that memorializes the rescission of "the access denial on Marc Wendling." Appeal at 3. When we provided a copy of this document to Richland with the Appeal, Richland identified the document as originating from Fluor Hanford, Inc. (FHI), a DOE contractor that manages activities at the Hanford Site. Based on this document, Richland was able to locate additional responsive documents in the files of FHI. On January 17, 2008, Richland provided a copy of these documents to our office and to Mr. Spanner.

From the initial request submitted by Mr. Spanner, the circumstances of the denial of access to Mr. Wendling were not apparent. Therefore it would be reasonable for Richland to have assumed that Mr. Spanner was seeking personnel security records regarding Mr. Wendling, which would be maintained either by Richland's Security and Emergency Services Division, or by Mr. Wendling's employer, ESHI. Not until Richland received the additional document provided with the appeal did it became apparent that this was an issue involving physical security at the Hanford site, and that such documents would be in the possession of FHI. Thus, we conclude that Richland's search was adequate under the FOIA and Privacy Act.

B. Whether Documents in Mr. Wendling's ESHI Personnel File are Subject to Release Under the FOIA, Privacy Act, or DOE Regulations

The FOIA generally requires that documents held by federal agencies be released to the public on request. The Act does not, however, specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Id.* at 144-45. This is the standard we have adopted in prior cases concerning this issue. *See, e.g., Ed Aguilar*, 28 DOE ¶ 80,252 (March 16, 2006) (Case No. TFA-0148). Under the FOIA, "agency" means any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f).

The Privacy Act generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The Privacy Act adopts the FOIA definition of "agency" set forth in the preceding paragraph. 5 U.S.C. § 552a(a)(1).

In the present case, documents responsive to the request in Mr. Wendling's ESHI personnel file were neither created by the DOE nor are in the possession or control of the DOE. Moreover, Mr. Spanner

does not contend, nor do we find, that ESHI, a privately-owned and operated DOE subcontractor, is an "agency." Consequently, these documents would not be an agency record for purposes of the FOIA or part of an agency system of records for purposes of the Privacy Act.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). The contractual provision governing ownership of records is found in the Department of Energy Acquisition Regulations at 48 C.F.R. § 970.5204-3, "Access to and ownership of records." Paragraph (a) of the contract clause required by this sections states:

> (a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

48 C.F.R. § 970.5204-3(a). Paragraph (b) states, in pertinent part:

> (b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
> . . .
> (1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

48 C.F.R. § 970.5204-3(b).

The documents provided to the requester and to our office subsequent to the filing of the present Appeal refer to a dispute between Mr. Wendling and his former employer, ESHI, as the basis for his denial of access to the Hanford site. Based on this information, we agree with Richland that documents in Mr. Wendling's ESHI personnel file related to his denial of access would fall under the purview of the "Employment-related records" paragraph of the ownership of records clause, and therefore such documents would not be the property of the Government. Therefore, these documents

would not be subject to release under the FOIA, Privacy Act or the relevant DOE regulations.[3] We will therefore deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Marc A. Wendling, OHA Case Number TFA-0241, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 5 U.S.C. § 552a(g)(1) (Privacy Act). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 6, 2008

[3] Although we find in this decision that the responsive documents in the custody of ESHI are contractor-owned records, we make no finding here as to whether the responsive documents released by FHI, discussed in section II.A above, are government-owned or contractor-owned records under the contract between DOE and FHI. Because the responsive documents in the custody of FHI were released, the issue of their status under the contract between DOE and FHI is not before us.

February 22, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marilyn K. Lingle

Date of Filing: January 15, 2008

Case Number: TFA-0242

On January 15, 2008, Marilyn K. Lingle filed an Appeal from a final determination issued to her by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge withheld documents in response to a request for information that Ms. Lingle filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oak Ridge to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

By e-mail dated June 29, 2007, Ms. Lingle submitted a FOIA request to Oak Ridge seeking: (1) documents located within a Bechtel Jacobs Company (BJC) dosimetry records book indicating that a request for a bioassay sample was issued to herself and a co-worker (on or about the week ending June 4, 2005) and (2) any documents pertaining to the reason for her co-worker's termination from DOE.[1] *See* E-mail from Marilyn Lingle to Oak Ridge (June 29, 2007) (FOIA Request).

[1] In her FOIA Request, Ms. Lingle mentions that the Safety and Ecology Corporation (SEC), a sub-contractor of BJC, was given a "Red Letter" from BJC stating that she was not qualified in her new assignment as an Industrial Hygiene Technician in December 2005. *See* FOIA Request. In her Appeal, Ms. Lingle asserts that she did not receive a copy of the Red Letter, nor did she receive an explanation in the Determination Letter as to why this information was not included. *See* Appeal Letter.

Oak Ridge conducted a search of its records for responsive documents. Oak Ridge located and released a set of bioassay log sheets and similar files with deletions of the names and badge numbers of other individuals pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). *See* Letter from Amy Rothrock, Oak Ridge, to Marilyn Lingle (December 18, 2007) (Determination Letter).

On January 15, 2008, Ms. Lingle filed this Appeal[2] challenging Oak Ridge's decision to withhold information pursuant to Exemption 6. *See* Letter from Marilyn K. Lingle to OHA (received January 15, 2008) (Appeal Letter). In her Appeal, Ms. Lingle disputes the position taken by Oak Ridge that the release of names and identifiers of other employees when connected with their personal exposure data and other vital statistics is a serious invasion of privacy of those individuals and is not in the public interest. *Id.* Ms. Lingle argues that, "It is general knowledge that employees performing work in any radiologically controlled environment are on a bio-assay program… [and] the fact that an employee is…asked to submit to a sample should not be considered a serious invasion of privacy…" Ms. Lingle asserts that she requested the one-page computer-generated print-out that states the names of individuals who were required to submit to a bioassay in the specified time frame, not the set of bioassay log sheets that were released.[3] *Id*. Ms. Lingle continues that she "is not requesting the results of the bioassay" and maintains that "the information [she is] requesting is in no way connected with the personal exposure data of the named individuals." *Id.*

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

In reviewing this matter, we contacted Oak Ridge and learned that it did not construe the mere mention of the Red Letter as a request for that document, but rather as information provided in support of her other requests for information. *See* Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and Avery Webster, OHA (dated February 19, 2008). Therefore, Oak Ridge did not perform a search for the Red Letter. Ms. Lingle may consider filing a new FOIA Request with Oak Ridge for the document.

[2] Ms. Lingle is not contesting the adequacy of search as it relates to item two of her FOIA Request. *See* Appeal Letter.

[3] With regard to the one-page computer-generated document that Ms. Lingle requested, Oak Ridge conducted a search of all agency records pertaining to DOE and BJC contractor oversight of the dosimetry monitoring program for projects under the control of BJC. *See* Electronic Mail Message from Amy Rothrock, Oak Ridge, to Avery Webster, OHA, dated January 25, 2008 (January 25, 2008 Email). The search produced 79 pages of various types of radiation control operational and health physics department documents, including Ms. Lingle's personnel radiation exposure record file (DOE-33). *See* Electronic Mail Message from Amy Rothrock, Oak Ridge, to Avery Webster, OHA, dated January 18, 2008. Oak Ridge provided Ms. Lingle with all 79 pages of information it located in its search. *See* January 25, 2008 Email. Based on the results of the search, Oak Ridge concluded that no one-page computer-generated document from June 2005 containing Ms. Lingle's name and that of her co-workers asked to submit to a bioassay exists. *Id*.

5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte, Beard and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499).[4]

1. The Privacy Interest

Oak Ridge determined that the release of names and identifiers of other employees when connected with their personal exposure data and other vital statistics is a serious invasion of privacy. In her Appeal, Ms. Lingle argues that it is general knowledge that employees who perform work in any radiologically-controlled environment are on a bioassay program, and therefore, the fact that an employee is asked to submit to a sample is not considered a serious invasion of privacy.

BJC is the environmental management contractor for the DOE's Oak Ridge Office. Employees of BJC are contractor employees, not federal government employees, whose names, job titles, work stations and salaries must be released under the FOIA (see 5 C.F.R. § 293.311). Thus, BJC employees have a reasonable expectation of privacy concerning their identity.

We agree with Oak Ridge that a substantial privacy interest exists in the identity of the contractor employee. *See Citizen Action New Mexico*, 29 DOE ¶ 80,311 (October 19, 2007) (Case No. TFA-0224). The courts have also reached this conclusion. *See Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Applying these standards to the facts of this case, we believe that the release of the individual's names and other identifiers (i.e. corresponding badge numbers) would reveal personal information or records about the individual. Therefore, we find that there is a substantial privacy interest in the identity of contractor employees.

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

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *see Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (August 5, 1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)).

In determining whether any public interest is served by a requested disclosure, an agency should not consider "the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. The Court held that rather than turn on a requester's particular purpose, circumstances, or proposed use, such determinations must turn on the nature of the requested document and the relationship to the basic purpose of the FOIA. *Id.* at 772. Furthermore, the Court delimited the scope of the public interest to be considered under the FOIA's privacy exemptions to include the "core purpose of the FOIA" or "the kind of public interest for which Congress enacted the FOIA." *Id.*

We find that there is a minimal public interest, if any, in release of the withheld information. Ms. Lingle has not demonstrated how the disclosure of the names and badge numbers of the non-federal employees will reveal anything of importance regarding the DOE or how it would serve the public interest. At best, Ms. Lingle has articulated a personal interest in obtaining the withheld information. Further, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with Oak Ridge and find that there is a minimal public interest in the disclosure of the names and badge numbers withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a significant privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names and badge numbers of the contractor employees.

It is Ms. Lingle's contention that no privacy interest exists where an employee is asked to submit to a bioassay sample, simply because it is general knowledge that employees who perform work in radiologically-controlled environments participate in bioassay programs. We disagree. The fact that an event or occurrence is not wholly private does not mean that the individual has no interest in limiting disclosure or dissemination of the information. *See Reporters Committee*, 489 U.S. at 770. Further, the fact that certain employees are asked to submit to a bioassay program is not, in itself, the kind of public interest for which Congress enacted the FOIA. Therefore, we find that the public interest in disclosure of the names and badge numbers

withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the named individuals.

III. Conclusion

Based on the foregoing information, we find that Oak Ridge properly withheld the names and badge numbers of the individuals pursuant to Exemption 6 of the FOIA. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Marilyn K. Lingle on January 15, 2008, Case No. TFA-0242, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 22, 2008

March 5, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	EverNu Technology, LLC
Date of Filing:	January 18, 2008
Case Number:	TFA-0243

On January 18, 2008, EverNu Technology (EverNu) filed an Appeal from a determination issued to it by the Department of Energy's Office of the General Counsel (OGC). In that determination, OGC withheld information in response to a request for information that EverNu filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OGC to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

I. Background

On October 3, 2007, EverNu sent a FOIA request to the FOIA Office at DOE Headquarters, for a memorandum dated on or about February 17, 2006, regarding EverNu Technology, LLC. E-mail from EverNu Technology to FOIA Officer, Department of Energy (October 3, 2007) (FOIA Request). By letter dated October 5, 2007, the Director of DOE's Headquarters FOIA Office (DOE/FOI) informed EverNu that the request was assigned to the Office of Energy Efficiency and Renewable Energy (EERE). EverNu contacted DOE/FOI to inform them that the responsive document was located in the Office of the General Counsel (OGC). DOE/FOI re-assigned the request to OGC, the office most likely to have the responsive document.

OGC conducted a search of its records and located a document responsive to EverNu's request. In its Determination Letter, OGC withheld portions of the document claiming that the responsive material was shielded under the deliberative process privilege of Exemption 5. Letter from OGC to EverNu, December 7, 2007 (Determination Letter). In withholding the information, OGC stated that the information withheld in the responsive document consists of deliberative material reflecting the process of formulating DOE's response to EverNu's September 21, 2005, and September 23, 2005, requests for assistance. *Id.*

On January 18, 2008, EverNu filed this Appeal of OGC's decision to withhold information under Exemption 5, arguing that the decision is untimely. Appeal Letter at 1-2. EverNu further argues that the DOE 1) failed to reasonably segregate the scientific material contained in the responsive document and 2) waived its right to claim the deliberative process privilege under Exemption 5 of the FOIA because the responsive material has been publicly disseminated. *Id*. at 2-3. We will address each of these issues in our discussion.

II. Analysis

A. OGC Determination Letter

In its Appeal, EverNu argues that OGC has failed to respond to its October 3, 2007, FOIA request in a timely manner[1] or provide an explanation for the delay. *Id*. at 1-2. EverNu argues that "[t]he FOIA permits an agency to extend the time limits up to 10 days in unusual circumstances....[and] [t]he agency [must] notify the requester whenever an extension is invoked..." *Id*. at 2. Further, EverNu maintains that it was never notified that unusual circumstances prevented the DOE from complying with the prescribed time limit. *Id.* Therefore, EverNu requests the release of all redacted portions of responsive document. *Id*. at 3.

This portion of EverNu's Appeal must be dismissed because the Office of Hearings and Appeals (OHA) does not have the jurisdiction over matters that relate to whether the agency has responded to a FOIA request in a timely manner. *See R.E.V. Engineering Services*, 28 DOE ¶ 80,180 at 80,678 (July 20, 2001) (Case No. VFA-0680) (dismissing appeal where no jurisdiction exists); *see also R.E.V. Engineering Services*, 28 DOE ¶ 80,136 at 80,580 (January 10, 2001) (Case No. VFA-0636).[2] Section 1004.8(a) of the DOE regulations grants OHA jurisdiction to consider FOIA appeals when: 1) the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request or 2) when the Freedom of Information Officer has denied a request for waiver of fees. 10 C.F.R. § 1004.8(a).

Section 1004.8(a) confers jurisdiction on OHA when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. *See Suffolk County*, 17 DOE ¶ 80,111 at 80,524 (April 8, 1988) (Case Nos. KFA-0168 and KFA-0169). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when an appeal is based on the agency's failure to process a FOIA within the time specified by law. *See Tulsa Tribune*, 11 DOE ¶ 80,161 at 80,741 (February 29, 1984) (Case No. HFA-0207) (no administrative remedy for agency's non-compliance with a timeliness requirement). Accordingly, this part of EverNu's Appeal is dismissed.

[1] In response to EverNu's October 3, 2007, FOIA Request, OGC issued a Determination Letter on December 7, 2007, 44 days (excluding weekends and holidays) after the request was received.

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

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from EverNu, OGC relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested document at issue, we have concluded that OGC's determination in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from EverNu is a memorandum containing comments and opinions drafted by a manager at EERE in response to an inquiry from an OGC attorney. The comments and opinions contained in the memorandum are clearly predecisional and deliberative. The memorandum was drafted to assist OGC in formulating the DOE's response to EverNu's September 21, 2005, and September 23, 2005, requests for assistance. In addition, the document reflects the opinion of a DOE manager regarding a proposed agency position. These comments and opinions were subject to further agency review and do not represent the final agency decision.

EverNu further argues that "[p]rotection for the decision-making process is appropriate only for the period while decisions are being made…[and that] [o]nce a policy is adopted, the public has a greater interest in knowing the basis for the decision." Appeal Letter at 3. We agree. However, in this case, protection under the deliberative process privilege of Exemption 5 is not lost because the DOE has neither expressly chosen to adopt the memorandum nor incorporated it by reference into a final agency determination. *See Ashfar v. Dep't of State*, 702 F.2d 1125 at 1140 (finding no protection when recommendation expressly adopted in post-decisional memorandum); *see also Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of an "underlying memorandum" that was "expressly relied [up]on in a final agency . . . document").

Accordingly, we hold that the comments and opinions withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

C. Waiver

In its Appeal, EverNu suggests that even if the document is shielded by Exemption 5 of the FOIA, the DOE waived its right to withhold the responsive material because it previously disclosed the information to the public. Appeal at 3. EverNu's claim is based on the principle that if an agency has previously disclosed certain data, it may have waived its ability to later withhold the data under a FOIA exemption. *Carson v. Dep't of Justice*, 631 F.2d 1008, 1015 n.30 (D.C. Cir. 1980). Determining whether such a waiver has been made requires a careful analysis of "the circumstances of prior disclosure and . . . the particular exemptions claimed." *Carson*, 631 F.2d at 1015 n.30.

In support of its argument, EverNu provided OHA with an unsigned version of the document it is seeking. This document appears to be a final draft of the responsive memorandum. In providing this information, EverNu has established that the responsive information is duplicative of the information that exists in the public domain. *Ashfar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (the burden is on the requester to establish that the requested information is duplicative of the disclosed information).

Courts have routinely held that an agency has waived is protection under a FOIA exemption where there has been an official disclosure or direct acknowledgment by authorized government officials. Thus, waiver of the privilege to withhold information under the FOIA depends upon prior official release of the information or disclosure under circumstances in which an authorized government official allowed the information to be made public. *See Wolf v. CIA*, 473 F. 3d 370, 379-380 (D.C. Cir. 2007) (holding that an agency waived its ability to refuse to confirm or deny the existence of responsive records pertaining to an individual because a top agency official had discussed that individual during congressional testimony); *see also Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver).

OGC has informed OHA that the responsive memorandum has never been officially disclosed to the public. *See* Memorandum of Telephone Conversation between Jocelyn Richards, Attorney-Adviser, OGC, and Avery Webster, Attorney-Examiner, OHA (dated February 21, 2008).

Based on the foregoing, we find that the DOE has not authorized the release of the responsive material to the public and, therefore, no waiver of protection under the deliberative process privilege of Exemption 5 has occurred.

D. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060).

In the Appeal Letter, EverNu argues:

> [C]ourts routinely consider scientific deliberation to be objective interpretations of technical data[] [f]inding that disclosure of scientific deliberations is not equivalent to revealing an agency's deliberative processes regarding policy matters . . . and that purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended."

(*quoting Ethyl Corp. v. EPA*, 478 F.2d 50, 48-50 (D.C. Cir. 1983)).

Exemption 5 covers scientific reports that constitute the interpretation of technical data, to the extent that the "opinion of an expert reflects the deliberative process of decision or policy making." *See Parke, Davis & Co. v. Califano*, 623 F.2d 1 at 6 (6th Cir. 1980) (protecting opinions and objective evaluations of scientists engaged in interpreting technical and scientific data where the opinion reflects the deliberative process of decision or policy making).

In the case at hand, the majority of the material withheld under Exemption 5 is non-factual in nature and is composed of the preliminary opinions of a DOE manager as to the validity of the allegations EverNu raised in its earlier request for assistance. Further, the scientific information contained in this document is presented by the DOE manager in support of his opinion. Notwithstanding the holding in *Ethyl Corp.*, the factual information, including scientific analysis, contained in the responsive document is so intertwined with the DOE manager's opinion as to make any segregation virtually impossible. *See Lead Industries Ass'n. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *see also Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (March 2, 2001) (VFA-0650).

E. Public Interest Determination

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

In this case, no public interest would be served by release of the withheld material in the document at issue, which consists of comments and opinions provided to the OGC to assist in the process of formulating an agency response. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080).

Based on the foregoing, we have determined that OGC properly withheld the document pursuant to the deliberative process privilege of Exemption 5.

III. Conclusion

As discussed above, EverNu's claim of an untimely response to its FOIA request is hereby dismissed. In addition, we find that OGC properly withheld the responsive material pursuant to the deliberative process privilege of Exemption 5 of the FOIA. Finally, we find that the prior unauthorized disclosure of responsive information does not constitute a waiver of OGC's application of Exemption 5 in these circumstances. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by EverNu Technology on January 18, 2008, OHA Case No. TFA-0243, is hereby dismissed in part and denied in part.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 5, 2008

February 13, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Glen Bowers
Date of Filing:	January 22, 2008
Case Number:	TFA-0244

On January 22, 2008, Glen Bowers (Bowers) filed an Appeal from a determination issued to him in response to a request for documents concerning his father, John Wyley Bowers, that Bowers submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on December 18, 2007, by the Savannah River Operations Office (SR). This Appeal, if granted, would require that SR perform an additional search for responsive material.

I. Background

Bowers requested employment records for his deceased father, John Wyley Bowers. In his request, Bowers indicated that his father worked with the Department of Defense Union Contractors and the Atomic Energy Commission. Upon receiving Bowers' request, SR expanded its search efforts to include medical and radiation exposure records. SR conducted a search for responsive material, but was unable to locate any employment or radiation exposure records for Mr. John Wyley Bowers. However, SR was able to locate a medical record which it released to Bowers. *See* Determination Letter at 1.

Bowers contends that the search was inadequate. He argues that his father worked for DOE for many years during the 1950s and possibly the 1960s. Bowers provided the name and address of a contractor, Morrison Knudson, that worked at the Savannah River Plant and listed a website "that explains that there was a DOE request for investigation of former workers who were employed at the Savannah River Plant, and could have been exposed to harmful agents." *See* Appeal Letter at 1. In light of this additional information, Bowers asks OHA to direct SR to search again for responsive information related to his father. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United*

States Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted SR to ascertain the scope of the search. Bowers originally submitted his FOIA request to the DOE Headquarters FOIA Office (DOE-HQ). DOE-HQ then transferred his request to the relevant field office for action and a direct response to the requester. Bowers' request was sent to the Washington Savannah River Company (WSRC) for a response. According to SR, WSRC inherited some of the records of its predecessor Management and Operating (M&O) contractor. SR requested that WSRC expand its search efforts to include any medical and radiation exposure records related to Bowers' father. WSRC conducted a search in three of its departments: Personnel Department, Dosimetry Department and Medical Department. *See* SR Response Letter at 1. WSRC's Personnel Department maintains various databases for personnel records, including the Peoplesoft System. The Dosimetry Department maintains the personnel dosimetry folders, microfiche records, archived microfiche rolls, and visitor cards and visitor database on employees. Finally, the Medical Department maintains databases of all medical files and documents for the Savannah River Site, including a database for the Atomic Energy Commission. *Id.* WSRC conducted a search using several search aids including Bowers' father's name and social security number, and was unable to locate the requested employment records. However, WSRC was able to locate one medical record for the time period of June 14, 1952, and July 11 and 12, 1952. *Id.* This document was provided to Bowers. Based on the information above, we find that WSRC has conducted a search reasonably calculated to uncover any records relating to Mr. John Wyley Bowers. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Glen Bowers on January 22, 2008, OHA Case No. TFA-0244, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 13, 2008

March 12, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Western Resource Advocates

Date of Filing: February 12, 2008

Case Number: TFA-0246

This Decision concerns Western Resource Advocates' (WRA) Appeal from a determination that the Department of Energy's (DOE) Western Area Power Administration (WAPA) issued to it on January 30, 2008. In that determination, WAPA denied WRA's fee waiver request in conjunction with a document request WRA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. WAPA denied WRA's fee waiver request because it stated that WRA failed to meet its burden in showing that granting the fee waiver is in the public interest. In its Appeal, WRA asks us to grant it a fee waiver.

I. Background

The Eastern Plains Transmission Project (EPTP) is a construction project for hundreds of miles of power lines over several Great Plains states. The Tri-State Generation and Transmission Association (Tri-State), a WAPA contractor, is one of the EPTP's builders. Memorandum of telephone conversation between Patricia Land, Paralegal Specialist, WAPA, and David M. Petrush, Attorney-Examiner, Office of Hearings and Appeals (OHA), December 20, 2007. WRA filed a FOIA request for numerous records regarding the EPTP. In particular, WRA sought records regarding Tri-State's EPTP "Integrated Resource Plan," WAPA's annual reports to Congress, and correspondence and memoranda on numerous EPTP-related topics. WRA requested that WAPA waive all the fees associated with processing its FOIA request. Request Letter, dated June 29, 2007.

WAPA partially denied WRA's fee waiver request because WRA failed to satisfy Factor B of the public interest fee waiver factors (see factor definitions in the Analysis section, below) because "documents and other information [WRA is] requesting already exists in the public domain. . . ." WAPA estimated that processing WRA's request would cost approximately $80,955.66. Determination Letter, dated November 7, 2007 (italics removed). However, without explanation, WAPA offered to absorb 40% of the processing costs. Letter from WAPA to WRA, dated August 30, 2007.

WRA appealed to OHA, challenging WAPA's partial denial of its fee waiver request. Namely, WRA complained that the "determination . . . [did] not identify which records are in the public domain, nor where they can be found." Also, WRA "appeal[ed] WAPA's failure to provide a rationale that makes sense for its estimated $80,000 cost to provide the requested documents and information." Appeal Letter, dated November 28, 2007.

OHA found that WAPA improperly denied WRA's fee waiver request because it did not explain to WRA where in the public domain its requested documents reside. *Western Resource Advocates*, 30 DOE ¶ _____ (Jan. 11, 2008) (Case No. TFA-0233).[1] Therefore, we granted WRA's Appeal. We remanded the case to WAPA to issue a new determination letter. We required that on remand, WAPA must explain where in the public domain WRA's requested documents reside and if those documents have "met a threshold level of public dissemination," as required by *Campbell v. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) (citation omitted). We said that in the alternative, WAPA may base its new fee waiver determination on analysis considering the DOE's fee waiver factors that it left unaddressed in its initial determination – the commercial interest factors and public interest Factors A, C and D. We did not reach the fee estimation issue.

In response to the remand, WAPA issued a new determination. WAPA did not address the commercial interest fee waiver factors. WAPA conceded that WRA satisfied public interest fee waiver Factor A because the EPTP concerns the government's activities. WAPA stated that WRA did not satisfy public interest fee waiver Factor B because many of the documents it requested are posted on web sites that it listed in its determination and therefore meet a threshold level of public dissemination. Determination Letter, dated January 30, 2008.

WAPA stated WRA is not entitled to a fee waiver for the documents that it requested that are not publicly available because WRA did not satisfy public interest fee waiver Factors C and D. Regarding Factor C, WAPA stated that WRA's intention to "disseminate the requested information through its website, newsletter, public forums, and interaction with government and interested organizations is not significantly different than the efforts WAPA has already accomplished." WAPA also stated that, "[M]aking the information available to anyone who may access it does not demonstrate an increased understanding to the public." WAPA determined that the information WRA requested "is common knowledge among the landowners, residents and the general public affected by the construction of EPTP." Regarding Factor D, WAPA stated, "Information, such as[] routine correspondence, emails, [and] draft documents . . . does not significantly contribute to the public's understanding." Determination Letter, dated January 30, 2008.

WRA filed the present appeal with OHA. Appeal Letter, dated February 11, 2008. WRA narrowed the scope of its request to documents that are not publicly available. WRA also asks us to grant it a fee waiver. *Id.*

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

II. Analysis

"Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed . . . the [FOIA] requires federal agencies to disclose information upon request. . . ." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (citation and quotations omitted).

The FOIA generally requires document requesters to pay for search and duplication costs. *See* 5 U.S.C. § 552(a)(4)(A)(i). However, each agency has promulgated regulations explaining when a requester is entitled[2] to receive documents at no charge or reduced charge. DOE regulations set forth "two basic requirements, both of which must be satisfied before fees will be waived or reduced." 10 C.F.R. § 1004.9(a)(8); *see also* 5 U.S.C. § 552(a)(4)(A)(iii) (providing authorization for DOE's fee waiver regulations). First, a requester must show that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 10 C.F.R. § 1004.9(a)(8)(i) (internal quotations omitted). This is known as the "public interest" requirement. Second, a requester must show that "disclosure of the information is not primarily in the commercial interest of the requester." 10 C.F.R. § 1004.9(a)(8)(ii) (internal quotations omitted). This is known as the "commercial interest" requirement.

The public interest and commercial interest requirements each have non-exclusive factors to show when they are met. A FOIA officer should address the following factors to determine if a requester meets the public interest requirement:

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i)(A)-(D) (internal quotations omitted).

A FOIA officer should address the following factors to determine if a requester meets the commercial interest requirement:

[2] The regulations state, "When these requirements are satisfied . . . the waiver or reduction of a FOIA fee *will be* granted." 10 C.F.R. § 1004.9(a)(8) (emphasis added).

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B) (internal quotations omitted).

"[F]ee waiver requests must be made with 'reasonable specificity' . . . and [be] based on more than 'conclusory allegations.'" *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citations omitted). "Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." *Id.* (citation and quotations omitted). The requester has the burden of satisfying the fee waiver factors. *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citation omitted).

Here, we will address WRA's commercial interest in the documents it requested. Regarding the public interest in disclosure, WAPA conceded that WRA has met Factor A. Therefore, we will address public interest fee waiver Factors B, C and D.

Commercial Interest

The first commercial interest factor requires us to determine if, as a threshold matter, the requester has a commercial interest that disclosure of the requested documents would further. DOE's FOIA regulations do not define "commercial interest." However, the D.C. Circuit has "consistently held" that we should give the word "commercial" its "ordinary meaning." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (applying an "ordinary meaning[]" of the word "commercial" in a FOIA Exemption 4 case); *see also McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (citing *Pub. Citizen Health Research Group* to apply an "ordinary meaning" of the word "commercial" in a FOIA fee waiver case).

Here, WRA has flatly stated that it "will not use the requested information to earn a profit." Letter from WRA to WAPA, dated Aug. 3, 2007. For this reason, WRA does not have a commercial interest in the requested documents, within the ordinary meaning of the word "commercial." Therefore, we find that WRA has carried its burden in showing that it has met the commercial interest requirement.

Public Interest Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See, e.g., James Salsman*, 29 DOE ¶ 80,223 (Sept. 7,

2005) (Case No. TFA-0114) (citation omitted) (stating, "If the information is already publicly available, release . . . would not contribute to public understanding [i.e., release would not have informative value] and a fee waiver may not be appropriate").

Here, WRA has narrowed the scope of its request to documents that are not publicly available. Release of those documents will necessarily contribute to the public understanding of the EPTP. Therefore, we find that WRA has satisfied Factor B.

Public Interest Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of an individual requester or of a narrow segment of interested persons. Thus, the requester must have the intention and ability to disseminate the requested information to the public. *See Roderick Ott*, 26 DOE ¶ 80,187 (May 16, 1997) (Case No. VFA-0288); *James L. Schwab*, 22 DOE ¶ 80,133 (Oct. 17, 1991) (Case No. LFA-0152).

In this case, WRA contends that

> it will share the requested information with its members and members of the public, through regular contact with the public, conservation organizations, and government decision-makers. WRA will also inform the public of the contents of responsive documents through publication of its newsletter and through updates on its website.

Letter from WRA to WAPA, dated Aug. 3, 2007. WAPA says that WRA's dissemination plan "is not significantly different than the efforts WAPA has already accomplished." "Further," WAPA says, "making the information available to anyone who may access it does not demonstrate an increased understanding to the public." WAPA concluded that "the information is available to the public and is common knowledge among the landowners, residents and the general public affected by construction of [the] EPTP." Determination Letter, dated Jan. 30, 2008.

We find that WRA has shown the intention and ability to disseminate the information it requested from WAPA. We have previously found that a requester satisfies Factor C when, as here, it publishes the requested information on its website and works to educate the public through a variety of forums, including public meetings and presentations. *Citizen Action*, 28 DOE ¶ 80,277 (April 1, 2003) (TFA-0016).

We do not agree with WAPA's contention that the information WRA now seeks is common knowledge in the surrounding community. Since WRA is asking for non-public information, we do not see how it can be common knowledge. Even if it were, whether any particular segment of the public already has the requested information is not part of the test for satisfying Factor C, which focuses on whether WRA has the ability and intent to disseminate the requested information to the public at large. Similarly, whether WRA's methods of dissemination overlap with the methods WAPA has used to disseminate the information is also not part of the test for satisfying Factor C. Accordingly, we find that WRA has satisfied Factor C.

Public Interest Factor D

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must likely be enhanced by the disclosure to a significant extent." *Roderick Ott*, 26 DOE ¶ 80,187 (May 16, 1997) (Case No. VFA-0288).

Here, WRA contends that

> the public understanding of interactions between Western, Tri-State and various contractors, consultants and government agencies is not generally understood, and the disclosure of the requested information will help raise this level of understanding. . . . This information has not been disclosed to the public, nor has it been the subject of widespread public debate, personal notice, or public comment. The requested information will clarify previously released public information in that it will inform the public of deliberations and communications that underlie decisions of [WAPA] with respect to energy and resource development. . . . [T]he information is not already publicly available. Correspondence and communications between [WAPA], Tri-state and consultants, contractors and others associated with the EPTP are not maintained in an agency or library or reading room. The contribution to the public understanding from disclosure of the requested documents would thus be significant.

Letter from WRA to WAPA, dated Aug. 3, 2007.

In response, WAPA stated that, "Due to WAPA's and Tri-State's extensive efforts to communicate with the public, [WAPA has] determined that the release of the documents requested by WRA would not contribute to the public understanding. . . . WAPA has therefore found that WRA's request does not meet the requirement of Factor D." Determination Letter, dated Jan. 30, 2008. WAPA further stated that the publicly unavailable information that WRA requested, "such as[] routine correspondence, emails, draft documents, as requested by WRA does not significantly contribute to the public's understanding." *Id.*

We contacted WAPA to evaluate its Factor D reasons for denying WRA's fee waiver request. A WAPA employee stated that WAPA informally polled its employees and estimated that it has roughly 47,000 pages responsive to WRA's request. Memorandum of telephone conversation between Patricia Land, Paralegal Specialist, WAPA, and David M. Petrush, Attorney-Examiner, OHA, February 28, 2008. WAPA's general impression from its employee poll is that the non-publicly available documents consist of administrative minutia. WAPA cannot yet justify its impression with specific information because it has not yet reviewed the documents. *Id.*

Because WAPA cannot yet justify its Factor D reasons for denying WRA's fee waiver request with specific information, we cannot yet evaluate whether WAPA's disclosure of WRA's requested documents will enhance the public understanding of the EPTP. In similar cases we have remanded to the issuing authority so that it can provide more information. For example, in

James L. Schwab, the issuing authority denied a requester's fee waiver request because the responsive documents "do not contain anything 'meaningfully informative' that would contribute to public understanding of government operations or activities." *James L. Schwab*, 21 DOE ¶ 80,154 (Oct. 17, 1991) (Case No. LFA-0152). Yet, the issuing authority had "not yet concluded its search for responsive documents." We said that, "Without knowing what information would be released, [we cannot make] a meaningful determination of the public interest [in releasing the documents]." Therefore, the issuing authority's "determination to deny the request for a fee waiver was premature." *Id*.; *see also Gov't Accountability Project*, 23 DOE ¶ 80,139 (Aug. 27, 1993) (Case No. LFA-0312) (remanding a case where OHA could not evaluate the agency's fee waiver denial because the agency had not provided a reason for denying the requester's fee waiver request or determined what information would be released to the requester).

Following *James L. Schwab*, we will remand to WAPA so that WAPA can review the documents responsive to WRA's request. However, due to the large number of responsive documents in this case, we will not require WAPA to perform a complete document review, as we did in *James L. Schwab*. Instead, we will require WAPA to review documents responsive to WRA's request to the extent necessary to enable WAPA to issue a new determination justifying its Factor D decision with specific information. We will then be able to compare WRA's stated reasons for its fee waiver request, listed above, with WAPA's specific information, to determine if WRA carried its burden of satisfying fee waiver Factor D.

It Is Therefore Ordered That:

(1) The Appeal that Western Resource Advocates filed on February 12, 2008, OHA Case No. TFA-0246, is denied in part and remanded to the Western Area Power Administration. The Western Area Power Administration may review the documents responsive to Western Resource Advocates' request to the extent necessary to issue a new determination justifying its public interest fee waiver Factor D decision with specific information. In the alternative, the Western Area Power Administration may grant the Western Resource Advocates' fee waiver request.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 12, 2008

March 26, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Research Focus, LLC
Date of Filing:	March 10, 2008
Case Number:	TFA-0247

On March 10, 2008, Research Focus, LLC (Appellant) filed an Appeal from a determination issued to it on February 26, 2008, by the Department of Energy's (DOE) Western Area Power Administration (WAPA) in Lakewood, Colorado. In that determination, WAPA responded to a request for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. WAPA released the requested document to the Appellant with some information withheld under Exemption 4 of the FOIA. The Appellant has challenged the withholding of that information. This Appeal, if granted, would require WAPA to release the information it redacted from the document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 12, 2008, the Appellant filed a request with WAPA for the "Power Purchase Agreement between SunEdison Corporation [SunEdison] . . . for solar electricity supplied to the National Renewable Energy Laboratory." Electronic Mail Message dated February 12, 2008, from Joseph Berwind, Appellant, to WAPA. On February 26, 2008, WAPA released the Power Purchase Agreement (PPA) with redactions. The redactions were made under Exemption 4. Determination Letter dated February 26, 2008, from Liova D. Juárez, General Counsel, WAPA, to Joseph Berwind, Appellant (February 26, 2008 Determination Letter). WAPA relied on *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) to withhold the redacted information. In relying on *Critical*

Mass, WAPA claimed that the information had been voluntarily submitted by SunEdison because it had been part of a negotiation of the PPA. *Id.* at 1.

On March 10, 2008, the Appellant appealed, contending that the DOE releases similar information in similar contracts. Appeal Letter dated February 26, 2008, from Joseph Berwind, Appellant, to Director, Office of Hearings and Appeals (OHA). Also, the Appellant challenges the validity of WAPA's claim that the PPA was voluntarily submitted. *Id.* at 2. Finally, the Appellant states that SunEdison has previously released to private equity firms the information the Appellant is requesting without the protection of a non-disclosure agreement. *Id.*

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass,* 975 F.2d at 871. Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

As stated above, WAPA indicated in the determination letter that the requested information was submitted by SunEdison on a *voluntary* basis in connection with the negotiation of the PPA. February 26, 2008 Determination Letter at 1. WAPA relied on *Critical Mass* to withhold the redacted information under Exemption 4. In previous cases before this office, we have found that information that is submitted in negotiating with the DOE is "involuntarily" submitted. *B.P. Exploration, Inc.*, 27 DOE ¶ 80,216 (1999); *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Because SunEdison was required to submit the agreement in negotiating the PPA with WAPA, we find that the PPA was "involuntarily" submitted. Thus, for the information to be withheld under Exemption 4, the *National Parks* test must be met. WAPA did not evaluate the information under *National Parks*, but rather it evaluated the information under *Critical Mass*. Therefore, we will remand the matter to WAPA for a new determination utilizing the *National Parks* test.

The Appellant also has argued that similar information has been made publicly available by the DOE. Appeal Letter dated February 26, 2008. Finally, the Appellant has argued that SunEdison itself has previously released the information. *Id.* WAPA should address each of these arguments on remand in its analysis of this request under *National Parks*.

III. Conclusion

WAPA used the *Critical Mass* test to evaluate whether to withhold the requested information under Exemption 4. Because the information was "involuntarily" submitted, WAPA should have used the test established in *National Parks*. Therefore, we will grant the Appeal in part and remand the matter to WAPA for a new analysis and determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Research Focus, LLC, Case No. TFA-0247, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Western Area Power Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 26, 2008

April 11, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cathy L. Schaufelberger

Date of Filing: March 15, 2008

Case Number: TFA-0248

This Decision concerns an Appeal that Cathy L. Schaufelberger filed in response to a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to her on February 25, 2008. In that determination, the BPA denied a request for personnel records that Ms. Schaufelberger submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the BPA to release the documents that it withheld from Ms. Schaufelberger.

The FOIA generally requires the federal agencies to release documents to the public, upon request. However, Congress has provided nine FOIA exemptions that set forth types of information that agencies may withhold. *See* 5 U.S.C. §§ 552(b)(1)-(9); 10 C.F.R. §§ 1004.10(b)(1)-(9).

I. Background

In her FOIA request, Ms. Schaufelberger requested

> [I]nformation on individuals in organizations with department codes that begin with PG and for individuals in the organization with the department code of PTK. Information [Ms. Schaufelberger] requested include[s] awards, bonuses, and other monetary payouts such as Retention Allowance, Recruitment/Relocation bonuses, Awards, Tuition Reimbursement, Student Loan Reimbursement, Other Bonuses, Sustained Superior Performance, Quality Step Increases, and Promotions based on Accretion of Duties.

Determination Letter, dated February 25, 2008. The BPA released some responsive information to Ms. Schaufelberger. *Id*.

However, the BPA withheld the names and ages of Quality Step Increase (QSI) and Performance Award recipients. *Id*. The BPA found that BPA employees have a "personal privacy interest . . . [in] information that reveals the details of [their] job performance." The BPA also found that disclosing who received those awards would "not significantly contribute to the public's understanding of BPA operations or activities, or shed light on the performance of BPA's statutory duties." Lastly, the BPA found that "the individual privacy interest in protecting the names" of those award recipients "outweighs any public interest in disclosure." *Id*.

Ms. Schaufelberger appealed the BPA's withholding of the names of QSI and Performance Award recipients to the DOE's Office of Hearings and Appeals (OHA). She did not appeal the withholding of the individuals' ages. Appeal Letter, dated March 1, 2008.

II. Analysis

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. The Washington Post Co.*, 456 U.S. 595, 599 (1982).

Ms. Schaufelberger presents several arguments in her Appeal. First, she questions how knowing who received a QSI or Performance Award is an invasion of personal privacy, but releasing salaries is not. Second, she notes that the BPA is celebrating the "Administrators Excellence Awards." She asks why identifying Administrators Excellence Award recipients is not an invasion of privacy, but releasing QSI or Performance Award recipients is. Third, she states that a federal judge published her name as part of a transcribed telephone conversation at the BPA. Again, she juxtaposes the release of her name with releasing QSI or Performance Award recipients, the latter of which she suggests is far less of an invasion of personal privacy. Lastly, Ms. Schaufelberger states that the BPA should release the names of the QSI and Performance Award recipients because "there is a great public interest on how awards are given and how fair the distribution of awards are." In this regard, she questions whether "the majority of awards go to one race, one sex, or one age bracket." Appeal Letter, dated March 1, 2008.

We must apply a three-step analysis to determine whether the BPA properly withheld the QSI and Performance Award recipients from Ms. Schaufelberger pursuant to Exemption 6. First, we must determine whether disclosing the information compromises a significant privacy interest. If we do not identify a privacy interest, the BPA may not withhold the records. *Ripskis v. Dep't of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, we must determine whether releasing the information would further the public interest by shedding light on government operations and activities. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S.

749, 773 (1989). Third, we must balance the privacy interest against the public interest in order to determine whether releasing the information would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Regarding the first step, we have found that government employees have a privacy interest in maintaining the confidentiality of their performance awards because disclosure of performance awards "would allow direct comparison between employee awards and almost certainly incite jealousy in those employees receiving lower awards." *John Kasprowicz*, 28 DOE ¶ 80,161 (Apr. 12, 2001) (Case No. VFA-0660) (citing *Ripskis*, 746 F.2d at 3). Therefore, the BPA employees have a privacy interest in maintaining the confidentiality of their Performance Awards and QSI's, which are a type of performance award.

Regarding the second step, we have previously disagreed with an office's determination that there is no public interest in the withheld names of performance award recipients. *See John Kasprowicz* ("[F]ederal employees are public servants, and . . . the public has a significant interest in knowing how its employees are paid.") (citation omitted).

However, regarding the third step, we have previously found that an employee's privacy interest in withholding the fact that he or she received a performance award overrides the public interest in disclosure. *See Terry M. Apodaca*, 29 DOE ¶ 80,304 (July 25, 2007) (Case No. TFA-0204); *Robert J. Ylimaki*, 28 DOE ¶ 80,154 (Mar. 23, 2001) (Case No. VFA-0651). In *Terry M. Apodaca*, we found that the embarrassment and jealousy caused by disclosing an award recipient's name and the amount of the award may have a "deleterious effect[] . . . on employee morale and workplace efficiency." Similarly, in *Robert J. Ylimaki*, we found that disclosing an award recipient's name and the amount of the award would give rise to the "substantial possibility" that the recipient would suffer harassment from other employees. Although Ms. Schaufelberger requested only the recipients' names,[*] we find that disclosing that information would still give rise to a "substantial possibility" that the recipients would suffer harassment from other employees. Therefore, we find that the BPA properly withheld the QSI and Performance Award recipients from Ms. Schaufelberger.

In her Appeal, Ms. Schaufelberger raises additional arguments comparing the release of salaries, Administrators Excellence Award recipients and her own name through a federal lawsuit with releasing the recipients of a QSI or Performance Award. There is no evidence that those documents were released under the FOIA, having been subjected to the application of the standards discussed above. Moreover, even if they were released under the FOIA, because they are not relevant to the determination at issue in this case, they have no bearing on this Decision. *See* 10 C.F.R. § 1004.8(a) (stating that a FOIA

[*] Ms. Schaufelberger states, "[T]here is a great public interest on how awards are given and how fair the distribution of awards are. Do the majority of awards go to one race, one sex, or one age bracket?" Appeal Letter, dated March 1, 2008. We agree that Ms. Schaufelberger raises legitimate issues of public interest, but note that she may address the public interest and avoid privacy issues by requesting the above information without the recipients' names.

requester may "appeal *the determination* to [OHA]") (emphasis added). Exemption 6 analysis is fact-specific; in evaluating whether an office properly invoked Exemption 6, we must independently apply the federal and OHA case law to the facts of each case. Therefore, we applied the appropriate three-step Exemption 6 analysis of the relevant documents to reach our result.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Cathy L. Schaufelberger, OHA Case No. TFA-0248, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 11, 2008

April 11, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Faye Vlieger

Date of Filing: March 13, 2008

Case Number: TFA-0250

On March 13, 2008, Faye Vlieger (Appellant) filed an appeal from a determination issued to her on February 4, 2008, by the Department of Energy's (DOE) Richland Operations Office (Richland). In that determination, Richland responded to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Richland identified a number of documents responsive to the Appellant's request. Some of those documents were released in their entirety, but some information was withheld from one document pursuant to Exemption 6. Additionally, Richland identified possible responsive documents that were owned by various subcontractors and thus not subject to release under FOIA. With regard to the Appellant's request for other documents, Richland stated that, because of the cost of the search, it would require the Appellant to agree beforehand to pay for the cost of the search. Richland also denied the Appellant's request for a fee waiver with regard to her FOIA request. The Appellant has challenged the withholding of information under Exemption 6, the adequacy of the search that was conducted for responsive documents, and the denial of her request for a fee waiver. This appeal, if granted, would require Richland to release the withheld information in one document, conduct additional searches for documents, and grant the Appellant a fee waiver for all costs associated with her FOIA request.

I. Background

The Appellant requested information related to a 2002 industrial incident in the 272-AW building at the DOE's Richland facility, in which she and several employees may have been exposed to a chemical. The facility was operated for the DOE by CH2M Hill Hanford Group, Inc. (CHG). She first sought information from the Employee Concerns office of DOE's Office of River Protection (EC-ORP) on September 25, 2007. See Appendix A (list of 15 categories of documents requested from the Employee Concerns office). Among the documents the Appellant requested were copies of the Documentation References (Documentation References) listed on

page 25 of the report for Employee Concern 2002-0044 which details the specific incident.[1] This request was not made pursuant to the FOIA.[2] EC-ORP subsequently provided a number of the Documentation References in their entirety. Additionally, a number of the Documentation References were not provided.

While this request was still being processed by EC-ORP, the Appellant received a December 7, 2007, E-mail from Dorothy Riehle (Riehle), FOIA Officer at Richland. The E-mail informed the Appellant that her initial request to EC-ORP had been forwarded to her office so that it could be processed pursuant to the FOIA. During the pendency of Richland's processing of her FOIA request, the Appellant requested that she be granted a fee waiver for costs associated with her request.

On February 4, 2008, Richland provided a determination letter regarding the Appellant's FOIA request. Richland's determination regarding the 15 categories of documents is summarized below:

Category No. and Description	**Richland Determination**
Category 1 – Documentation References listed on page 25 of the Employee Concern 2002-0044 report	EC-ORP previously provided Documentation Reference Nos. 1, 2, 6, 7, 8, 9, 10, 11, 13-14, 16-21, 33, 34 and 36. Documentation Reference Nos. 3-5, 12, 22-32, 35, 37-40 are CHG-owned records and not subject to FOIA.
Category 2 - Technical review records and documents from Joe Elizaguirre	No responsive records found.
Category 3 – Investigation documents created by Marc Andersch, Rob Dunn, Carter Kirk, and Ron Legg	Investigation documents are CHG records and thus are not subject to FOIA. Several E-mail messages from named individuals were provided.
Category 4 - CHG records created by Gary Smith as part of the DOE directed investigation into chemical exposure on June 13, 2002	Investigation documents are CHG records and thus are not subject to FOIA. Search of DOE offices revealed no responsive documents.
Category 5 - Documents created from 7B100-02-PKA-025 Notification of Industrial Hygiene Monitoring Results Survey Number 02-2147, 11 7-02	One document was previously provided by EC-ORP. A search for responsive documents (because there is no electronic searchable database) would require 25-50 hours of search time at $35.91 per hour. Richland asks for an assurance of payment before undertaking search.

[1] The Documentation References consist of a number of reports and documents relating to the 2002 incident along with a number of witness statements. We note that the names of the witnesses were deleted on page 25 of the report.
[2] Even though the bottom of page 25 was marked "(b6,b7 & k2)," suggesting deletions under the FOIA, EC-ORP did not make any deletions to the copy of the document it provided to the Appellant. This document was not provided to the Appellant under the FOIA or the Privacy Act and we offer no opinion as to the propriety of this withholding. If the Appellant wishes to challenge this withholding, she should make a request for this document to Richland pursuant to the FOIA.

Category 6 - Reports and records from Sample Number W021001747, Rag "L" and blank bag samples	Search Time costs estimated to be one hour at $35.91 per hour. Richland asks for an assurance of payment before undertaking search.
Category 7 - Reports and records generated from the samples collected with the Organic Vapor Monitoring instrument used on June 13, 2002 in building 272 AW.	A copy of one document (Event Report) was provided to the Appellant under Privacy Act at no cost. Because there is no database or system which identifies documents created from the samples, Richland estimates that the search would require 25 to 50 hours at $35.91 per hour. Richland asks for an assurance of payment before undertaking search.
Category 8 - The complete files with all attachments and reports for PER 2002-3252, and PER 2002-4536[3]	PER 2002-3252 and PER 2002-4536 reports were provided to the Appellant by EC-ORP. No additional documents were found.
Category 9 - The OSHA logs and Computerized Accident and Injury Reporting System (CAIRS) reports from June 13, 2002 to the present for the incident.	OSHA logs were provided to the Appellant under Privacy Act at no cost. A two-page report was located and provided to the Appellant. Richland redacted the names of employees in the report pursuant to Exemption 6.
Category 10 - The DOE, HEHF (Hanford Environmental Health Foundation aka Advance Med), and CHG Case Management Records that have been created since the first reporting of the incident on June 13, 2002. (Also may be known as or will include Health Advocate files.)	All responsive documents in possession of Advance MedHanford, Inc. (aka Advance Med) were provided to the Appellant pursuant to Privacy Act. No other responsive documents were found.
Category 11 - DST (Double Shell Tank Farm) Operations Daily Release Sheet for the period June 12-14, 2002, for all and any work in and around building 272 AW and the adjacent tank farms	EC-ORP provided one document, the DST release Sheet for June 13, 2002. To search for other documents would require 8 to 16 hours of search at $35.91 per hour. Richland asks for an assurance of payment before undertaking search.
Category 12 - DOE, HEHF (Hanford Environmental Health Foundation aka Advance Med), and CHG files for Incident File Number 3362	Richland provided the Appellant with a copy of the entire OSHA file. However, other potentially responsive documents were found to be owned by CHG and thus were not subject to release under the FOIA.

[3] PER as an acronym for "Problem Evaluation Request." Memorandum of Telephone Conversation between Dorothy Riehle, FOIA Officer, Richard and Richard Cronin, Assistant Director, Office of Hearings and Appeals (March 31, 2008).

Category 13 - Air Modeling reports for the HVAC system for building 272 AW for the periods before and after the date of the incident, June 13, 2002.	Richland estimates that the search would require 10 to 20 hours at $35.91 per hour. Richland asks for an assurance of payment before undertaking search.
Category 14 - The HSS-ROV Log and HSS-ROV files, with distribution lists	Richland provided the Appellant with responsive documents pursuant to the Privacy Act at no cost.
Category 15 - The CHG Hill Causation Analysis Report (CAR) for the incident, AKA Root Cause Analysis	Richland provided the Appellant with responsive documents (under the response to Category 8) pursuant to the Privacy Act at no cost.

For the purpose of calculating fees to be charged with the processing of her FOIA Request, Richland determined that she fell in the "other requestor" category as defined in 10 C.F.R. § 1004.9(b). The Richland February 4 2008, determination letter also addressed the Appellant's request for a fee waiver under the FOIA. After considering the regulatory factors to be considered for a fee waiver (as listed in 10 C.F.R. § 1004.8(a)(8)), Richland denied the fee waiver request on the grounds that the subject matter of the requested information would not significantly add to the public understanding of the DOE's Richland facility and its operations. Additionally, Richland found that there was no evidence indicating that the Appellant would be able to disseminate the information to the public. *See* February 4, 2008, Determination Letter from Dorothy Riehle, FOIA Officer, Richland, to Appellant, at 3.

In her appeal, the Appellant challenges Richland's determination on a number of grounds. She takes issue with Richland's classification of her for fee purposes as well as its denial of her request for a fee waiver. She also takes issue with Richland's determination that a number of potentially responsive documents are exempt from the FOIA because they belong to CHG. The Appellant also challenges the extent of the search that was conducted for responsive documents.[4]

II. Analysis

1. Fee Categorization and Waiver

A. Fee Categorization

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). The DOE regulations implementing the FOIA delineates three types of costs – "search costs," "duplication costs," and "review costs" – and outlines four categories of requesters, "commercial use requesters," "educational and non-commercial scientific institution requesters," "requesters who are representatives of the news media," and "all other requesters." 10 C.F.R. § 1004.9(b). The regulations specify the costs each category of requesters must pay. If a requester wants the information for a "commercial use," it

[4] The Appellant also asserts that a number of the documents should be provided to her at no cost pursuant to two employee safety regulations, 29 C.F.R. § 1910 *et seq.* and 10 C.F.R. § 851 *et seq.* We have no jurisdiction under these regulations to mandate release of documents.

must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs, but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

For purposes of the calculation of fees, Richland placed the Appellant in the category of "all other requesters." *See* Electronic Mail from Dorothy Riehle to Appellant (December 6, 2007). Given the nature of the information requested, information regarding an industrial incident she may have been involved with, it does not appear that the Appellant's purpose in requesting the information was commercial. Additionally, there is no evidence before us that indicates that the Appellant's request was made on behalf of a representative of the news media or on behalf of an educational and non-commercial scientific institution. Consequently, we find that Richland properly classified the Appellant in the "all other requester" category for purposes of calculating fees for processing her FOIA request.

B. Fee Waiver

The FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8). In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i). As noted above, in Section II.1.A, the information is not primarily in the commercial interest of the Appellant. 10 C.F.R. § 1004.9(a)(8)(ii).

i. Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, it is undisputed that the requested information – concerning an

industrial incident at a DOE facility in Hanford – concerns activities or operations of the government. Therefore, we find that the Appellant's request satisfies Factor A.

ii. Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997); *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate."). In the present case, the vast majority of the requested information does not appear to be publicly available. Therefore, we find that the Appellant has satisfied Factor B.

iii. Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the individual requester or of a narrow segment of interested persons. *Schrecker v. Dep't of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, 26 DOE at 80,780; *see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992). In the present case, Richland determined that the Appellant did not establish her ability to disseminate the information.

After examining the E-mail communications between Richland and the Appellant during the processing of the Appellant's request, as well as the Appellant's appeal submission, we find that the Appellant has not submitted any evidence of her ability to disseminate the requested information to the public. Consequently, we find that the Appellant has not satisfied Factor C.

iv. Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act at* 381 (1995)).

In the present case, it remains unclear to what extent the public's understanding is likely to be enhanced by the disclosure of the information. However, we need not reach the issue because the inability to disseminate the information to the public is, in itself, a sufficient basis for denying a fee waiver request. *See Donald R. Patterson*, 27 DOE ¶ 80,267 at 80,927 (2000) (*citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)). Therefore, we find that Richland properly denied the Appellant a fee waiver.

2. Richland's Agency Record Determination

With regard to a number of categories of documents requested by the Appellant, Richland determined that potentially responsive documents were not agency records but instead were owned by CHG and thus were not subject to the FOIA.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as CHG, are subject to the FOIA. *See, e.g., BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595-96.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976) (*Orleans*), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Orleans 425 U.S.* at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) *(Forsham*). *See also Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

CHG is a privately owned and operated company. While the DOE exercises general control over the contract work performed by CHG, it does not supervise the company's day-to-day operations. *See* Contract No. DE-AC27-99RL14047, clause C.2. We therefore conclude that CHG is not an "agency" subject to the FOIA. *Radian International*, 26 DOE ¶ 80,126 (1996).

Although CHG is not an agency for the purposes of the FOIA, the requested documents could be considered "agency records" if the DOE obtained them and they were within the DOE's control at the time the Appellant made her FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (*Tax Analysts*); *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, we have determined that none of the documents the Appellant sought were in the agency's possession or control at the time of her

request. *See* Memorandum of Telephone Conversation between Dorothy Riehle, FOIA Officer, Richland, and Richard Cronin, Assistant Director, OHA (April 2, 2008). Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1). We therefore next look to the contract between DOE and CHG to determine the status of the requested records. That contract generally provides that records acquired or generated by CHG in its performance of the contract are deemed property of the government. Contract No. DE-AC27-99RL14047, clause I.109(a). However, the contract also defines documents which are deemed to be contractor-owned:

> (b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
>
> (1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except for those records described by the contract as being maintained in Privacy Act systems of records.
>
> . . . .
>
> (4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges;

Contract No. DE-AC27-99RL14047, clause I.109(b).

The potentially responsive records at issue in this appeal concern an incident which involved a potential exposure of a chemical to several employees including the Appellant. Richland identified potentially responsive documents that were owned by CHG with regard to request categories 1, 3, 4 and 12. The identified documents in category 1, which Richland found to be CHG-owned, consist of reports by the CHG Employee Concerns concerning the incident and witness statements about the incident. As such they are records relating to an employee concern that was raised about the incident. Many of these potentially responsive documents are located in the CHG's employee concerns files or files at CHG's Office of the Chief Counsel that were collected in anticipation of potential litigation concerning the Appellant's claim for worker's

compensation (arising from injuries from the incident). As such, these records are CHG-owned and not subject to the FOIA. With regard to the documents requested in Category 3 and 4, any responsive documents would consist of investigatory reports from various CHG Employee Concerns in regard to the incident. Since these would be records related to an employee concern, they, too, would be CHG property and exempt from disclosure under the FOIA. With regard to Category 12, the requested files also relate to an employee concern investigation regarding the incident and, as such, would be CHG property and not subject to the FOIA.

3. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 11384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g*., *Glen Milner*, 17 DOE ¶ 80,102 (1988).

The Appellant challenged the adequacy of the search conducted for documents in a number of categories. A summary of the searches that were conducted for each category of documents in which the adequacy of the search can be challenged is presented below. [5]

A. Category 2

This category comprises documents related to technical review records and documents originating from Joe Elizaguirre (Elizaguirre). In its search for documents, Richland discovered that Elizaguirre no longer worked for the Department of Energy. However, Richland conducted a search of the office where he used to work (Richland Operation Office's Office of Safety, Health and Quality) for responsive documents. Richland also had searches performed at Richland's Special Concerns Office, then CHG's Safety and Health Office. Richland searched all of the offices it thought most likely to possess responsive documents and found none.

B. Category 3

Richland provided the Appellant all documents responsive to Category 3 that were in the possession of DOE. Richland discovered that of the four named employees in Category 3, Marc Andersch, Carter Kirk, and Ron Legg were no longer employed at CHG. The office of the remaining employee was searched including an electronic search of his Electronic mail. Richland informed us that any documents these employees might have generated would have been filed in the Appellant's CHG employment, employee concerns or worker's compensation files and, as such, would be property of CHG and not DOE.

[5] As referenced above, Richland did not conduct a search in all requested categories since it did not receive assurance from the Appellant that she was willing to pay the costs associated with a search for documents in those categories.

C. Category 4

Richland searched the Richland Special Concerns office where Gary Smith (Smith) was employed. Richland informed us that any document that Smith might have created would have been filed in the CHG Employee Concerns file and would thus be a CHG-owned document. In addition, Richland also searched the CHG's Office of Chief Counsel for documents but none were found.

D. Category 8

Richland provided the Appellant the files for PER 2002-3252 and PER 2002-4536. Additionally, Richland searched the CHG legal office and the CHG quality assurance office but no additional documents were found.

E. Category 9

Richland informed us that OSHA logs are maintained and filed in an employee's OSHA file by the CHG Safety and Health Office. The entire OSHA file was provided to the Appellant. Richland also sought responsive documents from the Computerized Accident and Injury Reporting System (CAIRS), operated by the DOE's Environmental Safety and Quality office. The administrator of the CAIRS system found one responsive document, a CAIRS database report (CAIRS Report) and the report was provided to the Appellant after redactions were made by Richland pursuant to Exemption 6 of the FOIA.

F. Category 10

Richland conducted a search of the DOE's Environmental Safety and Quality Office, the Richland Special Concerns Office, CHG's Safety and Health Office, and CHG's Legal Office, but no responsive documents were found. Richland then conducted a search of Advanced Med's Medical Records Office and Safety Office and all responsive documents were provided to the Appellant.

G. Category 12

Richland discovered that many of the potentially responsive documents for this category would be located in the Appellant's workers compensation, employee concerns or legal files pertaining to a claim for worker's compensation filed by the Appellant. Consequently, Richland concluded these files are CHG-owned and not subject to the FOIA. Other potentially responsive documents were located in the Appellant's OSHA file maintained by CHG and medical files at Advance Med. These documents were provided to the Appellant.

H. Category 14

Richland believed that the most likely locations for responsive documents were the OSHA file maintained by CHG and the files of Advance Med. Both locations were searched and all responsive documents were provided.

I. Category 15

Richland conducted a search of the offices most likely to possess responsive documents – the CHG legal office, the CHG Quality Assurance office and the CHG Safety and Health office. Other than the documents provided in response to Category 8, no responsive documents were found.

In reviewing the search that was made for document in each of the categories above, we find that Richland conducted an adequate search for responsive documents. In each case, Richland conducted a search of the offices where responsive documents were most likely to be found concerning records related to the incident or the Appellant. As discussed above, to the extent that a number of these potentially responsive documents are located in CHG's employee concerns files or CHG's legal files collected in anticipation of potential litigation concerning a claim for worker's compensation filed by the Appellant, such files are owned by CHG and are not subject to the FOIA. In sum, we believe that Richland conducted searches reasonably calculated to discover responsive documents and thus performed adequate searches pursuant to the FOIA.

4. Exemption 6

One of the documents provided to the Appellant, the CAIRS Report, had information withheld pursuant to Exemption 6. The Appellant challenges the propriety of this deletion.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R.§ 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

We have reviewed an unredacted copy of the CAIRS Report. The Report is a database chart listing of accidents. One column of the Report, titled "Name/Description," was withheld in its entirety, except for the entry for the Appellant. This column consists of names of employees who have suffered injury or illness at the Richland facility. Applying the Exemption 6 analysis described above, we find that the employees have a significant privacy interest in not being associated with injuries or illness resulting from on-the-job accidents. The release of such information could be potentially embarrassing to the employees involved.

Having found a significant privacy interest in the redacted material, we now must determine if release of the employee names would further the public interest by shedding light on the operations and activities of the government. The release of the actual names of the employees who have suffered on-the-job accidents and have had injuries or illness result tells us little or nothing in itself about the activities at the DOE facility at Richland. Given the significant privacy interest in the names of the withheld employees with the, at best, *de minimus* public interest in release of the names of the employees, we find that Exemption 6 was properly applied to withhold the names of the employees in the CAIRS Report.

III. Summary

We find that Richland properly classified the Appellant for the purposes of assessing fees for the processing of her FOIA request and that Richland properly determined that she was not eligible for a waiver of fees. We also find that Richland's search for responsive documents was adequate and that Richland properly declined to apply the FOIA to records owned by CHG. Lastly we find that Richland properly applied Exemption 6 to the CAIRS Report. Consequently, the Appellant's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on March 13, 2008, by Faye Vlieger, OHA Case No. TFA-0250, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 11, 2008

May 1, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dorothy K. Hyde

Date of Filing: April 7, 2008

Case Number: TFA-0252

This Decision concerns Dorothy K. Hyde's Appeal from a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to her on March 12, 2008. In that determination, the ORO responded to Ms. Hyde's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Ms. Hyde's attorney filed a FOIA request with the ORO on her behalf for "all personnel, medical[,] industrial hygiene, radiation exposure and similar records on Delmer Dayton Hutchison [Ms. Hyde's father], deceased, SS number . . ., DOB . . ., employed by JA Jones and Stone & Webster[,] 1943-1953[,] K25 and Y12." Electronic FOIA Request, Dec. 12, 2007. Ms. Hyde's attorney faxed the ORO an autopsy protocol "on Delmer Hutchison, dated 1-19-71." Facsimile from Roy P. Neuenschwander, attorney for Ms. Hyde, to Amy Rothrock, FOIA Officer, ORO, Dec. 12, 2007.

The ORO provided Ms. Hyde a copy of Mr. Hutchison's employment card. Determination Letter, Mar. 17, 2008.

Ms. Hyde then filed the present Appeal with the Office of Hearings and Appeals (OHA). Appeal Letter. In the appeal letter, Ms. Hyde's attorney recounted the correspondence between Ms. Hyde and the ORO. Next, Ms. Hyde's attorney stated that Mr. Hutchison's autopsy protocol "lists Delmer's name as being spelled as Hutcherson and Hutchenson." However, Ms. Hyde's attorney stated that, "Mr. Hutchison's death certificate is enclosed and his name is spelled correctly." Ms. Hyde's attorney then stated, "I would hope that all records be checked in regard to this matter, to include all three spellings of Delmer's name." Lastly, Ms. Hyde's attorney requested "a prompt Hearing . . . before an Administrative Law Judge." *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (Aug. 26, 2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[1] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

We contacted the ORO to request additional information so that we could evaluate its search. From our inquiry we learned that since Ms. Hyde's request indicated that Mr. Hutchison worked at the K-25 facility for JA Jones and Stone & Webster, the ORO sent an information request to the Bechtel Jacobs Company and the DOE's Records Holding Area.[2] The Bechtel Jacobs Company is the DOE's prime or operating contractor at the former K-25 facility (now named the East Tennessee Technology Park). If the DOE has records from JA Jones and Stone & Webster, they would be at the Records Holding Area. E-mails from Linda G. Chapman, Legal Assistant, FOIA/Privacy Act Office, ORO, to David M. Petrush, Attorney-Examiner, OHA, April 9, 11, 24 and 25, 2008.

The Bechtel Jacobs Company and the DOE Records Holding Area each searched its medical, personnel, radiation exposure, and industrial hygiene records for Mr. Hutchison's name, birth date, and social security number. The Bechtel Jacobs Company found no responsive files. The DOE Records Holding Area found Mr. Hutchison's employment card, and the ORO provided a copy to Ms. Hyde with its determination letter. *Id.*

The ORO stated that the files most likely to have information responsive to Ms. Hyde's request were searched. We agree. For this reason, we find that the ORO conducted a search that was reasonably calculated to uncover all relevant documents, and was therefore adequate. Therefore, we will deny Ms. Hyde's Appeal, except as discussed below.[3]

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

[2] Since the request that Ms. Hyde's attorney submitted also indicated that Mr. Hutchison worked at the Y-12 facility, the ORO forwarded Ms. Hyde's request to the National Nuclear Security Administration (NNSA), which now maintains records from the Y-12 facility. The NNSA will issue Ms. Hyde a separate determination.

[3] In the appeal letter, Ms. Hyde's attorney requests a hearing before an administrative law judge. Because the DOE's FOIA regulations do not contain a provision for a hearing before an administrative law judge, we deny Ms. Hyde's request.

In the appeal letter, Ms. Hyde's attorney stated that the autopsy protocol shows Mr. Hutchison's name spelled as Hutcherson and Hutchenson. Appeal Letter. Although Ms. Hyde's attorney faxed the autopsy protocol to the ORO on the same day that he submitted Ms. Hyde's FOIA request, he did not specifically point out that the autopsy protocol apparently shows two alternate spellings of Mr. Hutchison's name until he filed Ms. Hyde's Appeal. Moreover, because the autopsy protocol's blurry text is extremely difficult to read, it is understandable that the ORO failed to realize that it contains alternate spellings. Therefore, we find that the ORO's failure to identify the two alternate spellings does not affect the adequacy of its search.

However, the ORO stated that, as a courtesy to Ms. Hyde, it is willing to conduct searches for information under the names Delmer Hutcherson and Delmer Hutchenson. E-mail from Amy L. Rothrock, FOIA Officer, ORO, to David M. Petrush, Attorney-Examiner, OHA, Apr. 23, 2008. Therefore, we will remand this case to the ORO so it may conduct those searches and issue Ms. Hyde a new determination.

It Is Therefore Ordered That:

(1) The Appeal that Dorothy K. Hyde filed on April 7, 2008, OHA Case No. TFA-0252, is granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is remanded to the Oak Ridge Office to search for files under the names Delmer Hutcherson and Delmer Hutchenson.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 1, 2008

May 16, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William A. Hewgley

Date of Filing: April 18, 2008

Case Number: TFA-0253

On April 18, 2008, William A. Hewgley filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Office of Inspector General (OIG). In that determination, OIG responded to a request for information that Mr. Hewgley filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIG to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On January 30, 2008, Mr. Hewgley submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for "all records exchanged between the DOE Headquarters Inspector General's Office and the FBI on or relating to the requester covering the period January 1, 1978 and the date of this request." *See* Letter from William A. Hewgley to FOIA Officer, U.S. Department of Energy (January 30, 2008) (Request Letter). DOE/FOIA forwarded the request to OIG because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

OIG conducted a search of its records which revealed that records responsive to Mr. Hewgley's request were destroyed in accordance with the DOE Records Inventory and Disposition Schedule pursuant to Disposition Authority N1-434-00-1.[1] *See* Letter from John Hartman, Assistant Inspector General for Investigations, OIG, to William A. Hewgley (March 26, 2008) (Determination Letter). On April 18, 2008, the Office of Hearings and Appeals (OHA) received Mr. Hewgley's Appeal, which challenged the adequacy of the search as it relates to the destruction of responsive documents. *See* Letter from William A. Hewgley to OHA (Appeal Letter). In his Appeal, Mr. Hewgley requests a copy of the applicable portion of Disposition Authority N1-434-00-1, in addition to a list of records destroyed, including the author of each record, the recipient, and the date of the record itself. *Id.* at 1.

[1] Disposition Authority N1-434-00-1 may be accessed at http://cio.energy.gov/documents/ADM_22.pdf.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[2]

In reviewing this Appeal, we contacted OIG to ascertain the scope of its search for responsive documents. *See* Email from Avery Webster, Attorney-Examiner, OHA, to Adrienne Martin, Freedom of Information and Privacy Acts Officer, OIG (April 22, 2008). OIG informed us that it conducted an electronic search of the OIG database using Mr. Hewgley's name which located two investigative case files[3] responsive to his request.[4] *See* Email from Ruby Len, Attorney-Adviser, OIG, to Avery Webster, Attorney-Examiner, OHA (April 25, 2008).

According to the DOE's Records Inventory and Disposition Schedule, OIG files containing information or allegations that do not result in a formal investigation must be destroyed after ten years. Given that Mr. Hewgley's responsive case files were over 20 years old at the time of the FOIA request, they had been destroyed pursuant to Disposition Authority N1-434-00-1. As for the documentation relating to the list of records destroyed, including the author of the record, the recipient, and the date of the record itself, OIG advised that no such documentation exists. *Id.*

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that OIG performed a search reasonably calculated to reveal documents responsive to Mr. Hewgley's request. Accordingly, the search was adequate under the FOIA and, therefore, Mr. Hewgley's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. William A. Hewgley on April 18, 2008, OHA Case No. TFA-0253, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be

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

[3] OIG advises that the two case files containing Mr. Hewgley's name were created in August 1987 and did not result in formal investigations.

[4] The Offices of Audit Services, Investigations, and Inspections and Special Inquiries also conducted a search for responsive documents and located no documents responsive to Mr. Hewgley's request.

sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 16, 2008

May 28, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kimberly J. Excel

Date of Filing: April 30, 2008

Case Number: TFA-0254

This Decision concerns Kimberly J. Excel's Appeal from a determination that the Department of Energy's (DOE) Richland Operations Office (ROO) issued to her on February 7, 2008. In that determination, the ROO responded to Ms. Excel's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the ROO to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Ms. Excel filed a FOIA request with the ROO for the following records regarding her deceased father, E.C. Warren:

(i) "Employment records; including but not limited to job descriptions, transfers, job assignments, training, housing, awards, reprimands, pay records, union records."

(ii) "Exposure records; including but not limited to all films, x-rays, log books, hand written notes, yearly summaries, weekly summaries, lost badge information, incidents during employment period, chemical handling, supervisor's log books, hand written notes, electronic records."

(iii) "Medical records; including but not limited to employment physicals, on the job injury records, first aid records, hospital records."

(iv) "Training records; including but not limited to qualifications for hazardous material handling, safety, radiation training, driver training."

E-mail from Rosemary Hoyt, Personal Assistant to Ms. Excel, to Office of Hearings and Appeals (OHA) filings, Mar. 5, 2008; E-mail from Rosemary Hoyt, Personal Assistant to Ms. Excel, to William Schwartz, Attorney-Examiner, OHA, Apr. 21, 2008.

In the ROO's determination letter, it explained that AdvanceMed Hanford, which maintains Mr. Warren's medical record for the DOE, will forward his medical record directly to Ms. Excel. The ROO enclosed Mr. Warren's radiation exposure record. The ROO was unable to locate Mr. Warren's employment or training records. Determination Letter, Feb. 7, 2008.

Ms. Excel then filed the present Appeal with OHA. Facsimile from Rosemary Hoyt, Personal Assistant to Ms. Excel, to David M. Petrush, Attorney, OHA, received Apr. 30, 2008 (containing the determination letter that the ROO issued to Ms. Excel). Ms. Excel stated that she "received a few transfer documents but nothing else." E-mail from Rosemary Hoyt, Personal Assistant to Ms. Excel, to William Schwartz, Attorney, OHA, Apr. 21, 2008. Regarding the exposure records, Ms. Excel stated that she did not receive "nearly all records." Regarding the medical records, Ms. Excel stated that she "received employment physicals and first aid records, nothing else." Lastly, Ms. Excel stated that she received no training records. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (Aug. 26, 2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[*] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

We contacted the ROO to request additional information so that we could evaluate its search. We learned that the ROO contacted AdvanceMed Hanford for medical records, Pacific Northwest National Laboratory for radiation exposure records, and the Records Holding Area and Fluor Hanford, Inc. for archived employment and training records. The searches were performed by contractor personnel who maintain the records and who are most familiar with the subjects of Ms. Excel's request. They searched electronic, paper files and microfiche by name and social security number. E-mail from Dorothy C. Riehle, Freedom of Information Specialist, ROO, to David M. Petrush, Attorney-Examiner, OHA, May 6, 2008.

The ROO stated that the files most likely to have information responsive to Ms. Excel's request were searched. We agree. For this reason, we find that the ROO conducted a search that was reasonably calculated to uncover all relevant documents, and was therefore adequate. Therefore, we will deny Ms. Excel's Appeal.

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

It Is Therefore Ordered That:

(1) The Appeal that Kimberly J. Excel filed on April 30, 2008, OHA Case No. TFA-0254, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 28, 2008

May 27, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Moran

Date of Filing: April 29, 2008

Case Number: TFA-0255

On April 29, 2008, Barbara Moran (Moran) filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) issued to her. The determination responded to a request for information Moran filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the NNSA to release the responsive information it withheld from Moran.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 27, 2007, Moran filed a FOIA request with the NNSA seeking documents relating to the 1966 collision of a B-52 bomber and a KC-135 tanker over Palomares, Spain (also known as the 1966 Broken Arrow). *See* Determination Letter at 1. In a determination letter, the NNSA stated it contacted the Sandia Site Office, which has oversight for the Sandia National Laboratories (SNL). SNL conducted a search of its records and stated that it identified eight documents responsive to Moran's FOIA request. However, the NNSA withheld portions of three of the documents pursuant Exemptions 2 and 6 of the FOIA. *Id.*

On April 28, 2008, Moran filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Moran challenges the withholding of information under Exemptions 2 and 6 of the FOIA. *See* Appeal Letter. Moran asks that the OHA direct the NNSA to release the withheld information.

II. Analysis

A. Exemption 2

In its determination letter, NNSA withheld specific assessment information on contamination under Exemption 2. The courts have interpreted Exemption 2 to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-prong test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978 (en banc).

As an initial matter, it is important to note that the documents at issue are agency records. Although they are located at SNL, they are agency records for purposes of the FOIA because the records were "obtained" by the DOE and were under DOE's control at the time of Moran's request.

We have reviewed the responsive information withheld under the "high two" exemption and find that the information deleted from the document relates to specific assessment information on contamination, including "assumptions, track records, transportation and lessons learned". This information is predominantly internal in nature because it is not intended for dissemination outside the DOE and "does not purport to regulate activities among members of the public." *See Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979). The NNSA has stated that release of this information "could benefit adversaries by helping them identify possible vulnerabilities, as well as provide them the opportunity to target facilities." In addition, the NNSA has contended that disclosure of this information significantly risks circumvention of statutes and agency regulations created to secure DOE's facilities. We agree. DOE has a legislated duty to protect its facilities and assets. Accordingly, we find that this information in the responsive document can be properly withheld under the "high two" prong of Exemption 2.

The DOE regulations, at 10 C.F.R. § 1004.1, provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the deleted information is protected under Exemption 2, we must address whether disclosure of this information is in the public interest. We find that it is not.

As discussed above, the information deleted from the responsive document relates to assessment information on contamination. The disclosure of this information would reveal agency determinations on practices taken to protect the safety of DOE and its facilities. Clearly, disclosing

such information is not in the public interest as this information could render DOE personnel and facilities vulnerable.

B. Exemption 6

In its determination letter, NNSA withheld the names of contractor employees from a responsive document under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

The NNSA determined that there was a privacy interest in the identities of contractor employees. We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc*., 15 DOE ¶ 80,115 at 80,537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc*., 16 DOE ¶ 80,102 at 80,504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,120 at 80,569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,104 at 80,519 (1985). The same type of privacy interest is involved in this case. In fact, because the contractor employees whose names are sought are non-federal employees, but work for a private entity under contract with the government, there is a significant privacy interest in maintaining their confidentiality. If this information were disclosed to the requester, the disclosure could "cause inevitable harassment and unwarranted solicitation." *See* Determination Letter at 2. We have previously found the potential for harassment of individuals to be sufficient justification for withholding information under Exemption 6. *See, e.g., William Hyde*, 18 DOE ¶ 80,102 (1988). These considerations govern our determination. We therefore find a real and substantial privacy interest in the names of the contractor employees.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996). According to the NNSA, "release of this information would not shed light on the operations of the federal government, as the Sandia Corporation is not a government agency, but a private [entity] under contract which provides a variety of important, and sometimes vital, goods and services to the federal government." Determination Letter at 2. The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We fail to see how release of the identities of the contractor employees in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the contractor employees' names.

3. Balancing the Interests

As stated earlier, there is a significant privacy interest in this information. In determining whether the disclosure of the identifying information could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989). We agree with NNSA and find that the minimal public interest here is far outweighed by the real and identifiable privacy interests of the contractor employees.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Moran on April 29, 2008, OHA Case No. TFA-0255, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 27, 2008

June 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mitchell L. Rychtanek

Date of Filing: May 14, 2008

Case Number: TFA-0256

This Decision concerns Mitchell L. Rychtanek's Appeal from a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to him on April 22, 2008. In that determination, the ORO responded to Mr. Rychtanek's request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Mr. Rychtanek filed a PA request with the Chicago Office for "records in the possession of Argonne National Laboratory (ANL) that may reflect [his] work for subcontractor, N.H. McLennon at ANL between 1965 – 1975." Letter from Miriam R. Legan, Privacy Act Officer, Chicago Office, to Mitchell L. Rychtanek, Apr. 7, 2008. The ORO responded to Mr. Rychtanek's request and sent him copies of his beryllium records and work history report. The ORO did not locate his personnel records. Determination Letter, Apr. 22, 2008.

Mr. Rychtanek then filed the present Appeal with OHA, to "access records of my employment. . . ." Letter from Mitchell L. Rychtanek to OHA, received May 14, 2008. OHA accepted Mr. Rychtanek's Appeal as challenging the adequacy of the ORO's search.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[1] courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search

[1] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA.

reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (Aug. 26, 2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[2] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

We contacted the Chicago Office and the ORO to request additional information so that we could evaluate their search. The Chicago Office forwarded Mr. Rychtanek's request to the ANL. The ANL searched its gate passes, human resources, medical, industrial hygiene, and radiological dose records and found no records regarding Mr. Rychtanek.[3] E-mail from Kimberly A. Johnson, Manager, Laboratory Records and Publications, ANL, to Miriam R. Legan, Privacy Act Officer, Chicago Office, Apr. 2, 2008.

The Chicago Office then forwarded Mr. Rychtanek's request to the ORO because an ORO contractor, the Oak Ridge Associated Universities (ORAU), maintains beryllium testing and work history records[4] for the DOE. The ORAU searched its electronic and paper files by name, social security number, date of birth, and badge number. E-mails from Leah Ann Schmidlin, FOIA/Privacy Act Office, ORO, to David M. Petrush, Attorney-Examiner, OHA, May 21 and 28, 2008. The ORAU located Mr. Rychtanek's beryllium testing and work history records. The ORO disclosed those records to Mr. Rychtanek with its determination letter.

The ORO stated that the files most likely to have information responsive to Mr. Rychtanek's request were searched. E-mail from Leah Ann Schmidlin, FOIA/Privacy Act Office, ORO, to David M. Petrush, Attorney-Examiner, OHA, May 21, 2008. We agree. For this reason, we find that the ORO conducted a search that was reasonably calculated to uncover all relevant documents, and was therefore adequate. Therefore, we will deny Mr. Rychtanek's Appeal.

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

[3] The ANL does not maintain personnel or other employee records from N.H. McLennon or any other sub-contractor. E-mail from Leah Ann Schmidlin, FOIA/Privacy Act Office, ORO, to David M. Petrush, Attorney-Examiner, OHA, May 28, 2008.

[4] A work history report is a brief listing of data on an employee that includes the employment site, department, dates of employment, job title, badge number, date of birth, and social security number. A personnel file, by contrast, contains the employee's application, resume, change in employee status, memoranda regarding duty station transfers, performance appraisals, etc. E-mail from Leah Ann Schmidlin, FOIA/Privacy Act Office, ORO, to David M. Petrush, Attorney-Examiner, OHA, May 28, 2008.

It Is Therefore Ordered That:

(1) The Appeal that Mitchell L. Rychtanek filed on May 14, 2008, OHA Case No. TFA-0256, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 6, 2008

June 18, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	State of New York
Date of Filing:	May 22, 2008
Case Number:	TFA-0257

This Decision concerns an Appeal that was filed by the State of New York from three partial determinations that were issued to it by the Office of Electricity Delivery and Energy Reliability (OE) of the Department of Energy (DOE). In these determinations, OE denied in part a request for documents that New York submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, New York seeks the release of the requested documents.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); see also 10 C.F.R. § 1004.10(b)(1) - (9).

I. Background

In its December 17, 2007, FOIA request, New York sought access to a copy of a study entitled "Grounded in Reality: Eastern Connection," prepared by Cambridge Energy Research Associates (CERA) in 2004, and to copies of any documents, e-mails or other correspondence between CRA International (CRA) and the DOE, CRA and any transmission developers or stakeholders, and the DOE and the stakeholders involving the DOE's August 8, 2006, Congestion Study and the DOE's October 2007 National Interest Electric Transmission Corridor (NIETC) designation order. Pursuant to Section 216(a) of the Federal Power Act, the DOE was required to issue the congestion study in August 2006 and every three years thereafter. The Congestion Study concerns the percentage of maximum capacity at which existing electricity transmission lines are being utilized. [1] The DOE contracted this task out to Lawrence Berkeley National Laboratory (LBNL) which, in turn, retained

1/ The DOE used this information in designating an NIETC in the northeastern United States in October 2007. This designation allows entities that wish to build electricity transmission facilities in these corridors, but have been denied permission to do so by state or local governments, to apply to the Federal Energy Regulatory Commission for permission.

the services of CRA to produce the Congestion Study. *See* memorandum of May 30, 2008, telephone conversation between Theresa Brown Shute, OE, and Robert Palmer, OHA Staff Attorney.

In its February 12, 2008, partial determination, OE informed New York that it had searched its files for the CERA study without success, and therefore had no documents responsive to this portion of New York's request. OE further stated that it was continuing to search for responsive documents concerning communications between CRA and the DOE, CRA and transmission developers or stakeholders, and the DOE and the stakeholders involving the Congestion Study. The letter also informed New York that responsive documents could be accessed through the DOE's NIETC website.

As part of its April 18, 2008, partial determination, OE released 33 documents in their entirety and a 34th document in redacted form. This document (hereinafter referred to as "Document 34") consists of hard copies of four pages of a presentation that CRA made to the DOE on July 20, 2006. OE informed New York that the presentation itself could be accessed through the NIETC website, and that the hard copy included handwritten notes, which were withheld pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). OE also informed New York that it had identified over 12,000 communications between the entities named in the request that "may be responsive" to the request, and that they were currently undergoing agency review. April 18, 2008, determination at 2.

In its May 6, 2008, partial determination, OE stated that it could not "respond to [New York's] request for documentation 'between CRA [] and any transmission developers or stakeholders,'" because generally, under the FOIA, agencies can only provide records that were "created by request of the agency or that the agency is in possession of." May 6, 2008, determination at 1. OE added that it would provide any such communications that it has "in [its] possession due to being a recipient or a sender." May 6, 2008, determination at 1.

In its submission, New York appeals these three determinations, and it also seeks to appeal the positions expressed in an April 28, 2008, e-mail from Theresa Brown Shute, OE, to Maureen Leary, Assistant Attorney General, State of New York. Specifically, New York challenges OE's failure to produce the CERA study and communications between "industry stakeholders" and CRA, OE's redaction of the handwritten notes from Document 34, and its failure to process portions of New York's request in a timely fashion.

II. Analysis

A. OHA's FOIA Jurisdiction

Section 1004.8(a) of the DOE's FOIA regulations defines the OHA's jurisdiction in this area. That section provides that the OHA may consider appeals "when the Authorizing Official has denied a request in whole or in part or has responded that there are no documents responsive to the request . . ., or when the Freedom of Information Officer has denied a request for waiver of fees . . ." 10 C.F.R. § 1004.8(a). Applying these guidelines to the case at hand, the OHA lacks jurisdiction to

consider an "appeal" of Ms. Brown Shute's April 28 e-mail, or to consider New York's arguments concerning the timeliness of OE's response.

Section 1004.2 of the FOIA regulations defines "Authorizing or Denying Official" as being "that DOE officer . . . , having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to . . . officials who report directly to either the Office of the Secretary or a Secretarial Officer . . . ." 10 C.F.R. § 1004.2(b). In OE, the Authorizing or Denying Official is Marshall E. Whitenton, the Deputy Assistant Secretary for Permitting, Siting and Analysis. *See* February 12, 2008, letter from Mr. Whitenton to Maureen F. Leary, Assistant Attorney General, State of New York at 1; April 18, 2008, letter from Mr. Whitenton to Ms. Leary at 2. Consequently, because Ms. Brown Shute is not an Authorizing or Denying Official, her e-mail does not provide an appropriate basis for an Appeal.

Similarly, the regulations do not provide for an appeal to the OHA of the DOE's failure to respond to a FOIA request in a timely fashion. Such a failure does not constitute a denial of a request in whole or in part, a statement that there are no responsive documents, or a denial of a fee waiver request. Consequently, the OHA does not have jurisdiction over claims of untimeliness. *See, e.g., EverNu Technology, LLC*, 30 DOE ¶ 80,112 (March 5, 2008) (Case No. TFA-0243); *Citizen Action New Mexico*, 29 DOE ¶ 80,302 (July 6, 2007) (Case No. TFA-0203); *Arlie Bryan Siebert*, 29 DOE ¶ 80,258 (April 20, 2006) (Case No. TFA-0157). Instead, the requester's remedy in such cases is to seek redress in a federal District Court. 10 C.F.R. § 1004.5(d)(4); *see also* 5 U.S.C. § 552(a)(6)(C)(i). We will, therefore, not consider New York's arguments concerning the timeliness of the DOE's response or Ms. Shute's e-mail.

B. Agency Records

New York also contests OE's failure in its February 12th response to provide the CERA study, and its finding in its May 6th response that communications between CRA and transmission developers and industry stakeholders are not subject to the provisions of the FOIA. In essence, OE has determined that the CERA study and the communications between CRA and industry entities, that were not in the DOE's possession at the time of New York's request, are not "agency records."

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the United States Supreme Court in *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors for determining whether a document was under an agency's control at the time of a request:

1. The intent of the document's creator to retain or relinquish control over the document;

2. The ability of the agency to use and dispose of the record as it sees fit;

3. The extent to which agency personnel have read or relied upon the record; and

4. The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. U.S. Department of Health and Human Services, 87 F.3d 508, 515 (D.C. Cir. 1996).

Applying these standards to the case at hand, we conclude that the CERA study, and communications between CRA and transmission developers and industry stakeholders that were not in the possession of the DOE at the time of the request, are not agency records. With regard to the CERA study, OE informed us that the study was acquired by an OE employee from FERC prior to OE's receipt of New York's request. *See* memorandum of June 3, 2008 telephone conversation between Robert Palmer, OHA Staff Attorney, and Mr. Whitenton. This satisfies the first prong of the *Tax Analysts* test. However, the study was not under the control of the DOE at the time of New York's request. Mr. Whitenton indicated that, although the employee sent the study to CRA prior to the request, a copy of the study was not retained in the DOE's records. *Id.* Consequently, at that time the DOE did not have "the ability to use and dispose of the record" as it saw fit. Moreover, although the OE employee apparently did read the study, the DOE did not rely on it in making any decisions regarding the Congestion Study or the related NIETC designation order. *See* memorandum of May 22, 2008 telephone conversation between Mr. Palmer and Ms. Brown Shute. Finally, the record's creator, CERA, has clearly expressed an intention to retain control over the record. According to Ms. Brown Shute, CERA declined to provide a copy of the study to OE in connection with New York's request, stating that it considered it to be "business confidential." *See* April 28, 2008 e-mail from Ms. Brown Shute to Ms. Leary. Moreover, only CERA clients are permitted to download the study from CERA's website. *See* http://www.cera.com. OE properly concluded that the CERA study is not an "agency record."

With regard to the communications between CRA and transmission developers and industry stakeholders, the DOE is currently reviewing those documents that are in its possession for possible release to New York. The communications that are not in its possession were neither created nor obtained by the DOE. Under the *Tax Analysts* standard, these communications are not "agency records."

However, a finding that certain documents are not "agency records" does not end our inquiry. Section 1004.3(e) of the DOE's FOIA regulations states that

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

We have also held that this provision is applicable to DOE subcontractors when the contract between the prime contractor and the subcontractor provides that records generated by the subcontractor are

the property of the DOE. *See Martin Becker*, 28 DOE ¶ 80,187 (September 7, 2001) (Case No. VFA-0666). We have examined the contract between LBNL and CRA, and have concluded that it does not include any language providing that the documents in question are the property of the DOE.[2] OE properly concluded that these documents are not subject to the FOIA.

C. Exemption 5

OE withheld portions of Document 34 pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). This document, which has the heading "Table 3. Top Constraints, Ranks and Most Affected," is a list of constraints, or areas of "congestion," in the northeastern U.S. [3] The portions of this document that were withheld consist of handwritten notes in the margins that were authored by a DOE employee.

Exemption 5 shields from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context."*NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears).* The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. 132, 150 (1975); *Coastal States*. The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the

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2/ Since CERA was neither a DOE contractor nor a subcontractor, this regulatory provision is inapplicable to the CERA study.

3/ In this context, "congestion" refers to areas where consumers are not able to obtain cheap electricity because transmission wires and facilities are running at or near capacity. *See* memorandum of May 22, 2008, telephone conversation between Mr. Palmer and Mr. Whitenton.

mental processes of the decision-maker. *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988).

In order to determine whether OE properly applied this Exemption, we obtained a copy of Document 34. At the outset, we note that the very nature of the withheld material, notes written by hand in the margins, suggests that it reflects the opinions of the author about the subject matter of the document, and not a final agency position. Our examination of the material confirmed this. We further find that the notes are predecisional, in that they reflect a part of the decision-making process that led up to the issuance of the Congestion Study. *See* memorandum of June 16, 2008, telephone conversation between Mr. Palmer, Mr. Whitenton and Ms. Brown Shute. They are also deliberative, in that they reflect the personal opinions of the author, rather than the final position of the DOE. The author's conclusions were subject to further review and analysis before the issuance of the Study. OE properly applied Exemption 5 in withholding these notes.

D. The Public Interest

Our finding that portions of this document are exempt from mandatory disclosure under Exemption 5 does not necessarily preclude release of the material to New York. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, the release of this predecisional, deliberative material could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (March 18, 1987) (Case No. KFA-0080). We do not believe that discretionary release of the withheld material would be in the public interest.

III. Conclusion

For the reasons set forth above, we find that OE properly determined that the CERA report and communications between CRA, the DOE and industry stakeholders that were not in the DOE's possession at the time of New York's request, are not "agency records." We further conclude that the handwritten notes deleted from Document 34 were properly withheld under Exemption 5. We will therefore deny New York's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York, Case Number TFA-0257, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 18, 2008

July 3, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: May 20, 2008

Case Number: TFA-0258

On May 20, 2008, Terry M. Apodaca (Apodaca) filed an appeal from a determination issued to her on April 23, 2008, by the Department of Energy's (DOE) National Nuclear Security Administration's Service Center (SC). In that determination, SC responded to a request for documents that Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. SC identified a number of documents responsive to Apodaca's request. Some of those documents were released in their entirety and, pursuant to Exemption 6 of the FOIA, others were released with some deletions. Apodaca has challenged the withholding of information under Exemption 6. Apodaca also challenges the extent of the search that was conducted for responsive documents. This appeal, if granted, would require SC to release the withheld information to Apodaca and conduct a more extensive search for documents.

I. Background

On August 29, 2007, Apodaca requested: (1) A copy of all documents relating to an investigation (and corrective actions) concerning an incident referred to in an E-mail message from Tyler Przybylek dated 3/14/07[1] (Przybylek E-mail), including any responsive documents in the offices of five specifically named employees (Category 1); and (2) a copy of the official FOIA file (Request No. 06-181-A) pertaining to the processing of a particular FOIA request (Category 2).

In its April 23, 2008, determination letter (Determination Letter) responding to Apodaca's request, SC provided Apodaca with one Category 1 document. SC also provided Apodaca with 39 Category 2 documents (numbered from 1 to 39).[2] SC withheld from Document Nos. 1-4, 10,

[1] The E-mail message references an incident concerning the improper release of information. The message goes on to state "[T]here [have] been multiple points of failure . . . . They will be investigated." Apodaca Appeal submission (August 29, 2007 FOIA Request from Terry Apodaca to Carolyn Becknell).

[2] The text of the letter indicated that there were 40 Category 2 documents while the list of Category 2 documents included in the letter described only 39 documents. Apodaca was only provided 39 Category 2 documents. Apodaca raised this difference as one of her grounds for appeal believing that SC had not provided her with a Category 2

21-25, 27, 29, 31,33, 35 and 36 information relating to the home address, telephone number and E-mail address of the individual who filed the request in Case No. 06-181-A). This information was withheld pursuant to Exemption 6 of the FOIA.

Apodaca challenges SC's determination on a number of grounds. First, Apodaca apparently challenges the withholding of information under Exemption 6 concerning the FOIA requester (the individual who filed the request in Case No. 06-181-A) from the various Category 2 documents, because contractor employee names, telephone and facsimile numbers, E-mail addresses and the name of the organizations they work for were not redacted from a number of Category 2 documents. Second, the Determination Letter did not specify that information was being withheld under Exemption 6 in Document Nos. 37 and 39. Third, Documents Nos. 22 and 35 were letters that indicated that each had an attachment, yet Apodaca was not provided a copy of these attachments. Lastly, she argues that SC failed to conduct a search for responsive documents at the Y-12 plant in Oak Ridge, Tennessee.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." U.S.C.§ 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte, Beard and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499). [3]

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document. Upon inquiry, SC has informed us that it found only 39 Category 2 documents and that the reference to 40 documents was in error. *See* E-mail from Carolyn Becknell, FOIA Officer, SC, to Richard Cronin, Attorney-Examiner, Office of Hearings and Appeals (May 30, 2008). Consequently, given SC's explanation as to the discrepancy, we need not address Apodaca's argument concerning a missing Category 2 document.

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

As an initial matter, we must reject Apodaca's argument that, because SC released information in the Category 2 documents relating to federal contractor employees, SC should have also released the redacted information concerning the individual FOIA requester. The fact that an agency may make differing privacy analyses concerning different individuals named in a document does not mandate that the agency release the names of all individuals. S*ee Neil Mock and Scott Lebow*, 28 DOE ¶ 80,138 at 80,587 (January 19, 2001) (Case No. VFA-0632). The privacy interest for different individuals or employee classes under Exemption 6 will always be dependent on the context in which it has been asserted.[4] *Id.* In the present case, SC decided to make a discretionary release of the contractor employees' information. *See* Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008). Even if SC erred in releasing this information concerning contractor employees, it does not change the fact that a private FOIA requester making a request in his or her own name has a privacy interest in remaining anonymous. *Cf. Silets v. Dep't of Justice*, 945 F.2d 227, 230-31 (7th Cir. 1991) (deciding to affirm the withholding of an individual first-party FOIA requester's name pursuant to Exemption 7(C)). There is little if any public interest in the release of the full name and personal information of the FOIA requester in this case, since release of the information would shed no additional information on the operations and activity of government in the processing of FOIA Request No. 06-181-A . Thus, balancing the privacy interest involved in this cases against the scant public interest, we find that SC properly withheld indentifying information about the requester in the Category 2 documents.

With regard to Document Nos. 37 and 39, SC's Determination Letter does not, in fact, list them as documents from which information has been withheld pursuant to Exemption 6. However, the copies of these two documents themselves indicate that information was withheld under Exemption 6. The information withheld under Exemption 6 in these documents is of the same type as the other Exemption 6 information withheld in the other documents and, as discussed above, was properly withheld.

B. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 11384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (January 22, 1988) (Case No. KFA-0153).

We contacted the FOIA Officer to ascertain the scope of the search that was made for responsive documents. The FOIA Officer informed us that with regard to the Category 1 documents, each of the five named employees was contacted and each made a search of his or her E-mails and

[4] We offer no opinion as to the propriety of the release of the information concerning contractor employees in the Category 2 documents.

other documents to see if responsive documents existed.[5] Only one employee found a responsive document and that document was provided to Apodaca. None of the five named employees knew of any investigation that was conducted pursuant to the Przybylek E-mail. No search at the Y-12 plant was conducted since, based on the information she had obtained, the FOIA Officer had no expectation that responsive documents would be located at that facility. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

With regard to the search for Category 2 documents, the FOIA Officer went to the Office of Public Affairs where the requested FOIA file (Case No. 06-181-A) was located and provided Apodaca with all documents in that file (after redacting various documents pursuant to Exemption 6). With regard to the attachments referenced in Apodaca's appeal, no copies were found in the file and the FOIA Officer had no knowledge that other copies would exist in any location other than in the file itself. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

Our review of the search that was conducted for documents responsive to Apodaca's appeal leads us to conclude that SC made an adequate search for documents. In the search for Category 1 documents, SC contacted each of the five named employees and had searches made for responsive documents. Further, none of the employees had any knowledge that any type of investigation had been made related to the Przybylek E-mail. As to the search for Category 2 documents, SC provided Apodaca with all documents in the requested FOIA file and there was no expectation that other documents would exist outside of that file. The adequacy of SC's search for Category 2 documents is not impaired by the fact that attachments to two of the documents could not be located. *See Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate"). In sum, SC conducted an adequate search reasonably calculated to discover responsive documents.

C. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). We find that SC complied with the FOIA's segregability requirement by releasing to Apodaca all portions of the documents not withholdable under Exemption 6.

III. Conclusion

We find that SC conducted an adequate search for documents responsive to Apodaca's FOIA Request. Additionally, SC properly withheld information in the documents provided to Apodaca under Exemption 6. Consequently, Apodaca's appeal should be denied.

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[5] The author of the Przybylek E-mail, Tyler Przybylek, was no longer employed at DOE's Oak Ridge facility at the time SC conducted a search for responsive records. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

It Is Therefore Ordered That:

(1) The Appeal filed on May 20, 2008, by Terry Apodaca, OHA Case No. TFA-0258, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 3, 2008

June 26, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Feldesman, Tucker & Leifer
Date of Filing:	May 29, 2008
Case Number:	TFA-0259

On May 29, 2008, Feldesman, Tucker & Leifer (Feldesman) appealed a determination issued by the Corporate Services Division of the Office of Headquarters Procurement Services (Procurement) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In its appeal, Feldesman contends that the Department failed to conduct an adequate search for documents responsive to its request. This Appeal, if granted, would require an additional search for responsive material.

I. Background

Feldesman filed a request in which it sought the following information: (1) a copy of any DOE contracts, agreements, grants, payment-related documents, and memoranda concerning or relating to the provision of small business conference event management services with the Veterans Corporation (TVC) (also known as the National Veterans Business Development Corporation) during calendar years 2006-2008, as well as subcontracts, subcontract approvals, and related material; (2) a copy of the proposal that TVC submitted to DOE to provide small business conference event management services; (3) DOE's contract, grant or other files for small business conference event management services provided by TVC; and (4) correspondence, memoranda, or other written material concerning or relating to TerraCom, Inc., TVC and the DOE Small Business 2007 Conference. *See* Appeal Letter at Attachment 3. Procurement issued a determination which stated that it found no proposal documents, correspondence, memoranda, or other written material concerning or relating to TerraCom Inc., TVC and the DOE Small Business 2007 Conference responsive to Feldesman's request. In addition, Procurement located and released one responsive document, Purchase Order Number DE-A01-07WO19945. However, it withheld portions of the document pursuant to FOIA Exemption 4. In its Appeal, Feldesman challenges the adequacy of the search conducted by Procurement.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted officials in Procurement to ascertain the scope of the search. Feldesman originally submitted its FOIA request to the DOE Headquarters FOIA Office (DOE-HQ). DOE-HQ then transferred its request to Procurement for a direct response to the requester. Procurement officials informed us that they conducted a search of their database by the relevant contract numbers, names and keywords (i.e., the National Veterans Business Corporation), and were able to locate one responsive document. Procurement provided this document, Purchase order Number DE-A01-07WO19945, to Feldesman, but redacted commercial and financial information under Exemption 4. Procurement informed us that it did not locate any other responsive information. *See* Record of Conversation between Phyllis Morgan and Craig Ashline, Procurement, and Kimberly Jenkins-Chapman, OHA (June 17, 2008). Given the facts presented to us, we are convinced that Procurement conducted an adequate search that was reasonably calculated to uncover documents responsive to Feldesman's request.

During the course of this Appeal, DOE-HQ informed us that it will forward Feldesman's request to DOE's Small Business Office within the Office of Economic Impact and Diversity to search for responsive documents. That office will respond directly to Feldesman. Accordingly, this Appeal is hereby remanded to DOE-HQ to conduct a new search for information responsive to Feldesman's request.

It Is Therefore Ordered That:

(1) The Appeal filed by Feldesman, Tucker & Leifer, OHA Case No. TFA-0259, on May 29, 2008, is hereby granted as set forth in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the DOE Headquarters FOIA Office for further processing in accordance with the instructions set forth in the Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 26, 2008

July 11, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: BPA Watch

Date of Filing: June 13, 2008

Case Number: TFA-0260

This Decision concerns the BPA Watch's Appeal from a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to it on May 20, 2008, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In that determination, the BPA disclosed some information and withheld other information under FOIA Exemption 6. This Appeal, if granted, would require the BPA to reconsider its Exemption 6 withholding under the analysis set forth below and either (i) justify its withholding or (ii) not withhold the information pursuant to Exemption 6.

I. Background

The BPA Watch filed a FOIA request with the BPA for "a copy of the manifest for the BPA plane(s) for [the] calendar year 2007 showing the date, destination, passengers and purpose of trip." Request Letter. The BPA issued a determination, disclosing 255 responsive documents that show the date, destination, and purpose of each BPA airplane trip in 2007. Determination Letter.

However, the BPA invoked FOIA Exemption 6 to withhold the names of the crew and passengers, aside from BPA Administrator and Chief Executive Officer Stephen J. Wright. The BPA stated that, "Exemption 6 is intended to protect individuals from the injury and harassment that could result from unnecessary disclosure of personal information." The BPA further stated that disclosing the withheld names "would not further the public interest" because "[t]he identity of the passengers and crew does not . . . shed a light on the agency's performance of its statutory duties." Finally, the BPA stated that the remaining information in the disclosed documents "can all be used to monitor the proper use of the BPA planes." *Id.*

The BPA Watch then filed the present Appeal. The BPA Watch asks the Office of Hearings and Appeals (OHA) to order the release of all passenger names, but not crew names. Appeal Letter. It argues that, (i) "There is no privacy interest in a BPA employee (or anyone else) riding a BPA

plane;" and (ii) "Even if there is a privacy interest, the public interest in verifying that [the] BPA is properly managing federal assets far outweighs a privacy interest." *Id.*

The BPA Watch argues that, "[T]he name of the passengers is vital to a determination of whether [the] BPA is complying with federal regulations . . . regarding government aircraft." *Id.* To prove its point, the BPA Watch listed seventeen questions, asking who rode on a BPA plane to a variety of events. Lastly, the BPA Watch notes that the Department of Energy's Inspector General has "indicat[ed] a need for increased DOE management oversight of aviation activities" and that the BPA manifests contain approximately a dozen blank entries for "purpose." *Id.*

II. Analysis

Congress designed the FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citation and quotations omitted). Therefore, the FOIA has a strong presumption in favor of disclosure. *Id.*

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). An agency should construe "similar files" broadly, "[T]o cover detailed Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982) (citation and quotations omitted). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id.* at 599.

The agency has the burden to show that requested material falls within an exemption. *Ray*, 502 U.S. at 173 (citation omitted); *see also News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) (describing the agency's burden as "onerous"). The agency must "narrowly construe[]" Exemption 6. *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citation and quotations omitted).

We must apply a three-step analysis to determine whether the DOE properly invoked Exemption 6 to withhold the passenger names. First, we must determine whether disclosing the information compromises a substantial privacy interest. If disclosure does not compromise a substantial privacy interest, the DOE may not withhold the information. Second, we must determine whether disclosing the information is in the public interest. Third, we must balance the substantial privacy interest against the public interest in order to determine whether disclosing the information would constitute a clearly unwarranted invasion of personal privacy. *Ripskis v. Dep't of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

We contacted the BPA to gather information to evaluate its withholding of the passenger names under Exemption 6. *See* Memorandum of Telephone Conversation between Christina Brannon, FOIA/ Privacy Act Office, BPA, and David M. Petrush, Attorney-Examiner, OHA, July 2, 2008. The BPA stated that BPA employees are entitled to privacy regarding their official activities. The BPA did not consider whether a privacy threat exists for any passenger, whether a federal

employee or non-federal employee. Instead, the BPA focused on whether releasing the names is in the public interest. The BPA concluded that releasing the names will not further the public interest. That is, according to the BPA, the BPA Watch made its FOIA request to determine if the BPA is committing fraud, waste, or abuse. The BPA stated that the BPA Watch will be able to make that determination without the passenger names and that knowing who went on a particular trip will not expose whether the plane was improperly used. Moreover, the BPA stated that it released the purpose of each trip, which it considers to be the piece of information of the greatest interest to the public. *Id*.

We find that Exemption 6 applies to the BPA plane manifests because, following *Wash. Post Co*., they may be "identified as applying" to the passengers whose names appear on them.

Regarding the first step of the *Ripskis* balancing test, "[T]he privacy threat depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue." *Norton*, 309 F.3d at 36. The privacy threat must be "real rather than speculative." *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 116 (D.D.C. 2005) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 381 n.19 (1976)); *see, e.g.*, *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (withholding a list of names and addresses when disclosing the list would have invited a "fusillade" of mailings from businesses and charities because the list indicated whether each individual was retired, disabled, or received a monthly annuity check). Further, releasing a list of names "does not inherently and always constitute a 'clearly unwarranted' invasion of personal privacy." *News-Press*, 489 F.3d at 1199; *see also Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980) (stating, Exemption 7(C) "do[es] not . . . imply a blanket exemption for the names of all [government employees] in all documents"); *Elec. Privacy Info. Ctr.*, 384 F. Supp. 2d at 116 (citing *Baez* in the Exemption 6 context).

We find that the BPA has not met its burden to show that disclosing the passenger names compromises a substantial privacy interest. The BPA did not identify a real privacy threat with likely consequences for the passengers, as *Norton* and *Elec. Privacy Info Ctr*. require. Also, following *News-Press* and *Baez*, the BPA may not withhold the names of federal employees merely because they are federal employees. Therefore, we will remand this case to the BPA to determine disclosing the passenger names compromises a substantial privacy interest that outweighs the public interest in disclosure.

On remand, if the BPA finds that disclosing the passenger names compromises a substantial privacy interest, the BPA must consider the second step of the *Ripskis* test – whether disclosing the names is in the public interest. We disagree with the BPA's conclusion that the public does not have an interest in disclosure of the passenger names. Disclosing information is in the public interest if it "shed[s] light on agency's performance of its statutory duties." *Norton*, 309 F.3d at 35 (citation and quotations omitted); *see also Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005) ("The focus of the public interest analysis is the citizens' right to know what their government is up to.") (citation and quotations omitted). Relevant here, the BPA may only use an aircraft for an official purpose. *See* 31 U.S.C. § 1344(a). An official purpose includes carrying only passengers authorized to travel on government aircraft, according to the requirements of Office of Management and Budget (OMB) Circular No. A-126. 41 C.F.R.

§§ 102-33.20, 102-33.25(c)-(d). OMB Circular No. A-126 requires the BPA to document the names of all passengers. It also requires passengers to reimburse the government for certain travel, including a wholly personal or political trip. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIR. NO. A-126, IMPROVING THE MANAGEMENT AND USE OF GOVERNMENT AIRCRAFT (May 22, 1992) (Revised).

We find that releasing the passenger names is in the public interest because it will shed light on whether the BPA operated its planes in accordance with its statutory duties, as specified in OMB Circular No. A-126. In particular, releasing the passenger names will allow the BPA Watch to determine if the BPA documented passenger names on the plane manifests. The BPA may have left the spaces in the manifests for passenger names blank, as it reportedly did under one or more spaces for "purpose," or listed "John Doe" instead of actual passengers. Reviewing the passenger lists may also indicate if the BPA used its planes for wholly personal or political trips. For example, a passenger list consisting of names from a single family may indicate a wholly personal trip. Similarly, a passenger list consisting of the names of public officials and/or registered lobbyists may indicate a wholly political trip. Without reviewing the passenger lists, the BPA Watch would never have the opportunity to find out.

It Is Therefore Ordered That:

(1) The Appeal that the BPA Watch filed on June 13, 2008, OHA Case No. TFA-0260, is granted, as set forth below.

(2) The BPA Watch's Appeal is remanded to the BPA. The BPA shall reconsider the BPA Watch's FOIA request for the passenger names under the analysis set forth above and issue a new determination. If it wishes to withhold the passenger names under Exemption 6, the BPA must identify the privacy threat and describe how that interest outweighs the public interest in disclosure. Otherwise, the BPA may not withhold the passenger names under Exemption 6.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 11, 2008

August 21, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	BPA Watch
Date of Filing:	June 25, 2008
Case Number:	TFA-0263

On June 25, 2008, BPA Watch filed an Appeal from a determination issued to it on May 30, 2008, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE) in response to a request for documents that BPA Watch submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that BPA release responsive material.

I. Background

BPA Watch is a web site that provides news, analysis and commentary about BPA, a federal power marketing agency headquartered in Portland, Oregon. On March 31, 2008, BPA Watch requested copies of certain records that BPA had provided to a federal district court in Portland, Oregon in response to a federal criminal subpoena. BPA Watch requested the following: "[c]alendars in hard copy or electronic form (i.e., Microsoft Outlook) for three BPA employees for the years 2001-2003: Mark A. Reynolds; Mark Wilczewski; and Chuck Meyer." Letter from BPA Watch to BPA (March 31, 2008). [1] On May 30, 3008, BPA issued a partial response to the request and informed BPA Watch that it had no responsive records for Mark A. Reynolds. Letter from BPA to BPA Watch, May 30, 2008 (Determination). The agency also explained that paper copies of the electronic calendars of Mark Wilczewski (Wilczewski) and Chuck Meyer (Meyer) did exist, but that they were being withheld because BPA considered the documents to be personal records of those individuals, and not agency records, and personal records are not subject to release under the FOIA. BPA Watch appealed this determination and asked OHA to order BPA to release the withheld material. Letter from BPA Watch to OHA (June 26, 2008) (Appeal).

[1] I note that BPA Watch stated in its appeal that it is not requesting the disclosure of any personal items on the calendars. Appeal at 2.

II. Analysis

A. The Test for Agency Records

Although the purpose of the FOIA is to provide public access to federal agency records that are not exempt from disclosure, the statutory language of the FOIA does not define an agency record, but merely lists examples of the types of information that agencies must make available to the public. *See* 5 U.S.C. § 552(a**).** Consequently, in order to distinguish agency records from personal records, federal courts have applied a "totality of the circumstances" test. This test "focus [es] on a variety of factors surrounding the creation, possession, control, and use of the document by an agency." *Consumer Federation of America v. Dep't of Agriculture*, 455 F. 3d 283, 287 (D.C.Cir. 2006) (citing *Bureau of Nat'l Affairs, Inc. v. Dept of Justice,* 742 F.2d 1484, 1490 (D.C.Cir. 1984)). Courts have identified four relevant factors for an agency to consider when determining whether the agency has control over a document: (1) the intent of the record's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the extent to which the record was integrated into the agency's recordkeeping system or files. *Consumer Federation of America,* 455 F.3d at 288 n.7.

Both parties in this case agree that the "totality of the circumstances test" is the appropriate standard for adjudicating this matter. *See* Appeal at 3; Determination at 1, 4. In their arguments, the parties refer to three cases that are instructive regarding the issue of whether records created by an agency employee using agency resources are properly classified as agency records or as personal records.

In the first case, *Bureau of National Affairs, Inc. v. Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (*BNA*), the United States Court of Appeals for the District of Columbia Circuit was asked to decide whether appointment calendars and daily agendas of a government official were agency records subject to disclosure under FOIA. The daily agendas were prepared by the official's secretary and distributed to his staff so that they would know his schedule. *BNA*, 742 F.2d at 1487. The appointment calendars were used to organize personal and business activities. Top level assistants occasionally had access to the calendars, paper documents located on the official's desk, in order to determine the availability and location of the official. However, the calendars were not distributed to other employees. *BNA*, 742 F.2d at 1495. The court concluded that the agendas (created for the purpose of informing others of the daily activities of the official and distributed to other employees) were agency records, but the calendars (created for the personal convenience of the official and not distributed) were not.

The remaining cases are more recent and involve requests for both electronic and paper documents. In 2004, the United States District Court for the District of Columbia considered a request for the appointment calendar of the SEC chairman. *Bloomberg v. Securities and Exchange Commission*, 357 F. Supp. 2d 156, 163 (D. D.C. 2004). This was a personal calendar maintained on the agency computer system that was created for the personal use of the chairman, not as an official record of his schedule. The chairman's Chief of Staff and Deputy Chief of Staff viewed the calendar on

occasion to determine the availability of the chairman, but the calendar did not circulate. The Court found that the appointment calendar was a personal record based on its limited distribution, its creation for personal use, and the fact that the agency allowed its employees limited use of government equipment for personal needs. *Id.* at 164.

In the third case, the United States Court of Appeals for the District of Columbia Circuit in 2006 considered whether the electronic appointment calendars of six officials of the Department of Agriculture were agency records. *Consumer Federation of America,* 455 F.3d at 283. Five of the officials distributed their calendars to other employees, including their secretaries, assistants, and colleagues. The sixth official was a lower level employee who distributed his calendar to his secretary only. *Id.* at 286. Using the totality of the circumstances test, the court determined that the use of the documents was the decisive factor because their creation, possession and control were not dispositive under the facts of the case. *Id.* at 291. The court found that the calendars of the five higher level officials were similar to the agendas in *BNA* because they were used to communicate availability of the five officials and because they were distributed to other employees. *Id.* at 292-3. Thus, the court concluded that these five calendars were agency records. However, because there was no evidence that other employees either relied on the calendar of the sixth official (with the exception of his secretary) or received copies of that calendar, the court found that the calendar of the sixth official was a personal record. *Id.* at 293.

B. Arguments of the Parties

BPA argues that the records requested are not agency records, but rather the personal records of Meyer, a BPA vice president, and Wilczewski, a BPA economist. Using the "totality of the circumstances" test, BPA highlighted the following significant facts. First, BPA noted that the calendars of both men contained personal as well as business entries, only Meyer and his assistant made entries in Meyer's electronic calendars, and Wilczewski gave access only to his secretary. However, Meyer's subordinates had access to his calendars "to know where he was and when he was available." Determination at 2. Second, although both calendars were maintained on BPA's Microsoft Outlook, neither the BPA computer administrator nor the BPA records custodian took control of the calendars. Third, there was no substantive agency-related information in the calendars. Finally, BPA does not require its employees to keep their calendars as agency records, and there are no BPA records retention schedules that apply to calendars. BPA admits that this fact is not dispositive. Determination at 2.

BPA asserts that the responsive material is similar to the appointment calendars that were requested in *BNA*-- the Meyer and Wisczlewski calendars were not placed into BPA files, the employees were allowed to dispose of the calendars at their discretion, and a few staff members had access to the calendars to determine the officials' availability. BPA contends that the presence of personal information classifies the calendars as personal records absent a showing of agency control over the documents. In support of its position, BPA also cited *Bloomberg*, where the court found that the Chairman's calendar was a personal record, even though two staff members also had access. BPA alleges that *Consumer Federation of America* can be distinguished because the court in that case could not determine if the calendars were part of the agency files, or if the employees were free to

dispose of their calendars as they wished. BPA argues that the Meyer and Wilczewski calendars were created for the personal convenience of the owners, who could have deleted them at any time. BPA had no control over the calendars, and only retained them in response to discovery requests. *Id.*

BPA Watch sets forth several arguments. First, the requester maintains that the calendars are agency records because BPA retained them in response to a subpoena. Second, the requester argues that BPA has released calendars as agency records in the past, and the withholding in this case presents an unjustified change in previous policy. Third, because the BPA Records Manual defines records broadly and requires retention of records concerning certain legal issues, BPA Watch contends that the responsive material should be considered agency records. Appeal at 7. Fourth, BPA Watch argues that the agency erred in emphasizing the very limited number of people who can make entries on the calendars when emphasis is more properly placed on the number of people who have access to the calendars. Finally, BPA Watch contends that BPA has dismissed the importance of the *Consumer Federation of America* finding that the USDA appointment calendars were agency records because they had "use characteristics" similar to the agendas in *BNA,* i.e., the calendars were distributed to employees, and those employees relied on the calendars in the performance of their duties. The requester maintains that this case is key to adjudicating the matter at hand.

C. Whether the Calendars Are Agency Records

It is clear that the documents (electronic appointment calendars) were created by agency employees using agency resources. However, it is not clear from the limited information in the Determination whether BPA had control over the calendars. When faced with conflicts in the first three factors, courts have been compelled to determine how the responsive material was used in order to determine whether that material is an agency record. *See Consumer Federation of America*, 455 F.3d at 290-291 (determining classification of document based on its use when creation, possession and control are not dispositive in determining whether calendars are agency records); *BNA,* 742 F.2d at 1492 (discussing relevance of use in inquiry into whether record is an agency record). *See also Charles Frazier,* 27 DOE ¶ 80,106 (January 28, 1998) (Case No. VFA-0261) (determining classification of record based on its use when other factors are in conflict).

1. The Wilczewski Calendars

I find that the Wilczewski calendars are not agency records. Wilczewski, an economist, created his calendars for personal convenience. Only Wilczewski and his secretary (or her replacement) had access to his calendars. Even though he kept both business and personal appointments on his calendars, they are very similar to the appointment calendar of the SEC chairman in *Bloomberg* (only the owner of the calendar and two staff members had access), the appointment calendar of the Department of Justice official in *BNA* (calendar was not distributed to other employees, but retained for the convenience of the official), and the calendar of the lower level USDA official in *Consumer Federation of America* (distributed only to his secretary). In those cases, the court found that the calendars were personal records. Similarly, this office has previously found that an appointment calendar that is not distributed to other employees is a personal record. *See Charles Frazier*

(appointment calendars of agency official found to be personal records where distribution was limited to secretary).

As guided by *BNA*, I have examined the totality of the circumstances surrounding the creation, maintenance, and use of Wilczewski's calendars to determine whether they are agency records or merely employee records that happen to be located physically within the agency. *BNA*, 742 F.2d at 1493. It is true that the calendars were created and maintained by an agency employee, and subject to regular computer maintenance by BPA technical personnel. However, the employee did not distribute the calendars to any of his colleagues, maintained the calendars for his own convenience, and also kept personal information on the calendars. Further, Wilczewski was free to dispose of the calendars as he wished. [2] Thus, I find that Wilczewski's calendars are not agency records.

2. The Meyer Calendars

After a review of the case law and the specific facts of this case, I conclude that the Meyer calendars are agency records. Meyer, a high level employee, created the calendars using agency resources and, similar to Wilczewski, was free to dispose of the calendars as he wished. However, Meyer, a BPA vice president, gave his staff members access to the calendars so that they could determine his availability. The Meyer calendars are similar to the calendars of the five higher-level officials in *Consumer Federation of America,* where the staff members relied on the calendars of the officials for the same reasons that Meyer's subordinates relied on his calendars – to determine the availability of another agency employee and to avoid double booking of work-related appointments. The BPA employees relied on Meyer's calendars in performing their duties, and thus his calendars were a part of BPA daily operations. As stated in *Consumer Federation of America*,

> Allowing others to have routine computer access to a calendar is more like distributing hard copies than it is like permitting occasional glances at a document on a desk. *In allowing computer access, the official surrenders personal control over the document and indicates that it will be used by others to plan their own workdays*.

Consumer Federation of America, 455 F. 3d at 292 n.16 (emphasis added).

The USDA calendars were electronically "distributed" to the listed recipients who used them to schedule agency meetings and prevent conflicts. *Id.* at 292. Meyer's subordinates used his calendars to plan their workdays, just as the USDA employees used the calendars of their superiors

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[2] BPA Watch argues that the calendars are agency records because the agency did not refuse to disclose them in response to a discovery request in a criminal case. BPA Watch suggests that BPA could have asserted that the calendars were personal records and not subject to the criminal subpoena. I am not persuaded that maintaining a record in a government office in response to a criminal subpoena converts that record to an agency record. The mere presence of the document in the agency offices does not create an agency record. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980). "To be agency records, something more than mere possession of the records by an agency official must be shown. Some nexus between the agency's work and the records must be established." *BNA*, 742 F.2d at 1491 (quoting *Illinois Institute for Continuing Legal Education v. Dep't of Labor*, 545 F. Supp. 1229, 1233-34 (N.D. Ill.1982)). Under the facts of this case, a criminal subpoena does not establish this nexus.

in *Consumer Federation of America*. For the reasons stated above, I find that the Meyer appointment calendars are agency records.

III. Conclusion

I conclude that the Meyer appointment calendars are agency records, and subject to release under FOIA. I further conclude that the Wilczewski appointment calendars are personal records and thus not subject to release under the FOIA.[3] Accordingly, this Appeal is granted in part. BPA shall either release the 2001-2003 appointment calendars of Chuck Meyer, or issue a new determination to justify its withholding of any portion of the calendars.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by BPA Watch on June 25, 2008, OHA Case Number TFA-0263, is hereby granted in part and denied in all other respects.

(2) BPA shall either release the 2001-2003 calendars of Chuck Meyer or issue a new determination to justify its withholding of any portion of the calendars.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli Marmolejos
Director
Office of Hearings and Appeals

Date: August 21, 2008

[3] I am not persuaded by BPA Watch's argument that BPA should release the Meyer and Wilczewski calendars because the BPA Records Manual defines records broadly. Courts have stated that federal records management statutes "cannot be used as the divining rod for the meaning of 'agency records' under FOIA." *Consumer Federation of America*, 455 F.3d at 289 (citing *BNA*, 742 F.2d at 1493).

July 14, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Elizabeth Borum

Date of Filing: July 1, 2008

Case Number: TFA-0265

This Decision concerns an Appeal that Elizabeth Borum filed in response to determinations that were issued to her by the Department of Energy's (DOE) Oak Ridge Operations Office (OR) and by the National Nuclear Security Administration's Albuquerque Service Center (NNSA). In these determinations, OR and NNSA replied to a request for documents that Ms. Borum submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. [1] OR released certain documents to Ms. Borum in their entirety, and NNSA stated that it could not locate any documents that are responsive to her request. This Appeal, if granted, would require OR and NNSA to conduct a new search for responsive documents.

In her FOIA request, Ms. Borum sought access to the medical, personnel and radiation exposure records of her deceased father, Roy L. Loudermilk. Mr. Loudermilk was employed at the K-25 plant in Oak Ridge from November 1944 until August 1961. In a partial response dated April 9, 2008, OR provided Ms. Borum with a copy of Mr. Loudermilk's personnel security clearance index card file, a radiation exposure record, and a work history report. In its "final" response, dated May 27, 2008, OR stated that the K-25 search had been completed, and that an additional radiation exposure record had been located. OR provided this record to Ms. Borum in its entirety and informed her that responsive documents might also be located at the Y-12 plant in Oak Ridge. Because the Y-12 plant is under the jurisdiction of NNSA, OR referred Ms. Borum's request to NNSA. In its response to Ms. Borum, NNSA stated that it could not locate any responsive documents.

1/ The FOIA generally requires that documents held by federal agencies be released to the public on request. FOIA Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, may be accessed at http://www.oha.doe/foia1.asp.

In her Appeal, Ms. Borum challenges the adequacy of the searches performed by OR and NNSA. Subsequent to our receipt of this Appeal, OR provided additional documents to Ms. Borum. [2] These documents consisted of approximately 140 pages of yearly X-Ray interpretation reports, EKG readings and interpretations, inoculation records, dispensary notes and dates of visits to the K-25 medical department, laboratory (urine and blood) tests, vision and hearing tests, work restrictions, correspondence to the Social Security Administration, physical examination results, a medical incident report, a disability claim for benefits, and "return to work" notes from private physicians. *See* July 3, 2008 e-mail from Ms. Rothrock to Mr. Palmer.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, 26 DOE ¶ 80,240 (1997).

In order to determine whether the search conducted was adequate, we contacted OR and NNSA. OR informed us that their search extended to the DOE Records Holding area, where Mr. Loudermilk's personnel security clearance assurance index card was found, and to the K-25 plant and Oak Ridge Associated Universities, where his medical records, employment history, and radiation exposure records were found. OR concluded that no other locations were likely to have records pertaining to Mr. Loudermilk. The searches were done both manually and electronically, depending on the nature of the system of records being searched. All electronic searches were performed using as many personal identifiers as possible, *e.g.*, name, badge number, social security number and date of birth. *See* July 3 e-mail from Ms. Rothrock to Mr. Palmer.

NNSA stated that the DOE Personnel Security Division and the active and archived personnel, medical and radiation records at the Y-12 plant were searched. As was the case with OR, the searches were either manual, or electronic using multiple identifiers, depending on the nature of the system of records being searched. *See* NNSA's April 15, 2008 determination letter to Ms. Borum; *see also* memorandum of July 8, 2008 telephone conversation between Christina Hamblen, NNSA, Carolyn Becknell, NNSA, and Mr. Palmer.

2/ Employees at the K-25 plant located these documents after OR's May 27 response and sent them to OR during the first week of July 2008. *See* July 3, 2008 e-mail from Amy Rothrock, OR, to Robert Palmer, OHA Staff Attorney.

Based on this information, we conclude that the DOE's search for responsive documents was reasonably calculated to uncover the sought materials, and was therefore adequate. Ms. Borum's Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Elizabeth Borum on July 1, 2008, OHA Case Number TFA-0265, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 14, 2008

July 25, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gary Maroney

Date of Filing: July 17, 2008

Case Number: TFA-0267

This Decision concerns Gary Maroney's Appeal from a determination that the Department of Energy's (DOE) Richland Operations Office (ROO) issued to him on May 19, 2008. In that determination, the ROO responded to Mr. Maroney's request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the ROO to perform an additional search and either release newly discovered documents or issue a new determination justifying its withholding.

I. Background

Mr. Maroney filed a request with the ROO for his Hanford Site work history records, which the ROO interpreted as a request for his employment records. Determination Letter. The ROO processed Mr. Maroney's request under the PA because the ROO maintains employment records in a PA system of records.[1] E-mail from Dorothy C. Riehle, PA Officer, ROO, to David M. Petrush, Attorney-Examiner, Office of Hearings and Appeals (OHA), July 17, 2008. The ROO denied Mr. Maroney's request because it could not locate his employment records. Determination Letter.

Mr. Maroney then filed the present Appeal with OHA, "[R]egarding the lack of records of [his] having worked at Hanford." Letter from Gary Maroney to OHA, received July 16, 2008. Mr. Maroney included his identification cards from Washington Public Power Supply System and WSH/ Boecon/ GERI, a statement from the Plumbers & Pipefitters National Pension Fund, and a J.A. Jones Construction Co. Statement of Earnings and Deductions, as evidence of his employment history. *Id.* OHA accepted Mr. Maroney's Appeal as challenging the adequacy of the ROO's search.

[1] The PA defines a system of records as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[2] courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g.*, *Todd J. Lemire*, 28 DOE ¶ 80,239 (Aug. 26, 2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);[3] *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

The ROO sent us additional information to help us evaluate its search. The ROO stated that it searched its paper file index and electronic database for Mr. Maroney's employment records, using his name and social security number. E-mail from Dorothy C. Riehle, PA Officer, ROO, to David M. Petrush, Attorney-Examiner, OHA, July 17, 2008. The ROO stated that it searched the files most likely to contain Mr. Maroney's employment records. We agree. For this reason, we find that the ROO conducted a search that was reasonably calculated to uncover all relevant documents, and was therefore adequate. Therefore, we will deny Mr. Maroney's Appeal.

The ROO noted that it believes that the Washington Public Power Supply System was never a contractor or subcontractor with the DOE. Even if it were, according to the ROO, the DOE did not require all contractors and subcontractors to transfer their employment records to the DOE. Therefore, the ROO suggested that Mr. Maroney consider contacting the Washington Public Power Supply System and the other companies named in his submissions to search for his employment records. *Id.*

[2] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the PA requires only that the agency search its systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA.

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

It Is Therefore Ordered That:

(1) The Appeal that Gary Maroney filed on July 17, 2008, OHA Case No. TFA-0267, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 25, 2008

August 19, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: July 23, 2008

Case Number: TFA-0269

On July 23, 2008, the State of New York (Appellant) filed an appeal from a determination issued to it on June 19, 2008, by the Department of Energy's (DOE) Office of Electricity Delivery and Energy Reliability (OE). In that determination, OE responded to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OE identified 17 documents responsive to the Appellant's request. OE provided the Appellant with 13 of the documents in their entirety. The remaining four documents were withheld in part by OE under Exemptions 4 and 5 of the FOIA. The Appellant challenges OE's withholding of information under Exemptions 4 and 5. This appeal, if granted, would require OE to release the withheld information to the Appellant.

I. Background

On December 17, 2007, the Appellant requested from the DOE a copy of a report entitled "Grounded in Reality: Eastern Interconnection" which was prepared by the firm, Cambridge Energy Research Associates, an affiliate of CRA International (CRA). Also requested were copies of all documents, E-mails, or other correspondence between CRA and the DOE. The Appellant also requested similar documents regarding communication between CRA, DOE or any transmission developers or stakeholders concerning the DOE's August 8, 2006, Congestion Study.[1]

[1] The Congestion Study concerns the percentage of maximum capacity at which existing electricity transmission lines are being used. The Congestion Study was used by DOE along with other data to designate the National Interest Electric Transmission Corridor (NIETC). Pursuant to Section 216(a) of the Federal Power Act, the DOE is required periodically to issue a congestion study. Designation of the NIETC allows entities that wish to build electricity transmission facilities within the boundaries of the NIETC to apply to the Federal Energy Regulatory Commission for permission to build notwithstanding local government disapproval of such construction. *See State of New York*, 30 DOE ¶ _____ (June 18, 2008) (Case No. TFA-0257).

In its June 19, 2008, determination letter (Determination Letter) which responded to the Appellant's request in part, OE provided the Appellant with 17 responsive documents (Document Nos. 1-11).[2] June 19, 2008, Determination Letter from Marshall E. Whitenton, OE. Of these, two attachments to a September 13, 2005, E-mail, Document Nos. 1a and 1b, had portions redacted pursuant to Exemption 4 of the FOIA, which protects trade secrets and commercial information. OE stated in its determination letter that the withheld portions of these documents contained privileged commercial information. Information in Document No. 4, a printout of a September 7, 2005, CRA presentation to DOE entitled "Defining Transmission Corridors of National Importance," was withheld pursuant to Exemptions 4 and 5. OE also claimed that the withheld information in Document No. 4 contained privileged commercial information which would be protected from release pursuant to Exemption 4. OE also asserted that Document No. 4 contained predecisional information which would not be subject to release in litigation and was thus protected by Exemption 5. Lastly, information in Document No. 5, a July 23, 2006, draft of Chapter Four of the 2006 DOE Congestion Study, was withheld pursuant to Exemption 5, since it consisted of predecisional "deliberations and proposed language that may not be a part of the final document." Determination Letter at 2.

The Appellant challenges OE's determination on a number of grounds. First, the Appellant asserts that OE did not identify any specific reason in its Determination Letter explaining how the withheld information constituted "privileged commercial information" or "pre-decisional discussions." Second, the Appellant maintains that OE's Determination Letter fails to provide an adequate description of the withheld information to enable the appellant to understand the basis of OR's determination. Third, the Appellant also asserts that OE failed to explain how release of the withheld commercial information could be expected to cause commercial harm. Fourth, with regard to Document No. 4, the Appellant argues that the document is in essence a presentation as to the methodologies CRA would use to define the NIETC and therefore cannot be considered an agency deliberation. Fifth, the Appellant contends that OE failed to segregate factual information from the two Exemption 5 documents. Finally, the Appellant argues that if any of the Exemption 5 documents were seen by non-DOE parties, any Exemption 5 protection would be waived.

II. Analysis

A. Adequacy of the Determination

According to the FOIA, after conducting a search for responsive documents under the FOIA, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id*.

An agency therefore has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, 26 DOE ¶ 80,232 at 80,888 (November 27, 1997) (Case No. VFA-0339); *Research Information*

[2] Some enclosures to documents were numbered using a number and a letter, such as Document Nos. 1a and 1b.

Services, Inc., 26 DOE 80,139 at 80,592 (November 27, 1996) (Case No. VFA-0235) (*RIS*). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *Paul W. Fox*, 25 DOE ¶ 80,150 (November 30, 1995) (Case No. VFA-0096). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*, 26 DOE at 80,592.

Thus, if an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result.[3] *Smith, Pachter, McWhorter & D'Ambrosio*, 27 DOE ¶ 80,228 (September 1, 1999) (Case No. VFA-0515). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Our review of the Determination Letter indicates that OE failed to provide any explanation as to how Exemption 4 applied to any of the information withheld in Documents Nos. 1a, 1b and 4. The only explanation offered in the Determination Letter was a statement that the withheld material consisted of "privileged commercial information" referencing CRA business activities and that the documents themselves were submitted to DOE with the "understanding" that the information contained within the documents would remain confidential. Determination Letter at 1-2. While the Determination Letter stated the general Exemption 4 requirements, it did not provide any description of the withheld material or explain how the Exemption applies to the withheld information. Consequently, OE's Determination Letter was inadequate with regard to all Exemption 4 withholdings. Further, with regard to Document No. 4, from which significant portions were withheld, there is no marking as to which portions were withheld pursuant to Exemption 4 and which were withheld pursuant to Exemption 5. Thus, administrative appeal without additional information is virtually impossible with regard to Document No. 4.

As to Document No. 5, the Exemption 5 determination is sufficient. In the Determination Letter's index, OE states that Document 5 was a draft document that contained language that "may not be a part of the final document." Determination Letter Attachment at 1. The Determination Letter specifically describes the withheld material as a draft version of one chapter of the Congestion Study which also contains handwritten notes of DOE employees. The Determination Letter identifies the "deliberative process privilege" as the Exemption 5 privilege justifying the withholding. Consequently, unlike the Exemption 4 determination, the Exemption 5 determination is sufficient to meet the requirements of 10 C.F.R. § 1004.7(b)(1).

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new

[3] See discussion of requirements for application of Exemption 4 discussed *infra*.

determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, 28 DOE ¶ 20,257 (December 19, 2002) (Case No. TFA-0003). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. In the present case, the amount of Exemption 4 material withheld in Document Nos. 1a and 1b is small and consists of a type of commercial information that OHA has reviewed in a number of Exemption 4 cases. We will therefore consider the propriety of OE's withholding of information in those documents, as well as the propriety of the withholding in Document No. 5, since the determination was adequate with regard to that document. However, with regard to Document No. 4, we will remand the matter to OE so that it can issue another determination regarding the document and inform the Appellant which specific portions of the document are being withheld pursuant to which Exemption and explain how Exemptions 4 and 5 apply to the withheld material in that document.[4]

B. Exemption 4 – Document Nos. 1a and 1b

1. Applicability of Exemption 4

The information redacted in Document 1a consists of proposed hourly rates of CRA officials, invoice submission methodology, proposed interest rates on outstanding balances, hourly rates to be charged for miscellaneous services and supplies along with CRA banking account information for payments. The information withheld in Document No. 1b consists of CRA estimation of the cost for various services for the "Transmission Corridor" study. All of this information was withheld under Exemption 4.

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 only if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

With regard to the information withheld in the contract, CRA was required by DOE to submit the information in question. *See* E-mail from David Meyer, OE, to Richard Cronin, OHA, (August

[4] As discussed *infa*, the FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). On remand, OE should examine the material in Document No. 4 to see if it contains any non-exempt material that may be segregated for release to the Appellant.

12, 2008). Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper with regard to the information withheld in the contract, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be "commercial or financial."[5] The information submitted by CRA, proposed labor rates, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power CHPS*, 28 DOE ¶ 80,105 (July 31, 2000) (Case No. VFA-0591). All of the information withheld in the contract originated from CRA, a corporation.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "privileged" or "confidential." This case concerns "confidential" information. Withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE's ability to obtain similar information in the future.

After reviewing the information in question, we conclude that all of the information is confidential because release of the information could substantially harm CRA's competitive position. Disclosure of the information could give competitors insight into CRA's pricing estimation processes, rate development methods and labor charges. *See FOIA Group, Inc.*, 30 DOE ¶ 80,107 (February 5, 2008) (Case No. TFA-0239). All of this information could be used by competitors to undercut CRA's position in future contract competitions. Consequently, we find that CRA could experience significant commercial harm from release of the material withheld in Document Nos. 1a and 1b and that OE properly withheld the information in these documents pursuant to Exemption 4.

2. Segregability

In the case of Document Nos. 1a and 1b, OE released virtually all of the documents except for the commercial Exemption 4 information. Consequently, we find that OE has satisfied its obligation under the FOIA to release all non-Exemption 4 information in the documents to the Appellant.

[5] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

C. Exemption 5 – Document No. 5

1. Applicability of Exemption 5

Document No. 5 consists of a draft of Chapter 4 of the Congestion Study. Essentially all of the document, including at least two hand-written symbolic markings concerning a portion of the draft, was withheld from the Appellant.

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified several traditional privileges that fall under this definition of exclusion, including but not limited to: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding Document No. 5 information from the Appellant, OE relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

Document No. 5 is a draft of Chapter Four of the Congestion Study. As such it represents the author's recommendation as to what the text should be regarding the Congestion Study's analysis of western U.S. electric transmission patterns and simulation modeling of future electric transmission patterns. Therefore, Document No. 5 is a predecisional, deliberative document. Further, Document No. 5 has not been expressly incorporated or adopted by reference in DOE's 2006 Congestion Study. *See* E-mail from David Meyer, OE, to Richard Cronin, OHA, (August 12, 2008). Consequently, we find that OE properly withheld Document No. 5 pursuant to Exemption 5.[6]

[6] In its appeal, the Appellant suggests the possibility that OE may have waived its right to assert Exemption 5 documents because it "believes the documents withheld from disclosure may have been made available to a third party." July 22, 2008 Appeal submission from the State of New York at 3. A generalized claim that the withheld information has been made "public" by disclosure to a third party is insufficient to conclude that OE has waived its privilege to assert Exemption 5. *See Steinberg v. United States Department of Justice*, 179 F.R.D. 357, 361 (D.D.C. 1998) (finding no waiver where requester did not produce evidence that specific withheld material is public, even though general subject matter appeared to be in public domain); *Bryan Cave*, 28 DOE ¶ 80,286 at 80,893 (April 30,

2.Segregability

In the case at hand, a significant portion of the material withheld under Exemption 5 is non-factual and not deliberative in nature. As mentioned above, Document No. 5 is composed of a draft analysis of current and future Western electric transmission patterns and uses a significant amount of specific factual data and studies concerning electricity transmission capacities and usage. Release of the data used by the author would, in essence, reveal the author's recommendations. We therefore find that the factual information contained in Document No. 5 is thus so intertwined with the author's analysis as to make any segregation virtually impossible. *See Lead Industries Ass'n. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *see also Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (March 2, 2001) (Case No. VFA-0650).

In sum, OE properly withheld the redacted information in Document No. 5 pursuant to Exemption 5.

D. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *FOIA Group, Inc.*, 30 DOE ¶ 80,198 (February 5, 2008) (Case No. TFA-0239). With regard to the withheld Exemption 5 material, given the strong public policy interest in protecting frank and independent discussion among those responsible for making governmental decisions and their advisors, we do not find that the public interest would be served by release of the Exemption 5 material in Document No. 5.

III. Conclusion

We find that OE properly withheld information in Documents Nos. 1a, 1b and 5 pursuant to Exemptions 4 or 5. However, we are remanding this matter to OE so that it may issue a new determination letter with regard to Document No. 4. Consequently, the Appellant's appeal is granted in part, and denied in all other aspects.

2003) (Case No. TFA-0026). Nevertheless, we inquired of an OE official about Document No. 5. This official informed us that to the best of his knowledge, no one had access to Document No. 5 except DOE officials and DOE-contractor personnel assigned to prepare the document. *See* E-mail from David Meyer, OE, to Richard Cronin, OHA, (August 12, 2008).

It Is Therefore Ordered That:

(1) The Appeal filed on July 23, 2008, by the State of New York, OHA Case No. TFA-0269, is hereby granted in part, and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Electricity Delivery and Energy Reliability, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 19, 2008

CONCURRENCE

HG-30 rac 6/27/08

Cronin _____

Lipton _____

OGC _____

October 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: August 8, 2008

Case Number: TFA-0271

This Decision concerns the State of New York's (New York) Appeal from a determination that the Department of Energy's Office of Electricity Delivery and Energy Reliability (OE) issued to it on July 3, 2008. In that determination, the OE responded to New York's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In its determination, the OE withheld information from 36 documents, under FOIA Exemptions 4 and 5. If we grant this Appeal, the OE may not withhold the information under FOIA Exemptions 4 and 5.

I. Background

New York filed a request with the OE for correspondence the DOE had with CRA International and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor [NIETC] Designation Order. Determination Letter. The OE provided 82 responsive documents in a numbered index. The documents consist of e-mails and memoranda among the OE, CRA International, and additional consultants that discuss the August 2006 Congestion Study and an October 2007 NIETC Designation Order. The OE redacted 36 of the documents pursuant to FOIA Exemptions 4 and 5, identified as Documents 8, 14, 16, 19, 22, 23(a), 23(b), 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 59(a), 60, 60(a), 62, 63(a), and 64(a). In particular, the OE redacted Document 59(a) pursuant to Exemptions 4 and 5. It redacted the other documents pursuant to Exemption 5. *Id*.

New York then filed the present Appeal with the Office of Hearings and Appeals (OHA). Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. New York advances six arguments to show that the OE improperly withheld information under Exemptions 4 and 5. First, New York contends that the DOE waived its exemption claims regarding certain documents because the DOE already officially disclosed them to the public. In particular, it argues that the DOE disclosed Documents 8, 14, 16, 19, 22,

23(a), 23(b), 47, 53, 58, 59, and 60. Second, New York contends that the OE may not withhold Document 59(a) under Exemption 4 because Document 59(a) does not contain confidential commercial information. Third, New York contends that the OE cannot withhold certain communications under Exemption 5 because CRA International acted in its own interest, rather than the government's interest.[1] In particular, these communications are contained in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64. Fourth, New York contends that the OE may not withhold any of the information under Exemption 5 because it does not contain predecisional, deliberative communications. Fifth, New York contends that the OE applied Exemptions 4 and 5 too broadly; the OE must disclose non-exempt, segregable facts. Finally,[2] New York contends that disclosing all of the withheld information is in the public interest. *Id*. We address New York's arguments in turn.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Waiver

New York argues that the OE has waived its exemption claims regarding Documents 8, 14, 16, 19, 22, 23(a), 23(b), 47, 53, 58, 59, and 60, because it has already officially disclosed those documents to the public. Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008.

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[1] New York raised this argument on September 2, after it filed its Appeal with OHA. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. When an appellant raises a new issue in an ongoing FOIA appeal, OHA's office policy allows an additional twenty working days to address the issue. Because we received New York's e-mail submission on September 3, our deadline for issuing this Decision became October 1. New York subsequently granted OHA an extension until October 6 to issue its Decision. *See* Memorandum of Telephone Conversation between Maureen Leary, Attorney, State of New York, Office of the Attorney General and David M. Petrush, Attorney-Examiner, OHA, Oct. 2, 2008.

[2] New York also appealed "DOE's failure to timely respond to the State's FOIA request." Appeal Letter. The DOE FOIA regulations do not allow OHA to review the timeliness of the determination issuer's response. If New York properly submitted a FOIA request and an authorizing official did not respond within the statutory deadline, it has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

New York also states that the OE did not disclose Documents 54(a), 54(b), and 55, despite indicating on its index that it intended to disclose them. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. New York states that it has contacted the OE to obtain these documents. *Id*. On remand, we will require the OE to disclose these documents, if it has not already done so.

An agency waives a valid exemption claim when it has "officially acknowledged" a document. An official acknowledgment must meet three criteria. First, the information requested must be as specific as the information previously disclosed. Second, the information requested must match the information previously disclosed. Third, the information requested must already have been made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). We read "an official and documented disclosure" to mean an authorized disclosure. *EverNu Tech., LLC*, 30 DOE ¶ 80,112 (TFA-0243) (Mar. 5, 2008).

A requester asserting a claim of prior disclosure has the initial burden of identifying specific information in the public domain that appears to duplicate the information that the agency is withholding pursuant to an exemption. *Wolf*, 473 F.3d at 378. A requester cannot rely on mere speculation. *Id.*

New York meets its initial burden of identifying specific information in the public domain that appears to duplicate the information that the OE is withholding by pointing to the withheld documents themselves. That is, New York argues that the withheld documents show that they have been communicated to members of the public: Document 8 is an e-mail to Doug Larson of the Western Governor's Association; Documents 14 and 19 are e-mails to Alison Silverstein, who is a former DOE employee; Document 16 is an e-mail to Brian Parsons of the National Renewable Energy Laboratory; Document 22 is an e-mail to Ken Jurman, an employee of the State of Virginia, and Mitch King of the Old Mill Power Company; Documents 23(a) and 23(b) were e-mailed to an individuals at Cornell University, the Tennessee Valley Authority, and the Bonneville Power Administration; Document 47 is an e-mail to Jay Loock, ostensibly of the Western Electricity Coordinating Council; Document 53 is an e-mail from Poonum Agrawal of the DOE to Alex Rudkevich of CRA International, that discusses questions raised by the State of Ohio; Document 58 is an e-mail to Alison Silverstein and Joe Eto, ostensibly of JBL; and Documents 59 and 60 are e-mails to Kurt Conger of Energy Expert Services, Inc.

Because New York points to the documents themselves to show that they have already been made public, the documents necessarily satisfy *Wolf*'s first and second requirements, that the information match and be as specific as the information previously disclosed. *Wolf*'s third requirement is at issue here – whether the information has been made public through an official and documented disclosure.

In order to evaluate New York's waiver argument, we contacted the OE to gather more information about the e-mail recipients. The OE informed us that the e-mail recipients of all documents except Document 60 are DOE subcontractors or consultants. *See* E-mails from Mark Whitenton, Deputy Assistant Secretary, Permitting, Siting and Analysis, DOE, to David M. Petrush, Attorney-Examiner, OHA, Sept. 9 and 11, 2008; e-mail from Theresa Brown Shute, Admin. Program Specialist, OE, to David M. Petrush, Attorney-Examiner, OHA, Sept. 11, 2008. Because the e-mail recipients in the documents other than Document 60 did not receive the e-mails as members of the public but as DOE subcontractors or consultants, New York has not shown that the OE has made the

information public through an official and documented disclosure. Therefore, the OE has not waived its exemption claims regarding those documents.

The OE has agreed to disclose Document 60 to New York because it has already disclosed it to members of the public. The OE will disclose Documents 59(a) and 60(a) for the same reason.[3] *See id.*

B. Exemption 5

The OE withheld Documents 8, 14, 16, 19, 22, 23(a), 23(b), 25-30, 32-40, 43, 47-48, 50-51, 53, 58-59, 62, 63(a), and 64(a), under Exemption 5, because the documents contain predecisional, deliberative communications. New York argues that the OE improperly withheld these documents because CRA International, the contractor who participated in the communications in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64, had a conflict of interest. New York also argues that the OE erred in withholding the documents pursuant to Exemption 5 because the documents do not contain predecisional, deliberative communications. Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008.

1. Authority

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statutory definition of "agency" is broad, and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)). Information prepared outside the government by a government consultant qualifies as an "intra-agency" communication except when the consultant urges the agency to support a position "that is necessarily adverse to the interests of [the consultant's] competitors." *Id*. at 14.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege. *Id*. at 8 (citations omitted). An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in

[3] Because the OE has waived its exemption claims regarding Documents 59(a), 60, and 60(a), we need not determine whether the OE properly withheld them pursuant to Exemptions 4 or 5.

temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id.* Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id.* The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id.*

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id.* The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id.* (citation omitted).

2. Whether the DOE Contractor's Conflict of Interest Defeats the OE's Claim of Exemption 5

New York argues that the OE improperly withheld information in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64 because CRA International, the DOE contractor who participated in the communications contained in the documents, had a conflict of interest. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. In particular, New York alleges that on September 26, 2006, CRA International entered into a contractual relationship with a power transmission developer, NYRI. E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 15, 2008. New York also alleges that CRA International represents "numerous" additional transmission developers and a trade

organization for transmission developers. Finally, New York alleges that NYRI and the other transmission developers have an interest in the August 2006 Congestion Report and October 2007 NIETC designation that the DOE consulted CRA International to help prepare. *Id*.

In *Klamath*, the United States filed a water rights claim in a state court on behalf of the Klamath Tribe. *Klamath*, 532 U.S. at 5. The Department of the Interior (DOI) and the Klamath Tribe exchanged written memoranda on the scope of the tribe's claims. *Id*. A non-profit water users association that neighbors the tribe filed a FOIA request for the written memoranda between the DOI and the tribe. *Id*. at 7.

The Supreme Court held that the DOI could not rely upon Exemption 5 to withhold the written memoranda between the DOI and the tribe. *Id*. at 15. The court reasoned that the tribe did not communicate with the DOI as a disinterested agency employee would have; rather, the tribe acted as "self-advocates at the expense of others seeking [water] benefits that were inadequate to satisfy everyone." *Id*. at 12.

Here, CRA International's alleged conflict of interest does not meet the narrow facts of *Klamath* that are necessary to defeat the OE's claim of Exemption 5. That is, even if indeed CRA International does have a conflict of interest stemming from its power transmission developer clientele – which has not been shown – New York has not alleged that the conflict of interest disadvantages those seeking benefits inadequate to satisfy everyone. Therefore, we cannot find that CRA International's alleged conflict of interest defeats the OE's withholding of information under Exemption 5.

3. Whether the Information that the OE Withheld Contains Predecisional, Deliberative Communications

New York argues that the OE improperly withheld information in each of the documents pursuant to Exemption 5 because that information does not contain predecisional, deliberative communications. *See* Appeal Letter.

We find that the OE properly withheld the information in Documents 8, 14, 16, 22, 23(b), 25, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 62, 63(a), and 64(a). We also find that the OE properly withheld the information in Documents 19 and 27, except the information that is segregable, as detailed below. These e-mails and memoranda are all similar in that they consist of the authors' opinions and recommendations regarding power line congestion and transmission issues, and factual material that the authors relied upon in forming those opinions and recommendations. The material is clearly predecisional, and deliberative in that it reflects the "give and take" of the decision-making process.

Document 23(a) is entitled "Defining and Measuring Transmission Corridors: Technical Plan for the DOE Congestion Study." Document 26 is entitled "Analysis of Implications of Transmission Congestion in PJM and NYISO." We will remand the portion of New York's Appeal regarding these documents so that the OE may issue a new determination to explain whether the OE has adopted them, formally or informally. That is, if the OE

entirely adopted Document 23(a) or Document 26, the OE would not be able to withhold those documents under Exemption 5.

4. Segregability of Factual Information

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

We carefully reviewed the withheld information and found non-exempt, segregable information in Documents 19 and 27. Regarding Document 19, the OE withheld the entire first page and portions of the third page, which discuss logistical planning details for a meeting. Certain details reflect upon the agency's decision-making process, and are therefore deliberative. These include the specific list of invitees, which could indicate the character of the discussion at the meeting. However, the bare logistical planning details, such as whether the meeting room has been reserved and who issues the invitations, do not reflect upon the agency's decision-making process. Therefore, we find that the OE must disclose this information. In particular, we find that the OE must disclose all information on the first page, including and above the sentence that begins, "[A]ny luck getting the rooms yet?"

Regarding Document 27, the OE withheld information on the bottom of the first page, consisting of an e-mail from Alex Rudkevich to Poonum Agrawal, sent December 18, 2006, at 8:27am. The first sentence describes a memorandum in response to particular comments from either a member of the public or a DOE consultant. This information is deliberative because it associates the e-mail's author with a position that the DOE took in response to particular comments. However, the second and third sentences merely include the e-mail author's meeting availability and his desire to discuss the scope of the project's remaining work, which is a very general topic. Therefore, we find that although the OE properly withheld the first sentence, the OE must disclose the second and third sentences.

C. Discretionary Public Interest Disclosure

The DOE regulations provide that the DOE should release information exempt from mandatory disclosure under the FOIA if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1.

In this case, the release of the predecisional, deliberative information that the OE withheld could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. We do not believe that discretionary release of the properly withheld material would be in the public interest. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 (Mar. 18, 1987) (Case No. KFA-0080).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York (New York), Case Number TFA-0271, is hereby denied regarding Documents 8, 14, 16, 22, 23(b), 25, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 62, 63(a), 64(a), and portions of Documents 19 and 27, as explained below.

(2) New York's Appeal is granted in part regarding Documents 19 and 27. The Office of Electricity Delivery and Energy Reliability (OE) must disclose portions of those documents, as indicated in the discussion above, or issue a new determination justifying their withholding.

(3) New York's Appeal is hereby granted regarding Document 59(a), 60, and 60(a). The OE shall disclose these documents to New York.

(4) New York's Appeal regarding Documents 23(a) and 26 is remanded to the OE. The OE shall issue New York a new determination, explaining whether the OE has fully adopted them, either formally or informally.

(5) New York's Appeal regarding Documents 54(a), 54(b), and 55 is remanded to the OE, for the OE to disclose these documents to New York, if it has not done so already.

(6) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 6, 2008

October 8, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lenard Trimmer

Date of Filing: September 9, 2008

Case Number: TFA-0272

This Decision concerns an Appeal that Lenard Trimmer filed in response to determinations that were issued to him by the Department of Energy's (DOE) Office of Health, Safety and Security (OHSS) and National Nuclear Security Administration Albuquerque Service Center (NNSA). In those determinations, OHSS and NNSA replied to a request for documents that Mr. Trimmer submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. [1] This Appeal, if granted, would require that we remand this matter to NNSA for another search.

In his request, Mr. Trimmer sought copies of H-Division Monthly Progress Reports for September 21-October 20, 1963; January 21-February 20, 1964; March 21-June 20, 1964; and November 21-December 20, 1964; copies of H-Division Quarterly Progress Reports for July-September 1968, October-December 1970, July-September 1972 and October-December 1972; and copies of H-Division Annual Progress Reports for 1963 and 1964. These documents concern radiological monitoring that was conducted at Los Alamos National Laboratories (LANL) in connection with the Human Radiation Experiments that were performed by predecessor agencies of the DOE. On December 19, 2007, NNSA issued a determination in response to Mr. Trimmer's request. In this determination, NNSA stated that it had been informed by LANL that the documents Mr. Trimmer requested had already been released to the public, and could be accessed through the internet at one or more of four specified web sites. NNSA also referred the request to DOE Headquarters and, ultimately, to OHSS. On August 15, 2008, OHSS issued a determination stating that it had searched its files and had been unable to identify any records that are responsive to Mr. Trimmer's request.

In his Appeal, Mr. Trimmer contests the adequacy of NNSA's search for responsive documents. He argues that, in his original FOIA request and in subsequent communications with NNSA, he provided specific locations in LANL's archives at which he believed the requested records

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1/ The FOIA generally requires that documents held by federal agencies be released to the public upon request. FOIA Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, may be accessed at http://www.oha.doe/foia1.asp.

October 7, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Associated Press
Date of Filing:	September 11, 2008
Case Number:	TFA-0273

On September 11, 2008, the Associated Press (AP) filed an Appeal from a determination issued to it by the Office of the Executive Secretariat and the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) on September 4, 2008, in response to a request for documents that AP submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of the AP's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On September 2, 2008, the AP filed a request for correspondence between each of the vice presidential candidates, Senator Joe Biden and Governor Sarah Palin, and the U. S. Department of Energy from January 2007 to the present. Letters from AP to DOE/HQ (September 2, 2008) (Request). The AP also requested expedited processing because "this information involves a vice presidential candidate up for election in November and is therefore of extremely timely value and great public interest…." *Id.*

On September 4, 2008, DOE/HQ denied the AP's request, arguing that the request did not establish any urgency to inform the public that would warrant expedited treatment. Letter from DOE/HQ to AP (September 4, 2008) (Determination) at 1. Further, DOE/HQ concluded that the AP did not identify any particular urgency that requires the provision of the requested information in an expedited manner.

On September 11, 2008, the AP submitted this appeal of HQ's denial of expedited processing. The AP asks that the Office of Hearings and Appeals (OHA) order DOE/HQ to expedite the processing of its FOIA request. Letter from AP to Director, OHA (September 11, 2008).

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552 (a) (6) (E) (v). Our analysis in this case examines the second situation—the "urgency to inform."

In order to determine whether a requester has demonstrated an "urgency to inform," and hence a "compelling need," courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d.300, 310 (D.C. Cir. 2001).

Courts have found sufficient exigency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See, e.g., Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61, 65 (D.D.C. 2006) (granting expedited processing based on public need for requested material concerning visitors to vice presidential offices and degree to which lobbyists influenced policy discussions during an ongoing investigation prior to upcoming election); *Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress); *American Civil Liberties Union v. Department of Defense*, No. C-06-01698 WHA, 2006 WL 1469418, at *6 (N.D. Cal. May 25, 2006) at *6 (holding that expedited processing was warranted for information related to a "breaking news story," *i.e*. a story that would lose value if it were delayed).

Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester's failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Department of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of "current exigency"); *Al-Fayed v. C.I.A.*, 254 F.3d. at 310 (finding that there is no evidence of a substantial public interest in plaintiff's allegations and that plaintiff did not demonstrate any significant adverse consequence if expedited processing was denied). *See also Eugenie Reich*, 29 DOE ¶ 80,289, Case No. TFA-0187 (March 5, 2007) (denying request for expedited processing because journalist did not establish urgency and did not make clear that the

requested information would not be useful to her if processed within the timeframe of a normal FOIA request).

The AP argues that the information requested relates to a currently unfolding story regarding the vice presidential candidates, specifically "on whose behalf and in what issues they may have intervened with the Department of Energy." Appeal at 1. The AP also contends that any delay in release of the information will harm the public interest in knowing before the election the extent of the candidates' involvement with the agency and if any intervention has affected any DOE action. [1]

In its determination, DOE states that the AP "ha[s] not demonstrated the urgency that exists that would warrant expedited treatment of the request." Determination at 1. DOE further advised the AP that DOE "cannot conduct a search on Governor Palin's administration without the names of individuals in her administration." Determination at 1. DOE asked the requester to provide the names of individuals for whom the search should be conducted. *Id*. We contacted DOE/HQ, and they explained that their decision to deny expedited processing was based on the lack of specificity in the AP request. Memorandum of Telephone Conversation between Chris Morris, FOIA /Privacy Act Officer, DOE/HQ, and Valerie Vance Adeyeye, Staff Attorney, OHA (September 17, 2008).

After reviewing the record of this case, we find that the AP has not established a compelling need for expedited processing of its request. First, the AP has not demonstrated that the correspondence of the vice presidential candidates, if any exists, is a matter of current exigency to the American public. It is true that the upcoming elections are important and that voters have a right to be informed. However, "[t]he public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the "urgency to inform"] standard." *Al-Fayed*, 254 F.3d at 310. Substantial interest on the part of the American public does not amount to exigency. *Electronic Privacy Information Center*, 322 F. Supp. 2d at 5. Second, the AP has not made clear that the requested information will not be useful if processed within the timeframe of a normal FOIA request (i.e. 20 working days). The fact that the election will take place in approximately 30 days does not demonstrate the requisite urgency. [2] Finally, the requested correspondence between the vice presidential candidates and DOE, if it exists, is not a "breaking news story" in this context. In case law related to expedited processing, a "breaking news story" is one that conveys information the public wants quickly, and that would lose value if it were delayed. *American Civil Liberties Union*, 2006 WL 1469418 at *6. The AP has not presented any "significant adverse consequence" that would result to a recognized interest if expedited processing of this request were denied. *See Al Fayed*, 254 F.3d at 311; *American Civil Liberties Union*, 2006 WL 1469418 at *8. I conclude that the AP argument that the candidates may have intervened in DOE activities is speculative and is not a "breaking news story" requiring expedited processing. Those instances where courts have granted an appellant's request for expedited processing have involved high profile stories such as investigations into the alleged influence of lobbyists on the vice president, and investigations into a controversial Department of Defense database that collected information on political protesters. *See*

[1] The AP also argues that its request involves federal government activities. We agree with this argument.

[2] Under regular processing, the information would be released to the requester, if permitted by law, in sufficient time prior to the election for dissemination to the public.

Washington Post, 459 F. Supp. 2d at 61 (granting expedited processing of newspaper's request to Secret Service for logs of visitors to Vice President Cheney and members of his staff); *American Civil Liberties Union*, 2006 WL 1469418 at *1 (granting expedited processing of request for documents collected under controversial DOD program designed to gather information on terrorism and threats to military bases).

For the reasons stated above, we find that the AP has not established any urgency for the release of the requested material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by The Associated Press on September 11, 2008, OHA Case Number TFA-0273, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli Marmolejos
Director
Office of Hearings and Appeals

Date: October 7, 2008

October 9, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: September 11, 2008

Case Number: TFA-0274

This Decision concerns the State of New York's (New York) Appeal from a determination that the Department of Energy's Office of Electricity Delivery and Energy Reliability (OE) issued to it on August 8, 2008. In that determination, the OE responded to New York's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In its determination, the OE withheld information in four documents under FOIA Exemption 5. If we grant this Appeal, the OE may not withhold the information under FOIA Exemption 5.

I. Background

New York filed a request with the OE for correspondence the DOE had with CRA International and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor [NIETC] Designation Order. Determination Letter. The OE provided more than 33 responsive documents in a numbered index. The documents consist of e-mails and memoranda among the OE, CRA International, and additional consultants. The OE redacted four of the documents pursuant to Exemption 5, Documents 1, 2, 2(b), and 3. *Id*.

New York then filed the present Appeal with the Office of Hearings and Appeals (OHA). Appeal Letter. New York advances five arguments to show that the OE improperly withheld information under Exemption 5. First, New York contends that the DOE waived its exemption claims to the extent that the DOE already officially disclosed the documents to the public. Second, New York contends that the OE may not withhold any of the information under Exemption 5 because it does not contain predecisional, deliberative communications. Third, New York contends that the OE applied Exemption 5 too broadly; the OE must disclose non-exempt, segregable facts. Fourth, New York contends that if "pre-decisional positions were adopted by DOE as a part of its final

action, that information is subject to disclosure." Finally,[1] New York contends that disclosing all of the withheld information is in the public interest. *Id*. We address New York's arguments in turn.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Waiver

New York argues that if the OE has disclosed any of the withheld information to the public, it has waived its claim of exemption. Appeal Letter.

An agency waives a valid exemption claim when it has "officially acknowledged" a document. An official acknowledgment must meet three criteria. First, the information requested must be as specific as the information previously disclosed. Second, the information requested must match the information previously disclosed. Third, the information requested must already have been made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). We read "an official and documented disclosure" to mean an authorized disclosure. *EverNu Tech., LLC*, 30 DOE ¶ 80,112 (Case No. TFA-0243) (Mar. 5, 2008).[2]

A requester asserting a claim of prior disclosure has the initial burden of identifying specific information in the public domain that appears to duplicate the information that the agency is withholding pursuant to an exemption. *Wolf*, 473 F.3d at 378. A requester cannot rely on mere speculation. *Id*.

New York has not met its initial burden; it has not identified specific information in the public domain that appears to duplicate the information that the OE withheld. Therefore, we may not find that the OE waived its claim of exemption.

[1] New York also appealed "DOE's failure to timely respond to the State's December 2007 FOIA request." Appeal Letter. The DOE FOIA regulations do not allow OHA to review the timeliness of the determination issuer's response. If New York properly submitted a FOIA request and an authorizing official did not respond within the statutory deadline, it has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

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

B. Exemption 5

New York argues that the OE improperly withheld information under Exemption 5 because the withheld information does not contain predecisional, deliberative communications. *See* Appeal Letter.

1. Authority

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statutory definition of "agency" is broad, and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)). Information prepared outside the government by a government consultant qualifies as an "intra-agency" communication except when the consultant urges the agency to support a position "that is necessarily adverse to the interests of [the consultant's] competitors." *Id*. at 14.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege. *Id*. at 8 (citations omitted). An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id*. The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*.

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

2. Whether the Information that the OE Withheld Contains Predecisional, Deliberative Communications

New York argues that the OE improperly withheld information in each of the documents under Exemption 5 because that information does not contain predecisional, deliberative communications. *See* Appeal Letter.

We find that the OE properly withheld the information in each document, except the information in Document 2(b), as detailed below. The documents are predecisional because they were created in March 2006 – before the DOE issued the August 2006 Congestion Study and October 2007 Designation Order.

The withheld information in Documents 1 and 2 is also deliberative. It consists of the same e-mail, instructing DOE employees and consultants how to assemble a table of commenters' remarks. Although the instructions do not substantively discuss any particular comment, they recommend how DOE employees and consultants should process the information. Therefore, the information is deliberative because it influences substantive choices in the policy-making process.

The withheld information in Document 3 is similarly deliberative. It is an e-mail suggesting that DOE employees and consultants discuss a particular issue at an upcoming meeting. The information is deliberative because the consultant's suggestion is a policy choice to examine that issue.

Lastly, some of the withheld information in Document 2(b) is deliberative and some of it is not. Document 2(b) consists of a table. Each of the ten pages lists commenters. The first and second pages contain deliberative information. They feature column space to briefly summarize commenters' definitions "of a corridor designation," and allow for the

categorization of commenters' responses. On both pages, the columns categorizing commenters' responses feature check marks, and on the first page, the column space for summaries of commenters' definitions is filled in. This information is deliberative because the check marks and summaries reflect how DOE employees and consultants evaluated the information. The commenters' names on the first and second pages are not deliberative and therefore consist of segregable factual information, as detailed below.

3. Segregability of Factual Information

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

We carefully reviewed the withheld information and found non-exempt, segregable information in Document 2(b). As discussed above, the OE properly withheld the columns on the first and second pages of Document 2(b) consisting of summaries and categorizations of commenters' responses. Without this information connecting the commenters' names to particular responses, the commenters' names are purely factual and therefore segregable. We find that the commenters' names on pages one and two consist of segregable factual information that the OE may not withhold under Exemption 5.

Similarly, we find that the OE may not withhold pages three through ten of Document 2(b) under Exemption 5. Those pages do not have columns that list DOE employees and consultant's summaries of comments or their categorization of comments. Instead, those eight pages merely include columns for categories labeled "Criteria 1" through "Criteria 8" and "Other." The document does not explain the criteria. Moreover, the columns are blank. As a result, these eight pages do not reflect the policy opinions or reflections of DOE employees and consultants. Therefore, we find that pages three through ten consist of segregable factual information that the OE may not withhold under Exemption 5.

4. Whether the OE Adopted the Withheld Information as an Agency Position

As stated above, information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866. New York asks us to consider whether the information that the OE withheld has lost its predecisional status.

We find that it has not. The information does not consist of an agency position; it consists of a series of instructional e-mails and a table contributing to one or more agency positions. Therefore, we find that the OE cannot have adopted it as an agency position.

C. Discretionary Public Interest Disclosure

The DOE regulations provide that the DOE should release information exempt from mandatory disclosure under the FOIA if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1.

In this case, the release of the predecisional, deliberative information that the OE withheld could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. We do not believe that discretionary release of the properly withheld material would be in the public interest. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 (Mar. 18, 1987) (Case No. KFA-0080).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York, Case Number TFA-0274, is hereby denied regarding Documents 1, 2, and 3. It is granted in part regarding Document 2(b), as set forth below, and denied in all other respects.

(2) In Document 2(b), the OE must either disclose pages three through ten and the commenters' names on page two, or issue a new determination, justifying their withholding.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 9, 2008

October 30, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Judy A. Meyer
Date of Filing:	September 19, 2008
Case Number:	TFA-0275

On September 19, 2008, Judy A. Meyer filed an Appeal from a determination issued to her by the Department of Energy's (DOE) Office of Legacy Management (OLM). In that determination, OLM responded to a request for information that Ms. Meyer filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OLM to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On July 31, 2008, Ms. Meyer submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for a "copy of the Radiation Dose Report, Training Records and Employment Records" of her deceased husband, Gary Lee Meyer, who worked at the Fernald Site from January 1993 to August 1993. *See* Routine Employee Record Request from Judy A. Meyer (August 4, 2008) (FOIA Request). DOE/FOIA forwarded the request to OLM because any document responsive to the request, if it existed, would fall under the jurisdiction of that office. *See* Letter from Verlette L. Gatlin, Deputy Director, DOE/FOIA to Judy A. Meyer (July 31, 2008).

OLM conducted a search of its records and located and released copies of Mr. Meyer's medical, radiological, and training records but were unable to locate Mr. Meyer's employment file. *See* Letter from John V. Montgomery, Freedom of Information Officer, OLM, to Judy A. Meyer (August 18, 2008) (Determination Letter). On September 19, 2008, the Office of Hearings and Appeals (OHA) received Ms. Meyer's Appeal in which she requested an additional search for her husband's employment records. *See* Letter from Judy Meyer to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't*

of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[1]

In reviewing this Appeal, we contacted OLM to ascertain the scope of its search for responsive documents. *See* Email from Avery Webster, Attorney-Examiner, OHA, to John Montgomery, Freedom of Information Officer, OLM (September 22, 2008). OLM informed us that it conducted a thorough search of the records database[2] using Mr. Meyer's name and social security number and located copies of Mr. Meyer's medical,[3] radiological, and training records, but not his employment records. *See* September Email.

According to OLM records, Mr. Meyer's files indicated that he worked at the Fernald Site[4] under a subcontract to either Lockheed Martin Environmental or Rust Engineering.[5] *Id.* At the Fernald Site, subcontractor records which related to site operations such as medical, radiological and training were maintained as Federal records. *See* October 8, 2008, Email. Records relating to employment such as personnel and benefits were maintained and retained by the subcontractor. *Id.* In this instance, it is unlikely that subcontractor employee records would have been designated as government-owned records. *See* October 22, 2008, Email. Thus, the Fernald Site would not have kept a personnel file or employment records for Mr. Meyer. [6] *See* October 8, 2008, Email. Those records would have been maintained by the company that he worked for, in this case either Lockheed Martin Environmental or Rust Engineering.[7] *Id.*

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

[2] The electronic records database contains a listing of all government records which have been archived from the Fernald site, as well as other Legacy Management sites, to Federal Records Centers. *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (September 23, 2008) (September Email).

[3] OLM did not provide a copy of Mr. Meyer's medical file because it was not requested in Ms. Meyer's July 31, 2008, FOIA request.

[4] In the case of Fernald and many other DOE sites, the Management and Operating contracts were awarded to a large private-sector Prime contractor with Federal Government oversight. In these environments, the Prime contractor employed many smaller subcontractors (e.g. Lockheed Martin Environmental and Rust Engineering) to accomplish specific or routine tasks. The Prime contractor at the Fernald Site during 1993 was Fluor Corporation (the original request states Mr. Meyer worked at Fernald from January 1993 to August 1993). *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (October 8, 2008) (October 8, 2008, Email).

[5] Generally, in DOE contracts there is an ownership of records clause that defines government-owned and contractor-owned records. *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (October 22, 2008) (October 22, 2008, Email). OLM conducted a complete and thorough search of relevant documents at the National Archives and could not locate the contracts that would specify ownership of either Lockheed Martin Environmental or Rust Engineering's employment records. *Id.*

[6] According to OLM, the only location where the subcontractor's employment records would exist is within that company. *See* October 22, 2008, Email.

[7] Mrs. Meyer may consider contacting Lockheed Martin Environmental or Rust Engineering to request a copy of Mr. Meyer's employment records.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that OLM performed a search reasonably calculated to reveal documents responsive to Ms. Meyer's request. Accordingly, the search was adequate under the FOIA and, therefore, Ms. Meyer's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ms. Judy A. Meyer on September 19, 2008, OHA Case No. TFA-0275, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 30, 2008

October 28, 2008
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners:	Mark Steven Ludwig Patrick Daniel O'Neill, Jr.
Dates of Filing:	September 24, 2008 September 29, 2008
Case Numbers:	TFA-0276 TFA-0278

On September 24 and September 29, 2008, Mark Steven Ludwig and Patrick Daniel O'Neill, Jr. (Appellants), respectively, filed appeals from determinations issued to them on August 29, 2008, by the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC). In the two determinations, NNSA/SC responded to a request for documents that each Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. At issue in this case is NNSA/SC's determination withholding in its entirety a report (and the majority of its appendices) authored by Norman Bay and John Kern (Bay Report) from each Appellant under Exemption 5 of the FOIA. NNSA withheld the Bay Report and most of its appendices, claiming it was protected by the attorney work-product and attorney-client privileges. The Appellants challenge NNSA/SC's withholding of the Bay Report and its appendices under Exemptions 5. Specifically, they allege that the New Mexico Court of Appeals in *Gingrich v. Sandia Corp*, 142 N.M. 359 (2007) (*Gingrich*), found that these privileges had been waived by Sandia. Consequently, they argue that NNSA/SC may no longer justify withholding the Bay Report and its appendices pursuant to Exemption 5.[1] This appeal, if granted, would require NNSA/SC to release the Bay Report and its appendices to the Appellants. [2]

I. Background

The Bay Report was created pursuant to a request of Sandia Corporation (Sandia). Sandia received allegations from two Sandia Ethics Office investigators who claimed their work was being impeded and that they were being retaliated against by Sandia managers as a result of their investigation. Because such allegations would have been investigated by the complaining Ethics

[1] In *Gingrich*, the New Mexico Court of Appeals, citing Rule 11-511 of the New Mexico Rules Annotated regarding waiver of privileges, upheld a District Court Judge's finding that Sandia had waived the attorney-client privilege with regard to the Bay Report through its disclosure of the Bay Report to the plaintiff in the underlying litigation, as well as its "extrajudicial" disclosure to members of Congress and representatives of the Department of Energy. *Id* at 363. The Court also held that Sandia had also waived attorney work-product privilege for all such Bay Report-related documents that had been similarly communicated to others. *Id*. at 368.

[2] We will reference the Bay Report and the withheld appendices henceforth as the "Bay Report."

Office investigators themselves, Sandia retained Norman Bay (Bay), a professor of law at the University of New Mexico, to conduct an investigation.

In requests dated February 19, 2008, the appellants each sought from NNSA/SC various documents including the Bay report and all associated appendices. NNSA/SC sent each of the Appellants a determination letter regarding their requests in which the appellants were supplied a number of requested documents. However, NNSA/SC withheld the Bay Report and almost all of the appendices from both Appellants pursuant to Exemption 5 of the FOIA.[3] Specifically, NNSA/SC asserted that the Bay Report and its appendices were protected by the attorney work-product and attorney-client privileges and thus were appropriately withheld pursuant to Exemption 5, which exempts documents which would not be available by law to a party other than an agency in litigation with the agency.

The Appellants challenge NNSA/SC's determination on one sole ground. As referenced above, the Appellants direct our attention to the New Mexico Court of Appeals' decision in *Gingrich* to support their argument that Sandia has waived the two privileges that formed the basis of NNSA/SC's invocation of Exemption 5. Consequently, they contend, the Bay Report may not be withheld under Exemption 5.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified several traditional privileges that fall under this definition of exclusion, including but not limited to the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding the Bay Report from the Appellants, NNSA/SC relied upon the attorney-client and attorney work-product privileges of Exemption 5.

Given the facts presented to us, we cannot conclude that the Bay Report may be withheld under Exemption 5 pursuant to the attorney-client or attorney work-product privileges. We have previously held that Sandia can not be considered an agency for purposes of the FOIA. *Caroline C. Roberts*, 27 DOE ¶ 80,284 (Case No. TFA-0023) (April 25, 2003).[4] The attorney-client privilege "covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts." *Washington*

[3] Each of the Appellants were provided three letters contained in the appendices which related to communications from the Appellant's attorney.

[4] There is no evidence before us that would indicate that the Bay Report was created at the behest of NNSA or as part of a decision making process of NNSA. Consequently, we can not find that the Bay Report is an "intra- or inter-agency" document for the purposes of FOIA.

Electric Cooperative/Downs Rachlin Martin PLLC, 29 DOE ¶ 80,264 (Case No. TFA-0141) (August 3, 2006) (citing *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)) (citation omitted). The attorney work-product privilege protects any document prepared in anticipation of litigation by and for the attorney. *In re Special September 1978 Grand Jury*, 640 F. 2d 49, 62 (7th Cir. 1980) (*1978 Grand Jury*). The attorney-client privilege belongs to the client and the attorney work-product privilege belongs to the client or the attorney. *1978 Grand Jury*, 640 F. 2d at 62. Because Sandia, and not NNSA/SC, engaged Bay as its attorney to prepare the report, the only relevant attorney-client or attorney work-product privilege as to the Bay Report would belong to Sandia or Bay and not to NNSA/SC. Consequently, we find that NNSA/SC has no standing to assert the two privileges cited in its determination letter to the Appellants. We will therefore remand this matter to NNSA/SC to release the Bay Report to the Appellants or issue another determination to the Appellants justifying withholding the Bay Report. [5]

It Is Therefore Ordered That:

(1) The Appeals filed by Mark Steven Ludwig, Case No. TFA-0276 (submitted on September 24, 2008) and Patrick Daniel O'Neill, Jr., Case No. TFA-0278 (submitted on September 29, 2008) are hereby granted as set forth in paragraph (2) and denied in all other respects.

(2) This matter is remanded to National Nuclear Security Administration Service Center for further proceedings as described in the decision above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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[5] In its reply to the appeal filed by the Appellants, NNSA has raised the possibility that Exemption 6 regarding personal information may apply to the Bay Report. While we will not consider the applicability of Exemption 6 in this decision since NNSA did not invoke Exemption 6 in its determination letters, NNSA on remand may consider whether Exemption 6 is applicable to the Bay Report.

In making its new determination, NNSA may also wish to consider the applicability of Exemption 4 to the Bay Report. *See Charles Varnadore*, 24 DOE ¶ 80,123 (Case No. LFA-0375) (July 21, 1994) (attorney-client and attorney work-product documents submitted to agency from non-agency counsel found to be protected from disclosure by Exemption 4).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 28, 2008

CONCURRENCE

HG-30 rac 6/27/08

Cronin _____

Lipton _____

OGC _____

October 28, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugenie Reich

Date of Filing: September 29, 2008

Case Number: TFA-0279

On September 29, 2008 1/ , Eugenie Reich (Reich) filed an Appeal from a determination issued to her on January 15, 2008, by the FOIA and Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ release responsive material.

I. Background

In December 2006, Reich filed a FOIA request with DOE/HQ seeking: (1) records that would identify the members of a panel convened to investigate allegations of fraud and research misconduct at Oak Ridge National Laboratory in 2006; and (2) the final investigation report from the panel. 2/ On January 15, 2008, DOE/HQ issued a determination which stated that the DOE Office of Science (DOE/OS) conducted a search of its files for responsive documents. According to DOE/OS, that search located one document responsive to Reich's request, "the draft document 'Report on Allegations of Research Misconduct'"(hereinafter referred to as "Draft Report"). Letter from DOE/HQ to Reich, January 15, 2008 (Determination Letter). According to DOE/HQ, the responsive document is a "draft copy of a report of an investigation into allegations of research misconduct or fraud in connection with work that was carried out by an Agency contractor, UT-Battelle." DOE/HQ further stated that this document was being withheld in its entirety pursuant to Exemptions 5 and 6

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[1] Reich submitted a detailed justification for the delay in filing her appeal of the agency's determination beyond the 30-day appeal period provided in DOE's regulations. *See* C.F.R. § 1004.8(a). Before proceeding with this appeal, we also confirmed with DOE/HQ and DOE/OGC that the factual and legal bases for the agency's determination are still applicable; that is, that the determination has not been rendered moot by the passage of time or by events having occurred during the period between the issuance of the determination and the date of the appeal.

[2] These are the same documents that were the subject of the request that led to two prior appeals. *See Eugenie Reich,* 29 DOE ¶ 80,289 (2007); *Eugenie Reich*, 29 DOE ¶ 80,315 (2007).

of the FOIA. *Id.* On September 29, 2008, Reich filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Reich asserts that the responsive document was improperly withheld under Exemptions 5 and 6 and asks OHA to order DOE/HQ to release the responsive document. *See* Appeal Letter.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding the responsive document from Reich, DOE/HQ relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears,* 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested document, we have concluded that the determination made by DOE/OS in applying Exemption 5 was correct and consistent with the principles outlined above. First, the document withheld from Reich consists of comments, preliminary findings and opinions prepared by an independent investigating committee and intended only for internal DOE use. In her Appeal, Reich asserts, *inter alia,* that the Report does not meet the threshold test of "inter-agency or intra-agency memorandum." We disagree and find that the information requested in this case properly falls within the definition of "intra-agency memoranda" pursuant to Exemption 5 of the FOIA. Courts have routinely held that documents provided by an agency's contractor employees or by outside consultants may be considered "intra-agency memoranda" for the purposes of Exemption 5. The Court of Appeals for the District of Columbia Circuit observed in *Ryan v. Department of Justice* that "Congress apparently did not intend 'inter-agency or intra-agency' to be

rigidly exclusive terms, but rather to include [nearly any record] that is part of the deliberative process." *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980). The court included in this category recommendations from Members of Congress, recommendations from judges and special prosecutors, recommendations from an agency to a commission established to assist another agency's policymaking, and documents provided by an agency's contractor employees. *See Ryan,* 617 F.2d at 790; *see also Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding agency's invocation of Exemption 5 to protect documents prepared by private contractor hired to perform audit for agency). Furthermore, courts have applied a common-sense approach to documents generated by consultants outside of an agency and found that these documents generally qualify for Exemption 5 protection because in the exercise of their functions, agencies have "a special need for the opinions and recommendations of temporary consultants." *See Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *cf. CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (observing the importance of outside consultants in deliberative process privilege context). The independent investigation committee in this case clearly serves the needs of the agency. 3/

Second, the comments, recommendations and opinions contained in the Draft Report are clearly predecisional and deliberative. DOE/HQ asserts that the responsive document at issue is a draft, and is marked as a draft, and "the evidence suggests that the final version of the Draft Report, on which Agency officials received a briefing, differed from the draft copy, as the draft Report consisted only of the first sixteen pages of text, and did not include Appendices A-I." Determination Letter. In addition, it asserts that Exemption 5 protects against "the premature disclosure of draft documents before they are finally adopted and against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for any agency's decision." *Id.* We agree. This Draft Report discusses observations and findings that were subject to further agency review and do not represent final agency position. Accordingly, we hold that the Draft Report was properly withheld in its entirety under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consists solely of advisory opinions, observations and findings provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE consultants to

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[3] We note that Reich, in her assertion that the Draft Report does not meet the "inter-agency or intra-agency memorandum" threshold test of Exemption 5, discusses the *Klamath* case. In a recent case, we interpreted the holding in *Klamath* narrowly. On the basis of our interpretation of *Klamath,* its ruling does not apply in this case. *See State of New York,* 30 DOE ¶____(2008).

make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE consultants were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Exemption 6

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1,3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

In this case, DOE/HQ found a privacy interest in the identities and personal information of ORNL employees being investigated regarding allegations of research misconduct as well as in the names of the outside investigators tasked with examining the allegations. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative documents. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual). Accordingly, our office has followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80, 117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990).

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.; see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). Reich asserts that there is a public interest, specifically in the "sense of public oversight of

government operations," in knowing identities in the Draft Report. *See* Appeal Letter at 7. We disagree. We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Releasing the names and identifying information of ORNL employees being investigated as well as the names and identifying information of the outside investigators would add little to the public's analysis of any allegations of misconduct, but would rather "have a chilling effect on future independent researchers' willingness to participate in the important process of peer-reviewing one another's work." *See* Determination Letter at 2. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against a minimal public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Therefore, we find that the identities of individuals in the Draft Report were properly withheld under Exemption 6.

III. Conclusion

We have reviewed and considered all of Reich's arguments. For the reasons stated above, we have determined that DOE/HQ properly applied Exemptions 5 and 6 of the FOIA in withholding the responsive document at issue from Reich. Therefore, Reich's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Eugenie Reich on September 29, 2008, OHA Case No. TFA-0279, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 28, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

November 10, 2008

Appeal

Petitioner: Susan P. Meacham

Filing Date: October 15, 2008

Case Number: TFA-0280

This Decision concerns Susan P. Meacham's Appeal from a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to her on September 10, 2008. In that determination, the ORO responded to Ms. Meacham's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Sterling Meacham, Ms. Meacham's late husband, worked at the Oak Ridge National Laboratory (ORNL). Appeal Letter. She filed a FOIA request with the ORO for his medical records. *Id*. The ORO did not find them. Determination Letter. Ms. Meacham then filed the present Appeal with OHA. Appeal Letter.

II. Analysis

In responding to a FOIA request for information, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[1]

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

We contacted the ORO to request additional information so that we could evaluate its search. We learned that the ORO searched for medical records at the K-25 site because that was Mr. Meacham's last employment site, which is most likely to have his records. E-mail from Amy L. Rothrock, FOIA Officer, ORO, to David M. Petrush, Attorney-Examiner, OHA, Oct. 30, 2008. The ORO's search for responsive documents also included the DOE Records Holding Area, the ORNL, the Oak Ridge Associated Universities, and the Energy Employee Occupational Illness Program Act files. Paper files and electronic documents were searched by Mr. Meacham's name, date of birth, and social security number, which were the most useful search terms.[2] *See id*.

Based on this information, we conclude that the ORO's search for responsive documents was reasonably calculated to uncover the information that Ms. Meacham requested, and was therefore adequate. Therefore, we will deny Ms. Meacham's Appeal.

It Is Therefore Ordered That:

(1) The Appeal that Susan P. Meacham filed on October 15, 2008, OHA Case No. TFA-0280, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 10, 2008

[2] After the ORO sent Ms. Meacham its determination letter, employees at the K-25 facility searched again and found responsive medical records that they initially overlooked. E-mail from Amy L. Rothrock, FOIA Officer, ORO, to David M. Petrush, Attorney-Examiner, OHA, Oct. 30, 2008. The ORO has provided them to Ms. Meacham. *Id.*

We note that the fact that responsive records were found after the ORO completed its search does not render its otherwise adequate search inadequate. "[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Therefore, "[A] search is not unreasonable simply because it fails to produce all relevant [information]. . . ." *Id*. at 952-53.

December 23, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Charles D. Saunders

Filing Date: December 2, 2008

Case Number: TFA-0282

This Decision concerns Charles D. Saunders' Appeal from a determination that the Department of Energy's (DOE) Office of Legacy Management (OLM) issued to him on November 20, 2008. In that determination, the OLM responded to Mr. Saunders' request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the OLM to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

Mr. Saunders worked at the DOE's Rocky Flats Site. On April 28, 2008, he filed a FOIA request with the OLM seeking "(1) notes from the Criticality Engineering Department about radiation levels in Building 707, and (2) calculations for any amounts of plutonium recovered from the duct work in Building 881." October 28, 2008, Letter (the Gatlin Letter) from Verlette L. Gatlin, Deputy Director, Office of Information Resources (OIR), to Mr. Saunders at 1. In a letter dated June 12, 2008, the OLM informed Mr. Saunders that he did not reasonably describe the records he was requesting in part (1) and would therefore be required to reformulate that part of his request. That letter also informed Saunders that the OLM's search for documents responsive to part (2) of his request did not locate any responsive documents.

As a result of consultations with OIR, Mr. Saunders' reformulated part (1) of his request to "seek any studies that indicate the amount of radiation or plutonium absorbed by employees from 45 minutes of exposure to ingots of plutonium in building 707 from June 1984 to June 1985." Gatlin Letter at 1. On November 20, 2008, OLM issued a Determination Letter in which it stated that its search under the reformulated request had not located any responsive documents. On December 2, 2008, Mr. Saunders filed the present Appeal with OHA.[1]

II. Analysis

In responding to a FOIA request for information, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't*

[1] The Determination Letter addresses only the reformulated part (1) of Mr. Saunders' April 28, 2008, request and does not address part (2) of that request.

of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, (Case No. VFA-0098) (1995) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[2]

We contacted the OLM to request additional information so that we could evaluate its search. We learned that the OLM conducted electronic searches in the OLM's Electronic Recordkeeping System (ERKS) for studies that indicate the amount of radiation or plutonium absorbed by employees from 45 minutes of exposure to ingots of plutonium in building 707 from June 1984 to June 1985. OLM informed us that "[s]earch terms utilized were: ingot and plutonium; ingot and pu; ingot and study; ingot and dose; 45 and minute and plutonium; 45 and minute and pu; 45 and minute and study; 45 and minute and ingot; 45 and minute and dose; Forty-five and minute and plutonium; Forty-five and minute and pu; Forty-five and minute and study; Forty-five and minute and ingot; and Forty-five and minute and dose." December 11, 2008, Electronic Mail Message from John V. Montgomery, Freedom of Information Act Officer, Office of Legacy Management to Steven L. Fine, OHA Staff Attorney. As a result of this search, no responsive documents were located.

Based on this information, we conclude that the OLM's search for responsive documents was reasonably calculated to uncover the information described in Mr. Saunders' reformulated request, and was therefore adequate. Therefore, we will deny Mr. Saunders' Appeal.

It Is Therefore Ordered That:

(1) The Appeal that Charles D. Saunders filed on December 2, 2008, OHA Case No. TFA-0282, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 23, 2008

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[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm .

February 2, 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Donald R. Jackson
Date of Filing:	January 5, 2009
Case Number:	TFA-0284

On January 5, 2009, Donald R. Jackson filed an Appeal from a determination issued to Representative Artur Davis of Alabama on Mr. Jackson's behalf. The Oak Ridge Office (ORO) of the Department of Energy (DOE) issued the determination on November 25, 2008, in response to a request for documents that Representative Davis submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require that DOE/ORO perform an additional search for responsive material and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On October 23, 2008, Representative Davis filed a Privacy Act request with DOE/ORO on behalf of Mr. Jackson for copies of all "work, medical, and exposure records" related to Mr. Jackson, who was previously employed at the DOE Oak Ridge site. Letter from Elizabeth Dillon, Authorizing Official, to The Honorable Artur Davis (November 25, 2008) (Determination Letter). DOE/ORO sent a copy of Mr. Jackson's radiation exposure records to Representative Davis, but stated that it could not find any personnel or medical records. *Id.* In the Appeal, Mr. Jackson challenged the adequacy of the search. Letter from Mr. Jackson to Director, Office of Hearings and Appeals (January 5, 2009) (Appeal).

II. Analysis

The Privacy Act (PA) generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. 552a (d). The Act defines a "system of records as a group of any records under the control of any agency from which information is retrieved by the name of the individual or by

some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a (a) (5). [1]

This case concerns a request for information filed under the PA. We require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the FOIA, where it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, Case No.TFA-0015 (2003).[2]

We contacted DOE/ORO to request additional information so that we could evaluate the search for Mr. Jackson's records. Electronic Mail Message from Elizabeth Dillon, DOE/ORO to Valerie Vance Adeyeye, Staff Attorney, OHA (January 8, 2009). On October 28, 2008, DOE/ORO requested that Oak Ridge Associated Universities (ORAU) perform a search for Mr. Jackson's personnel, medical and radiation exposure records. ORAU searched the Radiation Exposure Information and Reporting System (REIRS) and the DOE Radiation Exposure Monitoring System (REMS), and found responsive radiation exposure records. DOE/ORO released those documents to Representative Davis on Mr. Jackson's behalf. However, ORAU was unable to locate any responsive personnel or medical records. DOE/ORO then requested an additional search, and ORAU expanded its search to include additional databases.[3] ORAU did not find any additional responsive material.

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[1] The Privacy Act adopts the FOIA definition of agency. 5 U.S.C. § 552a (a)(1). The FOIA defines "agency" as any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f).

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

[3] ORAU searched files at ORAU Human Resources and the Comparative Animal Research Laboratory (CARL) for personnel records. ORAU searched the following files for medical records: (1) ORAU Human Resources, Occupational Medicine; (2) Beryllium (BESIS)-Occupational Exposure and Worker Health (OEWH); and (3) Oak Ridge Institute for Nuclear Studies Hospital files from 1947 to 1975. In the expanded search, ORAU searched the following files for radiation exposure records: (1) ORAU Environment, Safety & Health student and employee database; and (2) Accident Registry of the Radiation Emergency Assistance Center/Training Site (REAC/TS). ORAU searched the Training and Technology files and the REAC/TS Course Registry for training records, and also searched the Science, Engineering and Education Historical Database (SEE) for research participant records prior to 1998, and the Science Education Program (SEP) records for research participants after 1998. Finally, ORAU searched OEWH work history records and OEWH National Supplemental Screening Program records. Electronic mail message from Linda Chapman, DOE/ORO, to Valerie Vance Adeyeye, OHA Staff Attorney (January 22, 2009).

III. Conclusion

After reviewing the record of this case, we find that DOE/ORO conducted a search that was adequate and reasonably calculated to uncover the requested information. The search did, in fact, locate some responsive material, and that material has been released to Mr. Jackson. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by Donald R. Jackson on January 5, 2009, OHA Case Number TFA-0284 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 2, 2009

January 15, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner:	Morsey Constructors
Filing Date:	January 5, 2009
Case Number:	TFA-0285

This Decision concerns Morsey Constructors' (Morsey) Appeal from a determination that the Department of Energy's (DOE) Environmental Management Consolidated Business Center (EM) issued to it on November 18, 2008. In that determination, EM responded to Morsey's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the EM to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On September 5, 2008, Morsey filed a FOIA request with the EM seeking three specific documents pertaining to a contract between the DOE and Uranium Disposition Services (UDS) regarding the DUF6 Conversion Project (the Project). On November 19, 2008, EM issued a Determination Letter in which it released one of the requested documents in its entirety and provided the internet address of another of the requested documents. EM indicated that it had performed a search for the third requested document, "a copy of a payment bond between the DOE and UDS regarding the Project," and that this search had not located any responsive documents. Determination Letter at 1. On January 5, 2009, Morsey filed the present Appeal with OHA contending that EM's search for this responsive document was inadequate.

II. Analysis

In responding to a FOIA request for information, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, (Case No. VFA-0098) (1995) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[1]

In support of its assertion that EM's search for responsive documents was inadequate Morsey claims that EM should have located a payment bond for the project because UDP was obligated to post one with EM. In support of this assertion, Morsey cites the Federal Acquisition Regulations, the United States Code, and the language of the contract between DOE and UDS. Appeal at 1-2.

We contacted Brady Jones, a procurement attorney with EM, to evaluate the adequacy of EM's search. Jones stated:

> I contacted the Contracting Officer, Ms. Pamela Thompson, and she advised that there is no payment bond in the contract file because the Contracting Officer, Mr. Mark A. Million, determined on June 28, 2004, that a payment bond was not necessary. Attached is a copy of the June 28, 2004 letter. Prior to this letter, UDS proposed and the Contracting Officer accepted an alternative financial protection to requiring UDS to post performance and payment bonds. The alternative approach included subcontractor bonding and the performance guarantees of UDS's three member companies.

January 7, 2009, Electronic Mail Message from Brady Jones III, Procurement Attorney, Environmental Management, to Steven L. Fine, OHA Staff Attorney. Based upon our communications with Mr. Jones and our own examination of the June 28, 2004, letter, we find that EM conducted a reasonable search for responsive documents and has provided a compelling explanation of why that search did not locate any responsive documents. Accordingly, we conclude that the EM's search for responsive documents was reasonably calculated to uncover the information described in Morsey's request, and was therefore adequate. Therefore, we will deny Morsey's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Morsey Constructors on January 5, 2009, OHA Case No. TFA-0285, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm .

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 15, 2009

January 16, 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Linda Dunham

Date of Filing: January 6, 2009

Case Number: TFA-0286

This Decision concerns an Appeal that was filed by Linda Dunham in response to a determination that was issued to her by the Freedom of Information Act Officer (the FOIA Officer) of the Department of Energy's (DOE) Southwestern Power Administration. In that determination, the FOIA Officer replied to a request for performance ratings of two specified Southwestern Power Administration employees for the fiscal year 2008, which Ms. Dunham submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Director released portions of each FY 2008 Annual Summary Rating to Ms. Dunham, but withheld other portions of those documents. This Appeal, if granted, would require that the FOIA Officer release the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); *see also* 10 C.F.R. § 1004.10(b)(1)-(9).

I. BACKGROUND

In her response to Ms. Dunham's FOIA request, the FOIA Officer released those portions of the Annual Summary Rating documents that contained the name of the employee being rated, the rating period, the code for the organization in which the employee worked, each element on which the employee was rated, and the name and signature of the rating official, the reviewing official, and the employee. The FOIA Officer withheld the value of the rating given for each element, any comments made regarding any such rating, the summary rating based on an aggregation of the ratings for each element, and any recommendation for an award based on the employee's performance. The FOIA Officer's determination indicates that all information deleted from the Annual Summary Rating documents was withheld under FOIA Exemption 6.

In her Appeal, Ms. Dunham requests that this Office review the withheld portions of the documents that were provided to her and determine whether the FOIA Officer properly withheld them from disclosure to her.

II. ANALYSIS

Exemption 6 of the FOIA protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*).

In determining whether the performance ratings may be withheld under Exemption 6, we must undertake a three-step analysis. First, we must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the ratings may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, we must determine whether release of the information would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Third, we must balance the identified privacy interests against the public interest in order to determine whether release of the information would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *Ripskis*, 746 F.2d at 3.

We find that substantial privacy interests would be implicated by the release of the employees' performance ratings. The humiliation that could result from the release of mediocre or poor ratings is apparent. However, the release of even favorable ratings can cause embarrassment, as well as jealousy and possible harassment from employees who receive lesser ratings. On the other hand, release of the ratings would further the public interest to some extent by shedding light on the way in which the government evaluates its employees. We believe that this interest is outweighed, though, by the deleterious effects that disclosure could have on employee morale and workplace efficiency. As the District of Columbia Circuit Court of Appeals stated in *Ripskis*, "Disclosure will be likely to spur unhealthy comparisons among . . . employees and thus breed discord in the workplace," and "chill candor in the evaluation process as well." 746 F.2d at 3. In that case, the Court upheld the decision of a lower court that the names of employees were properly redacted under Exemption 6 from personnel evaluation forms provided to a requester. Under these circumstances, in which the names of the rated employees have been released, we find that the FOIA Officer properly determined that the personnel ratings are exempt from mandatory disclosure pursuant to Exemption 6. In addition, we find that release of any comments or recommendations that appear on the Annual Summary Rating documents should also be withheld, because their disclosure would likely reveal the nature of the employees' performance ratings, if not their actual value.

We have reviewed the information that was withheld from the appellant and have determined that the FOIA Officer segregated and released to Ms. Dunham all information that is not subject to

withholding under Exemption 6. Having found that the FOIA Officer properly withheld personal information regarding employees from the documents it released to Ms. Dunham, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Linda Dunham, OHA Case Number TFA-0286, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 16, 2009

January 15, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ernest D. Steelman

Date of Filing: January 7, 2009

Case Number: TFA-0287

This Decision concerns Ernest D. Steelman's Appeal from a determination that the Department of Energy's (DOE) Oak Ridge Office (ORO) issued to him on December 17, 2008. In that determination, the ORO responded to Mr. Steelman's request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered records or issue a new determination justifying its withholding.

I. Background

Mr. Steelman worked at the Oak Ridge Site for Rust Engineering, from approximately 1976 to 1986. Appeal Letter. He filed a Privacy Act request with the ORO for his payroll and personnel records. Determination Letter. The ORO disclosed a copy of his personnel clearance master card and stated that it could not locate any other records. *Id*.

Mr. Steelman then filed the present Appeal with the Office of Hearings and Appeals (OHA), challenging the adequacy of the ORO's search. *See* Appeal Letter. He repeated his request for his payroll and personnel records and stated that his personnel clearance master card listed his birth date incorrectly. *Id*.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[1] courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search

[1] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the PA requires only that the agency search its systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA.

procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (Dec. 13, 1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[2]

We contacted the ORO to gain additional information to evaluate its search. The ORO stated that it searched for Mr. Steelman's records at the Oak Ridge National Laboratory, the East TN Tech Center (K-25), and the DOE Records Holding Area.[3] E-mail from Elizabeth M. Dillon, Authorizing Official, ORO, to David M. Petrush, Attorney-Examiner, OHA, Jan. 8, 2009. Those facilities searched their paper files and electronic databases, using Mr. Steelman's name and social security number.[4] The ORO stated that it searched the files most likely to contain Mr. Steelman's employment records. *Id*. For these reasons, we find that the ORO conducted a search that was reasonably calculated to uncover all relevant records, and was therefore adequate. Therefore, we will deny Mr. Steelman's Appeal.

It Is Therefore Ordered That:

(1) The Appeal that Ernest D. Steelman filed on January 7, 2009, OHA Case No. TFA-0287, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 15, 2009

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

[3] The ORO stated that the National Nuclear Security Administration's (NNSA) Y-12 facility maintains records for Rust Engineering, and that on October 7, 2008, it forwarded Mr. Steelman's request to the NNSA. E-mail from Elizabeth M. Dillon, Authorizing Official, ORO, to David M. Petrush, Attorney-Examiner, OHA, Jan. 8, 2009. The NNSA will respond to Mr. Steelman separately; the ORO's Determination Letter and this Appeal do not address the NNSA's search.

[4] Mr. Steelman noted that his personnel clearance master card showed an incorrect birth date. This error did not affect the ORO's search because the ORO did not search using his birth date. Rather, it searched using his correct name and social security number.

February 5, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Tom Marks
Date of Filing:	January 7, 2009
Case Number:	TFA-0288

On January 7, 2009, Tom Marks (Appellant) filed an Appeal from a determination issued to him on November 26, 2008, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. NNSA identified 17 documents responsive to the Appellant's request. NNSA provided the Appellant with seven of the documents in their entirety. The remaining ten documents were withheld in their entirety by NNSA under Exemptions 2 and 4 of the FOIA. The Appellant challenges NNSA's withholding of information under those Exemptions. This appeal, if granted, would require NNSA to release the withheld information to the Appellant.

I. Background

On September 10, 2007, the Appellant filed a request with NNSA for

> 1. FY00-FY08 "salary increase authorization" proposals submitted to LANL and/or the University of California on behalf of Las Alamos National Laboratory (LANL) to NNSA/DOE. These are also referred to as "compensation increase" plans or proposals.
>
> 2. DOE/NNSA "salary increase authorization" responses to LANL/University of California for FY00-FY08.
>
> 3. All [computer] "hot skills" requests or proposals submitted by LANL and/or the University of California on behalf of LANL to the NNSA/DOE after January 1, 1999.

> 4. All DOE/NNSA responses to the request and/or proposals as described in item 3, above, and all authorization for [computer] hot skills compensation to LANL/UC after January 1, 1999.

Determination Letter from Carolyn Becknell, NNSA, to Appellant, November 26, 2008, at 1.

On November 26, 2008, NNSA released copies of letters from DOE to the contractors approving the Compensation Increase Plans for FY 2000, 2001, 2002, 2004, 2005, 2006, and 2008. In its Determination Letter, NNSA stated that "[t]he remainder of the responsive records are withheld in their entirety pursuant to 5 U.S.C., Section 552(b)(2) (Exemption 2 for the FOIA) and 5 U.S.C. Section 552 (b)(4) (Exemption 4 of the FOIA)." Determination Letter at 2. NNSA then explained that federal courts have interpreted Exemption 2 to encompass "low 2" information and "high 2" information. *Id.* NNSA stated that the withheld portions constituted "high 2" information. *Id.* NNSA then explained what type of information is exempt from disclosure under Exemption 4 and that, in making its determination, it solicited and received comments from the submitters of the requested documents. NNSA went on to indicate that it attempted to segregate factual, nonexempt information from exempt information. However, NNSA determined that after segregation, the factual, nonexempt information would be so small in quantity as to make its release meaningless. Finally, NNSA determined that release of the information was not in the public interest.

On January 7, 2009, the Appellant appealed, contending that NNSA did not properly support its Exemption 2 and Exemption 4 withholdings. Appeal Letter received January 7, 2008, from Appellant to Director, OHA at 1-2. The Appellant also contends that NNSA did not identify the specific exemption for each redaction in the responsive information. *Id.* at 2. Finally, the Appellant contends that NNSA conducted a flawed analysis to determine if disclosure of the information was contrary to the public interest. *Id.*

II. Analysis

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552 (a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

An agency therefore has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Servs., Inc.*, Case No.

VFA-0235 (1996) (RIS).[1/] Generally a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *State of New York,* Case No. TFA-0269 (2008). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*.

A. Adequacy of the Determination

Our review of the Determination Letter indicates that NNSA failed to indicate which portions of the withheld documents were withheld pursuant to Exemption 2 and which portions were withheld pursuant to Exemption 4. Thus, an administrative appeal in this case, without additional information, is virtually impossible to consider. In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination letter, so that the Appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg,* Case No. TFA-0003 (2002). We will remand the matter to NNSA so that it can issue another determination and inform the Appellant which specific portions of the documents are being withheld pursuant to which Exemption and explain how Exemptions 2 and 4 apply to the withheld material in that document.

B. Adequacy of the Justification

Although we have already decided to remand the matter to NNSA, for the purposes of administrative efficiency we will address NNSA's application of Exemptions 2 and 4. An agency has a similar obligation to properly justify its withholding of documents under the FOIA. NNSA relied on Exemptions 2 and 4 to withhold the information that was responsive to the Appellant's request. We do not believe NNSA properly justified its application of either of these Exemptions.

Exemption 2 of the FOIA exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). In the Determination Letter, NNSA stated that "[t]he Exemption 2 information that was deleted from these documents reveals the method by which [the information] is gathered and the proposals reflect LANL's methods and procedures for determining salary bands and staff compensation." Determination letter

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

at 3. LANL is a DOE contractor, not a government agency. Therefore, NNSA cannot use Exemption 2 to withhold information that would reflect LANL's procedures.

Similarly, NNSA misapplied the Exemption 4 standard to the withheld information. Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). There are a number of requirements that must be met for information to be withheld under Exemption 4. NNSA correctly stated the test outlined in *National Parks*, which includes that the information must be "commercial or financial," "obtained from a person," and "confidential." *National Parks* stated that withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. NNSA then determined that release of the information would "undermine LANL's ability to continue to obtain this type of proprietary vendor information in the future." Determination Letter at 3. As stated above, LANL is a DOE contractor, not a government agency. Therefore, NNSA improperly considered the impact on LANL's ability to obtain information in the future in its justification for withholding information under Exemption 4.

C. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 104.1. With regard to the information withheld pursuant to Exemption 2, NNSA claimed the release of the information would risk either circumvention of a legal requirement or disruption of a critical operation or activity. If NNSA determines on remand that Exemption 2 still forms a basis for withholding information from responsive documents, it should reconsider whether the public interest nevertheless mandates its discretionary release. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, the usual inquiry into whether release of the material would be in the public interest is unnecessary. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292).

III. Conclusion

For all the reasons stated above, we will remand the matter to NNSA for a new analysis and determination. Therefore, we will grant the Appeal in part and remand it to NNSA.

It Is Therefore Ordered That:

(1) The Appeal filed by Tom Marks, Case No. TFA-0288, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 5, 2009

February 25, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: January 9, 2009

Case Number: TFA-0289

On January 9, 2009, the State of New York (New York) filed an Appeal from a determination issued to it by the Department of Energy's (DOE) Office of Electricity Delivery and Energy Reliability (OE). In that determination, OE released some documents in response to a request for information that New York filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to release certain withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

In December 2007, New York filed a FOIA request with DOE for correspondence between DOE, CRA International, and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor (NIETC) Designation Order. [1] DOE released some information to New York in a July 2008 determination letter. In the determination, DOE released 82 documents, some redacted, and an index. On August 11, 2008, New York filed an Appeal from the determination. OHA issued a decision on October 6, 2008, that granted the appeal in part. In that decision, OHA ordered that OE disclose certain portions of Document 27, or issue a new determination justifying its withholding. OHA also ordered that OE issue a new determination regarding Documents 23(a) and 26, or issue a new

[1] CRA International (CRAI) is a subcontractor to the prime contractor in the August 2006 Congestion Study. CRAI was tasked to collect and analyze transmission data and transmission studies. CRAI submitted its analyses to the prime contractor and to DOE staff, who then drafted the study with graphics assistance from CRAI. *See* Electronic mail message from Marshall Whitenton, Deputy Assistant Secretary, DOE, to Dave Petrush, OHA Staff Attorney (September 9, 2008).

determination, "explaining whether the OE has fully adopted them, either formally or informally." *See State of New* York, Case No. TFA-0271 (October 6, 2008).

OE issued a new determination letter to New York on December 5, 2008, in which it released additional documents but continued to withhold portions of Documents 23(a), 26, and 27. Letter from OE to New York (December 5, 2008). On January 9, 2009, New York filed this appeal requesting that OHA order OE to release Documents 23(a), 26, and 27. As an initial matter, New York contends that DOE applied Exemption 5 to the documents in error. New York further argues that OE has "failed to state any legitimate basis in law or fact for continuing to withhold those documents." Appeal at 1. New York also alleges that DOE erred in denying New York access to these documents under Exemption 5 because the documents contained factual statements and had been seen by third parties who are not DOE employees. Appeal at 1. New York therefore asks OHA to order the release of the withheld information.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

1. Document 27

New York contends that OE "continues to withhold a portion of information that the OHA determined should be disclosed (Document 27) . . . ." Appeal at 1. We reviewed the OHA order, and conclude that this portion of the appeal should be denied because OE has followed the directions of the order.

Document 27 is a copy of a three-sentence electronic mail message. The OHA order states, in pertinent part, "*although the OE properly withheld the first sentence*, the OE must disclose the second and third sentences." TFA-0271, October 6, 2008 (emphasis added). OE stated in its determination that it was "continuing to withhold one sentence that the October 6 Order upheld as 'deliberative because it associates the email's author with a position that the DOE took in response to particular comments.'" Letter from OE to New York (December 5, 2008) (Determination) at 1. OE went on to say that it was "releasing the next two sentences, which were previously withheld."

Id. OE released the last two sentences to New York. Therefore, we find that OE properly withheld the first sentence of Document 27.

2. Applicability of Exemption 5

Exemption 5 protects documents that would reveal the decision-making process that results in a final agency decision. Thus, we focus our analysis on the effect that release of the responsive material would have on the process of arriving at an agency final decision. *Schell v. HHS*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that in an Exemption 5 case, courts now focus less on the material sought and more on the effect of the release of the material). The ultimate issue in evaluating any deliberative process privilege claim is "whether the materials bear on the formulation or exercise of agency policy-oriented judgment." *City of Virginia Beach, Va. v. Department of Commerce*, 995 F.2d 1247, 1254 (4th Cir. 1993).

This office has conducted a *de novo* review of the documents at issue, and we conclude that Documents 23(a), 26 and 27 contain material that is pre-decisional and deliberative. Document 23(a), as described by OE, "contains preliminary questions and issues that were part of the deliberative process in defining the scope and direction of the project." Determination at 1. The document was created during the planning stages of the Congestion Study. We agree with OE that the document is pre-decisional and deliberative. Document 26, titled "Analysis of Implications of Transmission Congestion in PJM and NYISO," is a draft that DOE received in December 2006, and was a basis for a document that was finalized in March 2007. This document is also predecisional. Release of the document would reveal the thought process that the DOE employees and their consultants used to arrive at the final document. Further, we have previously concluded that the first sentence of Document 27 is deliberative. *See* discussion *supra* Section II.A.1. Thus, release of this information could have a chilling effect on employees who are tasked to create policy in the future.

New York also argued that the documents are not protected under Exemption 5 because they were seen by third parties. OE provided information on all recipients of Documents 23(a), 26, and 27. *See* Memorandum from Theresa Brown Shute, OE, to Valerie Vance Adeyeye, OHA Staff Attorney (January 26, 2009). The recipients were DOE employees, DOE contractors, and CRAI employees. We have previously found that the CRAI employees are "government consultants" and that their communication with DOE employees and DOE contractors regarding these documents is protected. *See State of New York*, Case No. TFA-0271 (2008).

In summary, we find that DOE properly applied the protection of Exemption 5 to the responsive material. The documents in question are communications between employees and government consultants who assisted in the agency study. The material documents the discussions and analysis that transpired during the creation of the policy. Therefore, based on the content of the documents, we find that the material is deliberative and exempt from disclosure under Exemption 5.

B. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C.

§ 552(b). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, Case No. VFA-0650 (March 2, 2001). OE released the headings of Documents 23(a) and 26, but did not address the issue of segregability in the determination. This office reviewed all of the material that was withheld in its entirety and, based on our review, we find that OE should reconsider the issue of segregability in Document 26. OE has disclosed non-exempt material in Documents 23(a) and 27. However, our review of Document 26 concluded that the document may contain some factual, segregable material that could be released to the requester without revealing the deliberative process. For example, Paragraph 3 of Page 4 in Document 26 contains some information that appears to be factual and segregable. Non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Accordingly, this portion of the Appeal is remanded to OE.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. *See also Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, President Barack Obama (January 21, 2009) (stating that "[t]he presumption of disclosure should be applied to all decisions involving FOIA").

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, Case No. TFA-0150 (October 16, 2006).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York on January 9, 2009, OHA Case No. TFA-0289, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Electricity Delivery and Energy Reliability of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 25, 2009

February 19, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners: Patrick Daniel O'Neill, Jr.
Mark Steven Ludwig

Date of Filing: January 21, 2009

Case Numbers: TFA-0291
TFA-0292

On January 21, 2009, Mark Steven Ludwig and Patrick Daniel O'Neill, Jr. (Appellants) filed appeals from determinations issued to them by the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC). In the two determinations, NNSA/SC responded to a request for documents that each Appellant had submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. At issue in this case is NNSA/SC's withholding from each Appellant of a report, and most of its appendices, authored by Norman Bay and John Kern (Bay Report). This appeal, if granted, would require NNSA to release the Bay Report and its appendices to the Appellants.[1]

I. Background

The Bay Report was created pursuant to a request of Sandia Corporation (Sandia). Sandia received allegations from two Sandia Ethics Office investigators who claimed their work was being impeded and that they were being retaliated against by Sandia managers as a result of their investigation. Because such allegations would have been investigated by the complaining Ethics Office investigators themselves, Sandia retained Norman Bay (Bay), a professor of law at the University of New Mexico, to conduct an investigation.

In requests dated February 19, 2008, the Appellants each sought from NNSA/SC various documents including the Bay Report and all associated appendices. On August 29, 2008, NNSA/SC sent each of the Appellants a determination letter regarding his request in which the Appellant was supplied a number of requested documents. However, NNSA/SC withheld the Bay Report pursuant to Exemption 5 of the FOIA. Specifically, NNSA/SC asserted that the Bay Report was protected by the attorney work product and attorney-client privileges and thus was appropriately withheld pursuant to Exemption 5. Exemption 5 exempts documents which would not be available by law to a party other than an agency in litigation with the agency.

[1] We will reference the Bay Report and the withheld appendices henceforth as the "Bay Report."

The Appellants filed appeals of NNSA/SC's determinations with the Office of Hearings and Appeals (OHA) on September 24 and September 29, 2008. We granted the appeals, finding that NNSA/SC lacked standing to assert the two privileges cited in its determination letter to the Appellants. We found that because Sandia, and not NNSA/SC, engaged Bay as its attorney to prepare the report, the only relevant attorney-client or attorney work product privilege as to the Bay Report would belong to Sandia or Bay and not to NNSA/SC. We therefore remanded the matter to NNSA/SC to release the Bay Report to the Appellants or issue another determination to the Appellants justifying withholding the Bay Report. *Mark Steven Ludwig*, Case No. TFA-0276 (2008).[2]

On December 17, 2008, NNSA/SC issued a new determination to each Appellant, this time withholding the Bay Report pursuant to FOIA Exemption 4, as well as finding that certain information in the report was protected by Exemption 6. Letter from Carolyn Becknell, Freedom of Information Officer, Office of Public Affairs, NNSA/SC, and Tracy Loughead, Manager, Office of Public Affairs to Mark Stephen Ludwig (December 17, 2008); Letter from Carolyn Becknell, Freedom of Information Officer, Office of Public Affairs, NNSA/SC, and Tracy Loughead, Manager, Office of Public Affairs to Patrick Daniel O'Neill, Jr. (December 17, 2008).[3] Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In its new determination, NNSA/SC stated that the Bay Report is confidential and also "is privileged in that it is protected by the attorney-client privilege and the attorney work product privilege." Determination Letter at 1.

In the present appeal, the Appellants contend that the Bay Report is not exempt from disclosure under the FOIA. Regarding the application of Exemption 4, the Appellants do not claim that the Bay Report does not fall within the scope of either the attorney-client or attorney work product privileges. Rather, they contend that Sandia waived these privileges by taking the following alleged actions: (1) making a "redacted summary" of the report, a copy of which was provided with the appeal, available on its internal web page and releasing it to the media; (2) providing a complete copy of report to the Appellants for their review in June and July 2003; (3) providing a copy of the report in its entirety to one of its employees, Patricia Gingrich, prior to her initiating litigation against Sandia; (4) providing entire copies of the report to other individuals both internal and external to Sandia without accounting for how it was to be shared or copied; (5) providing a copy of the report to the office of Senator Charles Grassley; (6) leaving a company-owned laptop containing the report on a commercial aircraft and forgetting to retrieve it. Letter from Mark Stephen Ludwig to Director, Office of Hearings and Appeals (January 16, 2009); Letter from Patrick Daniel O'Neill, Jr. to Director, Office of Hearings and Appeals (January 16, 2009).

After receiving the present appeal, we provided a copy to NNSA/SC and asked for Sandia's response to the above allegations. Electronic mail from Steven Goering, OHA, to Carolyn

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[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996 are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[3] Because these two determinations letters are substantially identical, save for the names and addresses of the Appellants, we hereinafter cite them as "Determination Letter."

Becknell, Freedom of Information Officer, NNSA/SC (January 22, 2009); Electronic mail from Steven Goering, OHA, to Pamela Arias-Ortega, NNSA/SC Office of Chief Counsel (January 29, 2009).

With regard to the Appellants' first allegation, Sandia states that it has never asserted a claim of attorney work product privilege as to the redacted summary of the Bay Report, which it describes as "a releasable copy for use by Sandia Management in both responding to external requests and in informing the Sandia workforce concerning the outcome of the investigation." Attachment to electronic mail from Pamela Arias-Ortega to Steven Goering (February 2, 2009) ("Sandia Response") at 1.[4]

Sandia admits that the Appellants were given access to read the report in July 2003, but that neither was "provided a copy of the Bay Report or any part of it or of the unredacted summary of the Bay Report." *Id.* Further, Sandia disputes the allegation that it provided Ms. Gingrich with a copy of the entire report, stating that it provided only that portion of the report addressing a specific matter that was being reviewed by a Sandia Disciplinary Review Committee in considering possible disciplinary action against Ms. Gingrich. *Id.* "Consistent with Sandia policy and practice, Ms. Gingrich was earlier provided that portion of the Bay Report to enable her to provide a written response and position statement regarding those concerns . . . ." *Id.* During subsequent litigation against Sandia, Ms. Gingrich was provided the report in its entirety, "but only after a Confidentiality Order, to which the Report was subject, was entered by the Court." *Id.*

Sandia also denies that it released the report to other individuals

> without accounting for the release or how it was shared or copied. Sandia kept record of the releases, which were made to a limited number of people both internally who had a business need to know and externally to an even more limited number of people who had both a relationship with Sandia and who either had a right to such copy and/or a business need to know (e.g., various DOE officials/employees, Lockheed Martin Corporation). The copies were properly marked as Privileged and as Unclassified Controlled Information and, when that designation was considered not to be meaningful to or binding upon the recipient, the Report was released only when assurance was given by the recipient that the Report would be kept confidential.

Id. As an example of its treatment of the Bay Report, Sandia cites its release of the report to Senator Grassley, and references documents provided to our office in our consideration of the previous appeal regarding the report. Included in those documents were copies of communications among the Senator, DOE, and Sandia, one of which is a letter from Senator Grassley to the Secretary of Energy stating that the Senator "would agree to maintain the

[4] Sandia states that the language found in the redacted summary of the Bay Report is the same as that "found at pages 1 through 4 and 34 through 59 of the Report." Electronic mail from Pamela Arias-Ortega to Steven Goering (February 10, 2009). NNSA/SC has since informed us that Sandia will provide those pages to NNSA/SC for release to the Appellants. Electronic mail from Pamela Arias-Ortega to Steven Goering (February 12, 2009).

confidentiality of the Bay Report." Letter from Senator Charles E. Grassley to Spencer Abraham, Secretary of Energy (June 17, 2003).

Finally, Sandia disputes "that the Bay Report [was] on the laptop lost by a Sandia Vice President." Sandia Response at 1. Sandia states that the company official in question headed a "Special Management Team" that was "specifically charged with addressing concerns that were *not* addressed in the Bay Report." *Id.* at 2. The team was provided hard copies of the report, "so that they could understand what the issues were that the Appellants had raised; identify and consider what was not addressed by the Bay Report; . . ." *Id.* Sandia also notes that the report "was not provided to anyone outside the Legal Division in electronic form, . . ." *Id.* at 1.

Beyond assertions, the Appellants offer no basis for their allegations that Sandia did not account for the release and further distribution of the report, or for the allegation regarding the lost laptop, and we find none. We are left then with the issue of whether the disclosures of the report which are not in dispute waived protection of the report under the attorney work product privilege.[5] We conclude, for the reasons set forth below, that Sandia actions did not waive the privilege.

II. Analysis

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

A. Sandia Did Not Waive the Privilege By Release of the Bay Report to Senator Grassley or By Its Public Release of a Redacted Summary of the Report

This office has never ruled on the issue of waiver of the attorney work product privilege under the FOIA.[6] However, the U.S. Court of Appeals for the D.C. Circuit considered the waiver

[5] We make no finding here as to whether Sandia waived protection of the report under the attorney-client privilege. Though NNSA/SC also cited that privilege and other bases for the withholding of the Bay Report, each of which the Appellants challenge, we need not address them here. Even if we were to find that the report could not be withheld for other reasons, we would reach the same conclusion that no waiver of the attorney work product privilege by Sandia precluded NNSA/SC from withholding the Bay Report under Exemption 4.

[6] The Appellants cite the decision of the New Mexico Court of Appeals in *Gingrich v. Sandia Corp.*, 142 N.M. 359 (2007), in which the court found that Sandia had waived the attorney-client and attorney work product privileges with respect to the Bay Report. We note that the cited decision contains no discussion of the reasons for its finding of waiver as to the attorney work product privilege, but does cite standards for waivers of privileges generally set forth in the *New Mexico Rules Annotated.* Unlike the New Mexico state courts, our decisions in FOIA cases are not governed by particular state laws, but rather by federal statutory and common law, in this instance the federal common law as to the attorney work product privilege. Thus, the decision cited by the Appellants is not authority that is binding on this office nor helpful to our determination in the present case.

issue in the context of application of the privilege under FOIA Exemption 5. *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598 (D.C. Cir. 2001). At issue in *Rockwell* was a Justice Department report of investigation of its prosecution of Rockwell International Corporation, the DOE contractor that had been responsible for the operation of the Rocky Flats Nuclear Weapons Plant. Rockwell sought copies of attachments to the report that the Justice Department had not made public, and the Department withheld them under the Exemption 5 attorney work product privilege.

In *Rockwell*, the Appellant argued that the Justice Department waived the work product privilege by taking "'many actions inconsistent with maintaining the confidentiality of its work-product,' such as 'provid[ing] its work-product to Congress . . . , and publish[ing] portions of its work-product in its Report.'" *Rockwell*, 235 F.3d at 605. Regarding the release of some of the attachments to Congress, the court relied on a previous case where it found that the Army's release of an internal legal memorandum to Congress did not waive the protection of Exemption 5. *Id.* at 232 (citing *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir.1979)). As it did in *Murphy*, the court cited section 552(d) of the FOIA, which states that the Act "is not authority to withhold information from Congress." *Id.*

> If "disclosure of information to Congress [were] disclosure to the whole world," we observed, it would be "inconsistent with the obvious purpose of the Congress [in 552(d)] to carve out for itself a special right of access to privileged information," and would "effectively transform section [552(d)] into a congressional declassification scheme, a result supported neither by the legislative history of the Act, nor by general legal principles or common sense."

Id. (quoting *Murphy*, 613 F.2d at 1155-56). Further, because such an interpretation would render every disclosure to Congress "'a waiver of all privileges and exemptions, executive agencies would inevitably become more cautious in furnishing sensitive information to the legislative branch—a development at odds with public policy which encourages broad congressional access to governmental information.'" *Id.* (quoting *Murphy*, 613 F.2d at 1156). The court in *Rockwell* found that the facts before it were even more compelling than in *Murphy*, because "the Justice Department gave the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public." *Id.*

As for the fact that the Justice Department published portions of its work product in its report, the court stated that disclosure of work product privileged materials to a third party can waive the privilege if "such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Id.* (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). The court did not find the Justice Department's publishing of portions of its work product "inconsistent with a desire to keep the rest secret, particularly in view of the steps the Department took to maintain their confidentiality, . . ." *Id.* at 233.

Though the court in *Rockwell* considered waiver of the attorney work product privilege under Exemption 5, we find its holdings to be particularly applicable to the same issue in the present case under Exemption 4. First, the court relied on a standard for waiver of the privilege that it

had set forth in a prior case outside of the FOIA context, from which we can safely conclude that the court would apply the same standard under FOIA Exemption 4.[7]

Second, the *Rockwell* court's holding addresses facts analogous to those cited by the Appellants in this case, including the disclosure of the Bay Report to a member of Congress and the public release of the report's redacted summary. Following the reasoning of the court in *Rockwell*, we find that Sandia's release of the Bay Report to Senator Grassley, premised as it was on a promise of confidentiality, did not waive protection of the report under the attorney work product privilege, nor do we find that such a waiver was effected by the release of a redacted summary of the report.

B. Sandia Did Not Waive the Privilege By Allowing the Appellants and Patricia Gingrich Access to Review Part or All of the Bay Report

A more difficult issue is raised by the fact that Sandia allowed Patricia Gingrich and the Appellants access to review part or all of the report. In *Rockwell* and *Indian Law*,[8] respectively, the courts found that waiver could be triggered by disclosure of privileged information that "is inconsistent with the maintenance of secrecy from the disclosing party's adversary," *Rockwell*, 235 F.2d. at 233 (citation omitted), or "substantially increase[s] the opportunities for potential adversaries to obtain the information." *Indian Law*, 477 F. Supp. at 148. Arguably, Gingrich was a potential adversary of Sandia before she sued the company and became a real adversary. Less clear is whether the Appellants could be viewed as potential adversaries, particularly at the time they were given access to the report in 2003.

In any event, even assuming, *arguendo*, that all three were adversaries of Sandia at time they were allowed to read the report, we would not find that Sandia waived the attorney work product privilege by granting them such access. As did the court in *Rockwell*, we find support for our conclusion in previous decisions of the D.C. Circuit on the issue of waiver of the attorney work product privilege, outside the context of the FOIA.

For example, the *Rockwell* court cited its previous decision in *In re Sealed Case*, quoting its statement that the "purposes of the work product privilege are . . . not inconsistent with selective disclosure—even in some circumstances to an adversary." *Rockwell*, 235 F.2d. at 233 (quoting *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). Framing the issue as one of whether an "'objective consideration' of fairness negates Company's assertion of privilege," the court in *Sealed Case* found selective disclosure inconsistent with the purposes of the privilege "when a party seeks greater advantage from its control over work product than the law must provide to maintain a healthy adversary system . . . ." *Sealed Case*, 676 F.2d at 817, 818 (citation omitted).

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[7] Indeed, a very similar standard was applied under Exemption 4 by the U.S. District Court for the District of Columbia. *Indian Law Res. Ctr. v. Dep't of the Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979). In *Indian Law*, the court found that the Hopi Tribe did not waive the attorney work product privilege by disclosing to the Department of Interior, acting as a "confidential agent" of the Tribe, documents prepared for the Tribe by its private counsel. *Indian Law*, 477 F. Supp. at 148. "Such limited disclosure does not . . . constitute a waiver of the work product privilege, as it will not substantially increase the opportunities for potential adversaries to obtain the information." *Id.*

[8] *See supra* note 9.

Thus, the court found the privilege was waived when a company had voluntarily provided a report of internal investigation to the SEC, and thereby could not invoke the privilege in resisting a subsequent grand jury subpoena for documents on the same subject matter. Based on a "substantial likelihood" that the company had "attempted to manipulate its privilege, by withholding vital documents while making a great pretense of full disclosure of their contents," the court concluded that the company did not "deserve the protections enjoyed by those who use the adversary system for its legitimate ends." *Id.* at 825.

Two years after *Sealed Case,* the court elaborated on the circumstances under which disclosure to an adversary would be inconsistent with the purposes of the privilege. *In re Subpoenas Duces Tecum,* 738 F.2d 1367 (D.C. Cir. 1984). At issue again were documents a company had previously disclosed to the SEC, but for which the company later claimed work product privilege protection from discovery in subsequent private litigation. The court noted that, in return for its voluntary disclosure to the SEC, the company "received the quid pro quo of lenient punishment for any wrongdoings exposed in the process. That decision was obviously motivated by self-interest. Appellants now want work product protection for those same disclosures against different adversaries . . . ." *Id.* at 1372. The court found that it would be "inconsistent and unfair to allow appellants to select according to their own self-interest to which adversaries they will allow access to the materials." *Id.* The court also considered it important that the "appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC; . . ." *Id.*

Applying the same factors of "fairness" to the present case, we cannot find that Sandia waived the attorney work product privilege in the Bay Report by its past disclosures to Ms. Gingrich and the Appellants. This is not a case where, as in *Sealed Case,* Sandia is attempting to manipulate the privilege, nor is it one in which, as in *Subpoenas,* Sandia received a *quid pro quo* benefit by allowing certain of its employees to read part or all of the Bay Report, whether or not the employees were potential adversaries at the time. Further, we have no basis for finding that Sandia seeks, for tactical reasons, to withhold work product now, from a particular adversary, that it had disclosed to a different adversary in the past. Finally, based on its careful handling and limited dissemination of the full report, Sandia had a reasonable basis for believing that the contents of the report would be kept confidential by the limited number of people to whom it has been disclosed.

For all of the reasons set forth above, we find that Sandia has not waived the attorney work product privilege as to the Bay Report, and that therefore NNSA/SC was not precluded from relying on this privilege in withholding the report under FOIA Exemption 4. Accordingly, the present appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by Mark Steven Ludwig, Case No. TFA-0291, and Patrick Daniel O'Neill, Jr., Case No. TFA-0292, are denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 19, 2009

March 17, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Environmental Defense Institute
Date of Filing:	February 24, 2009
Case Number:	TFA-0295

On February 24, 2009, Environmental Defense Institute (Appellant) filed an Appeal from a determination issued to it on December 16, 2008, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004.[1/] In its determination, Idaho identified and released numerous documents responsive to the Appellant's request. Most of the documents Idaho provided the Appellant were released in their entirety. The Appellant challenges Idaho's withholding of information from three documents. This appeal, if granted, would require Idaho to release the withheld information to the Appellant.

I. Background

On April 10, 2008, the Appellant filed a request with Idaho for documents referring to the Advanced Test Reactor (ATR) that were referenced in DOE/Idaho National Laboratory (INL) "Certification Report No. 29." Request Letter dated April 10, 2008, from Chuck Broscious, President, Board of Directors, Appellant, to Idaho. On December 16, 2008, Idaho released numerous documents in full to the Appellant. Idaho redacted a portion of one document. In its Determination Letter, Idaho stated that the redacted document contains information that is exempt from disclosure under FOIA Exemptions 2 and 3.[2/] Determination Letter dated December 16, 2008, from Clayton Ogilvie, FOIA Officer, Idaho, to Appellant. In addition to the redacted document, Idaho released two single pages of two documents. Those two single pages were responsive to the Appellant's request.

[1/] The request was submitted on April 10, 2008. Because of the broad scope of the request, Idaho has been sending responsive documents to the Appellant in installments as the documents are reviewed and ready for release.

[2/] Idaho withheld a portion of one other document under Exemption 6. The Appeal Letter did not request this withheld information be released.

On February 24, 2009, the Appellant appealed, contending that the FOIA exemptions that Idaho cited in its Determination Letter do not apply to the document that Idaho has redacted. Appeal Letter at 1 received February 24, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA). The relief requested by the Appellant is unredacted copies of

> 1. ATR Vessel Vent Valve Installation, EG&G Facility Change Form, 1988; Reactor Vessel Vent System issued 6/22/93, Doc. No. 7.3.12.3.21;
> 2. Recommendation for Upgrade of Radiation monitoring at the Idaho National Laboratory Reactor Technology Complex, August 2007, ANN, Inc., et al.
> 3. Chapter 12, Radiological Protection Upgraded Final Safety Analysis Report for Advanced Test Reactor, SAR-153, 2/05/08.

Appeal Letter at 2. The Appellant argued that Exemptions 2 and 3 do not apply to these three documents.[3/] The Appellant claimed that Idaho's assertion that release of the information could lead to sabotage of the ATR Vessel Vent Valve Installation was incorrect because the circumvention element of Exemption 2 "only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individuals may not use them to circumvent the law or law enforcement measures." *Id.* at 3. In regard to Exemption 3, the Appellant argues that the requested documents "do not relate to 'special nuclear fuel.'" *Id.* If the Appeal were granted, these three documents would be released to the Appellant without redactions.

II. Analysis

A. Information redacted under Exemptions 2 and 3

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold

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[3/] In the Appeal, the Appellant also appears to challenge the withholding under Exemption 6. However, no portions of the three documents which the Appellant has requested to receive in full were withheld under Exemption 6. Therefore, this Decision will not consider the withholding under Exemption 6.

information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

1. Exemption 2

a. Application of Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). "Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes." *Judicial Watch, Inc., v. Dep't of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). Idaho has claimed that the information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho withheld portions of the "ATR Vessel Vent Valve Installation, EG&G Facility Change Form, 1988; Reactor Vessel Vent System issued 6/22/93, Doc. No. 7.3.12.3.21" (ATR Vessel Vent Valve Installation) under FOIA Exemption 2. Idaho explained that this document is internal, and its disclosure would "significantly risk installations and projects that safeguard nuclear materials and facilities." Determination Letter at 1. Thus, it is exempt from disclosure under Exemption 2. It further stated that Exemption 2's anti-circumvention protection is applicable in this case because the document identifies "vulnerabilities to sabotage events, system configurations/capabilities that may be exploited and internal procedures for operating the reactor that are inherently internal." *Id.* Idaho stated that it withheld those portions because disclosure of the information "would significantly risk installations and projects that safeguard nuclear materials and facilities." *Id.*

We have reviewed an unredacted version of the ATR Vessel Vent Valve Installation document that was released to the Appellant. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that

information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that Idaho withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the ATR Vessel Vent Valve Installation and to understand how to sabotage it. Accordingly, disclosure of the information at issue risks circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Even though this Appellant may have no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that "[t]he 'circumvention' exemption only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individual may not use them to circumvent the law or law enforcement measures." Appeal Letter at 3. We disagree. Exemption 2 encompasses documents that are used for internal purposes not just for law enforcement purposes. *Judicial Watch, Inc.*, 2005 WL 1606915, at *9. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

b. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that Idaho redacted from the ATR Vessel Vent Valve Installation document. Idaho was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

c. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Idaho claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the ATR Vessel Vent Valve Installation. It is therefore obvious that release of the information would not be in the public interest.

2. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute [other than the FOIA itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As articulated by the Supreme Court in *CIA v. Sims*, 471 U.S. 159, 167 (1985), application of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. *Id.; see also Kelly, Anderson & Associates, Inc.*, Case No. TFA-0638 (2001).

In its determination, Idaho relied upon the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (AEA), for redacting information from the ATR Vessel Vent Valve Installation document, stating that the AEA "prohibit[s] the disclosure of restricted data to the public specifically related to special nuclear materials." Determination Letter at 1. We have previously determined that the AEA is a statute to which Exemption 3 is applicable. *See, e.g., Beveridge & Diamond, P.C.*, Case No. TFA-0167 (2006). However, in order for information to be withheld under the AEA, it must be properly classified or identified as Unclassified Controlled Nuclear Information (UCNI) under the provisions of the AEA. There is no indication that the information withheld by Idaho in this case has been either properly classified or properly identified as UCNI pursuant to those provisions. Therefore, Idaho improperly invoked Exemption 3 to protect the information requested by the Appellant in this case. We note, however, that the information Idaho withheld pursuant to Exemption 3 was also withheld under Exemption 2 discussed in the above section.

B. Non Responsive Information in Two Documents

The Appellant argues that Idaho improperly redacted information from two other documents, Recommendation for Upgrade of Radiation monitoring at the Idaho National

Laboratory Reactor Technology Complex, August 2007, ANN, Inc., et al. (Recommendation) and Chapter 12, Radiological Protection Upgraded Final Safety Analysis Report for Advanced Test Reactor, SAR-153, 2/05/08 (Chapter 12). The Appellant points out that only one page from each of these documents was released. The Appellant argues that since only one page was released, the rest of the document was redacted. We contacted Idaho and ascertained that the one page that was released from each document was the only information found to be responsive to the Appellant's request. The remainder of each document was not responsive to the Appellant's request and therefore not released. We have previously found that non-responsive material is not subject to disclosure under the FOIA. *Northwest Technical Resources, Inc.*, Case No. VFA-0611 (2000). Therefore, we shall deny this portion of the Appeal.

III. Conclusion

Idaho improperly relied on the AEA to withhold information under Exemption 3, since there is no indication that the material has been classified or properly identified as UCNI under the AEA. However, the information redacted from the ATR Vessel Vent Valve Installation document was properly withheld under Exemption 2. Further, Idaho is not required to release non-responsive portions of documents that contain responsive information. Therefore, we will deny the Appeal filed by the Environmental Defense Institute.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute, Case No. TFA-0295, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 17, 2009

March 30, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Power Wire Constructors

Date of Filing: March 9, 2009

Case Number: TFA-0297

On March 9, 2009, Power Wire Constructors (Power Wire) filed an Appeal from a determination issued to it by the Department of Energy's Western Area Power Administration (WAPA). In that determination, WAPA withheld information in response to a request for information that Power Wire filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require WAPA to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 21, 2008, Power Wire submitted an electronic FOIA request to WAPA's Upper Great Plains Regional Office (UGPR), for "[WAPA's] employees' and inspectors' daily reports, logs, notes, letters, e-mails, etc., … [including the] writings of Ron French, Sid Paulson, Jimmy Black, Cory Herman, David Kluth, Pat Doak, Don McCleary and Jim Dickey" beginning August 1, 2008, to the present. (FOIA Request). On November 21, 2008, UGPR forwarded the request to the FOIA Office at DOE Headquarters (DOE/FOI). Upon receipt, DOE/FOI assigned the request to the Office of General Counsel at WAPA, the office most likely to have responsive documents. On December 2, 2008, Power Wire amended its FOIA request to include a search for additional documents.

WAPA conducted a search of its records and located over 2,000 pages of responsive documents. In its initial response, WAPA provided Power Wire with 140 pages of the responsive material. Letter from WAPA to Power Wire, January 13, 2009 (Initial Determination Letter).[1] In its second

[1] In its initial response dated January 13, 2009, and supplemental response dated February 10, 2009, WAPA provided Power Wire with responsive documents in their entirety. The initial determination and supplemental response are not the subject of this appeal.

response, WAPA produced 2,284 pages of responsive material but withheld portions of the documents claiming that those portions were shielded under the deliberative process and attorney-client privileges of Exemption 5. Letter from WAPA to Power Wire, January 26, 2009 (Final Determination Letter). WAPA also withheld employees' personal e-mail addresses and telephone numbers pursuant to Exemption 6. *Id.*

On March 9, 2009, Power Wire filed this Appeal of WAPA's decision to withhold information under Exemptions 5 and 6, arguing that there is no basis for withholding the information. Appeal Letter at 1. Later in its Appeal, Power Wire requests the redaction of the personal privacy information so that all of the responsive material can be immediately provided to them. *Id.* That request is inconsistent with Power Wire's challenge of WAPA's application of Exemption 6 to employees' personal information. Nevertheless, I analyze below WAPA's application of both Exemption 5 and Exemption 6 to the information it withheld from the material responsive to Power Wire's November 21, 2008, request for information.

II. Analysis

A. WAPA's Justification of Exemption 5

After conducting a search for records under the FOIA, an agency must provide a written determination notifying the requester of the results of that search and, if applicable, a "statement of the reason for denial, containing a reference to the specific exemption under the [FOIA] authorizing the withholding of the record, … a brief explanation of how the exemption applies to the record withheld, and a statement of why discretionary release is not appropriate." 10 C.F.R. § 1004.7(b). Thus, an agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *State of New York*, Case No. TFA-0269 (2008); *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996) (*RIS*).[2] Generally, a determination is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. This allows both the requester and this Office to determine whether the claimed exception was accurately applied. *Tri-State Drilling, Inc.*, Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and assists this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, Case No. LFA-0176 (1992). Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations.

In its Final Determination Letter, WAPA provided a categorical explanation that information pertaining to the Letcher Substation Historical Site Incident Investigation was withheld pursuant to

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[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

the deliberative process privilege of Exemption 5, because the draft documents created during the investigation, as well as comments, notes and preliminary opinions reflected in the documents, consists of pre-decisional, deliberative material that does not represent the final position of the agency. *Id.* WAPA further stated that it withheld documents that contained confidential communications because they revealed the motive of its client in seeking the legal advice of WAPA's General Counsel personnel. Although WAPA provided an explanation for invoking the deliberative process and attorney-client privileges under Exemption 5, our review of the Determination Letter indicates that in documents where portions of information were withheld, WAPA failed to identify which portions were withheld pursuant to the deliberative process privilege and which were withheld pursuant to the attorney-client privilege. Our Office cannot conduct a meaningful review of the documents without an adequate description of which privilege applies to the information that was withheld. Thus, an administrative appeal without additional information is virtually impossible with regard to all Exemption 5 withholdings.

In cases where agencies do not provide adequate justification for withholding information under an enumerated FOIA exemption, we have remanded the request to the agency with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). Accordingly, we will remand this matter to WAPA to articulate which privileges apply to the specific parts of the documents. The basis for each withholding under Exemption 5 must be explained in a new determination letter, with specific reference to the privileges invoked in each case. In a situation where several portions of a document are withheld for the same reason, WAPA may identify each portion withheld and then provide categorical explanation for the exemption's application to all such portions. WAPA must nevertheless ensure that the explanation of the withholding applies to each document or portion of the document in the category.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters*

Committee, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte, Beard and Watson LLC*, Case No. VFA-0510 (1999); *Frank E. Isbill*, Case No. VFA-0499 (1999).

In invoking Exemption 6, WAPA determined that the release of employees' personal e-mail addresses and telephone numbers is a serious invasion of privacy. WAPA further determined that such a release would reveal personal information or records about the individuals. We agree with WAPA and find that there is a substantial privacy interest in the personal information of WAPA employees. *See L. Daniel Glass*, Case No. TFA-0150 (2006) (a DOE employee has a significant expectation of privacy regarding his personal telephone number and e-mail address).

In its Appeal, Power Wire failed to demonstrate how the disclosure of WAPA employees' personal e-mail addresses and telephone numbers will reveal anything of importance regarding the DOE or how it would serve the public interest. We have concluded that release of this type of information would not illuminate the inner workings of the federal government. *Id.* at 4. Likewise, release of this information would not further the public interest by shedding light on the operations of the federal government. *Id.* at 4.

We find that there is a significant privacy interest in maintaining the confidentiality of the withheld information. Moreover, release of this information would not shed light on the operations of government. On balance, release of the information withheld by WAPA pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. Thus, WAPA correctly applied Exemption 6 in withholding this information.

C. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, Case No. VFA-0060 (1995). We find that WAPA complied with the FOIA's segregability requirement by releasing to Power Wire all portions of the documents not withholdable under Exemption 6.

III. Conclusion

Based on the foregoing information, we find that WAPA's justification for invoking the deliberative process and attorney-client privileges was inadequate with respect to its Exemption 5 withholdings. Accordingly, we remand this matter to WAPA to identify which privileges under Exemption 5 apply to the portions of the documents that are being withheld and explain the basis for all Exemption 5 withholdings in a new determination letter. We find, however, that WAPA properly withheld the personal e-mail addresses and telephone numbers of WAPA employees pursuant to Exemption 6 of the FOIA. Therefore, the Appeal will be remanded in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Power Wire Constructors on March 9, 2009, Case No. TFA-0297, is hereby remanded to WAPA which shall issue a new determination in accordance with the instructions set forth above.

(2) This matter is hereby denied in all other aspects.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2009

March 25, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Environmental Defense Institute
Date of Filing:	March 10, 2009
Case Number:	TFA-0298

On March 10, 2009, Environmental Defense Institute (Appellant) filed an Appeal from a determination issued to it on February 25, 2009, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004.[1/] In its determination, Idaho identified and released numerous documents responsive to the Appellant's request. The Appellant challenges Idaho's withholding of information from nine documents. This appeal, if granted, would require Idaho to release the withheld information to the Appellant.

I. Background

On April 10, 2008, the Appellant filed a request with Idaho for documents referring to the Advanced Test Reactor (ATR) that were referenced in DOE/Idaho National Laboratory (INL) "Certification Report No. 29." Request Letter dated April 10, 2008, from Chuck Broscious, President, Board of Directors, Appellant, to Idaho. On February 25, 2009, Idaho released numerous documents in full to the Appellant. Idaho redacted a portion of nine documents. In its Determination Letter, Idaho stated that eight of the redacted documents contain information that is exempt from disclosure under FOIA Exemptions 2. Determination Letter dated February 25, 2009, from Clayton Ogilvie, FOIA Officer, Idaho, to Appellant. The remaining document contained information that was exempt from disclosure under FOIA Exemption 4. *Id.* at 2.

[1/] The request was submitted on April 10, 2008. Because of the broad scope of the request, Idaho has been sending responsive documents to the Appellant in installments as the documents are reviewed and ready for release.

On March 10, 2009, the Appellant appealed, contending that the FOIA exemptions that Idaho cited in its Determination Letter do not apply to the redacted documents. Appeal Letter at 1 received March 10, 2008, from Appellant to Director, Office of Hearings and Appeals (OHA). With regard to the documents where information was withheld under Exemption 2, the Appellant claimed that Idaho's assertion that release of the information could lead to sabotage was an inappropriate reason to invoke the Exemption. According to the Appellant, the circumvention element of Exemption 2 "only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individuals may not use them to circumvent the law or law enforcement measures." *Id.* at 3. Thus, prevention of sabotage would not be a proper justification to invoke Exemption 2. The Appellant also argued that Idaho inappropriately applied Exemption 4 to redact the remaining document responsive to its request.[2/]

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 2 and 4 are at issue in this case.

[2/] In the Appeal, the Appellant also appears to challenge withholdings under Exemptions 3 and 6. However, no portions of the nine documents which the Appellant has requested to receive in full were withheld under either of these Exemptions.

A. Exemption 2

1. Analysis

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). "Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes." *Judicial Watch, Inc., v. Dep't of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). Idaho has claimed that the information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho withheld portions of eight documents under FOIA Exemption 2. Idaho explained in its Determination Letter that the information redacted from these eight documents is inherently internal. Determination Letter at 1. Thus, it is "high 2" information and exempt from disclosure under Exemption 2. It further stated that Exemption 2's anti-circumvention protection is applicable in this case because the information identifies "vulnerabilities to sabotage events, system configurations/capabilities that may be exploited and internal procedures for operating the reactor that are inherently internal." *Id.* Idaho stated that it withheld those portions because disclosure of the information "would significantly risk installations and projects that safeguard nuclear materials and facilities." *Id.*

Idaho claimed in its Determination Letter that the information it withheld from the eight documents was "Official Use Only" information. When used by the DOE, the term "Official Use Only" reflects an agency determination that the information in question is protected from mandatory FOIA disclosure under one or more of eight of the exemptions set forth at 5 U.S.C. § 552(b).[3/] *See* DOE Order 471.3, Identifying and Protecting Official Use

[3/] Exemption 1 information can never be "Official Use Only" because such information is classified by executive order.

Only Information. We have previously held that this designation by itself is insufficient as a justification for withholding information under the FOIA because it does not explain how a FOIA exemption is applied, thereby making it impossible for the requestor to formulate a meaningful appeal, and for this Office to evaluate that appeal. *Joseph K. Huffman*, Case No. TFA-0153 (2006).[4/] Therefore, the designation of a document as "Official Use Only" is only a suggestion that the document must be evaluated to determine whether it should be released under the FOIA.

However, we have reviewed unredacted versions of all eight Exemption 2 documents that were released to the Appellant. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that Idaho withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, this meets the first prong of the *Crooker* test and is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the ATR and to understand how to sabotage it. Accordingly, disclosure of the information at issue risks circumvention of DOE's efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials. *See, e.g.*, 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no such intentions, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that "[t]he 'circumvention' exemption only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individual may not

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

use them to circumvent the law or law enforcement measures." Appeal Letter at 3. The appellant's definition of the limits of Exemption 2 is too narrow. Exemption 2 encompasses documents that are used for internal purposes not just for law enforcement purposes. *Judicial Watch, Inc.*, 2005 WL 1606915, at 9. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

2. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that Idaho redacted from the eight documents. Idaho was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Idaho claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the ATR. It is therefore obvious that release of the information would not be in the public interest.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered

confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Idaho withheld a portion of the document "commercial grade item dedication documentation and receiving inspection documentation" under Exemption 4. Idaho claimed that the redacted information is commercial or proprietary information. The Appellant challenged the appropriateness of Idaho's Exemption 4 application to the redacted information.

An agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996) (*RIS*). A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*.

If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Our review of the Determination Letter indicates that Idaho failed to provide any explanation as to how Exemption 4 applied to any of the information withheld in the document, "Commercial grade item dedication documentation and receiving inspection documentation." The only explanation offered in the Determination Letter was a statement that the document "contains information of a commercial or proprietary nature and as such is redacted pursuant to Exemption 4. Exemption 4 allows a federal agency to withheld 'commercial or financial information obtained from a person [that is] privileged or confidential.' 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4)." Determination Letter at 2. While the Determination Letter stated the general Exemption 4 requirements, it did not provide any description of the withheld material or explain how the Exemption applies to

the withheld information. Consequently, Idaho's Determination Letter was inadequate with regard to its Exemption 4 withholding.

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. We will remand the matter to Idaho so that it can issue another determination explaining how Exemption 4 applies to the withheld material in that document.

III. Conclusion

The information redacted from the eight documents was properly withheld under Exemption 2. However, Idaho did not provide an adequate determination with respect to Exemption 4. Therefore, we will grant the Appeal in part and remand the matter to Idaho for a further determination on the Exemption 4 withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute, Case No. TFA-0298, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Idaho Operations Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 25, 2009

May 12, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Tri-Valley CAREs
Date of Filing:	April 17, 2009
Case Number:	TFA-0302

On April 17, 2009, Tri-Valley CAREs (Appellant) filed an Appeal from a determination issued to it on March 6, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified and released ten documents responsive to the Appellant's request. The Appellant challenges NNSA/SC's withholding of information from two of these ten documents. In addition, the Appellant challenged the adequacy of NNSA/SC's search for documents. This appeal, if granted, would require NNSA/SC to release the withheld information to the Appellant and conduct a further search.

I. Background

On October 24, 2008, the Appellant requested

> the preliminary documented safety analysis, the documented safety analysis, the Quality Assurance Program, the safety management system, the technical safety requirements, the safety management program, the safety evaluation report, the safety basis for the facility, any documents relating to the unreviewed safety question process, the June 20, 2006, approval by the Livermore Site Office of the future segmentation of the Tritium Facility into two Category 3 nuclear facilities, and any other relevant documents.

Request Letter dated October 24, 2008, from Robert Schwartz, Appellant, to Carolyn A. Becknell, FOIA Officer, NNSA/SC. On March 6, 2009, NNSA/SC released seven documents in full to the Appellant. NNSA/SC redacted portions of three documents,

contending that the redacted information is exempt from disclosure under FOIA Exemption 3.[1/] Portions of two of those documents were also withheld under FOIA Exemption 2. Determination Letter dated March 6, 2009, from Carolyn Becknell, FOIA Officer, NNSA/SC, to Appellant (Determination Letter).

On April 17, 2009, the Appellant appealed, contending that the NNSA/SC improperly justified its withholding of information under Exemption 2. Appeal Letter at 3 received April 17, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA) (Appeal Letter). The Appellant claims that NNSA/SC failed to "provide a sufficient factual or legal basis to support its assertion that the requested records are within the terms of the statutory language as personnel rules or internal practices of the agency." *Id.* The Appellant also claims that NNSA/SC failed to justify its statement that release of the information "could possibly expose this department, as well as other department/organization, to a 'significant risk of circumvention of agency regulations or statutes.'" *Id.* at 4. The Appellant claims that the public interest in release of the information outweighs withholding, since the records do not fall under Exemption 2. *Id.* In addition, the Appellant challenged NNSA/SC's search for documents. *Id.*

II. Analysis

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[2/]

We contacted NNSA/SC to determine what type of search was conducted. NNSA/SC indicated that the request was forwarded to both the Livermore Site Office (LSO) and the Lawrence Livermore National Laboratory (LLNL). LSO stated that it conducted both a computerized and hand search to recover the requested information. A senior nuclear

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[1/] The Appellant is not challenging the withholdings made under Exemption 3.

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

safety analyst conducted the hand search, searching "facility records as they relate to the safety basis of nuclear facilities." E-mail dated May 5, 2009, from Shirley Peterson, NNSA/SC, to Janet R. H. Fishman, Attorney-Examiner, OHA (May 5, 2009 E-mail). LLNL indicated that it conducted a hand search because the documents are not "indexed electronically, as the project is still active." *Id.* The search was conducted through "the project records stored on the Plant Engineering server and the project manager's [personal computer]." *Id.* The electronic project folders were reviewed manually. *Id.* NNSA/SC searched in the areas most likely to have the requested information. Further, a person with knowledge of the subject matter conducted the search. We believe the searches that were conducted were reasonably calculated to uncover the requested information in those offices.

However, the Appellant challenged the search because the "evaluation by the Chief of Defense Nuclear Safety (CDNS) regarding the decision to approve segmentation of LLNL Building 331" was not provided. Appeal Letter at 3. LSO indicated that no formal evaluation by the CDNS was provided to LSO. May 5, 2009 E-mail. LSO continued "[a]ny evaluation provided by the CDNS to the NNSA Central Technical Authority[3/] (CTA) to recommend approval of the exemption was not provided to LSO and would be maintained at either the CDNS office or the NNSA Headquarters." *Id.* We believe that NNSA/SC should have also sent the request to the CTA and to the CDNS, which are both at NNSA Headquarters. For that reason, we will remand the matter to NNSA/SC for a further search of NNSA Headquarters.

B. Exemption 2

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*,

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[3/] The term NNSA Central Technical Authority (CTA) is used in a number of DOE directives and addressed in more detail in a NNSA Supplemental Directive. DOE Directive, "Implementation of National Nuclear Security Administration Central Technical Authority Responsibilities Regarding Nuclear Safety Requirements," NA-1 M 410.1 (March 10, 2008). Further, the NNSA Principal Deputy Administrator is designated as NNSA's CTA. DOE Directive, "NNSA Safety Management Functions, Responsibilities and Authorities Manual (FRAM)," NA-1 SD 411.1-1C (February 15, 2008).

424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 2 is at issue in this case.

1. Analysis

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). "Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes." *Judicial Watch, Inc., v. Dep't of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). NNSA/SC has claimed that the information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (*en banc*).

NNSA/SC withheld portions of two documents under FOIA Exemption 2. NNSA/SC explained in its Determination Letter that the information redacted from these documents is inherently internal. Determination Letter at 2. NNSA/SC further stated that the anti-circumvention protection of Exemption 2 is applicable in this case because the information "contains critical infrastructure information, the release of which could identify vulnerabilities." *Id.* NNSA/SC stated that "if any of the information was released that it could benefit adversaries by helping them identify possible program impacts and vulnerabilities, as well as provide them the opportunity to target these facilities." *Id.* Thus, it is "high 2" information and exempt from disclosure under Exemption 2.

We have reviewed unredacted versions of the two documents that were released to the Appellant with information withheld under Exemption 2. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among

members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that NNSA/SC withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, this meets the first prong of the *Crooker* test and is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the Tritium facility. Accordingly, disclosure of the information at issue risks circumvention of DOE's efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials. *See, e.g.,* 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no intention to identify vulnerabilities of the Tritium facility, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that NNSA presented conclusory and generalized allegations about how the withheld information would risk circumvention of agency regulation. Appeal Letter at 4. We disagree. We believe that NNSA/SC explained its withholding properly. Any further information may also lead a malefactor to identify vulnerabilities. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

2. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC redacted from the two documents. NNSA/SC was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. NNSA/SC claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the Tritium Facility. It is therefore obvious that release of the information would not be in the public interest.

III. Conclusion

The information redacted from the two documents was properly withheld under Exemption 2. The search conducted by NNSA/SC of LSO and LLNL was reasonably calculated to uncover all documents responsive to the Appellant's request. However, we believe that the NNSA Headquarters should have also been searched. Therefore, we will grant the Appeal in part and remand the matter to NNSA/SC for a further search.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, Case No. TFA-0302, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall conduct a further search for information in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 12, 2009

May 11, 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gabriele Weber

Date of Filing: April 22, 2009

Case Number: TFA-0303

This Decision concerns an Appeal Dr. Gabriele Weber filed from a determination issued to her by the Department of Energy's (DOE) Office of Information Resources (OIR). In that determination, OIR, on behalf of several DOE offices, responded to a request for documents that Dr. Weber submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIR stated that one office, the DOE Office of History and Heritage Resources (OHHR) located eight documents responsive to Dr. Weber's request, which were released to Dr. Weber in their entirety. No other DOE office located records responsive to Dr. Weber's request. This appeal, if granted, would require OIR to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Dr. Weber filed a FOIA request with OIR for records pertaining to collaboration on nuclear development between Argentina, Israel and Germany in the late 1950s and early 1960s, including any documents related to the efforts of the United States during that time period to monitor the nuclear programs of those countries, as well as any DOE records pertaining to Nazi war criminal, Adolf Eichmann. *See* Email from Dr. Gabriele Weber to OIR (August 28, 2008) (FOIA Request). In two separate determination letters, OIR stated that a search for records conducted by OHHR yielded a total of eight responsive documents. Those eight documents were released in their entirety. *See* Letter from Verlette Gatlin, OIR, to Dr. Gabriele Weber (September 29, 2008) (Interim Response Letter); Letter from Alexander Morris, OIR, to Dr. Gabriele Weber (March 20, 2009) (Final Determination Letter).

Dr. Weber filed the present appeal challenging the adequacy of the search performed by OIR. Letter from Gabriele Weber to OHA (received April 22, 2009) (Appeal Letter). Dr. Weber's appeal contends that none of the eight previously released documents specifically address the transfer of a large quantity of uranium from Argentina to Israel in 1963, although they mention two previous transfers of smaller amounts of uranium in 1960 and 1962. Appeal Letter.

According to Dr. Weber, "the main aim of the [DOE] was always to control foreign nuclear programs" and, therefore, the DOE must have known about the third, larger transfer. *Id*. Consequently, Dr. Weber believes that the absence of any reference to the 1963 shipment in the eight previously released documents suggests that additional responsive documents should exist.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[1]

In reviewing this appeal, we contacted OIR to ascertain the scope of the search. OIR informed us that when it received Dr. Weber's FOIA Request, it forwarded the request to several DOE elements to determine whether they maintained the types of records requested by Dr. Weber.[2] E-mail from Alexander C. Morris, OIR, to Diane DeMoura, OHA, April 28, 2009. With the exception of OHHR, each of the DOE elements contacted responded that it did not maintain the types of records sought by Dr. Weber.[3] *Id*. OHHR, whose primary responsibility is to preserve the agency's historic records and artifacts and coordinate the transfer of the records to the National Archives and Records Administration, determined that it might have documents of the types Dr. Weber requested and conducted a search for responsive documents. *Id*.

We contacted OHHR to discuss the search for records. OHHR informed us that it maintains an electronic database containing "a folder title listing of [OHHR] records holdings." Email from Terry Fehner, OHHR, to Diane DeMoura, OHA, April 27, 2009. In addition, OHHR has a card catalog, containing 20,000 or more cards, listing the subjects of the Atomic Energy Commission (AEC) Secretariat files, which contain materials that went to and from the AEC Commissioners.[4] *Id*.; Memorandum of Telephone Conversation between Terry Fehner and Diane DeMoura, April 27, 2009. According to OHHR, a search was conducted of the electronic database containing folder titles and the card catalog, which subsequently led to a physical search of folders on Germany, Argentina, and Israel. The search yielded the eight previously released documents

[1] All OHA FOIA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.
[2] The DOE elements contacted in this case were the Office of Policy and International Affairs (PI), the National Nuclear Security Administration (NNSA), the Office of Nuclear Energy (NE), the Office of Intelligence and Counterintelligence (IN), and the Office of History and Heritage Resources (OHHR).
[3] Because the records sought by Dr. Weber appear to be related to intelligence matters, we contacted IN to discuss in greater detail its search for documents. IN responded that "a search of IN holdings did not produce any documents on the requested subject" because "the events described in the request date to 1960-63, significantly predating [the] office." IN further recommended that the request be forwarded to OHHR whose mission includes maintaining the DOE's historic records. Email from Debbie Tijani, IN, to Diane DeMoura, OHA, April 29, 2009.
[4] The AEC, a predecessor agency to the DOE, was in existence during the years relevant to the records Dr. Weber requested.

pertaining to the 1960 and 1962 uranium transfers. *Id*. Neither the electronic database nor the card catalog contained any references to the 1963 uranium transfer or Adolf Eichmann. *Id*.

Based on this information, we find that OIR, and subsequently OHHR, performed an extensive search reasonably calculated to reveal records responsive to Dr. Weber's request, despite the absence of references to the 1963 shipment of uranium and Adolf Eichmann in the eight responsive documents. Therefore, the search was adequate. Accordingly, Dr. Weber's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on April 22, 2009, by Gabriele Weber, OHA Case No. TFA-0303, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 11, 2009

May 21, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: State of New York

Filing Date: April 23, 2009

Case Number: TFA-0304

This Decision concerns the State of New York's Appeal from a determination that the Department of Energy's (DOE) Office of Electricity Delivery and Energy Reliability (OE) issued to it on March 19, 2009. In that determination, the OE withheld information under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. If we grant this Appeal, the OE may not withhold the information under Exemption 5 of the FOIA.

I. Background

In December 2007, New York filed a FOIA request with DOE for correspondence between DOE, CRA International, and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor (NIETC) Designation Order. Determination Letter, July 3, 2008. DOE released some information and withheld other information under FOIA Exemption 5, including Document 26, entitled "Analysis of Implications of Transmission Congestion in PJM and NYISO." New York appealed the determination. The Office of Hearings and Appeals (OHA) ordered the OE to issue a new determination, "explaining whether the OE has fully adopted [Document 26], either formally or informally." *State of New York*, TFA-0271 (2008).[*]

The OE issued a new determination, withholding Document 26 under FOIA Exemption 5 because the OE has "not adopted" it, "formally or informally." Determination Letter, Dec. 5, 2008. New York appealed the determination. OHA remanded the case to the OE, and stated "that [Document 26] may contain factual, segregable material that could be released to the requester without revealing the deliberative process. For example, Paragraph 3 of Page 4 . . . contains some information that appears to be factual and segregable." *State of New York*, TFA-0289 (2009).

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

The OE issued a new determination, withholding Document 26 under FOIA Exemption 5. Determination Letter, Mar. 19, 2009. The OE provided three reasons for withholding Document 26:

1) Document 26 is entirely "deliberative and pre-decisional." Its "very nature and purpose . . . was to assist in discussions and determinations that the Agency was making with regard to corridor transmission congestion";

2) "The final analysis" released on March 2, 2007 "did not include any of the theories or ideas found on Page 4 of [Document 26]"; and

3) "Attempts to separate factual deliberative material would result in meaningless phrases as discussed in Mead Data Central, Inc., 566 F.2d 242, 261 (D.C. Cir. 1977) . . . . The purpose of the document was to *begin* the discussion and review of corridor transmission discussion. Therefore, it is difficult to segregate the advisory opinions and recommendations from 'facts.'"

Id.

New York then filed the present Appeal with OHA. New York first argues that "Document 26 should be disclosed" if it "was seen by third parties who are not DOE employees"; i.e., if the OE has waived its claim of exemption. New York also provides the following arguments under Exemption 5:

1) "Document 26 should be disclosed to the extent that it contains factual statements";

2) "DOE has made no attempt to separate the factual information in Document 26 from information allegedly of a deliberative nature"; and

3) "The difficulty of the task of separating the factual from the deliberative is irrelevant."

Appeal Letter, Apr. 23, 2009.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Waiver

In its Appeal in TFA-0271, New York argued that the OE waived its claim of exemption by disclosing Document 26 to third parties. We rejected that argument. *See State of New York*, TFA-0271 (2008). We declined to consider the argument when New York raised it again. *See State of New York*, TFA-0289 (2009). We also decline to consider the argument here.

B. Exemption 5

1. Authority

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statutory definition of "agency" is broad, and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)). Information prepared outside the government by a government consultant qualifies as an "intra-agency" communication except when the consultant urges the agency to support a position "that is necessarily adverse to the interests of [the consultant's] competitors." *Id*. at 14.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege. *Id*. at 8 (citations omitted). An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position . . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id*. The agency must identify the role the information plays in that process.

Hinckley, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency . . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*.

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

2. Whether Document 26 Contains Segregable Factual Information

As stated above, the OE presented three arguments to justify its withholding of Document 26 under Exemption 5: (i) the document is pre-decisional and deliberative; (ii) the OE's final analysis did not include information from Document 26; and (iii) because segregating factual information would result in "meaningless phrases," "it is difficult to segregate the advisory opinions and recommendations from 'facts.'" New York responded that (i) the OE should disclose segregable factual information; and (ii) the difficulty of segregating the information is irrelevant. We reviewed Document 26 and address the arguments together.

First, in TFA-0289, we found that the OE properly invoked Exemption 5 to withhold the non-segregable portions of Document 26. Therefore, we need not rule on whether the OE properly withheld the non-segregable portions of Document 26. Second, Exemption 5 does not allow an agency to withhold segregable information merely because the agency did not include that information in its final decision. Third, we reviewed Document 26 and found segregable information. The information we found is factual – it does not

represent opinion that reflects the OE's deliberative process. Fourth, segregating that information would not result in "meaningless phrases." Therefore, the OE may not invoke Exemption 5 to withhold the following information in Document 26:

Page	*Sentence or Paragraph*	*Passage*
3	Paragraphs 3 and 4	The entire paragraphs. The third paragraph begins "The cost of distribution services . . . ." The fourth paragraph begins "The cost of transmission . . . ."
4	Paragraph 3	The excerpt beginning, "In an LMP structure . . ." and ending "energy is being supplied."
5	Last Sentence	The entire sentence. It begins "Figure 1-PJM . . . ."
6	Paragraph 1	The entire paragraph. It begins "All zones . . . ."
7	Paragraph 3	The entire paragraph. It begins "On-Peak . . . ."
11	Sentence 1	The entire sentence. It begins "Figures 7-PJM . . ." and ends "observed price disparity."
15	Footnote 1	The entire footnote.
18	Paragraph 2	The entire paragraph. It begins "Figure 1-NY below . . . ."
18	Paragraph 3	The entire paragraph. It begins "All zones . . . ."
19	Paragraph 3	The entire paragraph. It begins "On-Peak . . . ."
23	Sentence 1	The entire sentence. It begins "Figures 7-NY . . ." and ends "price disparity."

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York, Case Number TFA-0304, is granted in part. The Office of Electricity Delivery and Energy Reliability (OE) may not invoke Exemption 5 of the Freedom of Information Act to withhold the passages of Document 26 cited in the Decision above.

(2) This matter is remanded to the OE to disclose the passages of Document 26 cited in the Decision above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 21, 2009

May 27, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Lisa Thornburgh
Date of Filing:	May 7, 2009
Case Number:	TFA-0306

On May 7, 2009, Lisa Thornburgh filed an Appeal from a determination the Department of Energy's Oak Ridge Office (DOE/OR) issued on March 31, 2009. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from DOE any records concerning "possible illegal human radiation experiments on the general public in eastern Tennessee, specifically between Erwin nuclear reprocessing facility and [Oak Ridge National Laboratory]." E-mail from Lisa Thornburgh to DOE FOIA Officer (March 12, 2009). In response to this request, DOE/OR issued a determination stating that "no documents could be located in the files of the Oak Ridge Office, Oak Ridge Associated Universities (ORAU) or the Oak Ridge National Laboratory (ORNL)." Letter from Amy L. Rothrock, DOE/OR, to Lisa Thornburgh (March 31, 2009). Ms. Thornburgh challenges the adequacy of DOE/OR's search for documents responsive to her request.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Butler*, *Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, upon receiving the present Appeal, we contacted DOE/OR to inquire as to the search it conducted in response to Ms. Thornburgh's request. DOE/OR states that it searched its

Environmental Management program office, as well as "Oak Ridge Associated Universities, and Oak Ridge National Laboratory. We searched our document management storage system for any relevant documents. This system stores many documents uploaded from DOE program offices dating back to April 2001." E-Mail from Amy Rothrock, DOE/OR, to Steven Goering, Office of Hearings and Appeals (OHA) (May 14, 2009). DOE/OR further informed us that its Environmental Management program office

> covers relations [with] and requests for assistance or involvement with State and Local agencies, towns, counties, if relevant . . . ; Oak Ridge Associated Universities coordinates with [the Centers for Disease Control, the Agency for Toxic Substances and Disease Registry, the National Institute for Occupational Safety and Health, and the Department of Health and Human Services] to perform epidemiology studies in communities outside the Oak Ridge Reservation (Erwin is about 100 miles north of Oak Ridge) as well as surveys and monitoring of formerly utilized sites; and Oak Ridge National laboratory also performs surveys and monitoring of formerly utilized sites.

Id. Ms. Rothrock notes that she "reviewed prior requests from Ms. Thornburgh and then contacted [points of contact] at the three locations and asked them to identify and copy any relevant documents for the new request." *Id.* These points of contact responded to Ms. Rothrock "with negative search results for the new request." *Id.*

Based on the above descriptions, it appears clear to us that DOE/OR performed a search of locations where responsive documents were most likely to exist. We therefore conclude that DOE/OR's search was reasonably calculated to uncover the records sought by the Appellant. Thus, the present Appeal will be denied.[*]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Lisa Thornburgh, Case Number TFA-0306, is hereby denied.

[*] Ms. Thornburgh's appeal also referenced a previous determination issued by DOE/OR on October 20, 2008. The DOE FOIA regulations provide that an appeal may be filed "within 30 calendar days of its receipt, . . ." 10 C.F.R. § 1004.8(a). Thus, to the extent that her submission is an appeal of DOE/OR's October 20, 2008, determination, the appeal is dismissed as untimely.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 27, 2009

June 12, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mike Malik

Date of Filing: May 15, 2009

Case Number: TFA-0307

On May 15, 2009, Mr. Mike Malik appealed a determination issued by the Office of Scientific and Technical Information (OSTI) of the Department of Energy's (DOE) Oak Ridge Operations Office under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his appeal, Mr. Malik contends that OSTI failed to provide documents responsive to his request. If the present Appeal is granted, OSTI will be ordered to release the requested information.

I. Background

On January 30, 2009, Mr. Malik filed a request in which he sought the following computer software packages: (1) SW AP-9 (nesc0828)- 1-D Stress Analysis for Hydrostatic and Elastic Plastic Materials; (2) THEMP3D (nesc9766) - 3-D Time-Dependent Elastic Plastic Flow; and (3) TOODY -2 (nesc0627) - Lagrangian Nonlinear Wave Propagation in 2-D X-Y or Cylindrical Geometry. On February 18, 2009, OSTI issued a determination in which it stated that the Energy Science and Technology Software Center (ESTSC) conducted a search of its files and located no responsive records. *See* February 18, 2009 Determination Letter at 1. However, on April 13, 2009, OSTI issued a supplemental response to its February 18, 2009 Determination Letter. In that response, OSTI indicated that it re-examined the parameters of Mr. Malik's request and determined that ESTSC is the office most likely to maintain the requested records. *See* April 13, 2009 Determination Letter. OSTI further stated that ESTSC conducted a search of its files for the software packages but did not find copies as it does not physically maintain copies of such records. *Id.* OSTI stated that the packages requested by Mr. Malik are maintained by the Nuclear Energy Agency of the Organization for Economic Cooperation and Development (NEA). 1/ Finally, OSTI stated that

1/ Pursuant to a Cooperative Agreement between the DOE and the NEA, American requests for software programs are handled by DOE centralized software management facilities. The ESTSC is the facility responsible for handling requests for all codes with -NESC prefixes, which include the three packages that Mr. Malik requested. *Id.*

(continued...)

NEA, through DOE, will be able to provide Mr. Malik with the packages. However, it stated that copies of these packages will cost $1,137.00 each, at a total cost of $3,411.00. 2/ *Id.* In his Appeal, Mr. Malik contends that ESTSC's fee schedule "is not applicable." *See* Appeal Letter at 1. He asserts that "only regular FOIA pricing statutes are applicable." *Id.* Mr. Malik asks OHA to order OSTI to release the requested software packages and that he be charged "pursuant to charges authorized by FOIA statutes," specifically copying costs. *Id.* at 3. 3/ To further support his Appeal, Mr. Malik notes, *inter alia,* that the packages that he requests are not included in a "selective list" of ESTSC packages offered for sale and are not part of the ESTSC rate structure that was quoted to him. *Id.* at 2. He also contends that precedent has already been set by his previous FOIA request in which he requested a similar record, the requested record was provided to him and no copying fees were charged. *Id.*

II. Analysis

In its Determination Letter, OSTI informed Mr. Malik that NEA, through DOE, would be able to provide the requested records. However, the total cost of the packages would be $3,411.00. As stated above, Mr. Malik asserts in his Appeal that ESTSC's rate structure is not applicable and that he had previously requested a similar record pursuant to a FOIA request and the software package was provided to him at no cost (although he states that he was willing to pay copying costs pursuant to the FOIA). We contacted ESTSC for a response to Mr. Malik's Appeal. *See* Record of Telephone Conversation between Kimberly Jenkins-Chapman, OHA and Kim Buckner, ESTSC (June 3, 2009). With regard to Mr. Malik's assertion that he had previously requested a similar record and received it, ESTSC explained that when Mr. Malik requested this package, the office searched its database and located an entry for the software package. *Id.* However, the database record indicated that this software package was inactive and that ESTSC no longer offered it for purchase. *Id.* However, ESTSC indicated that after searching its CD master file, it located a copy of a CD that had been obtained from NEA in previous years. *Id.* ESTSC stated that it decided to make the CD to available to Mr. Malik at no charge since it no longer offered the package for sale. In addition, since it did not have an electronic copy of the manual that went with the package, ESTSC asked NEA for a copy of the manual which it acquired in PDF format. ESTSC further stated that this was the only item it obtained from the NEA for this FOIA request. *Id.*

1/(...continued)

2/ OSTI also indicated that the requested packages have been discounted by 40% because they are more than eight years old.

3/ In his Appeal, Mr. Malik specifically requests the following: (1) that the requested records be provided along with a signed certification by the General Counsel that the certified copies of the original records are being provided without any tampering; (2) that the requested records be provided expeditiously; (3) that penalties be assessed "pursuant to 10 C.F.R. § 552," as the actions are arbitrary and capricious and (4) that an investigation be conducted to identify a possible third party who may have been involved in "behind the scene deliberations" with OSTI. Mr. Malik has not provided any proof or documentation of these allegations regarding his requested records. Moreover, these requests are beyond the scope of the FOIA.

According to ESTSC, unlike Mr. Malik's previous FOIA request which consisted of a unique set of circumstances, his current FOIA request would be processed according to its normal procedure for obtaining software from NEA. ESTSC stated that once it receives a request from a customer for a software package available from NEA, if the customer ensures that it is interested in purchasing the package, then ESTSC contacts NEA and requests a copy of the package. *Id.* NEA then ships the package to ESTSC, it is processed, inputted in a database and announced on the Internet via ESTSC's web page. ESTSC stated that the price of the package "is based on the type of customer and the type of computer for which the package is written." *Id.* After the package is processed, ESTSC sends the customer a price quote and a license agreement. When the customer returns payment for the package along with the license agreement, ESTSC processes the order and ships the package to the customer. *Id.* According to ESTSC, Mr. Malik's current request would be handled pursuant to this procedure. 4/

We find ESTSC procedure and fee structure to be appropriate. It is generally true that an agency may not withhold documents in its possession solely because the requester can obtain the document from a source outside that agency. An agency need not provide to a requester documents that "have been previously published or made available by the agency itself." *Department of Justice v. Tax Analysts*, 492 U.S. 136 at 152 (1988). Since the DOE has chosen to make the records in question publicly available through ESTSC, OSTI is not required by the FOIA to provide this document to Mr. Malik directly, and may instead refer him to the location where the document is available. *See Henry, Lowerre, Johnson, Hess & Frederick,* 25 DOE ¶ 80,141 at 80,598 (1995); *Daniel Grossman,* 22 DOE ¶ 80,117 at 80,537 (1992). Mr. Malik would then be required to pay the accompanying fees as set forth by ESTSC. Accordingly, Mr. Malik's appeal is denied. 5/

It Is Therefore Ordered That:

(1) The Appeal filed by Mike Malik, OHA Case No. TFA-0307, on May 15, 2009, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the

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4/ In his Appeal, Mr. Malik asserts that ESTSC has a "selective list" of computer programs that it offers for sale and the packages he requested are not part of that "selective list." *See* Appeal at 2. ESTSC, which serves as the DOE's central repository for scientific and technical software developed at DOE laboratories, has indicated that it is does not know what Mr. Malik means by a "selective list," but that the package codes that are submitted to the ESTSC and which have either a copyrighted or unlimited distribution, are announced through the ESTSC Home Page on the Internet. According to ESTSC, a package may not be announced on the web if it has given a "limited" distribution by the submitting organization. *Id.*

5/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 12, 2009

June 17, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Tri-Valley CAREs
Date of Filing:	May 15, 2009
Case Number:	TFA-0308

On May 15, 2009, Tri-Valley CAREs (Appellant) filed an Appeal from a determination issued to it on April 15, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified 100 documents responsive to the Appellant's request. The Appellant challenges NNSA/SC's withholding in their entirety 62 of the documents and the withholding of portions of one other document. This appeal, if granted, would require NNSA/SC to release the withheld information to the Appellant.

I. Background

On June 26, 2007, the Appellant requested all documents related to programs, projects, reports, schedules, letters, notes and memos concerning the Tritium Facility Modernization Project at Lawrence Livermore National Laboratory (LLNL). June 26, 2007, Request Letter from Appellant to NNSA/SC. On October 11, 2007, the Appellant supplemented its request for information. October 11, 2007, Request Letter from Appellant to NNSA/SC. On March 2, 2009, NNSA/SC responded to the request and informed the Appellant that it had found 100 documents responsive to its request. March 2, 2009 Determination Letter from Carolyn Becknell, NNSA/SC, to Appellant. It withheld 62 of those documents in their entirety and one document in part, all pursuant to Exemption 2 of the FOIA.[1/] *Id.* On March 30, 2009, the Appellant appealed the March 2, 2009, determination to the Office of Hearings and Appeals (OHA). On April 16, 2009, OHA dismissed the Appeal because NNSA/SC withdrew its March 2, 2009, determination, so that it could include a list of

[1/] NNSA/SC also withheld portions of two documents under Exemption 6 of the FOIA. Those withholdings are not at issue in this Appeal.

documents with the determination. April 16, 2009, Dismissal Letter from Fred L. Brown, OHA, to Appellant. On April 15, 2009, NNSA/SC issued a new determination. April 15, 2009, Determination Letter from Carolyn Becknell, NNSA/SC, to Appellant. The new determination withheld the same documents under the same rationale. *Id.* The only difference between the two determinations was the inclusion of a list of the documents in the second determination. On May 15, 2009, the Appellant filed this Appeal, claiming that NNSA/SC improperly withheld the information under Exemption 2 because the information is not "within the terms of the statutory language as personnel rules or internal practices of the agency." May 5, 2009, Appeal Letter at 4 from Robert Schwartz, Attorney, Appellant, to Director, OHA (May 5, 2009, Appeal Letter). In addition, the Appellant claimed that NNSA/SC failed to provide sufficient justification for how the withheld information would allow individuals to engage in criminal activity. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 2 is at issue in this case.

1. Exemption 2

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). "Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes." *Judicial Watch, Inc., v. Dep't of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). NNSA/SC asserts that the information at issue in the present case falls within the second category, "high two"

information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (*en banc*).

As referenced above, NNSA/SC withheld 62 documents in their entirety and a portion of one other document under FOIA Exemption 2. NNSA/SC explained in its Determination Letter that the withheld information is inherently internal. Determination Letter at 2. NNSA/SC further stated that the anti-circumvention protection of Exemption 2 is applicable in this case because the information "could benefit adversaries by helping them identify possible vulnerabilities, as well as provide them the opportunity to target this [Tritium] facility." *Id.* Thus, it is "high 2" information and exempt from disclosure under Exemption 2.

We have reviewed an unredacted version of the one document that was released in part to the Appellant. We have also reviewed the 62 documents withheld in their entirety. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that NNSA/SC withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. The 62 documents withheld in their entirety are architectural drawings. The document with portions redacted contains specific plans for modernization of the Tritium facility. Accordingly, these meet the first prong of the *Crooker* test and are predominantly internal.

The information, with two exceptions, meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the Tritium facility. Accordingly, disclosure of the information at issue risks circumvention of DOE's efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials.

See, e.g., 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no intention to identify vulnerabilities of the Tritium facility, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argues that NNSA presented conclusory and generalized allegations about how the withheld information would risk circumvention of agency regulation. Appeal Letter at 4. We disagree. We believe that NNSA/SC explained its withholding properly. Any further information may also lead a malefactor to identify vulnerabilities. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information, with two exceptions, was properly withheld under the "high two" prong of Exemption 2.

We carefully reviewed the 62 documents which were withheld in their entirety by NNSA/SC. These are architectural drawings. After reviewing the documents, we believe that all the drawings, but three, can be withheld under Exemption 2. NNSA/SC agreed that three documents can be released to the Appellant: document number 13, the topographic survey; document number 14, the site demolition plan; and document number 15, the grading and paving plan. We are remanding the matter to NNSA/SC for release of these three documents.

2. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC withheld. NNSA/SC was very careful with its redactions from the one document. We believe that none of the information that was redacted could be reasonably segregated. Consequently, any releasable material is inextricably intertwined with the Exemption 2 protected information.

In regard to the 59 drawings withheld in their entirety, we believe that some of the textual information contained on the drawings could be released. For example, drawing 52 contains only symbols and legends. It is not clear to us why this drawing could not be released. Also, there are certain pages that contain general information that might also be released. For example, drawing 12 contains a map of Livermore, California. We will remand the matter to NNSA/SC for a new determination regarding the 59 drawings.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has

indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. In regard to the one document which was redacted in part, NNSA/SC claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the Tritium Facility. It is therefore obvious that release of the information would not be in the public interest.

III. Conclusion

Except as discussed above, the information was properly withheld under Exemption 2. Therefore, we will grant the Appeal in part and remand the matter to NNSA/SC for release of documents 13, 14, and 15 and a new determination on the segregability of information in the other 59 drawings.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, Case No. TFA-0308, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall release document numbers 13, 14, and 15 and issue a new determination regarding the other 59 drawings in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 17, 2009

June 11, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	A.V. Mehta
Date of Filing:	May 15, 2009
Case Number:	TFA-0309

On May 15, 2009, A.V. Mehta filed an Appeal from a determination the Department of Energy's Oak Ridge Office (DOE/OR) issued on March 31, 2009. The determination responded to a request for information filed under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008.

I. Background

The Appellant, a DOE/OR employee, requested from DOE/OR his medical, personnel, radiation exposure, chest x-ray, beryllium, industrial hygiene, and training records, as well as his personnel security file and Office of Personnel Management (OPM) background investigation. Record of Privacy Act Information Telephone Request to DOE/OR (February 19, 2009). Letter from Elizabeth M. Dillon, DOE/OR, to A.V. Mehta (April 9, 2009). In response to this request, DOE/OR issued a determination releasing to Mr. Mehta a copy of his medical, personnel, radiation exposure, and training records, and his personnel security file.[1] However, the determination stated that DOE/OR did not locate beryllium or industrial hygiene records and that copies of chest x-rays were not available. *Id.*[2] Mr. Mehta challenges the adequacy of DOE/OR's search for documents responsive to his request.[3]

II. Analysis

[1] Subsequent to the filing of the present Appeal, DOE/OR informed us that it "plan[s] to send a supplemental response to Mr. Mehta's Privacy Act request to clarify that the classified pages found in his personnel security file were not subject to the Privacy Act pursuant to the k1 exemption of the Privacy Act and thus were not provided, since we failed to cite the k1 exemption in our original response." E-Mail from Amy Rothrock, DOE/OR, to Steven Goering, Office of Hearings and Appeals (OHA) (June 2, 2009). Mr. Mehta may, if he chooses, file an appeal of DOE/OR's supplemental response.

[2] In its determination, DOE/OR informed Mr. Mehta that his background investigation "was conducted by the OPM and only that agency can release that information. On February 19, 2009, we sent a copy of your request and driver's license to OPM for a copy of your [background investigation] to be sent directly to you." *Id.*

[3] Mr. Mehta also states in his Appeal that "[a]mong the copies of the documents received so far, there are many instances of incorrect information and inaccuracies. I am in the process of preparing responses with corrections that I will send to [DOE/OR] after receiving all of the remaining items." Appeal at 1. DOE/OR states that it has not yet received from Mr. Mehta a request for amendment or correction of his records. E-Mail from Amy Rothrock, DOE/OR, to Steven Goering, Office of Hearings and Appeals (OHA) (June 2, 2009); *see* 10 C.F.R. § 1008.6 (procedures for filing a request for correction or amendment).

Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records.[4] However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, upon receiving the present Appeal, we contacted DOE/OR to inquire as to the search it conducted in response to Mr. Mehta's request. DOE/OR provided the following details regarding its search:

> 1. Searches were conducted in all locations we believed responsive Privacy Act records on current DOE employees would be found as follows because these are the repositories where DOE employee personnel, medical and similar files are maintained until the employee retires or takes employment with another agency. Mr. Mehta is a current DOE Oak Ridge Office employee.
>
> 1) at ORNL and DOE ORO Medical Departments for medical and X-rays that are maintained on current DOE employees
> 2) at DOE ORO Human Resources for personnel records that are maintained on current DOE employees
> 3) at K25, X10, Portsmouth, Paducah and ORAU for any radiation exposure, IH and beryllium monitoring records on all DOE employees
> 4) at DOE ORO's Human Capital training office for training records maintained on DOE current employees

[4] The Privacy Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). DOE/OR explained to Mr. Mehta, after he filed his Privacy Act request, that he would need to file a FOIA request for any documents that DOE/OR "would consider FOIA records (for example, reports, inspections, or similar documents on activities and operations he was involved with)" i.e., those not contained in a Privacy Act system of records. E-Mail from Amy Rothrock, DOE/OR, to Steven Goering, Office of Hearings and Appeals (OHA) (June 2, 2009).

5) at DOE ORO's Personnel Security Branch for personnel security clearance files are maintained on current DOE and contractor employees up to ten years after termination of a clearance (we transferred his request to OPM for the background investigation file search and separate response from OPM directly to him)

2. Searches were conducted by contacting federal and contractor Points-of-Contact for Privacy Act records at each of these possible locations (i.e., record custodians, nurses, health physicists, industrial hygiene specialists, etc. who use paper, electronic and other finding aids to retrieve by identifier and copy records for response to us by a reasonable due date).

E-Mail from Amy Rothrock, DOE/OR, to Steven Goering, Office of Hearings and Appeals (OHA) (June 2, 2009).

Based on the above description, it appears clear to us that DOE/OR performed a search of locations where responsive documents were most likely to exist. We therefore conclude that DOE/OR's search was reasonably calculated to uncover the records sought by the Appellant. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by A.V. Mehta, Case Number TFA-0309, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 11, 2009

June 18, 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Society of Professionals, Scientists and Engineers

Date of Filing: May 21, 2009

Case Number: TFA-0310

This Decision concerns an Appeal the Society of Professionals, Scientists and Engineers ("SPSE") filed from a determination issued by the Department of Energy's (DOE) National Nuclear Security Administration Service Center ("NNSA") in Albuquerque, New Mexico. In that determination, NNSA denied SPSE's request for a waiver of fees in connection with a request the organization submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would overturn NNSA's determination and waive in full the fees associated with his request.

I. Background

SPSE is a labor union which represents certain employees at the DOE's Lawrence Livermore National Laboratory (LLNL), in Livermore, California. The union filed a FOIA request for various documents pertaining to Contract DE-AC52-07NA27344, the contract awarded by the DOE to Lawrence Livermore National Security, L. L. C. (LLNS), to manage and operate LLNL. Specifically, SPSE requested documents on individual compensation actions, periodic appraisals, reporting requirements, pension plans, and workforce planning. Letter from Bruce Kelly, SPSE, to Carolyn Becknell, NNSA, March 24, 2009 (Fee Waiver Request) at 1. SPSE also requested a waiver of all fees associated with the processing of its FOIA request. SPSE noted that the requested documents "will, in and of themselves, do little to inform the public." *Id.* at 2. SPSE added, however, that it will review those requested documents and provide its commentary and analysis, along with the documents themselves, to various organizations, including "other unions; professional organizations; the media; and Tri-Valley CAREs, a local non-profit environmental association." Letter from Bruce Kelly, SPSE, to OHA, May 13, 2009 (Appeal) at 3-4.

In an April 14, 2009, determination letter, NNSA denied the fee waiver request on the grounds that the requested information "is not likely to contribute significantly to public understanding of the operation and activities of the government." Letter from Carolyn Becknell, NNSA, to Eileen

Montano, SPSE, April 14, 2009 (Determination Letter). NNSA added that "although the government provides oversight of the contractor," the requested documents "relate to the workings of the contractor and not to the operations or activities of the government." *Id*.

SPSE filed the present appeal on May 21, 2009. In its Appeal, SPSE contends that NNSA's determination regarding the fee waiver request is "clearly arbitrary and capricious." Appeal at 3. SPSE maintains that records pertaining to the workforce at one of the DOE's national laboratories, which "performs vital national security functions," concern the activities and operations of the government, "even if such records were not generated by the government." *Id*. SPSE further added that it has the intention and the ability to disseminate the requested documents widely. Therefore, SPSE argues that the information will contribute to the public's understanding of the activities or operations of the government, namely the management and operation of LLNL. *Id*. at 4.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the two-prong test, the regulations set forth the following factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

Factor A

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). In the present case, we are not convinced that the requested documents – primarily pertaining to routine personnel matters – concern the "operations or activities of the government." However, given that LLNS manages and operates one of the DOE's national laboratories, it is possible that the contractor's workforce-related documents may concern the operations and activities of government. Therefore, we find that SPSE's request satisfies Factor A.

Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Roderick Ott*, Case No. VFA-0288 (1997) [*]; *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) ("If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate.").

In the present case, it is unclear whether the requested information is already publicly available. However, given the nature of the information requested – information relating to a DOE contractor's personnel policies and actions – and because we have no evidence that the information is already publicly available, we will assume that the information is not already in the public domain. Therefore, we find that SPSE has satisfied Factor B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding individually of the requester or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Ott*, VFA-0288; *see also Tod N. Rockefeller*, Case No. VFA-0468 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

In the present case, it appears that SPSE has both the intention and the ability to disseminate the requested information to the public. SPSE indicated in its fee waiver request and on appeal that it has "excellent relations with the media and [SPSE's] press releases … are often used by local and national newspapers as the basis for in-depth reports on government policies." Appeal at 4.

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

In addition, SPSE intends to provide the requested documents to other individuals and organizations who have the intent and ability to disseminate the information to the public. *Id*. Based on this information, we find that SPSE's request satisfies Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, VFA-0288 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it is not readily apparent how the public's understanding of the activities or operations of the government will be enhanced by the disclosure of the requested documents, which relate primarily to contractor LLNS' personnel matters. While it is possible that disclosure of records pertaining to the workings of a DOE contractor may significantly contribute to the public's understanding of the activities or operations of the government, we do not believe that to be true in the case of mundane personnel matters such as compensation actions, performance appraisals, and pension plans that are the subject of SPSE's FOIA request. SPSE, itself, admits that the requested documents "will, in and of themselves, do little to inform the public." Fee Waiver Request at 2. Rather, SPSE asserts that in order to have any informative value, the information must be coupled with commentary and analysis from SPSE. Based on this information, we find that disclosure of the requested documents themselves is unlikely to significantly contribute to the public's understanding of the operations and activities of the government. As a result, SPSE's request for a fee waiver does not satisfy Factor D.

III. Conclusion

As the foregoing indicates, SPSE has failed to adequately demonstrate that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. After considering each of the above factors, we have determined that the absence of the requested information in the public domain and SPSE's ability to disseminate the information are outweighed by the *de minimis* effect on the public's understanding of government operations. Therefore, SPSE's request for a fee waiver does not satisfy the requirement set forth in the FOIA and in the DOE regulations concerning fee waivers that release of the requested information be in the public interest. Because the public-interest prong of the test is not met, we need not address the commercial-interest prong of that test. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on May 21, 2009, by the Society of Professionals, Scientists and Engineers, OHA Case No. TFA-0310, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 18, 2009

June 16, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Power Wire Constructors
Date of Filing:	May 27, 2009
Case Number:	TFA-0312

On May 27, 2009, Power Wire Constructors (Appellant) filed an Appeal from a determination issued to it on April 15, 2009, by the Western Area Power Administration (WAPA) of the Department of Energy (DOE). In that determination, WAPA responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, WAPA identified over 2,000 pages of documents responsive to the Appellant's request. WAPA withheld some of the responsive information under Exemption 5 of the FOIA. This appeal, if granted, would require WAPA to release the withheld information to the Appellant.

I. Background

On November 21, 2008, the Appellant submitted a FOIA request to WAPA for "daily reports, logs, notes, letters, e-mails, etc.," of specific WAPA employees. FOIA Request dated November 21, 2008, from Appellant to WAPA. On December 2, 2008, the Appellant amended its FOIA request to include similar documents from additional employees. FOIA Request Amendment dated December 2, 2008, from Appellant to WAPA.

WAPA conducted a search of its records and located over 2,000 pages of responsive documents.[1/] In an initial response, WAPA released 140 pages of responsive information to the Appellant. Determination Letter dated January 13, 2009, from WAPA to Appellant. On January 26, 2009, WAPA identified an additional 2,284 pages of responsive material.

[1/] WAPA released 2,424 pages to the Appellant. Some of the documents consisted of one page; some of the documents consisted of numerous pages. WAPA marked the documents with consecutive page numbers for a total of 2,424 pages released to the Appellant. Because WAPA indicated that it redacted information from specific pages, rather than from specific documents, we will refer to page numbers in this Decision.

WAPA withheld portions of the pages claiming that those portions were shielded under Exemptions 5 and 6. Determination Letter dated January 26, 2009, from WAPA to Appellant. On March 9, 2009, the Appellant filed an Appeal, challenging WAPA's withholdings under both Exemptions. On March 30, 2009, this Office upheld the withholdings under Exemption 6, but remanded the matter to WAPA asking that it provide an adequate justification for withholding the information under Exemption 5. *Power Wire Constructors*, Case No. TFA-0297, (March 30, 2009).[2/] On April 15, 2009, WAPA issued a new determination explaining that certain specified pages contained information subject to the attorney-client privilege of Exemption 5 and that other specified pages contained information under the deliberative process privilege of Exemption 5. Determination Letter dated April 15, 2009, from WAPA to Appellant. On May 27, 2009, the Appellant filed the present Appeal, claiming that the attorney-client privilege does not apply because there is no pending litigation and

> [t]he documents withheld by deliberative process should also be released if the investigation involves [Appellant] so we would be aware of any and all information pertaining to that investigation and as previously agreed to by [WAPA]. The information would not be released to general public, but would be used for informational purposes by [Appellant] alone.

Appeal Letter dated May 20, 2009, from Russ Wyant, President, Appellant, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), DOE (May 20, 2009, Appeal Letter).

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal*

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

States Gas Corp. v. Department of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 5 is at issue in this case.

1. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 862 (D.C. Cir 1980) (*Coastal States*). The Appellant is challenging WAPA's withholdings under the attorney-client privilege and the deliberative process privilege.

a. Attorney-Client Privilege

The attorney-client privilege protects from mandatory disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. United States Dep't of the Air Force,* 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead Data*). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts. *See, e.g., Jernigan v. United States Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982), *aff'd* 734 F.2d 18 (7th Cir. 1984) (unpublished table decision). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States,* 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, 24 DOE ¶ 80, 129 at 80,570 (1994).

Applying these criteria to the numerous document pages withheld by WAPA, it is apparent that these pages, with a few exceptions, consist almost entirely of communications between an attorney (WAPA General Counsel) and her client, WAPA, in which WAPA asks for, and receives legal advice about a legal matter. It is this type of communication that the privilege was designed to protect. In its Appeal, the Appellant claims that there is no anticipated litigation, and therefore, the attorney-client privilege does not apply. We disagree. Unlike the attorney work-product privilege, the attorney-client privilege is not limited to documents prepared in advance of litigation. *See, e.g., Mead*

Data, 566 F.2d at 252-53. Release of attorney-client communications would stifle frank and full discussions between the attorney and his client. With the exceptions noted below, we conclude that WAPA properly applied the attorney-client privilege in withholding portions of the document pages in question.

Nevertheless, our review of these document pages reveals that there are five pages that contain information that is informational or procedural in nature or is already public information. These portions are not exempt from mandatory disclosure under the attorney-client privilege and must therefore be provided to the Appellant. Specifically, pages 494, 495, 497, and 510 of the sequentially numbered documents provided are procedural in nature. Page 508 contains information that we believe is already public. It is possible that some of the information on page 508 may be withheld under Exemption 6,[3/] however, WAPA did not apply that exemption to this information. Therefore, we will remand the matter to WAPA to release pages 494, 495, 497, and 510 in full and to issue a new determination for page 508.

b. Deliberative Process Privilege

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to the general rule that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual

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[3/] Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6).

matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

WAPA listed numerous pages that had portions withheld because the information contained therein is predecisional and part of the deliberative process.[4/] We have been provided with copies of these pages. We have reviewed these pages and believe that all but one page were properly withheld under Exemption 5. These pages contain deliberative information that reflects the personal opinions of the authors. Release of this deliberative information could stifle honest and direct communication of federal employees' opinions. Further, the factual information contained in these documents is so intertwined as to make segregation virtually impossible. Additionally, withholding under Exemption 5 is appropriate because the factual information contained in these documents was selected from a larger quantity of factual information so that the selection of these facts would reveal some of the deliberative process. These documents were prepared by an advisor who reviewed many facts, but relied on only selected facts for these documents.

However, we believe that the information contained on page 813 is neither predecisional nor deliberative. It is possible that the information contained in this page may be withheld under Exemption 6, but we do not believe that the information can be withheld under Exemption 5. Therefore, we will remand this matter to WAPA for a another determination on page 813.

2. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that WAPA redacted from the responsive information. WAPA was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only

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[4/] In some instances, entire pages were withheld. In other instances, only portions of the pages were withheld.

in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. WAPA concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to WAPA's ongoing decision-making process. Further, with regard to the attorney-client material, given the strong public policy interest in protecting frank and independent discussion among those responsible for making governmental decisions and their advisors, we do not find that the public interest would be served by release of the attorney-client material. Therefore, release of the withheld information would not be in the public interest.

III. Conclusion

Most of the information withheld by WAPA was properly withheld under Exemption 5. However, we believe that there are five pages that contain information that is not subject to the attorney-client privilege. In addition, we believe that there is one page that contains information that is not subject to the deliberative process privilege. Therefore, we will grant the Appeal in regard to those six documents and remand the matter to WAPA to release pages 494, 495, 497, and 510 and to issue another determination regarding pages 508 and 813. We will deny the Appeal in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Power Wire Constructors, Case No. TFA-0312, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Western Area Power Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 16, 2009

July 1, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	J. Edward Hollington
Date of Filing:	June 3, 2009
Case Number:	TFA-0314

On June 3, 2009, J. Edward Hollington (the Appellant) filed an Appeal from a final determination issued on April 30, 2009, by the Department of Energy's (DOE) National Nuclear Security Administration Service Center (NNSA). In that determination, the NNSA responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the NNSA to release a document withheld in its entirety under FOIA Exemptions 4 and 5.

I. BACKGROUND

On February 11, 2009, the Appellant filed a request for information under the FOIA with NNSA. That request sought "complete copies . . . of settlement, general release, and any other settlement documents showing terms, conditions, and monetary payments for settlement of claims between Nanodetex Corporation and Sandia Corporation." Determination Letter at 1. On April 30, 2009, NNSA issued a determination letter (the Determination Letter) indicating that its search had identified one responsive document: the settlement agreement and mutual release between Nanodetex and Sandia (the Settlement Agreement). NNSA withheld the Settlement Agreement in its entirety under Exemptions 4 and 5. On June 3, 2009, the Appellant filed an appeal of that determination with this office.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption

to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). In the present case, NNSA's determination letter relied only on Exemptions 4 and 5. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). On July 1, 2009, NNSA informed OHA that due to the particular facts in this case, NNSA is no longer relying on Exemptions 4 and 5 as grounds for withholding this Settlement Agreement and that, upon remand to NNSA, NNSA will then make a new determination as to whether any information in the Settlement Agreement is exempt from disclosure on any other basis. *See* Electronic Mail from Ida Hernandez-Sedillo, Office of Chief Counsel, NNSA Service Center, to Ann Augustyn, Chief, Personnel Security and Appeals Division, OHA (July 1, 2009).

III. CONCLUSION

Based on the statements made by Counsel for the NNSA Service Center on July 1, 2009, we conclude that the present appeal should be remanded to NNSA, with the instructions that NNSA must either release the Settlement Agreement to the Appellant or issue a new determination letter setting forth the appropriate basis for withholding.[1]

It Is Therefore Ordered That:

(1) The Appeal filed by J. Edward Hollington, Case No. TFA-0314, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the National Nuclear Security Administration Service Center for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial

[1] The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. 5 U.S.C. § 552(b). The Determination Letter does not indicate that NNSA performed a review of the Settlement Agreement in order to determine whether it contains any segregable material. On remand, if NNSA issues a new Determination Letter withholding the Settlement Agreement, NNSA must review the Settlement Agreement in order to determine whether any portions of it could be released without harming the interests protected by any applicable FOIA exemption. The new Determination Letter must describe this review and explain its results.

review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 1, 2009

June 24, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Paul Linkes
Date of Filing:	June 5, 2009
Case Number:	TFA-0315

On June 5, 2009, Paul Linkes (Appellant) filed an Appeal from a determination issued to him on April 27, 2009, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, Oak Ridge identified and released documents responsive to the Appellant's request. The Appellant challenged the adequacy of Oak Ridge's search for documents. This appeal, if granted, would require Oak Ridge to conduct a further search for responsive documents.

I. Background

On February 26, 2009, the Appellant requested copies of medical, personnel, radiation exposure, and beryllium records for Ashley Dalton Linkes, deceased. Request dated February 26, 2009, from Appellant to Oak Ridge. On April 27, 2009, Oak Ridge released the documents it located to the Appellant. Oak Ridge also indicated in its determination letter that some documents may be located at the National Nuclear Security Administration Service Center (NNSA/SC), because Mr. Linkes worked at Y-12, now an NNSA facility. Determination Letter dated April 27, 2009, from Elizabeth Dillon, Authorizing Official, Oak Ridge, to Appellant. On June 5, 2009, the Appellant appealed, asking for help in locating the documents he is requesting. Appeal Letter received June 5, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard

of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted Oak Ridge to determine what type of search was conducted. Oak Ridge indicated that it requested Oak Ridge Associated Universities (ORAU) to search its files for beryllium, radiation exposure, and medical records, and a work history for Mr. Linkes. E-mail dated June 10, 2009, from Amy Rothrock, Oak Ridge, to Janet R. H. Fishman, OHA, DOE (June 10 E-mail). Oak Ridge continued that ORAU maintains centralized personnel, medical, beryllium, and radiation exposure records on thousands of individuals who may have been participants in various epidemiology research projects. *Id.* The request was also sent to the K-25 site, the Oak Ridge National Laboratory (ORNL), and the DOE Records Holding Area. *Id.* A personnel security clearance assurance index card file located at the DOE Records Holding Area indicated that Mr. Linkes worked as a RUST Engineering construction contractor and also worked for Union Carbide[2/] at the Y-12 facility. *Id.* A work history report received from ORAU and a printout from a DOE historical employment database maintained in the FOIA office indicated that Mr. Linkes also worked at K-25 as a guard. *Id.* As a result of this information, the request for any records maintained at Y-12 was sent to the NNSA/SC in Albuquerque, New Mexico, because RUST construction contractor records, Y-12 contractor records, and some records of former K-25 employees are now under NNSA jurisdiction.[3/] *Id.*

The searches were performed using electronic finding aids and electronic document storage systems for actual records in electronic form. *Id.* Paper files were searched by hand using paper or electronic indices of the contents of those paper files from ORNL. *Id.* The search conducted at Oak Ridge resulted in a few pages of medical files, a few pages of inactive payroll records from K-25, a few pages of employment and personnel security records from the DOE Records Holding Area, and a work history report from ORAU. No beryllium or radiation exposure records were located. Oak Ridge indicated that these

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

[2/] Carbide and Carbon Chemicals Corporation were the contractor at Oak Ridge beginning in 1945. Carbide became Union Carbide in 1977. Email dated June 17, 2009, from Amy Rothrock, Oak Ridge, to Janet R. H. Fishman, OHA.

[3/] NNSA/SC will respond directly to the Appellant when its search is concluded. E-Mail dated June 17, 2009, from Amy Rothrock, Oak Ridge, to Janet R. H. Fishman, OHA.

records may be held at NNSA. *Id.* After the receipt of a copy of this Appeal, Oak Ridge indicated that additional payroll records from K-25 were located and it will provide those records in a supplemental response to the Appellant. *Id.*

Oak Ridge searched in the areas most likely to have the requested information. Further, a person with knowledge of the subject matter conducted the search. Oak Ridge forwarded the request to another office, NNSA/SC, because it is possible that it might have possession of responsive information. NNSA/SC will be responding to the Appellant directly with the results of its search. We believe the search that Oak Ridge conducted was reasonably calculated to uncover the requested information in those offices.

III. Conclusion

The search conducted by Oak Ridge was reasonably calculated to uncover all documents responsive to the Appellant's request. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Paul Linkes, Case No. TFA-0315, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 24, 2009

July 31, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Keeton and Tait
Date of Filing:	June 9, 2009
Case Number:	TFA-0316

On June 9, 2009, The Law Offices of Keeton and Tait (Keeton and Tait) filed an Appeal from a determination issued to it by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). In that determination, BPA withheld information in response to a request for information that Keeton and Tait (or "Appellant") filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the withheld information.

I. Background

On February 20, 2009, Keeton and Tait sent a FOIA request to the FOIA Office at DOE Headquarters (DOE/FOI), for "[a]ny and all records pertaining to a fire[1] that commenced on July 10, 2008, on or around Eaton Road in the City of Lewiston, County of Nez Perce, State of Idaho." Letter from Keeton and Tait to FOIA Officer, Department of Energy (February 20, 2009) (FOIA Request). Upon receipt, DOE/FOI assigned the request to BPA, the office most likely to have the responsive documents.

BPA conducted a search of its records and located documents responsive to Keeton and Tait's request. In its response, BPA released most of the responsive records but withheld portions of the documents, claiming that they were shielded under the attorney-client privilege of Exemption 5. The remainder of the withheld information, the identities of BPA and non-BPA employees, was withheld pursuant to Exemption 6.[2] Letter from BPA to Keeton and Tait, May 7, 2009 (Determination Letter).

[1] This fire will hereinafter be referred to as the "Lewiston fire."

[2] In its Appeal, Keeton and Tait does not challenge BPA's withholding of responsive information pursuant to the attorney-client privilege of Exemption 5 or the withholding of the names of *non-BPA* employees pursuant to Exemption 6. Appeal at 1.

In withholding the information pursuant to Exemption 6, BPA stated that there is a significant privacy interest in the identities of the BPA employee crew members who were patrolling the area where the Lewiston fire occurred, especially since there are "unfounded accusations of wrongdoing against the crew members." *Id.* BPA further stated that release of this information could subject those individuals to "unwanted inquiries or harassment." *Id.*

On June 9, 2009, Keeton and Tait filed this Appeal of BPA's decision to withhold information under Exemption 6, arguing that BPA improperly withheld the identities of its employees.[3] Appeal Letter at 1-4. Keeton and Tait maintains that this information is "very much necessary to shed light on the operations of [the] activities of BPA" and is "well within the basic purpose of the FOIA." *Id*. at 3.

II. Analysis

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). Thus, the purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Wash. Post Co*., 456 U.S. 595, 602 (1982).

To warrant protection under Exemption 6, information must first meet the threshold requirement that it fall within a category of "personnel," "medical" or "similar" files. 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). An agency should construe "similar" files broadly, "[T]o cover detailed Government records on an individual which can be identified as applying to that individual." *Wash. Post Co*., 456 U.S. at 602 (citations and quotations omitted).

In its Appeal, Keeton and Tait argues that portions of certain documents containing the names of BPA crew members cannot be withheld because the information is not similar to a "personnel" or "medical" file, as is required by Exemption 6. Appeal at 2. We disagree. In *Wash. Post Co*., the Supreme Court reasoned that the protection of an individual's privacy "was not intended to turn upon the label of the file which contains the damaging information." *Wash. Post Co.*, 456 U.S. at 599-603. Simply put, information that "applies to a particular individual" will most likely meet the threshold requirement for Exemption 6 protection. *Id.* at 602. In this case, BPA

[3] Keeton and Tait further argues that BPA failed to release information such as the number of crew patrolling the area, their job titles, responsibilities and their purpose for being in the area. *Id.* at 2-3. We have reviewed unredacted versions of the responsive documents and confirm that only names and personal information were withheld pursuant to Exemption 6. *See* Memorandum of Telephone Conversation between Paul F. Mautner, Attorney, Office of General Counsel, BPA, and Avery R. Webster, Attorney-Examiner, OHA (July 7, 2009) (Mautner Telephone Memo).

withheld the names of crew members who were patrolling the Lewiston area at the time of the fire. We find that this information relates to the BPA crew members and therefore falls within the definition of "similar" files articulated by the Court in *Wash. Post Co*.

Once it has been established that the information meets the threshold requirement of Exemption 6, an agency must undertake a three-step analysis to determine if the information in question was properly withheld pursuant to Exemption 6. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest, by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Comm.*, 489 U.S. at 762-770.

A. The Privacy Interest

The agency has the burden to show that the requested material falls within an exception. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citation and quotations omitted)*; see also News-Press v. Dep't of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) (describing the agency's burden as "onerous"). Thus, the BPA must demonstrate that releasing the names of federal employees will compromise a substantial privacy interest. *See BPA Watch*, Case No. TFA-0260 (2008).[4]

OPM regulations provide that names, titles, grades, salaries, position descriptions, and duty stations of federal employees are publicly available information. 5 C.F.R. § 293.311. Thus, we have consistently held that the names of federal employees, by themselves, reveal nothing private about a person and, therefore, are not the type of information that creates a protectable privacy interest for the purposes of Exemption 6. *See Mary Feild Jarvis*, Case No. VFA-0292 (1997); *see also BPA Watch*, Case No. TFA-0260 (2008) (an agency may not withhold the names of federal employees simply because they are federal employees).

Generally, release of the employees' identities alone would not reveal personal information or records about the individual. However, there are instances where "[n]ames and other identifying information do not always present a significant threat to an individual's privacy interest. Instead, whether disclosure threatens a significant privacy interest depends on the *consequences* likely to ensue from disclosure." *Wood v. FBI*, 432 F.3d 78, 88 (2nd Cir. 2005) (emphasis added). Thus, in recognizing the existence of a cognizable privacy interest, we must consider the effect that disclosure would have on the BPA crew members.

[4] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

In considering whether a significant privacy interest would be invaded, BPA determined that disclosure of the crew members' identities could subject them to unwarranted inquiries or harassment. Determination Letter at 2. As a general rule, "[t]he threat to privacy. . . need not be patent or obvious to be relevant." *See Wash. Post Co.*, 456 U.S. at 600. In its Appeal, Keeton and Tait in fact argues that "[w]ell founded accusations of wrongdoing require disclosure of the crew names." Appeal at 3. This argument very strongly suggests that should the crew members' names become publicly available, they would be subjected to unwanted contact by Appellant and others, who are skeptical of the BPA's determination in a pending tort claim.

Furthermore, the Lewiston fire has received significant public attention. *See* FOIA Request at 2-4. Therefore, it is not only likely, but obvious, that the media and others would join Keeton and Tait in its pursuit to solicit information from the BPA crew members. Notably, BPA did not withhold names of employees whose identities had been previously made public, but withheld only the identities of the unidentified crew members who patrolled the area where the Lewiston fire occurred.

Based on the foregoing, we conclude that the BPA crew members have a privacy interest in avoiding unwanted contacts by the Appellant and others. *See Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) (avoiding undesired contacts is a protected privacy interest). For these reasons, we find that there is a substantial privacy interest in the identity of the BPA employees.

B. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. The requester has the burden of establishing that disclosure would serve the public interest. *See Carter v. Dep't of Commerce*, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987).

In determining whether any public interest is served by a requested disclosure, an agency should not consider "the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. The Court held that rather than turn on a requester's particular purpose, circumstances, or proposed use, such determinations must turn on the nature of the requested document and the relationship to the basic purpose of the FOIA. *Id.* at 772. Furthermore, the Court delimited the scope of the public interest to be considered under the FOIA's privacy exemptions to include the "core purpose of the FOIA" or "the kind of public interest for which Congress enacted the FOIA." *Id.*

Given the facts in this case, we find that there is a minimal public interest, if any, in release of the withheld information. In its Appeal, Keeton and Tait fails to demonstrate how the disclosure of BPA employees' identities would reveal anything of importance regarding the DOE or how it would serve the public interest.

BPA has released to Keeton and Tait all of the information in its possession regarding the Lewiston Fire, save the names of the BPA crew members and other information that is subject to Exemptions 5 and 6 withholdings. *See* Mautner Telephone Memo. The names of the BPA crew members alone add no additional information that would contribute significantly to the public's awareness and understanding of BPA activities.

When "the only way the release of the identities" will benefit the public "is if the public uses such information to contact the employees directly," such use cannot justify release of the information. *Forest Service Employees*, 524 F.3d at 1028 (quoting *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1485 (9th Cir. 1994)). Accordingly, we agree with BPA and find that there is a minimal public interest in the disclosure of the identities of the BPA crew members withheld pursuant to Exemption 6.

C. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a significant privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the identities of the BPA employees.

Courts have long recognized that certain government personnel may be subjected to harassment or embarrassment if their identities are disclosed. *See Wood*, 432 F.3d at 88 (citation omitted); *see also FLRA v. Dep't of Veterans Affairs*, 958 F.2d 503, 512 (2nd Cir. 1992) (disclosure of employee names is not related to informing the public about an agency's actions). "The interest against possible harassment and embarrassment of investigative personnel raises a measurable privacy concern that must be weighed against the public's interest in disclosure." *Leadership Conference on Civil Rights v. Alberto Gonzales*, 421 F. Supp. 2d 104 at 109 (quoting *Wood v. FBI*, 432 F.3d at 88). While the privacy interest of the BPA crew members is not as particularized as that of investigative personnel, due to the public nature of this matter, disclosing their identities would subject them to unwanted privacy intrusions. Thus, disclosing the identities of the BPA crew would compromise a substantial privacy interest that outweighs the public interest in disclosure.

In sum, we find that there is a significant privacy interest in maintaining the confidentiality of the withheld information. Moreover, release of this information would not shed light on the operations of government. On balance, release of the information withheld by BPA pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. Thus, BPA correctly applied Exemption 6 in withholding this information.

III. Conclusion

Based on the foregoing information, we find that BPA properly withheld the names and identities of its employees pursuant to Exemption 6 of the FOIA. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Law Offices of Keeton and Tait on June 9, 2009, Case No. TFA-0316, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 31, 2009

July 2, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Citizen Action New Mexico
Date of Filing:	June 12, 2009
Case Number:	TFA-0317

On June 12, 2009, Citizen Action New Mexico (Appellant) filed an Appeal from a determination issued to it on May 11, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified and released documents responsive to the Appellant's request. The Appellant challenged the adequacy of NNSA/SC's search for documents. This appeal, if granted, would require NNSA/SC to conduct a further search for responsive documents.

I. Background

On September 8, 2008, the Appellant requested 24 items regarding Building 807 at Sandia National Laboratories (SNL). Request dated September 8, 2008, from David McCoy, Appellant, to NNSA/SC. Relevant to this Appeal, the Appellant requested that NNSA/SC:

> 17. Provide the specific articles from the Sandia Lab News and the Sandia Daily News Bulletin that discuss Buildings 805, 807 and/or 807 in any manner including, but not limited to employee sickness, employee concerns, SNL or Contractor plans, studies, tests and results thereof, and demolition.
>
> 18. Provide any documents that show how employee sickness absences are accumulated, referenced, complied, summarized, and reported.

19. Provide any aggregate reports of employee sickness absences for Building 807 by year from 1990 to 2008.

20. Provide any aggregate reports of employee sickness absences for all buildings in Technical Area 1.

21. Provide any information or reports where employee deaths are accumulated, referenced, compiled, summarized, and/or reported. Provide the period for which these records exist and have been accumulated and/or maintained. Provide these reports for both active employees and retired employees at SNL for the period 1990-2008. Provide all documentation to show any records that have been archived at any location by SNL. Provide where possible employee age and cause of death.

22. Provide any documents that identify any buildings at SNL, other than Building 807, that have been identified as having "sick-building syndrome" or having a higher incidence of employee sickness absence and or employee death than the average rates for SNL employees.

Id. at 2. On May 11, 2009, NNSA/SC released documents responsive to requests 1-9, 12, 14, 15, 17, and 24 to the Appellant. NNSA/SC redacted portions of some of the documents, contending that the redacted information was exempt from disclosure under FOIA Exemption 6.[1/] Determination Letter dated May 11, 2009, at 1-5 from Carolyn Becknell, FOIA Officer, NNSA/SC, to Appellant (Determination Letter). In addition, NNSA/SC indicated that the information responsive to requests 10, 11, 12, and 16 was publicly available.[2/] *Id.* at 2-3. Also, NNSA/SC indicated that the documents responsive to requests 18-22 were contractor, *i.e.*, Sandia Corporation (Sandia), records, which are in the possession and control of the contractor. *Id.* at 4. Finally, NNSA/SC found no documents responsive to requests 13 and 23.[3/] *Id.* at 3, 4-5.

On June 12, 2009, the Appellant appealed, challenging the adequacy of NNSA/SC's search for responsive documents. With regard to request 17, the Appellant claims that a former Sandia employee stated there was additional information which had not been provided to the Appellant. Appeal Letter at 1 dated June 12, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA).

[1/] The Appellant is not challenging the withholdings made under Exemption 6.

[2/] The Appellant is not challenging this response by NNSA/SC.

[3/] The Appellant is not challenging this response by NNSA/SC.

Regarding requests 18 to 22, the Appellant claims that the information it is requesting is "directly related to federal [DOE] activities at [SNL] as carried out by the DOE and its contractor. Therefore, [the Appellant's] request indisputably concerns 'the operations or activities of the government.'" *Id.* at 2. As support for its response to NNSA/SC's claim that the documents it is requesting are contractor records, the Appellant argues: (1) that DOE is dodging the question of whether responsive information is in its possession by asserting contractual reasons for not releasing the information; (2) that NNSA/SC has not stated a recognizable FOIA exemption for withholding the documents and reliance on such exemptions are discretionary, not mandatory; (3) that "[d]ocuments that result from *accumulating, referencing, compiling, summarizing, and reporting* health and safety data about sickness and absences would be documents in the possession and control of DOE;" (4) that Sandia regularly releases health and safety data in the *Sandia Lab News* for dissemination to the general public regarding sickness and deaths of Sandia workers; (5) lumping together both the DOE and Sandia as one entity, that the "compilation and reporting of employee absence, sickness and deaths records can[not] reasonably be withheld for contractual reasons given that Sandia is distributing such information to the wide public;" (6) that DOE Orders require DOE to evaluate hazards in the workplace and protect workers. *Id.* at 2-3.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[4/]

We contacted NNSA/SC to determine what type of search was conducted. In response to request 17, NNSA/SC indicated that "the Sandia Lab News and the Sandia News conducted a computer search using search engines and inputting key terms for information noted in [the request] pertaining to Buildings 805, 806, and 807." E-mail dated June 24, 2009, from Karen Laney, NNSA/SC, to Janet R. H. Fishman, OHA (June 24, 2009, E-mail). NNSA/SC searched in the areas most likely to have the requested information. NNSA/SC is required to conduct a search that is reasonably calculated to uncover the requested

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

information. NNSA/SC is not required to conduct an exhaustive search. NNSA/SC enclosed copies of two articles from the *Sandia Lab News* and sent the results of the search of the *Sandia Daily News*. We believe the search that NNSA/SC conducted was reasonably calculated to uncover the requested information in those offices.

As to the Appellant's claims that NNSA/SC must have documents responsive to requests 18 to 22, NNSA/SC stated that it interpreted the request too narrowly. After reviewing the information provided in the Appeal, NNSA/SC determined that it does have responsive records. June 24, 2009, E-mail. NNSA/SC is rescinding the original determination in regard to requests 18 to 22 and will issue a new response to the Appellant. Therefore, we will dismiss this portion of the Appeal.

III. Conclusion

The search conducted by NNSA/SC in regard to request 17 was reasonably calculated to uncover all documents responsive to the Appellant's request. Accordingly, this aspect of its Appeal will be denied. The NNSA/SC has determined that it interpreted requests 18 to 22 too narrowly and it will issue a new determination regarding those requests. Therefore, we will dismiss the Appeal as it pertains to these requests.

It Is Therefore Ordered That:

(1) The Appeal filed by Citizen Action New Mexico, Case No. TFA-0317, is hereby denied in regard to request 17.

(2) The Appeal filed by Citizen Action New Mexico, Case No. TFA-0317, is hereby dismissed in regard to requests 18 to 22, concerning which NNSA/SC will issue a new determination.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 2, 2009

July 7, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry M. Apodaca
Date of Filing:	June 30, 2009
Case Number:	TFA-0319

On June 30, 2009, Terry M. Apodaca (Appellant) filed an Appeal from a determination issued to her on June 11, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC partially responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA/SC to create a list of the pages which were responsive to the Appellant's request.

On May 19, 2009, the Appellant requested 11 items from various NNSA/SC offices. Request dated May 19, 2009, from Appellant to NNSA/SC. She agreed to pay $25 in fees associated with processing the Request. *Id.* at 2. Relevant to this Appeal, the Appellant requested that NNSA/SC provide copies of "all documents and files in the possession of the Office of Equal Opportunity at the NNSA/SC pertaining to [the Appellant's] grievance dated December 22, 2008, and my EEO complaints from December 2006 to present." *Id.* at 1.

NNSA/SC's June 11, 2009, determination letter was a partial response to the Appellant's request. Determination Letter at 1 dated June 11, 2009, from Carolyn Becknell, NNSA/SC, to Appellant. In that determination, NNSA/SC released 100 responsive pages to the Appellant. *Id.* NNSA/SC also indicated that there were approximately 1,538 additional pages that were responsive to the request. *Id.* NNSA/SC indicated that the fee associated with release of these additional documents would total $76.90. *Id.* NNSA/SC also stated that no list of the responsive documents exists which would allow the Appellant to narrow the scope of her request.[1/] *Id.*

[1/] A number of e-mails were exchanged between the Appellant and NNSA/SC regarding the documents and fee associated with their release. On June 4, 2009, the Appellant requested that the

On June 30, 2009, the Appellant appealed, asking that we require NNSA/SC to prepare a list of the responsive documents so that she can narrow the scope of her search. Appeal Letter dated June 29, 2009, from Appellant, to William Schwartz, Office of Hearings and Appeals (OHA), DOE (Appeal Letter). The FOIA does not require an agency to create documents in response to a request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2); *David B. McCoy*, Case No. VFA-0707 (January 16, 2002); *Barbara Schwarz*, Case No. VFA-0701 (November 5, 2001).[2/] NNSA/SC stated that no list exists. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry M. Apodaca, Case No. TFA-0319, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 7, 2009

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office with possession of the documents prepare a list showing the type of document, title, and exact page count. E-mail dated June 4, 2009, from Appellant, to Christina Hamblen, NNSA/SC.

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

July 22, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Roger A. Powell
Date of Filing:	July 7, 2009
Case Number:	TFA-0321

On July 7, 2009, Roger A. Powell (Appellant) filed an Appeal from a determination issued to him on June 10, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC partially responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA/SC to conduct a further search for documents responsive to the Appellant's request.

I. Background

On February 22, 2009, the Appellant requested "copies of internal files and memorandum regarding [DOE] claim AR 131-91." Request Letter dated February 22, 2009, from Appellant to Kevin Hagerty, Director, Office of Information Resources, DOE. On March 25, 2009, the Office of Information Resources transferred the request to NNSA/SC. E-mail dated July 8, 2009, at Attachment 1, from Christina Hamblen, NNSA/SC, to Janet Fishman, Office of Hearings and Appeals (OHA), DOE. On June 10, 2009, NNSA/SC's responded to the Appellant's request, stating that it had not located any responsive documents, but the request had been transferred to DOE Headquarters for an additional search. Determination Letter dated June 10, 2009, from Carolyn Becknell, NNSA/SC, to Appellant. On July 7, 2009, the Appellant appealed, asking that the search continue. Appeal Letter dated June 27, 2009, from Appellant, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter). On July 13, 2009, the Appellant provided additional information to assist in the search. Supplemental Letter dated July 13, 2009, from Appellant to Janet Fishman, Attorney-Examiner, OHA.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted NNSA/SC to determine what type of search was conducted. NNSA/SC indicated that both the Sandia Site Office (SSO) and the Livermore Site Office (LSO) conducted searches. SSO conducted a search of both SSO and Sandia National Laboratory (SNL). SSO conducted a computer search using the claim number and determined that it had no responsive documents. SNL conducted a search of its corporate archives and inactive records storage, but no responsive documents were located. It also searched its technical library catalogs, both classified and unclassified; again, no responsive documents were located. The legal department at SSO stated, however, that DOE Headquarters "had complete responsibility for both the patent and the handling of the administrative claim." E-mail dated July 14, 2009, at Attachment 1, from Christina Hamblen, NNSA/SC, to Janet Fishman, OHA. LSO indicated that its Patent Office had been transferred to NNSA/SC. Nevertheless, LSO contacted that office and requested that a search be conducted based on both the patent number and the claim number. No responsive documents were found. LSO also contacted Lawrence Livermore National Laboratory (LLNL). LLNL checked with its Industrial Partnership Office and the Patent Office in the General Counsel's office. LLNL added that the requested patent was not an LLNL patent. LLNL found no responsive documents. We believe the search that NNSA/SC conducted was reasonably calculated to uncover the requested information in those offices most likely to have the information.

NNSA/SC did indicate in its determination letter that DOE Headquarters may have responsive information. We have confirmed that the request has been transferred to DOE Headquarters and a search is being conducted. E-mail dated July 8, 2009, from Christina Hamblen to Janet Fishman. DOE Headquarters will issue a determination at the conclusion of its search. Upon receipt of that determination, the Appellant will have the opportunity to appeal DOE Headquarter's determination.

III. Conclusion

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

The search conducted by NNSA/SC was reasonably calculated to uncover all documents responsive to the Appellant's request. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Roger A. Powell, Case No. TFA-0321, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 22, 2009

August 5, 2005 August 5, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James C. Flynn

Date of Filing: July 8, 2009

Case Number: TFA-0322

On July 8, 2009, James C. Flynn filed an Appeal from a determination issued to him on June 24, 2009, by the Department of Energy's Office of Information Resources (DOE/HQ). That determination was issued in response to a request for information that Mr. Flynn submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Mr. Flynn asks that DOE/HQ conduct an additional search for documents responsive to his request.

I. Background

Mr. Flynn filed a request for information in which he sought his personnel, medical, employment and radiation exposure records while employed at the Pinellas Plant in Pinellas, Florida from 1959-1963. On June 24, 2009, DOE/HQ issued a determination letter which stated that the Office of Legacy Management (LM) of the DOE conducted a search of the following systems of records established under the Privacy Act: DOE-5 "Personnel Records of Former Contractors Employees," DOE-33 "Personnel Medical Records," and DOE-35 "Personnel Radiation Exposure Records." DOE/HQ further stated that the search of DOE-5 and DOE-35 did not locate any responsive records. However, a search of DOE-33 located three responsive documents. These documents were released to Mr. Flynn in their entirety. On July 8, 2009, Mr. Flynn filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Flynn challenges the adequacy of the search conducted by LM. *See* Appeal Letter. He asserts that responsive documents may be found in an additional location and asks OHA to direct DOE/HQ to conduct a new search for responsive documents.

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records.

However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, 28 DOE ¶ 80,251 (2002). */ Accordingly, in analyzing the adequacy of the search conducted by LM, we are guided by the principles we have applied in similar cases under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, 26 DOE ¶ 80,240 (1997).

In reviewing the present Appeal, we contacted officials in LM to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Flynn's request might reasonably be located. Upon receiving Mr. Flynn's request for information, LM conducted an electronic search of several of its systems of records using personal identifiers such as the requester's name, date of birth, badge number and work location. *See* Record of Telephone Conversation Between Pamela Watson, LM, and Kimberly Jenkins-Chapman, OHA (August 3, 2009). LM stated that this electronic search should have located any responsive documents in federal records centers. As a result of this search, LM located three documents which it classified as "general correspondence documents." These documents were released to Mr. Flynn in their entirety. No other documents regarding Mr. Flynn were located. Given the facts presented to us, we find that LM conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Flynn's request. Accordingly, Mr. Flynn's Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by James C. Flynn, OHA Case No. TFA-0322, on July 8, 2009, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (g)(1). Judicial review may be sought

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*/ All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.gov/foia1.asp

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 5, 2009

August 13, 2009

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ronald D. Hall
Date of Filing:	July 16, 2009
Case Number:	TFA-0324

On July 16, 2009, Ronald D. Hall filed an Appeal from a determination issued to him by the Oak Ridge Office (ORO) of the Department of Energy (DOE). ORO issued the determination on June 25, 2009, in response to a request for documents that Mr. Hall submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require that ORO perform an additional search for responsive material and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On May 28, 2009, Mr. Hall submitted a Privacy Act telephone request to ORO for copies of his medical, personnel, radiation exposure, and work history records during his employment by Rust Engineering at X-10 and Y-12 in ORO from April 1978, to June 1984. Letter from Mr. Hall to Director, Office of Hearings and Appeals (July 8, 2009) (Appeal).[1] On June 10, 2009, ORO informed Mr. Hall via letter that it was transferring a portion of his request to the National Nuclear Security Administration (NNSA) which currently has jurisdiction over records from the Y-12 National Security Complex. Letter from Amy Rothrock, Privacy Act Officer, DOE/ORO to Mr. Hall (June 10, 2009). DOE/ORO began a search for the remaining records. *Id.* On June 25, 2009, DOE/ORO sent Mr. Hall copies of his work history and a "Personnel Clearance Master Card" from DOE/ORO. The search did not locate any medical, personnel, or radiation exposure records. ORO further stated that NNSA would respond to Mr. Hall separately regarding the NNSA search. Letter from Elizabeth Dillon, Authorizing Official, to Ronald D. Hall (June 25, 2009) (Determination Letter). In the Appeal, Mr. Hall challenged the adequacy of the search. Letter from Mr. Hall to Director, Office of Hearings and Appeals (July 8, 2009) (Appeal).

II. Analysis

1 He indicated that he would send a copy of a document containing his current address and signature or a notarized signature in order to verify his identity for Privacy Act purposes.

The PA generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a (d). The Act defines a "system of records as a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a (a) (5). [2]

This case concerns a request for information filed under the PA. We require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the Freedom of Information Act. It is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Doris M. Harthun*, Case No.TFA-0015 (2003).[3]

We contacted ORO to request additional information so that we could evaluate the search for Mr. Hall's records. Electronic Mail Message from Amy Rothrock, DOE/ORO to Valerie Vance Adeyeye, Staff Attorney, OHA (July 28, 2009). ORO searched for responsive records at the Oak Ridge National Laboratory, the DOE Records Holding Area (RHA) and Oak Ridge Associated Universities. RHA maintains some legacy records of former Rust Engineering employees. ORAU houses a database of work history information from which work history reports are compiled and also has medical and radiation exposure data on some employees. Records custodians conducted a search by hand, electronically, and with the use of finding aids (e.g., indices) to retrieve records by identifiers. *Id*. ORO located a personnel security clearance assurance index card in the DOE RHA and a work history report at ORAU, and released those documents to Mr. Hall. However, no personnel, medical or radiation exposure records were located.

According to ORO, any existing DOE records related to RUST employees that are not in the DOE RHA are maintained at Y-12. NNSA now has jurisdiction over records stored at Y-12, including records on RUST employees. On June 10, 2009, ORO notified Mr. Hall that his request was forwarded to NNSA for further processing and ORO gave Mr. Hall the contact information of the NNSA Privacy Act Officer so that he may inquire about the status of his request. We contacted the NNSA Privacy Act Officer, who informed us that the search was not yet complete. Electronic mail message from Carolyn Becknell, NNSA Privacy Act Officer, to Valerie Vance Adeyeye, OHA (August 3, 2009). Upon completion of the search, NNSA will communicate the results to Mr. Hall.

[2] The Privacy Act adopts the FOIA definition of agency. 5 U.S.C. § 552a (a)(1). The FOIA defines "agency" as any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f).

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

III. Conclusion

After reviewing the record of this case, we find that DOE/ORO conducted a search that was adequate and reasonably calculated to uncover the requested information. The search did, in fact, locate some responsive material, and that material has been released to Mr. Hall. There may be additional responsive material under the jurisdiction of NNSA, and ORO has already transferred the request to NNSA for processing.[4] Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by Ronald D. Hall on July 16, 2009, OHA Case Number TFA-0324, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 13, 2009

4 Mr. Hall may appeal a future determination issued to him by NNSA.

September 4, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: United Block Captains Association Community Trust for Family Life Improvement, Inc.

Date of Filing: August 18, 2009

Case Number: TFA-0325

On August 18, 2009, the United Block Captains Association Community Trust for Family Life Improvement, Inc. (United) filed an appeal from a determination issued to it on August 10, 2009, by the Department of Energy's (DOE) Idaho Operations Office (Idaho). In that determination, Idaho responded to a request for documents (Request) that United submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its response (Determination Letter), Idaho stated that it did not possess any documents that were responsive to United's request. This appeal, if granted, would require Idaho to conduct a more extensive search for documents.

I. Background

In its July 15, 2009, Request, United requested:

> The RAW [sic] detail on the calculation of stream flow, hydraulic head, and power potential for the Delaware River and Schuylkill River under Philadelphia County, Hydrological Unit [Code] 02040202.[1]

[1] A "Hydrologic Unit Code" (HUC) is a four level descriptor of a water, river and drainage-related geographic areas in the United States. Each level refers to a progressively smaller unit-area of land. The first-level HUC (a two number code) refers to a region consisting of several States. A fourth-level HUC, such as that specified in the Request (an eight number code), would consist of a smaller geographic area representing part or all of a surface drainage basin, a combination of drainage basins, or a distinct hydrologic feature. The areas described by this level are sometimes called "watersheds." *See* U.S. Geologic Survey website http://water.usgs.gov/GIS/huc.html (visited on August 26, 2009).

Request at 1.[2] In its request, United asserts that the requested information should exist, given that the DOE authored a report entitled "Low Head/Low Power Hydropower Resource Assessment of the North Atlantic and Middle Atlantic Hydrologic Regions (DOE-ID 11077 April 2003)" (Mid-Atlantic Assessment).[3]

The request was transferred to Idaho when the DOE Office of Information Resources, which received the Request, determined that Idaho would be the DOE Office most likely to possess responsive data.[4] In its August 10, 2009, Determination Letter, Idaho asserted that it possessed no responsive documents. It stated that "[t]he data [used by the Virtual Hydropower Prospector[5] (VHP) tool] are not indexed to provide data values at specific locations, so we do not have the information available at the level of detail you are requesting." August 10, 2009, Determination Letter from Clayton Ogilvie, FOIA Officer, Idaho, to Jasper Jones, United. Consequently, Idaho asserted that it possessed no documents responsive to United's request.[6] Determination Letter at 1.

United challenges Idaho's conclusion that it has no responsive data with several arguments. First, United asserts that Idaho possesses the requested data because such data, by necessity, must have been obtained when the Mid-Atlantic Assessment was published. In this regard, it asserts that the underlying data is "mentioned" in the Mid-Atlantic Assessment. United also argues that its Request is not for a "sub-set" of the raw data but a request for the entire set of raw data used by the VHP. Lastly, United argues that Idaho has not identified a specific FOIA exemption that would justify withholding the data. Our review of the facts of this case indicates that Idaho did, as a matter of law, perform an adequate search for responsive data under the FOIA.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v.*

[2] All parties have interpreted United's request for "raw detail" as a request for "raw" data.

[3] The Mid-Atlantic Assessment was prepared at the DOE's Idaho National Laboratory (INL) for the DOE Office of Energy Efficiency and Renewable Energy Office's Wind and Hydropower Program.

[4] Prior to filing the Request, United had contacted Idaho contractor personnel directly in order to obtain the requested information. When the Idaho personnel were unable to supply the requested information, United submitted its formal FOIA request.

[5] The Virtual Hydropower Prospector tool is a computerized geographic information system (GIS) tool designed to assist users in locating and assessing natural stream water energy resources in the United States. *See* Idaho National Laboratory website http://hydropower.inel.gov/prospector/index.shtml (visited August 26, 2009).

[6] The FOIA itself refers to "records" as the object of a FOIA request. However, given the nature of the United's request, I will refer to such responsive records as "data."

Department of State, 779 F.2d 1378, 11384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760, (August 26, 2002).[7] With regard to documents stored electronically, the FOIA requires that agencies make "reasonable efforts" to search for documents kept in electronic form or format except when such a search would significantly interfere with the operation of the agency's automated information system. 5 U.S.C. § 552(a)(3)(c).

We inquired with officials at Idaho to determine the adequacy of the search that was conducted for the requested data. An Idaho official informed this Office that the only possible location that responsive data might exist would be in the data used by the VHP. Memorandum of telephone conversation between Doug Hall, INL Project Manager for Water Energy Programs, and Richard Cronin, OHA Staff Attorney (August 26, 2009) (Hall Memorandum). The hydrologic data that is used by the VHP (which includes data for the land area covered in the specific HUC referenced in the Request) is not indexed or organized by individual fourth-level HUCs. While data might theoretically be extracted for the particular fourth-level HUC, there is no currently existing database tool or easily created database tool that could extract data for an individual fourth-level HUC. Hall Memorandum. Given these facts, we conclude that Idaho properly determined that no reasonable effort of electronic search would produce data responsive to the Request.

None of United's remaining arguments are availing. Because Idaho found no records responsive to the Request, it was not required to identify a FOIA exemption. With regard to United's argument that the requested data was collected to prepare the Mid-Atlantic Assessment, an Idaho official familiar with its preparation informed us that the data used to prepare the Mid-Atlantic assessment were not indexed by individual fourth-level HUCs. Hall Memorandum. Lastly, our examination of United's Request does not indicate that it reasonably could have been understood to request the entire data set for the VHP. On Appeal, United may not now expand the scope of its initial request.[8]

In conclusion, we find that Idaho conducted an adequate search for data responsive to United's FOIA Request. Consequently, United's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 18, 2009, by United Block Captains Association Community Trust for Family Life Improvement, Inc., OHA Case No. TFA-0325, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

[7] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[8] United may, of course, submit another FOIA request for the entire set of data used by the VHP.

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 4, 2009

CONCURRENCE

HG-30 rac 6/27/08

Cronin _____

Lipton _____

OGC _____

September 23, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Scott Wenger
Date of Filing:	September 9, 2009
Case Number:	TFA-0328

On September 9, 2009, Scott Wenger (Appellant) filed an Appeal from a determination issued to him on August 4, 2009, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require Idaho to conduct a further search for documents responsive to the Appellant's request.

I. Background

On June 12, 2009, the Appellant requested "copies of any and all documents related to the use of radionuclides (radioisotopes) in any instrumentation package sent into space." Request Letter dated June 12, 2009, from Appellant to Director, FOIA/PA Division, DOE. On July 1, 2009, the Office of Information Resources transferred the request to the Office of Nuclear Energy (NE). E-mail dated September 16, 2009, at Attachment 1, from Alexander Morris, FOIA Officer, to Janet Fishman, Office of Hearings and Appeals (OHA), DOE. On August 25, 2009, Idaho, on behalf of NE, responded to the Appellant's request, stating that neither Idaho nor NE had located responsive documents, but that a cursory search of the Office of Scientific and Technical Information website yielded seven public documents that may be responsive to the request. Determination Letter dated August 4, 2009, from Clayton Ogilvie, Idaho, to Appellant. On September 9, 2009, the Appellant appealed, claiming that it stretches "credulity to believe that DOE has no documents under its control or has no documents that would suggest where records may exist that would document its preparation of radioisotopes for space applications." Appeal Letter dated August 28, 2009, from Appellant, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted Idaho to evaluate its search. Idaho indicated that a search had been conducted of the NE and Idaho offices most likely to contain documents responsive to the Appellant's request. E-mail dated September 14, 2009, from Clayton Ogilvie to Janet Fishman. A search was performed of the Idaho's Electronic Document Management System using a variety of key words including "Apollo Mission" and "plutonium." *Id.* NE also performed a search but was asked to repeat it because someone at Idaho recalled that documents were in an office belonging to a recently retired person. *Id.* No responsive documents were discovered by either search. We believe the searches that Idaho and NE conducted were reasonably calculated to uncover the requested information in those areas of Idaho and NE most likely to have the information.[2/] Accordingly, this Appeal will be denied.

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

[2/] On May 8, 2009, the Appellant filed another request, similar to the one under consideration in this Appeal. The May 8, 2009, request was forwarded to the Office of History and Heritage Resources (HHR) for review. HHR has identified responsive documents but has not issued a determination. Accordingly, the May 8, 2009, request is not ripe for review by the OHA. E-mails dated September 16, 2009, from Alexander Morris, FOIA Officer, DOE, to Janet Fishman.

Also, Idaho did indicate in its determination letter that it searched the Office of Scientific and Technical Information public website at www.osti.gov/bridge, using the key words "Apollo Mission" and "Plutonium." Seven documents responsive to those key words were located. Since those documents are publicly available, Idaho's notification to the Appellant as to how to access the documents is sufficient under the FOIA.

It Is Therefore Ordered That:

(1) The Appeal filed by Scott Wenger, Case No. TFA-0328, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 23, 2009

October 13, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Greg Muttitt
Date of Filing:	September 29, 2009
Case Number:	TFA-0329

On September 29, 2009, Greg Muttitt (Appellant) filed an Appeal from a determination issued to him on August 12, 2009, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR, on behalf of the Office of Policy and International Affairs (OPIA), responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require OPIA to conduct a further search for documents responsive to the Appellant's request.

I. Background

On June 11, 2009, the Appellant requested "documents on the subject of the Iraqi oil and gas (hydrocarbons) sector, relating to Energy Secretary Samuel Bodman's visit to Iraq on 18 July 2006." Request Letter dated June 11, 2009, from Appellant to Freedom of Information Officer, Headquarters, DOE, FOIA/PA Office, DOE. On August 12, 2009, OIR responded to the Appellant's request, releasing 17 responsive documents. Determination Letter dated August 12, 2009, from Alexander C. Morris, FOIA Officer, OIR, to Appellant. On September 29, 2009, the Appellant appealed, claiming that he was surprised there were no minutes from the meetings included among the 17 documents. Appeal Letter dated September 18, 2009, from Appellant, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord*

Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted OIR to evaluate the search. OIR indicated that a search had been conducted of the OPIA, as this office was most likely to contain documents responsive to the Appellant's request. E-mail dated September 30, 2009, from Alexander C. Morris to Janet Fishman, Attorney-Examiner, Office of Hearings and Appeals, DOE. We agree with OIR that OPIA was the appropriate office within DOE to conduct a search for the requested information.

Within OPIA, a knowledgeable person in the Office of African and Middle Eastern Affairs searched the computer drive. E-mail dated October 1, 2009, from Alexander C. Morris to Janet Fishman, forwarding an e-mail dated October 1, 2009, from Mark Melamed, Office of African and Middle Eastern Affairs, OPIA (October 1, 2009, E-mail). He searched all relevant folders related to Iraq and to meetings and briefings for the Secretary and other high-level officials. *Id.* He did not conduct a key word search, but rather opened each document individually where the file name indicated that it might be related to the subject trip or to meetings with Iraqi officials. *Id.* Nevertheless, no minutes of the meetings were located. *Id.*

In addition to the OPIA computer search, a former DOE employee, who was working at the United States Embassy in Baghdad at the time of the meeting and who escorted the Secretary, was asked if minutes were taken of the meetings. *Id.* She indicated that she did not take any minutes. *Id.* She does not believe that minutes were taken of the meetings. *Id.* She stated that it was a fast-paced day filled with many meetings in a short amount of time. *Id.*

We believe the search that OPIA conducted was reasonably calculated to uncover the requested information.[2/] Accordingly, this Appeal will be denied.

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

[2/]The Office of Policy and International Affairs indicated that it is possible that United States Embassy staff may have taken notes. October 1, 2009, E-mail. However, any notes they may have taken would be within the purview of the State Department and were not shared with the DOE. *Id.*

It Is Therefore Ordered That:

(1) The Appeal filed by Greg Muttitt, Case No. TFA-0329, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 13, 2009

November 23, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Harry Jacobs
Date of Filing:	October 29, 2009
Case Number:	TFA-0334

On October 29, 2009, Harry Jacobs filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Office of Human Capital Management (HCM). In that determination, HCM responded to a request for information that Mr. Jacobs filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require HCM to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

In July 2009, Mr. Jacobs submitted a FOIA request to the DOE for "all e-mails (internal/external) sent by Tonica (Toni) Smith from October 2008 [through] July 2009." He later amended his request to include all e-mails she had sent that were "in her deleted items folders, personal folders, and archived folders," but limited the request to include only "those e-mails pertaining to Harry Jacobs." *See* Appeal Letter.

HCM requested that the Information Technology Operations Office (IT) conduct a search to retrieve the e-mails Ms. Smith sent within the specified period. HCM reviewed the results of IT's search, identified the e-mails that pertained to Mr. Jacobs, and provided those e-mails to Mr. Jacobs, with certain information withheld. *See* Letter from Sarah J. Bonilla, Director, HCM, to Harry Jacobs (September 29, 2009) (Determination Letter). On October 29, 2009, the Office of Hearings and Appeals (OHA) received Mr. Jacobs's Appeal in which he requested an additional search for Ms. Smith's outgoing e-mails.[1] *See* Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of*

[1] Certain personal information was deleted from the copies of the e-mails that HCM provided to Mr. Jacobs. HCM withheld that information pursuant to Exemption 6 of the FOIA. Mr. Jacobs has not appealed the withholding of that information; therefore, we will not address this matter in this Decision.

State, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[2]

In reviewing this Appeal, we contacted HCM to ascertain the scope of its search for responsive documents. HCM informed us that it requested that IT perform a search of the agency's e-mail records to locate the requested information. Memorandum of Telephone Conversation between Theresa Heinicke, Human Resources Specialist, HCM, and William Schwartz, Attorney-Examiner, OHA (November 4, 2009). IT informed us that it searched the DOE mail server, as well as all archive folders located on Ms. Smith's local and network drives, for all e-mails that Ms. Smith sent to addressees outside of the DOE during the specified time period. Memorandum of Telephone Conversation between Kelly King, Information Technology Specialist, IT, and William Schwartz (November 9, 2009). IT located approximately 300 pages of e-mails that Ms. Smith had sent to addressees outside of the DOE from October 2008 through July 2009. That information was provided to HCM in two formats, one of which was an electronic file on which a word search could be performed. Memorandum of Telephone Conversation between Theresa Heinicke and William Schwartz (November 4, 2009). HCM searched the electronic file for all occurrences of Mr. Jacobs's full name, first name, last name and initials. Memorandum of Telephone Conversation between Theresa Heinicke and William Schwartz (November 9, 2009). The results of that search were enclosed with the Determination Letter provided to Mr. Jacobs. Memorandum of Telephone Conversation between Theresa Heinicke and William Schwartz (November 4, 2009).

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that HCM performed a search reasonably calculated to identify all e-mails pertaining to Mr. Jacobs that Ms. Smith sent during the period of October 2008 through July 2009 to addressees *outside of* the DOE. Mr. Jacobs, however, requested all e-mails regarding him that Ms. Smith sent during that period to addressees *both within and without* the DOE. Accordingly, the search performed was too narrow in scope to capture all the e-mails Mr. Jacobs sought. On remand, HCM should undertake a new search to identify all e-mails pertaining to Mr. Jacobs that Ms. Smith sent during the described period to addressees *within* the DOE. Mr. Jacobs's appeal should therefore be granted to the extent that the DOE should perform a new search for the documents described above, and denied to the extent that the search it conducted for e-mails that Ms. Smith sent to addressees outside of the DOE was adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Harry Jacobs on November 29, 2009, OHA Case No. TFA-0334, is hereby granted as set forth in paragraph (2) below and denied in all other respects.

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

(2) This matter is hereby remanded to the Office of Human Capital Management, which shall conduct a search for all e-mails sent by Tonica Smith from October 2008 through July 2009 to addressees within the Department of Energy that pertain to Harry Jacobs. Upon completing its search, the Office of Human Capital Management shall issue a new determination under the Freedom of Information Act, releasing any responsive documents identified through that search or justifying the withholding of any portions of such documents.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 23, 2009

November 25, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Joseph J. Muncey, Jr.
Date of Filing:	November 9, 2009
Case Number:	TFA-0335

On November 9, 2009, Joseph J. Muncey, Jr. filed an Appeal from a determination the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC) issued on October 18, 2009. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from NNSA/SC a copy of his "complete employment file," and provided the names of the following employers: Rocketdyne, North American Aviation, North American Rockwell, Rockwell International Hughes Aircraft, NASA/JPL, Boeing North American, Boeing, Inc., and Dravo Corporation. Letter from Joseph J. Muncey, Jr., to Office of Public Affairs, NNSA/SC (undated). Mr. Muncey included with his request documents indicating that he had worked for Rocketdyne, a former DOE contractor, at the Santa Susana Field Laboratory (SSFL) in Southern California.

On October 16, 2009, NNSA/SC issued a determination to Mr. Muncey stating that it located no documents responsive to the request. Letter from Carolyn A. Becknell, Freedom of Information Act Officer, Office of Public Affairs, NNSA/SC (October 16, 2009). In his appeal, Mr. Muncey does not directly challenge the adequacy of NNSA/SC's search for responsive documents, but we treat the appeal as such because there are no other possible grounds under the DOE FOIA regulations for appealing the determination in this case.[1]

II. Analysis

[1] *See* 10 C.F.R. § 1004.7(b)(4) ("Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals."). Mr. Muncey also requested that his appeal "be extended 90 days in order that you can obtain a copy of my complete and large case file from the Department of Labor, DEEOIC, Seattle, Washington, for your review." Appeal at 1. However, the FOIA requires that we "make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal." 5 U.S.C. § 552(a)(6)(A)(ii). Moreover, Mr. Muncey's Department of Labor case file would be unlikely to shed any light on the adequacy of NNSA/SC's search for responsive documents, which is the only issue before us in the present case.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

From the description in NNSA/SC's October 16 determination regarding its search for responsive documents, and from additional information NNSA/SC provided to our office subsequent to the filing of the appeal, we learned the following regarding the NNSA/SC's search. NNSA/SC first contacted the DOE's Livermore Site Office (LSO) in Livermore, California. LSO consulted its Contract Administration and Resource Management Division, which reported that it maintains no such records, and the Lawrence Livermore National Laboratory, which searched its database of current and former employees, and found no record concerning Mr. Muncey. Email from Carolyn Becknell, NNSA/SC, to Steven Goering, OHA Staff Attorney (November 12, 2009).

LSO also advised NNSA/SC to contact the DOE's Environmental Management Consolidated Business Center in Cincinnati, Ohio, which in turn recommended that NNSA/SC search the Federal Records Center in San Bruno, California. *Id*. The San Bruno Federal Records Center, operated by the National Archives and Records Administration, houses documents on behalf of the DOE and other federal agencies,[2] including documents related to work done at SSFL.[3] NNSA/SC records management personnel performed searches of databases of records held at Federal Records Centers as well as a DOE database of issued security clearances, using "the name Muncey or possible permutations of the name." Email from Cynthia Dabney, Senior Business Systems Analyst, NNSA/SC, to Steven Goering, OHA (November 23, 2009). These searches yielded no responsive documents.

Based on the above description, it appears clear to us that NNSA/SC performed a search reasonably calculated to locate documents responsive to Mr. Muncey's request. However, Mr. Muncey provided information with the present Appeal that was not available to NNSA/SC, and this information indicates that other DOE offices may have responsive documents.

Specifically, included with the Appeal was a September 28, 2009, decision issued by the Department of Labor (DOL) regarding a claim Mr. Muncey filed under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). This decision stated, among other things,

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[2] "Services for Federal Agencies," http://www.archives.gov/pacific/frc/san-francisco/agencies.html.

[3] "NIOSH Program Area - OCAS - General Activities on Department of Energy (DOE) Cases," http://www.cdc.gov/niosh/ocas/ocasdoe.html.

that a DOE representative had verified Mr. Muncey's employment history, including at SSFL "with Rocketdyne, a DOE contractor, as an Associate-Test Development from September 21, 1964 to February 12, 1965; . . . ." Therefore, it would appear likely that the DOE representative who verified Mr. Muncey's employment information had access to documents that would be responsive to Mr. Muncey's request.

While the DOL decision does not identify the DOE representative in question, we note that the DOE's Office of Former Worker Screening Programs, located at DOE Headquarters, "funds and coordinates records retrieval activities at all DOE sites to support the claims adjudication process for individual claims submitted by current and former DOE federal and contractor workers under EEOICPA. Records requests include requests from DOL for employment verification [and] claimants' work history, . . ."[4]

Though NNSA/SC's search for documents responsive to Mr. Muncey's request was clearly adequate, we find that this new information warrants a search for responsive documents at DOE Headquarters. We will therefore remand this matter to the Office of Information Resources to conduct this search and issue a new determination to Mr. Muncey.

It Is Therefore Ordered That:

(1) The Appeal filed by the Joseph J. Muncey, Jr on November 9, 2009, Case No. TFA-0335, is hereby granted as specified in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 25, 2009

[4] "Office of Former Worker Screening Programs," http://www.hss.doe.gov/HealthSafety/FWSP/.

December 9, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry M. Apodaca
Dates of Filing:	November 10, 2009 November 12, 2009
Case Numbers:	TFA-0336 TFA-0337

On November 10 and 12, 2009, Terry M. Apodaca (Appellant) filed Appeals from two determinations issued to her on October 14, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In those determinations, NNSA/SC responded to requests for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. These Appeals, if granted, would require NNSA/SC to release information withheld under Exemptions 5 and 6, and also to conduct a further search for information responsive to the Appellant's request.

I. Background

On May 18, 2009, the Appellant requested copies of

> 1. All [Office of Public Affairs] OPA personnel actions from May 2007 to present, to include all attached background information and justifications, just as was submitted for consideration.
>
> 2. Any and all complaints and/or grievances filed against any member of OPA, to include the FOIA/PA team, from May 2007 to present in the possession of OPA, Director's office.

First Request Letter dated May 18, 2009, from Appellant to Carolyn Becknell (First Request Letter). In the second request, the Appellant requested copies of

> 1. All documents involved in the processing of DOE Vacancy No. 09-0019, NNSA SC entitled "Lead Information Program Specialist, HQ-0301-03/03. As well as a copy of the successful candidate's job application with all attachments that were submitted, your response should include, but not be limited to:

> (a) all documents generated by Tracy Loughead and/or Al Stotts in ranking all applicants' qualifications.
>
> (b) documents created by any and all individuals in attendance during my interview on March 17, 2009, as well as a listing of their names, titles, a copy of their Position Descriptions, why they were present, the questions they asked and their evaluation of my response.
>
> (c) A copy of any and all notifications issued announcing who was selected for this position; i.e., to any organization in the Service Center to include OPA, and to any office in DOE or NNSA Headquarters.
>
> 2. Position description, performance measures, listing of job duties for this position as well as any and all operating instructions for the FOIA/PA team by which they operate. Listing of contractor employee's names and duties. Copy of training and travel budgets for FOIA/PA team that includes the purpose of each travel expenditure.

Second Request Letter dated May 18, 2009, from Appellant to Carolyn Becknell (Second Request Letter).

On October 14, 2009, NNSA/SC issued two determination letters responding to the Appellant's requests. Determination Letters dated October 14, 2009, from Carolyn Becknell, NNSA/SC, to Appellant (First and Second Determination Letter). In the first determination, NNSA/SC released information that was responsive to the request, but redacted some information under Exemption 5 or 6. First Determination Letter. In the second determination, NNSA/SC released 53 responsive documents to the Appellant.[1/] Second Determination Letter. Information from these documents was withheld under either Exemptions 5 or 6. *Id.* In a few documents, information was withheld under more than one of these exemptions.

On November 10, 2009, the Appellant appealed the second determination. In that Appeal, the Appellant challenged the redactions in 14 of the documents. Appeal E-Mail dated November 10, 2009, from Appellant to William Schwartz, Office of Hearings and Appeals, (OHA), DOE (November 10 Appeal). The Appellant also claimed that none of the documents were responsive to her request 1(c). Finally, the Appellant challenged the

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[1/] Although not numbered by NNSA/SC, the Appellant numbered the documents released to her prior to submitting the Appeal. We have retained this numbering system for ease of discussion in this decision.

adequacy of the search because NNSA/SC did not provide one of the documents listed in determination and did not provide any documents in response her request for "any operating instructions for the FOIA/PA Team." November 10 Appeal.

On November 12, 2009, the Appellant appealed the first determination, claiming that much of the information withheld is releasable. Further, she stated that she could not determine what information was redacted. November 12, 2009, E-Mail from Appellant to William Schwartz. She also challenged the withholding in their entirety of two other documents. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 5 and 6 are at issue in this case.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 862 (D.C. Cir 1980) (*Coastal States*). The Appellant is challenging NNSA/SC's withholdings under the deliberative process privilege.

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to the general rule that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Appellant challenged the withholding of information from a number of documents under Exemption 5. She claims that the information redacted from Document Nos. 26, 42, 43, 47 and 49,[2/] all of which documents regarded the hiring of the Lead Information Program Specialist in OPA, NNSA/SC did not explain how the information qualified for Exemption 5 protection. We disagree. NNSA/SC explained that the information it withheld was predecisional and part of the deliberative process. We have been provided with copies of these pages. We have reviewed these pages and believe that the information redacted was properly withheld under Exemption 5. These pages contain deliberative information that reflects the personal opinions of the authors. Release of this deliberative information could stifle honest and direct communication of federal employees' opinions. Further, there is no factual information contained in these documents.

[2/]The Appellant also claims that NNSA/SC did not explain why Exemption 2 was cited on this document. We disagree. The Determination Letter clearly states that "[d]isclosure of this information could possibly expose this department, as well as other departments/organizations, to a 'significant risk of circumvention of agency regulations or statutes.'" First Determination Letter. We do not need to address its withholding under Exemption 2, because she has not challenged that withholding, but only the justification.

1. Segregability

The Appellant has also challenged the withholding of the document identified as "NNSA Weights and Screenouts for Lead Information Programs Specialist Vacancy." The Appellant claimed that this document was withheld in its entirety, even though it was released to her as Document No. 5. NNSA/SC indicated that the withheld document was a draft version of the above titled document and should have included "DRAFT" in the title. Memorandum dated November 19, 2009, from Karen Laney, NNSA/SC, to Janet R. H. Fishman, OHA (November 19, 2009, Memorandum.) Drafts may be withheld under Exemption 5 because they may contain information that was not contained in the final version and their release may reveal the give and take of intra-governmental negotiations. However, NNSA/SC did not indicate whether it reviewed the document to determine whether any factual information could be segregated from the draft. We will remand this document to NNSA/SC for a review for segregability.

The Appellant also challenges the withholding of a report by GenQuest, Inc., prepared in response to a grievance she filed. She is claiming that NNSA/SC did not indicate whether or not the document was reviewed for segregability. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC redacted from the responsive information. Other than the GenQuest, Inc. Report, NNSA/SC was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated, with the exception of the GenQuest, Inc., report. Therefore, we will remand the GenQuest, Inc., report to NNSA/SC for a review to determine if any of the information within the report could reasonably be segregated.

2. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. NNSA/SC concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to NNSA/SC's ongoing decision-making

process. Therefore, release of the withheld information in Document Nos. 26, 42, 43, 47, and 49 would not be in the public interest.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). The second step is that the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Comm.*); *FLRA v. Department of the Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. Denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Comm.*, 489 U.S. at 762-770. *See Frank E. Isbill*, Case No. VFA-0499 (1999); *Sowell, Todd, Lafitte, Beard & Watson, LLC*, Case No. VFA-0496 (1999).

1. Federal Employee Salary Information

In her Appeal, the Appellant argues that the salaries of federal employees are not withholdable under the FOIA. Office of Personnel Management (OPM) regulations stipulate that present and past annual salary rates are to be made available to the public. 5 C.F.R. § 293.311(a)(4). In the determination, NNSA/SC found that the "basic pay, locality adjustment, adjusted basic pay, and total salary/award . . . if supplied and combined with other identifying information, could allow one to reasonably deduce the performance rating and award for an individual under the NNSA performance based pay plan." Second Determination Letter. We have previously held that a substantial privacy interest would be implicated by the release of the employees' performance rating. *Terry M. Apodaca*, Case

No. TFA-0204 (July 25, 2007);[3/] *see also* 5 C.F.R. § 293.311(a)(6) (performance appraisals are excepted from release). We will not revisit that argument here. We agree where release of salary could result in the determination of an employee's performance rating, release of the salary is exempt from mandatory disclosure pursuant to Exemption 6. *Cf.* 5 C.F.R. § 293.311(b)(1) (recognizing that salary and other information enumerated as releasable under § 293.311(a)(1) -(6) will generally be withheld by an agency if its release is a "list" would "reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). However, we have reviewed the documents in question and some of the salary information that was withheld is not indicative of a performance rating. For example, one Standard Form 50 (SF-50) that had salary information redacted is dated March 16, 2008, the date that NNSA implemented its performance based pay plan. That SF-50 shows the employee's salary increase based on time in service. It does not indicate a salary increase based upon performance. Another SF-50 shows only one salary, not an increase. All the withheld salary information that was redacted from the various documents must be reviewed by NNSA/SC. We believe there are many instances where salaries could have been released, without releasing an employee's performance rating. Any forms which were dated prior to March 16, 2008, should have salary information released. Any forms which show salary information increases not tied to performance must be released.

2. Grievance Information

In her request, the Appellant asked for "[a]ny and all complaints and/or grievance filed against any member of OPA, to include the FOIA/PA team, from May 2007 to present in the possession of OPA, Director's office." In response, NNSA/SC identified two documents. One document, the GenQuest, Inc., report, was addressed above in the section regarding Exemption 5. The other document was a grievance filed by a third party and was withheld in its entirety pursuant to Exemption 6. The Appellant argues that since the person who filed the grievance is no longer employed by DOE there is no longer any privacy concern. We disagree. First, we note that NNSA/SC never identified the person who filed the grievance. Second, courts have recognized that an individual's privacy interest may be diminished if the individual is deceased. *See, e.g., Davis v. Department of Justice*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) and cases cited therein. Nevertheless, neither this office nor the courts have considered such diminution of privacy interest merely because the affected individual has left one job for another. However, it is not clear whether NNSA/SC reviewed the document to determine whether any of the withheld information could be segregated and released without invading the individual's personal privacy.

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

Therefore, we will remand this grievance report to NNSA/SC for a determination about whether any information could be segregated and released.

3. Document-Specific Challenges Under Exemption 6

a. Document Nos. 11 and 23

The Appellant asks why the name of the unsuccessful candidate was withheld. Release of the name of the unsuccessful candidate would be embarrassing to that unsuccessful candidate and therefore is a clearly unwarranted invasion of personal privacy under Exemption 6. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. Where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

b. Document No. 27

The Appellant asks why her scores were released to her, but not the successful candidate's scores. We believe that this information is withholdable under Exemption 6. The Appellant has no privacy interest in her own information. Therefore, for her information the analysis described above stops at this step. But for the successful candidate's scores, the analysis must continue. Release of this information could prove embarrassing to the successful candidate. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. As stated above, where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

c. Document Nos. 14 and 41

The Appellant challenges the withholdings made in these documents. We believe that the redactions are allowed under Exemption 6. The information withheld consists of an applicant's personal information, *e.g.*, social security number, home address, home e-mail address, home telephone number, that should not be released to the public. Like Document No. 27 above, the information is not specifically required to be released under the OPM regulations. We believe that release of this information could prove embarrassing to the successful candidate and should be withheld. Moreover, release of the information would not further the public interest by shedding light on the operations and activities of the government. As stated above, where a substantial privacy interest has been identified and no public interest, we find release would be a clearly unwarranted invasion of privacy.

C. Other FOIA Matters Raised by Appellant

The Appellant claimed that none of the documents were responsive to request 1(c) in her first request. NNSA/SC explained that "there was no formal notification announcing who was selected for this position. Notification of selectee was verbal, announced in an Office of Public Affairs weekly staff meeting." November 19, 2009, Memorandum. Therefore, there are no responsive documents to produce. Under these circumstances, no search for responsive documents was required.

The Appellant also appealed NNSA/SC's "inability to locate . . . any operating instructions for the FOIA/PA Team." First Appeal Letter. NNSA/SC responded that "[g]eneral instructions for processing FOIA/PA requests [are] available to [the Appellant] at this website http://scweb.na.gov/scbusinessprocesses/13Communications.shtm. . . . No other written records exist." November 19, 2009, Memorandum.

The Appellant challenged the adequacy of NNSA/SC's ability to locate information regarding why the panel members were present for the selection committee, which she claimed should have been included as a portion of Document 39. In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See., e.g., Glen Bowers,* Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003). NNSA/SC could not locate any documents indicating why "panel members were present" for the selection committee. NNSA/SC indicated that it contacted Human Resources (HR), where all hiring files are sent after the position is filled. HR responded that the requested information was not in the file. The HR representative continued that "a verbal discussion took place between myself and Tracy Loughead during a HR consultation visit. I advised that I would be present . . . to ensure consistency of the interviews. Tracy advised me that she would select panel members based on them being subject matter experts. Lastly, EEO Rep is always present." E-Mail from Karen Laney, NNSA/SC, to Janet Fishman. In addition, the selecting official was also contacted to determine if she had retained any documents. She answered negatively. We believe that the search conducted by NNSA/SC in regard to this document was reasonably calculated to uncover the requested information.

In her Appeal, the Appellant states that as she "cannot see exactly where information was deleted, the documents need to be processed again to show . . . exactly where the deletion happened." Second Appeal Letter. A title at the top of the page that information was withheld under Exemption 6 and a form that has been "whited-out" is not sufficient under the FOIA. The FOIA states

> [t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). We believe this means that an agency must mark documents in a way that makes it readily apparent to the requester where information has been withheld. This can be accomplished by darkening, or "blacking out" the withheld portions of the documents, or by inserting brackets around the withheld portions. We agree with the Appellant that the SF-50 forms as provided to her do not satisfy this portion of the FOIA. We will remand the SF-50 forms to NNSA/SC for a new redaction. NNSA/SC must specify precisely where information was redacted from the form.

Also, in her Appeal, the Appellant asked specific questions about a number of documents. We will address those questions in this section.

1. Document No. 8.

The Appellant asks why personal information was withheld from her when the information was about her. We reviewed the document and did not find any information about the Appellant withheld from her.

2. Document No. 28

The Appellant claims that a document was provided to her but not listed in the final determination letter. NNSA/SC explained that the document that the Appellant has identified as Document No. 28 was in fact an attachment to Document No. 27.

III. Conclusion

NNSA/SC properly withheld information under Exemption 5. However, the GenQuest, Inc., report and other grievance report must be reviewed for segregation. Most of the information withheld under Exemption 6 was properly withheld. However, the document titled "NNSA Weights and Screenouts for Lead Information Programs Specialist Vacancy," which NNSA/SC stated was a DRAFT, must be reviewed for segregability. Also, NNSA/SC withheld federal salary information. All of the federal salary information that was withheld must be reviewed to determine if it can be released. The only federal salary information that should be withheld is salary information that would indicate the individual's performance rating. For the information withheld from the SF-50 forms that

were responsive to the Appellant's second request, NNSA/SC must specify precisely where information was redacted from the forms. We will remand these Appeals to NNSA/SC for further review as specified in this Decision. Therefore, these Appeals will be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeals filed by Terry M. Apodaca, Case Nos. TFA-0336 and TFA-0337, are hereby granted in part and denied in all other respects.

(2) These matters are hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 9, 2009

December 14, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen W. Bowers

Date of Filing: November 16, 2009

Case Number: TFA-0338

On November 16, 2009, Glen W. Bowers filed an Appeal from a determination issued to him on October 6, 2009, by the Department of Energy's Savannah River Operations Office (SR). That determination was issued in response to a request for information that Mr. Bowers submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Bowers asks that SR conduct an additional search for documents responsive to his request.

I. Background

Mr. Bowers filed a request for information in which he sought the employment and medical records, radiation exposure records, special awards, photographs, news letters, and all other information pertaining to his father, John Wyley Bowers. In his request, Mr. Bowers indicated that his father worked, *inter alia*, with the Department of Defense Union Contractors and the Atomic Energy Commission. Mr. Bowers submitted his request to DOE's Office of Information Resources (DOE/HQ). That office transferred Mr. Bowers' FOIA request to all relevant offices for action and a direct response to Mr. Bowers. Upon receiving Mr. Bowers' request, SR conducted a search, but found no responsive documents. On November 16, 2009, Mr. Bowers filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Bowers challenges the adequacy of the search conducted by SR. *See* Appeal Letter. He asserts that responsive documents may be found in a number of additional locations and asks OHA to direct SR to conduct a new search for responsive documents.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, Case No. TFA-0015 (2003). */ The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he

*/ All OHA FOIA decisions issued after November 19, 1996, may be accessed at
(continued...)

standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate.

In reviewing the present Appeal, we contacted officials in SR to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Bowers' request might reasonably be located. Upon receiving Mr. Bowers' request for information, SR conducted a search of their dosimetry records in the Radiation Exposure Department and medical records in the Electronic Data Warehouse Storage, which is a system that houses all records of former and current employees. SR indicated that it also searched archived microfiche, disposal records and personnel security records. SR conducted both manual and computer searches using several search aids including Mr. Bowers' father's name and social security number, and was unable to locate responsive material. *See* E-mail from Pauline Conner, SR, to Kimberly Jenkins-Chapman, OHA (November 23, 2009). Given the facts presented to us, we find that SR conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Bowers' request. Accordingly, Mr. Bowers' Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen W. Bowers, OHA Case No. TFA-0338, on November 16, 2009, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 14, 2009

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*/(...continued)
http://www.oha.doe.gov/foia1.asp.

December 11, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Glen W. Bowers
Date of Filing:	November 24, 2009
Case Number:	TFA-0339

On November 24, 2009, Glen W. Bowers filed an Appeal from a determination the Department of Energy Idaho Operations Office (DOE/ID) issued on October 14, 2009. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from DOE a copy of employment records of his father, John Wyley Bowers. Letter from Glen Bowers to Chris Morris, Freedom of Information Act Officer, Office of Information Resources (August 9, 2009). The request provided a list of John Bowers's employers, including C.F. Braun & Company. *Id.* The request was forwarded to, among other DOE offices, DOE/ID. On November 20, 2009, DOE/ID issued a determination to Mr. Bowers regarding all records within its purview. DOE/ID stated that it searched for documents responsive to his request, but located no documents in addition to those it had previously provided him on December 18, 2007, in response to an earlier request. Letter from Clayton Ogilvie, Freedom of Information Officer, DOE/ID, to Glen Bowers (October 14, 2009). In his Appeal, Mr. Bowers challenges the adequacy of DOE/ID's search for responsive documents. Appeal at 1-3.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore asked DOE/ID to provide our office with a description of its search for documents responsive to Mr. Bowers's request. DOE/ID informed us that, upon receiving Mr. Bowers's initial request in December 2007, it searched its Electronic Document Management System (EDMS) and inquired with the human resources department of Battelle Energy Alliance (BEA), the DOE contractor that operates the Department's Idaho National Laboratory (INL), using John Bowers's name and Social Security Number. This search yielded no responsive documents. However, DOE/ID's dosimetry office identified records indicating that John Bowers had been an employee of Braun Construction, a subcontractor at INL (then the National Reactor Testing Station, a facility of the Atomic Energy Commission, predecessor agency to the DOE), from April 9 to April 16, 1962. DOE/ID also contacted BEA's security office to attempt to locate John Bowers's security file, but was advised that such files have a retention period of ten years, after which they are destroyed. Email from Clayton Ogilvie, DOE/ID, to Steven Goering, Office of Hearings and Appeals (OHA) (December 1, 2009).

In its December 18, 2007, response to Mr. Bowers's initial request, DOE/ID explained that subcontractors "are not required to turn over their personnel files to the DOE when they are no longer under contract. Therefore, we do not have a personnel file for Mr. Bowers." Letter from Nicole Brooks, Privacy Act Officer, DOE/ID, to Glen Bowers (December 18, 2007). With its December 2007 response, DOE/ID provided Mr. Bowers with a copy of his father's dosimetry records. *Id.* After receiving Mr. Bowers's second request on September 4, 2009, DOE/ID conducted a further search of its EDMS system, as well as the Energy Employees Compensation Resource Center in Idaho Falls, Idaho, and located no documents in addition to those previously provided to Mr. Bowers. Email from Clayton Ogilvie to Steven Goering (December 1, 2009).

Based on the above description, it appears clear to us that DOE/ID performed a search of locations where responsive documents were likely to exist. We therefore conclude that DOE/ID's search was reasonably calculated to uncover the records sought by the Appellant. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Glen W. Bowers, Case Number TFA-0339, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 11, 2009

January 12, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Glen W. Bowers
Date of Filing:	November 30, 2009
Case Number:	TFA-0340

On November 30, 2009, Glen W. Bowers filed an Appeal from a determination issued to him on October 27, 2009, by the Richland Operations Office (Richland) of the Department of Energy (DOE). Richland issued the determination in response to a request for documents that Mr. Bowers submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland perform an additional search for responsive material and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On August 9 and September 27, 2009, Mr. Bowers filed a FOIA request in which he sought copies of the Hanford site employment, medical, and radiation exposure records relating to his father John Wyley Bowers, an employee of DuPont at the Hanford facility in 1943 and 1944. He also sought copies of any special awards, photographs, newsletters and any other information relating to his father. Letter from Mr. Bowers to Director, Office of Hearings and Appeals (July 8, 2009) (Appeal). On October 27, 2009, Richland informed Mr. Bowers that after a thorough search it was unable to find any records, and consequently denied the request. *See* Letter from Dorothy Riehle, FOIA Officer, Richland (October 27, 2009) (Determination). On November 30, 2009, Mr. Bowers filed the present Appeal with the Office of Hearings and Appeals (OHA). In the Appeal, Mr. Bowers challenges the adequacy of the search conducted by Richland and asks OHA to direct Richland to conduct a new search for responsive documents. Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The FOIA states that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). [1] The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See e.g. Doris M. Harthun*, Case No. TFA-0015 (2003).

We contacted Richland to request additional information so that we could evaluate the search conducted for Mr. Bowers' records. Richland informed OHA that it had conducted a thorough search, and provided additional details regarding the search. The individuals most familiar with the subject of the request conducted a search using the name and Social Security number of Mr. Bowers' father in the locations where responsive documents would most likely be found. The employees searched the following locations: (1) databases within the Records Holding Area (which stores historical employment records); (2) files within the Pacific Northwest National Laboratory (which holds Hanford Site radiation exposure records); and (3) files in AdvanceMed Hanford Inc., which maintains medical records for the Hanford site. According to Richland, they "searched all known locations at Hanford for any records regarding Mr. Bowers and none were located." Electronic Mail Message from Dorothy Riehle, Richland, to Valerie Vance Adeyeye, Staff Attorney, OHA (December 9, 2009).

III. Conclusion

After reviewing the record of this case, we find that Richland conducted a search that was adequate and reasonably calculated to uncover the requested information. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The FOIA Appeal filed by Glen W. Bowers on November 30, 2009, OHA Case Number TFA-0340 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 12, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

December 22, 2009

Appeal

Name of Petitioner:	Glen W. Bowers
Date of Filing:	December 2, 2009
Case Number:	TFA-0341

This Decision concerns an Appeal that was filed by Glen W. Bowers in response to a determination that was issued to him by the Department of Energy's (DOE) Office of Science, Chicago Office (hereinafter referred to as "SC-CH"). In that determination, SC-CH responded to a request for documents that Mr. Bowers submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. [1] This Appeal, if granted, would require that we remand this matter to SC-CH for another search. [2]

In his FOIA request, Mr. Bowers sought access to John W. Bowers' employment records, including his "Q" clearance number, location of job sites, names of projects on which he worked, any advanced training that he received, medical records including all radiation exposure records, special awards, photographs, and newsletters. In its response, SC-CH stated that it had been unable to locate any documents that were responsive to Mr. Bowers' request. In his Appeal, Mr. Bowers challenges the adequacy of SC-CH's search.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, Case No. VFA-0098 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

1/ The FOIA generally requires that documents held by federal agencies be released to the public upon request.

2/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm .

In order to determine whether the search conducted was adequate, we contacted SC-CH. We were informed that the search included SC-CH, Ames Laboratory, Argonne National laboratory, Brookhaven National Laboratory, Fermi National Accelerator Laboratory, Lawrence Berkeley National Laboratory, and Princeton Plasma Physics Laboratory. Personnel Security files were searched at SC-CH, and personnel, medical and dosimetry files were searched at SC-CH and all of the Laboratories mentioned above. Both manual and electronic searches were performed. *See* December 9, 2009 e-mail from Miriam Legan, SC-CH FOIA Officer, to Robert B. Palmer, Senior Staff Attorney, OHA. Mr. Bowers has not suggested, and we have been unable to discover, any other location in which responsive documents could reasonably be expected to be located. Based on the information before us, we conclude that the search for responsive documents was reasonably calculated to uncover the sought materials, and was therefore adequate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Glen W. Bowers, Case Number TFA-0341, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 22, 2009

January 13, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Stephen C. Huddy

Date of Filing: December 14, 2009

Case Number: TFA-0343

On December 14, 2009, Stephen C. Huddy filed an Appeal from a determination issued to him on November 24, 2009, by the Department of Energy's Office of Legacy Management (LM). That determination was issued in response to a request for information that Mr. Huddy submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Huddy asks that LM conduct an additional search for documents responsive to his request.

I. Background

Mr. Huddy filed a request for information in which he sought "a copy of documents, written or photographic records that pertain to all DOE investigations of chemical and radioactive contamination on a 8600-acre parcel of land known from 1942-44 as the Pennsylvania Ordnance Works and subsequently (1944-50) known as the Susquehanna Ordnance Depot." *See* Determination Letter at 1. In its Determination Letter, LM stated that it conducted a search of all available records but was unable to locate any documents responsive to Mr. Huddy's request. However, LM referred Mr. Huddy to one of its websites for additional information regarding his request. According to LM, the website "states that the Pennsylvania Ordnance Works (PA.32) site was in a group of sites for which almost no information is available." *Id.* LM further stated that Mr. Huddy may wish to search for additional documents with the Department of Defense, particularly the United States Army Corps of Engineers (USACE). Additionally, LM stated that if any clean-up was conducted at an Ordnance site, it most likely would have been done under the Defense Environmental Restoration Program for Formerly Used Defense Sites, which is administered by USACE. On December 14, 2009, Mr. Huddy filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Huddy challenges the adequacy of the search conducted by LM.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, Case No. TFA-0015

(2003). */ The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate.

In reviewing the present Appeal, we contacted officials in LM to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Huddy's request might reasonably be located. LM informed us that upon receiving Mr. Huddy's request for information, it directed its FOIA processing personnel to search the DOE-LM Electronic Recordkeeping System for information that could potentially be responsive to Mr. Huddy's request. This database contains information regarding all records in LM's custody. *See* LM's Response to FOIA Appeal (January 7, 2010). LM informed us that it used a number of search terms in conducting its search including the following: Pennsylvania Ordance Works, Pennsylvania, Ordnance Works, Susequehanna Ordance Depot, Susequahanna, Williamsport PA, Department of Defense, uranium metal turnings, James J. Fiore, James Fiore, Carl Shafer, May 29 1987, July 23, 1982, radiological contamination, ammunition igloos, magazines, War Department, U.S. Army Corps of Engineers, historical material, TNT production, mitigation planning, radiological issues, U.S. Bureau of Prisons and FCC Allenwood. *Id.* In addition, LM informed us that it consulted with a subject matter expert to aid in its processing and search activities for this request. *Id.* LM stated that its search yielded eight pages of documentation, which it reviewed and determined to be non-responsive to Mr. Huddy's request. *Id.* Given the facts presented to us, we find that LM conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Huddy's request. Accordingly, Mr. Huddy's Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Stephen C. Huddy, OHA Case No. TFA-0343, on December 14, 2009, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 13, 2010

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

January 19, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Lynn S. Berry
Date of Filing:	December 29, 2009
Case Number:	TFA-0344

On December 29, 2009, Lynn S. Berry filed an Appeal from a determination that the Department of Energy's Oak Ridge Office (DOE/OR) issued on December 8, 2009. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from DOE/OR a copy of records regarding her father, Edgar L. Moore. On December 8, 2009, DOE/OR issued a determination to Ms. Berry regarding all records within its purview, releasing to Ms. Berry copies of Mr. Moore's medical records, personnel records, payroll records, and work history report. Letter from Amy Rothrock, DOE/OR, to Lynn Berry (December 8, 2009). In her Appeal, Ms. Berry challenges the adequacy of DOE/OR's search for responsive documents. Appeal at 2.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore asked DOE/OR to provide our office with a description of its search for documents responsive to Ms. Berry's request. Upon receiving the request, DOE/OR determined that a search for records should be conducted in its Records Holding Area (RHA) and at the Oak Ridge Associated Universities (ORAU). Email from Linda Chapman, DOE/OR to Steven Goering (January 6, 2010). DOE/OR's RHA repository maintains legacy files on historical personnel, medical, radiation exposure, and personnel security clearance data going back to 1943. *Id.* ORAU maintains a database containing the work histories of hundreds of former DOE contractor employees. *Id.*

The search of the RHA repository produced seven pages of medical records and six pages of personnel/payroll records regarding Mr. Moore, while the search of ORAU produced a one-page work history showing that Mr. Moore worked for Tennessee Eastman Corporation from April 5, 1944, to May 1, 1944. *Id.* Searches at DOE/OR's sites are performed manually in paper files, and electronically in the case of digital records and databases, using as search terms date of birth, name(s), social security number, and badge numbers if known. *Id.*

DOE/OR also informed us that, based on the information provided by Ms. Berry, certain records responsive to her request might be found at the Y-12 National Security Complex, which is located in Oak Ridge, Tennessee, but is under the jurisdiction of the DOE's NNSA Service Center in Albuquerque, New Mexico. *Id.* Therefore, DOE/OR forwarded a copy of Ms. Berry's request to the NNSA Service Center, which will issue a separate determination to her. *Id.*

Based on the above description, it appears clear to us that DOE/OR performed a search of locations where responsive documents were likely to exist.* We therefore conclude that DOE/OR's search was reasonably calculated to uncover the records sought by the Appellant. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Lynn S. Berry, Case Number TFA-0344, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 19, 2010

* In her Appeal, Ms. Berry states that her father may have worked for a DOE subcontractor and that, if the DOE is "serious about locating records for their workers, they would necessarily have to go back to the contractor or subcontractor records." Appeal at 1. However, DOE/OR has stated that it does not have DOE subcontractor (as opposed to contractor) employment records, Email from Linda Chapman, DOE/OR to Steven Goering (January 6, 2010), and the FOIA requires only a search of "agency records" in response to a request. 5 U.S.C. § 552(a)(3)(C)-(D); *see also* Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request).

February 1, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James R. Cromeenes

Date of Filing: December 31, 2009

Case Number: TFA-0345

On December 31, 2009, James R. Cromeenes filed an Appeal from a determination issued to him on December 18, 2009, by the Department of Energy's Oak Ridge Office (Oak Ridge). That determination was issued in response to a request for information that Mr. Cromeenes submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Mr. Cromeenes asks that Oak Ridge conduct an additional search for documents responsive to his request.

I. Background

Mr. Cromeenes filed a request for information in which he sought copies of his personnel, medical, employment, radiation exposure records and similar files generated during his employment with Allied Chemical (Allied) in Metropolis, Illinois. On December 18, 2009, Oak Ridge issued a determination letter which stated that it conducted a search of "certain legacy records on former Atomic Weapon Employer workers retained at Oak Ridge that pertain to remote sites and companies not located at Oak Ridge." As a result of this search, Oak Ridge indicated that it located one record, Mr. Cromeenes' personnel security clearance assurance index card file. This record was released to Mr. Cromeenes. On December 31, 2009, Mr. Cromeenes filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Cromeene challenges the adequacy of the search conducted by Oak Ridge. *See* Appeal Letter. He asks OHA to direct Oak Ridge to conduct a new search for responsive documents.

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The U.S. Department of Justice has issued guidance stating that an individual's access request for his own record maintained in a system of records should be processed under both the Privacy Act and the FOIA, regardless of the statute(s) cited. U.S. Department of Justice, *Privacy*

Act Overview, May 2004. DOE requires a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, 28 DOE ¶ 80,251 (2002). */ Accordingly, in analyzing the adequacy of the search conducted by Oak Ridge, we are guided by the principles we have applied in similar cases under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus On Energy*, 26 DOE ¶ 80,240 (1997).

In reviewing the present Appeal, we contacted officials in Oak Ridge to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Cromeenes' request might reasonably be located. Upon receiving Mr. Cromeenes' request for information, Oak Ridge determined that the areas most reasonably calculated to contain documents regarding a former subcontractor employee were the Records Holding Area and the Oak Ridge Associated University's Oak Ridge Institute for Science and Education (ORISE) database. Oak Ridge conducted manual and electronic searches of its Records Holding Area, which contains legacy and personnel security data on employees dating back to 1940. *See* Record of Telephone Conversation between Amy Rothrock, Oak Ridge, and Kimberly Jenkins-Chapman, OHA (January 28, 2010). Oak Ridge stated that Mr. Cromeenes' former employer, Allied, was a subcontractor and that its Records Holding Area normally possesses only records for contractor employees. *Id.* However, Oak Ridge stated that, as a result of its search, it located one document, a personnel security clearance assurance index card file, which it released to Mr. Cromeenes. Oak Ridge indicated that this document was located because Mr. Cromeenes participated in a health study being conducted by DOE at time of his employment. *Id.* No other documents regarding Mr. Cromeenes were located in the Records Holding Area. Oak Ridge also stated that it conducted a search at the Oak Ridge Associated University's ORISE database for a work history report on Mr. Cromeenes and located no responsive documents. *Id.* Given the facts presented to us, we find that Oak Ridge conducted an adequate search under both the Privacy Act and the FOIA which was reasonably calculated to discover documents responsive to Mr. Cromeenes' request. Accordingly,

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*/ All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.gov/foia1.asp

Mr. Cromeenes' Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by James R. Cromeenes, OHA Case No. TFA-0345, on December 31, 2009, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 1, 2010

January 29, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Joseph Carson
Date of Filing:	December 31, 2009
Case Number:	TFA-0346

On December 31, 2009, Joseph Carson filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Office of Human Capital Management (HCM). In that determination, HCM responded to a request for information that Mr. Carson filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 14, 2009, Mr. Carson submitted a FOIA request to the DOE for "any records related to the Secretary's compliance with his positive duty to 'prevent prohibited personnel practices' in the Department, per 5 U.S.C. § 2302(c), . . . and [a]ny records of DOE's self-assessment of its performance in discharging this duty or" similar assessments by other organizations. The Office of Information Resources (IR), which receives all requests for information submitted under the FOIA, determined that the Office of Human Capital Management (HCM) was the office most likely to contain documents responsive to Mr. Carson's request. HCM conducted a search of its records and data and determined that it had no documents responsive to the request. Letter from Sarah J. Bonilla, Director, HCM, to Joseph Carson (December 15, 2009) (Determination Letter). On December 31, 2009, the Office of Hearings and Appeals (OHA) received Mr. Carson's Appeal. In his Appeal, Mr. Carson did not challenge the search undertaken by HCM, but rather stated his belief that the following offices, if searched, might have documents responsive to his request: Office of the Inspector General, Office of Health, Safety and Security, Office of the General Counsel, Office of Economic Impact and Diversity, and the Office of Management. *See* Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't*

of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).*

In reviewing this Appeal, we contacted IR to ascertain the rationale for forwarding the request to HCM for a response. IR informed us that it had in fact identified two offices that it believed might have responsive documents: HCM because the request concerned personnel practices, and ED because that office addresses prohibited personnel practices, such as violations of equal opportunity laws. ED informed IR at that time that administration of the protections set forth in 5 U.S.C. § 2302(c) did not fall within its jurisdiction, and therefore it had no responsive records. Memorandum of Telephone Conversation between Alexander C. Morris, Chief Freedom of Information Officer, Vera Dunmore, IR, and William Schwartz, Attorney-Examiner, OHA (January 5, 2010).

IR then offered to coordinate a search of the offices Mr. Carson named in his appeal letter and, in addition, the Office of the Executive Secretariat. The results of the new search demonstrated that Mr. Carson's request had been interpreted in various manners. Consequently, this Office spoke with Mr. Carson to determine the intended scope of his request. Memorandum of Telephone Conversation between William Schwartz, Staff Attorney, Office of Hearings and Appeals, and Mr. Carson (January 29, 2010). Mr. Carson does not seek statistical data regarding the DOE's enforcement of laws and policies that prevent prohibited personnel practices as defined at 5 U.S.C. § 2302(b), nor does he seek documents that express the Secretary of Energy's intent or direction to prevent prohibited personnel practices. He does, however, seek the following:

> (1) any delegation orders that delegate to another departmental employee the Secretary's responsibility, under 5 U.S.C. § 2302(c), to prevent the prohibited personnel practices defined at 5 U.S.C. § 2302(b), and
>
> (2) any assessment or evaluation of relevant data in which the Secretary or any such delegee expresses an opinion as to whether employees of the DOE are adequately protected from those prohibited personnel practices.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the divergent interpretations of Mr. Carson's request, we find that the DOE's prior search was not calculated to identify all documents responsive to Mr. Carson's request. Consequently, we are remanding this matter to IR, which shall conduct a new search for documents responsive to the above formulation of Mr. Carson's request. It shall then issue a new determination in which it either releases all documents responsive to the newly formulated request or identifies any responsive information it is withholding and provides adequate justification for such withholding. Accordingly, Mr. Carson's Appeal will be granted.

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* FOIA Appeal decisions issued by the OHA after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

It Is Therefore Ordered That:

(1) The Appeal filed by Joseph Carson on December 31, 2009, OHA Case No. TFA-0346, is hereby granted.

(2) This matter is hereby remanded to the Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 29, 2010

March 26, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: International Union of Painters and Allied Trades, District Council #15

Date of Filing: January 25, 2010

Case Number: TFA-0347

On January 25, 2010, Dennis Creese filed an Appeal from a determination issued to the International Union of Painters and Allied Trades, AFL-CIO, District Council 15 of Colorado (IUPAT) on December 18, 2009, by the Golden Field Office (Golden) of the Department of Energy (OR) in response to a request for documents that Mr. Creese submitted on behalf of IUPAT under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Golden release any responsive material to Mr. Creese.

I. Background

The National Renewable Energy Laboratory (NREL), located in Golden Colorado, is owned by DOE. A private contractor, The Alliance for Sustainable Energy, LLC (The Alliance), manages NREL through a management and operating contract (M&O contract). The Alliance entered into a contract with Haselden Construction Company (Haselden), a subcontractor, for the construction of the Research Support Facilities building on the NREL campus. Pursuant to the terms of the contract between The Alliance and Haselden, The Alliance maintains the documents for the Haselden construction contract, including weekly payroll submissions. Those submissions are required by the terms of the contract between The Alliance and Haselden so that The Alliance can ensure that Haselden is complying with the requirements of the Davis-Bacon Act.[1]

In a FOIA request, IUPAT requested: "(1) a list of glazing, drywall, painting, and floor covering subcontractors used by Haselden Construction Company (Haselden) for the

[1] The Davis Bacon Act applies to contractors and subcontractors working on federally funded contracts over $2000 for the construction, alteration, and repair of public buildings or public works. Contractors and subcontractors must submit a weekly certified payroll detailing employees' job classifications, wage rate, fringe benefits and other information to ensure compliance with the Act. *See* Letter from Kathryn Aleda and Becky Bye, Legal Counsel, Golden, to Valerie Vance Adeyeye, OHA (February 16, 2010) (Response) at 2, fn 1.

construction of the Research Support Facilities (RSF) building on the National Renewable Energy Lab (NREL) campus; and (2) a copy of all certified payrolls for glazing, drywall, painting and floor covering work done by Haselden for the construction of the RSF." *See* Letter from Christie A. Phoebe, Deputy Manager, to Dennis Creese, IUPAT (December 18, 2009) (Determination Letter) at 1.

In response to the first part of the request, Golden stated that it was unable to provide a list of the subcontractors used by Haselden because such a list did not exist. *See* Determination Letter at 1. As for the second part of the request, Golden did locate the certified payrolls for glazing and painting work. [2] Golden released 24 pages in full, but redacted the following information from 31 additional pages: (1) hours per day; (2) total hours worked; (3) gross earnings; and (4) personal identifiers (names and identification numbers). *Id.* at 3. In the Determination Letter, Golden stated that it had redacted this material because it was exempt under FOIA Exemption 6. IUPAT then appealed the determination, arguing that Exemption 6 applied only to the personal identifiers and that the remainder of the responsive material should be disclosed. If this Appeal were granted, Golden would be required to release the hours per day, total hours worked, and gross earnings information that was redacted from the certified payrolls.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b) (6); 10 C.F.R. § 1004.10(b) (6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982). Further, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602.

Golden stated that in invoking Exemption 6, it considered: 1) whether a significant privacy interest would be invaded by disclosure of information, 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government, and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. Determination Letter at 3. *See also Power Wire Constructors*, OHA Case No. TFA-0297 (2009) (explaining the three-step analysis required to determine whether information may be withheld under Exemption 6).[3]

[2] Golden addressed the request for information regarding drywall and floor covering in a separate FOIA response. Determination Letter at 1.

[3] Decisions issued by the Office of Hearings and Appeals after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

In invoking Exemption 6, Golden determined that the release of an employee's personal identifiers is a serious invasion of privacy and would reveal personal information about that employee. Golden maintains that disclosure of such personal information may subject Haselden workers to unwanted contact, harassment, and other unwarranted invasions of their privacy. *See* Response at 5. *See also Sheet Metal Workers Int'l Ass'n, Local No. 9 vs. U.S. Air Force*, 63 F.3d 994, 998 (10th Cir. 1995) (stating that employees of private contractors performing federal construction projects have a substantial privacy interest in personal financial information with personal identifiers linking the individual to the financial information). According to Golden, the need to keep the redacted information private outweighs the small public interest gained from its release. *Id.* [4]

In its appeal, IUPAT conceded that *Sheet Metal* supported Golden's redaction of the personal identifiers from the responsive payroll material. However, IUPAT argued that Golden had also redacted information that was not personal in nature and would not invade the personal privacy of the workers involved. Appeal at 3. Specifically, IUPAT maintained that the information relating to hours per day, total hours worked, and gross earnings ("hours and earnings") was not exempt under Exemption 6 and its release would not have compromised the privacy concerns of the individual workers. Appeal at 2. As regards the public interest in the requested information, IUPAT claims that its members and contractors are taxpayers and as such have a public interest in this information because taxpayers are funding this construction project. *Id.* at 3.

We find that Golden properly redacted the subcontractor employee names and personal identifiers under FOIA Exemption 6. As stated above, release of that information would reveal personal information about the subcontractor employees and could subject them to unwarranted invasions of their personal privacy. We further find that release of this information is of minimal public interest and is clearly outweighed by the privacy interest of the workers. Disclosure would not shed light on the operations of the government. *See Power Wire Constructors*. Thus, we agree with Golden and IUPAT that the employee names and identification numbers were properly withheld under Exemption 6.

B. Applicability of Exemption 4 to Hours and Earnings Information

In its Determination Letter, Golden argued that the "hours and earnings" information redacted from the responsive material was exempt from disclosure under Exemption 6. However, in its Response to the Appeal, Golden sets forth Exemption 4 as its new justification for redaction of the "hours and earnings" material.[5] Golden maintained that

[4] In its response to IUPAT's appeal, Golden also maintained that the records requested were not agency records and thus not subject to disclosure under the FOIA. According to Golden, the contract between DOE and The Alliance specifies that payroll records are contractor-owned records. Response at 3; Ex. E at 2. In addition, Golden stated that, according to the M&O contract, certain types of procurement records (e.g. employment-related records) are not government-owned records and are not subject to disclosure under the FOIA. *Id.*

[5] FOIA Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 USC§ 522(b) (4); 10 C.F.R. § 1004.10(b) (4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir.

it had intended to identify Exemption 4 in the Determination Letter as its rationale for withholding the hours and earnings data but instead had omitted the Exemption 4 language due to an oversight. Response at 2, fn 2. According to Golden, the documents released to Mr. Creese should have been stamped as having hours and earnings information redacted pursuant to Exemption 4. *Id.* In order to provide IUPAT an opportunity under the FOIA regulations to properly respond to this new justification, we will remand this matter to Golden to either release the redacted material to IUPAT or to issue a new determination adequately supporting the continued withholding of this material. Accordingly, this Appeal should be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by International Union of Painters and Allied Trades on January 25, 2010, OHA Case Number TFA-0347, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Golden Field Office of the Department of Energy which shall either release the withheld material or issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 26, 2010

1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. *See FOIA Group, Inc*., OHA Case No. TFA-0239 (2007). Documents submitted under the contract between Haselden and The Alliance Group are considered to be involuntarily submitted because their submission was a requirement of the contract. Response at 6.

February 26, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners:	Pike County Auditor Pike County Commissioners Scioto Valley Local School District
Date of Filing:	January 29, 2010
Case Number:	TFA-0348

This Decision concerns an Appeal filed by the Pike County (Ohio) Auditor, the Pike County Commissioners, and the Scioto Valley Local School District (hereinafter "the Appellants") from a determination issued by the Department of Energy's (DOE) Environmental Management Consolidated Business Center (EM) in Cincinnati, Ohio. In that determination, EM denied the Appellants' request for a waiver of fees in connection with a request the Appellants had submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would overturn EM's determination and waive in full the fees associated with the Appellants' FOIA request.

I. Background

The Appellants are local government entities with jurisdiction in the area where the DOE's Portsmouth Gaseous Diffusion Plant (Plant) is located. The Appellants filed a September 22, 2009, FOIA Request (Request) with DOE Headquarters asking for documents which "reflect the ownership" of uranium at the Plant. The Appellants' FOIA Request was referred to EM for a response. Letter to the Director of the Office of Hearings and Appeals from Kevin L. Shoemaker, Esq., January 29, 2010 (Appeal) at Exhibit 2. The Request also asked for a waiver of any processing fees pursuant to the fee waiver provisions of the FOIA. *See* Appeal Exhibit 1.

In an October 1, 2009, letter to the Appellants, EM asked for clarification as to which documents the Appellants were seeking. Additionally, with regard to the fee waiver request, EM asked the Appellants to address six specific questions EM considers in making a decision to grant a fee waiver.[1] Appeal Exhibit 3.

On October 20, 2009, the Appellants provided a response to the questions posed by EM. In its response, the Appellants stated that the requested information would contribute significantly to

[1] The six questions track DOE regulations pertaining to factors to be considered in making a decision to grant a fee waiver, 10 C.F.R. § 1004.9, discussed *infra*. *See* Appeal Exhibit 3 at 2.

the public's understanding of government operations since the information would assist the Appellants in determining whether taxes should have been paid to the Appellants from entities using a federal facility (the Plant). Appeal Exhibit 4 at 2. Additionally, because the sought information would be used to determine if taxes should have been paid to Pike County, any disclosure of documents pursuant to the Request would not be in the commercial interest of the Appellants. Appeal Exhibit 4 at 2.

In its December 30, 2009, response, EM denied the Appellants' fee waiver request. EM stated that the requested documents primarily concerned the commercial interests of the Appellants. Further, EM explained that the requested documents would not significantly contribute to the public's understanding of government activities or operations. Moreover, EM asserted that the Appellants had not demonstrated an ability to disseminate the information to the general public. Appeal Exhibit 1 at 1.

The Appellants filed the present Appeal on January 29, 2010. In their Appeal, the Appellants assert that they are attempting to determine if taxes should have been paid to Pike County and that the information was sought to support the operations of local government. They also assert that any documents obtained as a result of its Request would become a part of a public record. Thus, the requested information would be disseminated to any member of the public who requests the information. Appeal at 2. Additionally, the Appellants note that they would likely take legal action against certain firms based upon the information contained in the requested documents and that these legal proceedings would produce further dissemination of the information contained in the legal documents. Appeal at 2.

In its February 4, 2010, response to the Appeal, EM states that, in making its determination, it found that the requested information pertained to government operations and that the information would contribute to an understanding of government operations. February 4, 2010, Letter from Jay A. Jalovec, Esq., Office of Legal Services, EM to Richard Cronin, Attorney-Examiner, OHA (Response). However, EM determined that disclosure of the documents would not contribute to the public's understanding of the government's operations because the Appellants' commercial interest in the information was significantly greater than the public interest in the information. Further, EM states that the Appellants had not demonstrated an ability to disseminate the information to the public at large. Response at 1-2. EM notes that the Appellants' only asserted method for dissemination is a passive method of disclosure. Only those citizens who specifically request the documents would obtain the information. Response at 2.

II. Analysis

The FOIA generally requires that requesters pay fees associated with processing their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the FOIA provides for a reduction or waiver of fees if a requester can satisfy a two-part test. The requester must show that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and, (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. §1004.9(a)(8).

In analyzing the public-interest prong of the above two-prong test, the regulations set forth the following four factors the agency must consider in determining whether the disclosure of the information is likely to contribute significantly to public understanding of government operations or activities:

> (A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government" (Factor A);
>
> (B) The informative value of the information to be disclosed: Whether disclosure is "likely to contribute" to an understanding of government operations or activities (Factor B);
>
> (C) The contribution to an understanding by the general public of the subject likely to result from disclosure (Factor C); and
>
> (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).[2]

Factor A and Factor B

Factor A requires that the requested documents concern the "operations or activities of the government." *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481-1483 (1989); *U.A. Plumbers and Pipefitters Local 36*, 24 DOE ¶ 80,148 at 80,621 (1994). Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994).

In the present case, EM and the Appellants agree that the requested material concerns the operations and activities of the government and that the information would likely contribute to the public's understanding of a specific identifiable government operation. However, it is not apparent to us if DOE has any role in the payment of local taxes by firms owning uranium and who utilize the Plant. We contacted a supervisory accountant at EM who informed us that he had no knowledge of any DOE involvement or responsibility for local taxes on such contractors. Memorandum of telephone conversation between Darrell McFarland, Supervisory Account, EMCBC and Richard Cronin, Attorney-Examiner, Office of Hearings and Appeals (February 11,

[2] With regard to the commercial interest prong for the determination of the appropriateness of granting a fee waiver, the Part 1004 regulations specify two factors to be considered in determining whether the disclosure of information is not primarily in the commercial interest of the requestor. 10 C.F.R. § 1004.9(a)(8)(ii) (whether the requestor has a commercial interest that would be furthered by the requested documents and, if so, whether the identified commercial interest is sufficiently large in comparison with the public interest in disclosure, such that any disclosure would be primarily in the commercial interest of the requestor). As discussed *infra*, because we find that the Appellants have not satisfied the public-interest prong, we need not discuss whether the disclosure of information at issue in this case satisfies the commercial interest prong of the fee waiver test.

2010). Nonetheless, because this is not a disputed issue in this case, we will not disturb EM's determination with regard to these issues. Consequently, we find that the Appellants have satisfied Factors A and B.

Factor C

Factor C requires that the requested documents contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester individually or of a narrow segment of interested persons. *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the intention and ability to disseminate the requested information to the public. *Roderick L. Ott*, Case No. VFA-0288 (May 16, 1997) (*Ott*)[3]; *see also Tod N. Rockefeller*, Case No. VFA-0468 (January 21, 1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

In its submission, the Appellants assert that all documents obtained will be made part of a public record from which an interested party could obtain access. This type of passive distribution does not enable a sufficiently large segment of the public at large to receive and use such information. Consequently, the Appellants' proposed method of distribution would not enable the information in the requested documents to meaningfully contribute to the general public's understanding of the subject matter of the documents. *See e.g.*, *Van Fripp v. Parks*, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000) (placement of requested documents in a library does not establish entitlement to a fee waiver).[4] Based on the information provided to us, we find that the Appellants have not satisfied the requirements of Factor C.

Factor D

Under Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, slip op. at 5 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)).

In the present case, it is not readily apparent how the public's understanding of the activities or operations of the government will be significantly enhanced by the disclosure of the requested documents, which concern the identity of firms that have owned uranium at the Plant. The Appellants' explanation for seeking these documents relates to its desire to possibly recoup taxes owed by such firms to local government entities. Based on this information, we find that disclosure of the requested documents is unlikely to significantly contribute to the public's

[3] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[4] We also find that the Appellants' other suggested means of distribution, distribution via unspecified civil litigation, suffers the same defect as its planned distribution via a public record and, further, is too speculative a method to support a waiver of fees.

understanding of federal government operations and activities. As a result, the Appellants' request for a fee waiver does not satisfy Factor D.

After considering each of the above factors, we have determined that, given the limited amount of information on the government's activities and operations contained in the requested documents, the failure of the Appellants to demonstrate that they would actively disseminate the information in the documents, and the unlikelihood of the documents contributing significantly to the public's understanding of government activities and operations, the public-interest prong of fee waiver test has not been satisfied. Because the public-interest prong of the FOIA fee waiver test is not met, we need not address the commercial-interest prong.

III. Conclusion

As the foregoing indicates, the Appellants have failed to adequately demonstrate that disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 29, 2010, by the Pike County Auditor, the Pike County Commissioners, and the Scioto Valley Local School District, OHA Case No. TFA-0348, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 26, 2010

March 8, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Aurimas Svitojus
Date of Filing:	February 16, 2010
Case Number:	TFA-0349

On February 16, 2010, Aurimas Svitojus filed an Appeal from a determination the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC) issued on January 26, 2010. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from NNSA/SC a complete log of all reports still classified top secret that are in the repository of the Sandia National Laboratories (SNL) Technical Library's collection of classified material. Email from Aurimas Svitojus to Benito C. Jaramillo, NNSA/SC (November 16, 2009).[1] SNL is a government-owned facility managed by Sandia Corporation for DOE. Mr. Svitojus further stated in his request that, if SNL accounts for its top secret reports in an electronic database, he "would prefer a printout." *Id*. On January 26, 2010, NNSA/SC issued a determination to Mr. Svitojus stating that it located no documents responsive to the request. Letter from Carolyn A. Becknell, Freedom of Information Act Officer, Office of Public Affairs, NNSA/SC, to Aurimas Svitojus (January 26, 2010). In his appeal, Mr. Svitojus does not directly challenge the adequacy of NNSA/SC's search for responsive documents, but we treat the appeal as such because there are no other possible grounds under the DOE FOIA regulations for appealing the determination in this case.[2]

II. Analysis

[1] Mr. Svitojus's November 18, 2009, request revised a request that he had submitted previously and that was still being processed. *See* Email from Aurimas Svitojus to NNSA/SC (September 18, 2009).

[2] *See* 10 C.F.R. § 1004.7(b)(4) ("Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.").

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Natural Resources Defense Council*, Case No. TFA-0127 (2005).[3] The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore contacted the manager of operations for SNL's Technical Library for information regarding the search that was performed in this case. He informed us that he interpreted Mr. Svitojus's request as being for a "bibliography" of all top secret documents within the Technical Library's database. Email from Donald W. Guy, Manager, Technical Library Operations, SNL, to Steve Goering, Office of Hearings and Appeals (OHA) (February 24, 2010). He stated that the Technical Library had not taken steps to perform a search because the records in the library's catalog are for top secret

> Sigma 14 documents which are not viewable even at the title-level, without being on the Sigma 14 authorization list and having approval from the Sandia Sigma Program Office. So, while a "keyword" search could be conducted against the database, to view and thus create a "log" of titles would need approval that is beyond the Library's scope of responsibility.

Id.

Because it appears that SNL performed no search in order to identify records responsive to Mr. Svitojus's request, we will remand this matter to NNSA/SC. On remand, NNSA/SC, or SNL on behalf of NNSA/SC, must perform a search for responsive records. NNSA/SC must then issue a determination either releasing those records to the Appellant, or explaining the basis for withholding, in whole or part, information under one or more FOIA exemptions.[4]

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[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[4] In the course of our consideration of the present Appeal, SNL raised various issues pertaining to whether responsive records could, in fact, be provided to Mr. Svitojus. Among these issues is whether responsive records would be "readily reproducible" in the form that Mr. Svitojus has requested, and the possibility that the records would contain classified information. Email from Donald W. Guy, Manager, Technical Library Operations, SNL, to Steve Goering, OHA (February 24, 2010) (second email sent same day as email previously cited above); Email from Russell D. Elliot, Senior Attorney, Sandia Corporation, to Steve Goering, OHA (February 25, 2010). We acknowledge that, while Mr. Svitojus stated a preference that information from electronic records be provided to him in paper form, responsive records may not be readily reproducible in that format. If such is the case, and if the information is otherwise not exempt

It Is Therefore Ordered That:

(1) The Appeal filed by Aurimas Svitojus on February 16, 2010, Case No. TFA-0349, is hereby granted as specified in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 8, 2010

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from disclosure, we encourage NNSA/SC and Mr. Svitojus to communicate and work together to explore alternative formats in which NNSA/SC can more readily provide the responsive records. This type of cooperation assists the agency in fulfilling the intent of the FOIA to make agency records accessible to the public, and it increases administrative efficiency in handling these requests. *INEEL Research Bureau*, Case No. VFA-0373 (1998). As for any classified information contained in records responsive to the request, the FOIA clearly provides an exemption for information "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; . . ." 5 U.S.C. § 552(b)(1) (FOIA Exemption 1).

March 8, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ray W. Howe
Date of Filing:	February 16, 2010
Case Number:	TFA-0350

On February 16, 2010, Ray W. Howe filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Oak Ridge Office (Oak Ridge). In that determination, Oak Ridge responded to a request for information that Mr. Howe filed under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In his Appeal, Mr. Howe challenges the search that Oak Ridge conducted for documents responsive to his request. This Appeal, if granted, would require Oak Ridge to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying its withholding.

I. Background

On November 19, 2009, Oak Ridge received a request for information in which Mr. Howe sought copies of his medical, radiation exposure, personnel/employment, industrial hygiene, hearing tests/audiograms, beryllium and work history records. *See* Privacy Act Request from Ray W. Howe received by Oak Ridge on November 19, 2009 (PA Request). In a letter dated December 2, 2009, Oak Ridge informed Mr. Howe that it had transferred a portion of his request to the National Nuclear Security Administration (NNSA) which currently has jurisdiction over records from the Y-12 National Security Complex. Oak Ridge began a search for the remaining records and located and released copies of Mr. Howe's radiation exposure records, beryllium records, and work history reports from the East Tennessee Technology Park (ETTP) (formerly K-25) and Oak Ridge Associated Universities (ORAU). *See* Letter from Amy L. Rothrock, Authorizing Official, Oak Ridge, to Ray Howe (January 22, 2010) (Determination Letter). However, they were unable to locate Mr. Howe's medical records. *Id*. Oak Ridge further stated that NNSA would respond separately to Mr. Howe regarding the results of their search. *See id*. On February 16, 2010, the Office of Hearings and Appeals (OHA) received Mr. Howe's Appeal in which he challenges the adequacy of Oak Ridge's search for his medical records. *See* Letter from Ray W. Howe to OHA (February 16, 2010) (Appeal Letter).

II. Analysis

The Privacy Act generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a system of records as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by

some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

The U.S. Department of Justice has issued guidance stating that an individual's access request for his own records maintained in a system of records should be processed under both the Privacy Act and the Freedom of Information Act (FOIA), regardless of the statute(s) cited. U.S. Department of Justice, *Privacy Act Overview*, May 2004. DOE requires that a search for relevant records under the Privacy Act be conducted with the same rigor that we require for searches conducted under the FOIA. *See, e.g., James R. Cromeenes*, Case No. TFA-0345 (2010); *Ronald D. Hall*, Case No. TFA-0324 (2009); *James C. Flynn*, Case No. TFA-0322 (2009); *Carla Mink*, Case No. VFA-0763 (2002); *see also*, *Steven A. Jarvis*, Case No. VFA-0764 (2002).[*] Accordingly, in analyzing the adequacy of the search conducted by Oak Ridge, we are guided by principles that we have applied in similar cases under the FOIA.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). However, we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. *Cromeenes*, Case No. TFA-0345 (2010) (quoting *Robert Hale*, Case No. VFA-0026 (1995)). Instead, in evaluating the adequacy of the search, our inquiry generally focuses on the scope of the search that was performed. *See, e.g.*, *Information Focus on Energy*, Case No. VFA- 0353 (1997), *see also, Richard J. Levernier*, Case No. VFA-0025 (1995).

In reviewing this Appeal, we contacted Oak Ridge to ascertain the scope of its search for responsive documents. *See* E-mail from Avery Webster, Attorney-Examiner, OHA, to Amy L. Rothrock, Authorizing Official, Oak Ridge (February 23, 2010). Oak Ridge informed us that it sent a request for documents to ETTP and ORAU for a search to be conducted for records responsive to Mr. Howe's request, including medical (which would include some hearing records and audiograms), radiation exposure, industrial hygiene, work history and beryllium records. *See* E-mail from Linda G. Chapman, Legal Assistant, Oak Ridge to Avery R. Webster, Attorney-Examiner, OHA (February 23, 2010) (February E-mail). Both ETTP and ORAU conducted database searches using Mr. Howe's name and social security number. *Id*. As a result of its search, ETTP located and released Mr. Howe's radiation exposure records[†] and ORAU released his work history report, beryllium

[*] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[†] Radiation exposure records are routinely kept at each plant in which an employee works. *See* E-mail from Linda G. Chapman, Legal Assistant, Oak Ridge to Avery R. Webster, Attorney-Examiner, OHA (March 2, 2010) (March E-mail).

records, and radiation exposure records.[‡] *Id*. However, Mr. Howe argues that some of medical records were not found. Appeal at 1.

According to Oak Ridge records, Mr. Howe's files indicated that he worked at the K-25 worksite from June 12, 1977, until May 13, 1979. *See* February E-mail. Mr. Howe's records further indicate that he transferred to the Y-12 worksite on May 14, 1979, and remained employed there until March 4, 1991. *Id*. Oak Ridge has advised us that when employees transfer from one plant to another, their medical and personnel records transfer with them and remain at the last place of employment.[§] *See* March E-mail. Therefore, since Mr. Howe was last employed at the Y-12 worksite, any remaining records, if they exist, would be located there. *Id*.

As noted above, the Y-12 National Security Complex is under the jurisdiction of NNSA. There may be additional responsive material under the jurisdiction of NNSA, which is currently processing the request for documents responsive to Mr. Howe's request. *See* E-Mail from Carolyn Becknell, NNSA, to Avery R. Webster, Attorney-Examiner, OHA, dated February 19, 2010. Once its search for responsive documents has been completed, NNSA will issue a new determination letter to Mr. Howe. If Mr. Howe is unsatisfied with the determination that he receives from NNSA, he may appeal that determination to OHA pursuant to the guidelines set forth in 10 C.F.R. § 1008.11.

After reviewing the record in this case, we find that Oak Ridge performed a search reasonably calculated to reveal documents responsive to Mr. Howe's request. Accordingly, Mr. Howe's Appeal should be denied.

[‡] Pursuant to a contract with DOE, ORAU maintains a database of work history data for current and former contractor employees, provides management and operational support for DOE's Radiation Exposure Monitoring System (which is used to collect and analyze radiation exposure information for all DOE employees, contractors and visitors) and operates DOE's beryllium workers medical screening program. *See* March E-mail. For these reasons, ORAU was able to locate and release copies of Mr. Howe's work history report, beryllium records, and radiation exposure records.

[§] There are numerous types of medical information that is maintained in an employee's medical file, such as hearing records and audiograms, physicals, eye exams, visits to the dispensary, x-ray reports, lab and blood work results, EKG's and incident and accident reports. *See* March E-mail.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. Ray W. Howe on February 16, 2010, OHA Case No. TFA-0350, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia. 5 U.S.C. § 552a(g)(5).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 8, 2010

April 30, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American Small Business League

Date of Filing: March 2, 2010

Case Number: TFA-0352

On March 2, 2010, the American Small Business League (ASBL) filed an Appeal from a determination issued to it on February 1, 2010, by the Department of Energy (DOE) Naval Reactors Laboratory Field Office in response to a request for documents that ASBL submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the DOE Naval Reactors Laboratory Field Office release any responsive material to ASBL.

I. Background

On January 12, 2010, ASBL submitted a request for information pursuant to the FOIA to the Naval Reactors Laboratory Field Office (Naval Reactors). ASBL requested a copy of the "Individual Subcontracting Report (ISR/SF 294) and the Summary Subcontracting Report (SSR/SF 295) for the contract with PIID DEAC1198PN38206 to Bechtel Bettis Incorporated, DUNS 054319681." *See* Letter from Naval Reactors to ASBL (February 1, 2010) (Determination Letter). Naval Reactors sent ASBL a copy of the most recent individual and summary subcontracting reports for DOE Contract DE-AC11-98-PN-38206 with Bechtel Bettis, Inc. However, Naval Reactors withheld the identifying information of contractor employees under FOIA Exemption 6. ASBL then appealed the Determination and requested that the Office of Hearings and Appeals (OHA) order Naval Reactors to release the redacted information. According to ASBL, "[i]nformation related to government contracts, including information provided in the ISR's and SSR's is part of the public realm, and clearly does not fall within the scope of personal privacy." *See* Letter from ASBL to Director, OHA (February 18, 2010). If this Appeal were granted, Naval Reactors would be required to release the redacted contractor employee information to ASBL.

II. Analysis

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982). Further, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Id.* at 602.

This office has used the following three-step test to determine whether information may be withheld under Exemption 6: 1) whether a significant privacy interest would be invaded by disclosure of the information; 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government; and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. *See Power Wire Constructors*, OHA Case No. TFA-0297 (2009); *MGT Technical Consulting*, OHA Case No. TFA-0199 (2007).[1]

Naval Reactors stated that, in invoking Exemption 6, it considered that the privacy interests of individuals, including the contractor employees in this case, must be balanced against the public interest in release of that information. It further concluded that release of this information would shed no light on the operations or activities of DOE. Thus, Naval Reactors determined that under this balancing test, it was proper to redact the identifying information about contractor employees under Exemption 6. *See* Determination at 2.

A. Privacy Interest

In invoking Exemption 6, Naval Reactors determined that the release of a contractor employee's personal identifiers is a serious invasion of that individual's privacy. We agree that there was a substantial privacy interest in the identity of private citizens due to the potential for harassment or any other unwanted contact. *See Sheet Metal Workers v. Dep't. of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (stating that the disclosure of names or other identifying information of contractor employees would constitute an unwarranted invasion of personal privacy); *Sheet Metal Workers Int'l Ass'n, Local No. 9 vs. U.S. Air Force*, 63 F.3d 994, 998 (10th Cir. 1995) (stating that employees of private contractors performing federal construction projects have a substantial privacy interest in personal information); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employee names and addresses would constitute a substantial invasion of privacy). Naval Reactors explained that private

[1] Decisions issued by the Office of Hearings and Appeals after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

citizens have a privacy interest that is protectable even in the context of a business record, such as a contract.

B. Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989). The requester has the burden of establishing that disclosure would serve the public interest. *See MGT Technical Consulting,* OHA Case No. TFA-0199 (2007). We find that there is a minimal public interest in release of the redacted information. Further, ASBL has not demonstrated how the release of the names and contact information of contractor employees will either shed light on how DOE performs its duties or contribute to the public's understanding of government activities. Therefore, we agree with Naval Reactors and find that there is a minimal public interest in the disclosure of the redacted information.

C. Balancing Test

We have weighed the substantial privacy interest of the contractor employees that would be infringed by disclosure of personal information against the minimal public interest in the release of the personal information. Under the balancing test used by the courts, we conclude that the public interest in the disclosure of the contractor employee information is outweighed by the real and identifiable privacy interests of the contractor employees.

We find that Naval Reactors properly redacted the contractor employee personal identifiers under FOIA Exemption 6. As stated above, release of that information would reveal personal information about the contractor employees and could subject them to unwarranted invasions of their personal privacy. We further find that release of this information is of minimal public interest and is clearly outweighed by the privacy interest of the workers. Disclosure would not shed light on the operations of the government. Thus, we agree with Naval Reactors that the contractor employee identification information was properly withheld under Exemption 6. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by American Small Business League on March 2, 1010, OHA Case Number TFA-0352, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or

in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 30, 2010

March 9, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ken Hasten

Date of Filing: February 23, 2010

Case Number: TFA-0353

On February 23, 2010, Ken Hasten (Appellant) filed an Appeal from a determination that the Office of the Inspector General (OIG) of the Department of Energy (DOE) issued to him pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, OIG released a redacted version of a document to the Appellant. This Appeal, if granted, would require the DOE to release the document in its entirety.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his request (Request), the Appellant requested a copy of the OIG report prepared in response to OIG hotline complaint number P09HL079.[1] In its January 20, 2010, response (Response), the OIG stated that it had located one responsive document to the Request, a two-page Executive Brief Report (Report). The Report summarized the findings of an OIG investigation made pursuant to the hotline complaint. The OIG provided the Appellant with a copy of the Report but withheld portions of the Report pursuant to Exemptions 6 and 7(C) of the FOIA.[2] The Response stated that the information withheld in the Report consisted of names and information that would tend to disclose the identity of individuals named in the OIG Report. The Response went on to

[1] The hotline complaint was submitted by the Appellant regarding an allegation of misuse of authority involving work performed for a DOE official by subcontractor employees at the DOE's Waste Isolation Pilot Plant outside of Carlsbad, New Mexico.

[2] The provisions of Exemptions 6 and 7(C) allowing an agency to withhold information are discussed in more detail *infra*.

state that such individuals are entitled to privacy protection to prevent them from being subject to harassment, intimidation and other personal intrusions.

The Appellant appeals the OIG's withholding of information in the Report. Specifically, he argues that sections of the Report that were withheld must contain information other than the names of individuals and that this type of information may not be withheld pursuant to Exemptions 6 and 7(C).

II. Analysis

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

As an initial matter, we find the Appellant's argument unavailing. All information that could identify individuals, not just specific names, may be withheld under Exemption 6 and 7(C). *See, e.g., Yelder v. Department of Defense*, 577 F. Supp. 2d 342, 346 (D.D.C. 2008) (noting that information such as names, addresses, and other personally identifying information creates a palpable threat to privacy and, as such, may be protected by Exemption 6); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) (those portions of records in investigatory files which would identify subjects, witnesses, and informants in law enforcement investigations are categorically exempt under Exemption 7(C)). Nonetheless, we examined an unredacted version of the Report to evaluate the propriety of the claimed withholdings under Exemption 6 and 7(C). The portions of the Report that were withheld consisted of the name and job title of the accused official and the names and titles of those employees who were interviewed about the allegations. Also withheld were specific descriptions of the some of the performed work referenced in the Report.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the

Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

Exemption 7(C) applies to a much narrower class of cases than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Both Exemptions 6 and 7(C) require a balancing of the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of privacy." Pursuant to the provisions of Exemption 7(C), we have examined investigations conducted by the OIG in response to complaints by individuals, as in this case, and found that they are law enforcement activities. *See, e.g., Cynthia Frey Nordstrom,* Case No. VFA-0754 (July 9, 2002).[3] Since the Report at issue in this case meets the Exemption 7(C)'s threshold test, we need only examine the OIG's actions pursuant to the standard of Exemption 7(C), i.e., whether release of the withheld material would result in a reasonable expectation of an unwarranted invasion of personal privacy. *See, e.g., J. G. Truher,* Case No. VFA-0245 (January 15, 1997).

To evaluate the propriety of OIG's withholding of information in the Report, we first must determine if the release of the information withheld under Exemption 7 (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is widely recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987)). Thus, there is a very strong privacy interest with regard to the identity of individuals named in the Report. With regard to the withheld description of the performed work, its very nature would identify the individual accused of wrongdoing. Thus, we find there is a strong privacy interest in the withheld description of the performed work.

Against the strong privacy interest in the withheld material we must weigh the public interest. As discussed earlier, the public interest that must be considered is whether information would shed light on an agency's performance of its statutory duties. *Reporters Committee*, 489 U.S. at 773. There is little or no public interest in the identity of individual names in a law enforcement file since this information would reveal nothing about the activity of the OIG in performing its law enforcements duties. Likewise, the details of the performed work would reveal little, if anything, concerning the OIG's performance of its duties. Given the strong privacy interests connected with the withheld information and the little, if any, public interest that would be furthered by release of the withheld information, we find that release of the withheld information would

[3] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

reasonably be expected to constitute an unwarranted invasion of personal privacy. Therefore, we also find that Exemption 7(C) was properly applied to the withheld information.[4]

III. Conclusion

We find that OIG properly redacted the withheld information in the Report. Consequently, the Appellant's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ken Hasten on February 23, 2010, OHA Case No. TFA-0353, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 9, 2010

[4] The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, Case No. VFA-0400 (April 17, 1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). In the present case, the vast majority of the Report was provided to the Appellant and we could find no portion of the withheld material that could be segregated for release to the Appellant.

April 2, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Competitive Enterprise Institute
Date of Filing:	February 25, 2010
Case Number:	TFA-0354

On February 25, 2010, the Competitive Enterprise Institute (Appellant) filed an Appeal from a determination that the Golden Field Office (GFO) of the Department of Energy (DOE) issued to it pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, GFO released large number of documents to the Appellant. In some of the documents, information was redacted. Other documents were withheld in their entirety. This Appeal, if granted, would require the GFO to release the documents in their entirety and to conduct an additional search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request (Request), the Appellant sought, in essence, copies of all documents, analyses, and communications relating to a report issued by the DOE's National Renewable Energy Laboratory's (NREL) entitled "NREL Response to the Report *Study of the Effects on Employment of Public Aid to Renewable Energy Sources* by King Juan Carlos University (Spain)" (Report). [1]

In its January 25, 2010, response (Response), the GFO stated that it had located 247 electronic mail documents (E-mails) plus 12 other documents. GFO provided the Appellant with copies of

[1] The Report, an NREL White Paper, was authored by Eric Lantz and Suzanne Tegen and was electronically published on August 28, 2009. The Report challenges conclusions made by a King Juan Carlos University study which found, on average, that every renewable energy job in Spain "destroyed" 2.2 jobs in the broader Spanish economy. Report at 1.

the identified E-mails. However, portions of a number of the E-mails were withheld pursuant to Exemption 5 of the FOIA.[2] Of the 12 identified documents, GFO released two. Nine of the documents, all draft versions of the Report, were withheld in their entirety pursuant to Exemption 5. One document was provided to the Appellant with non-responsive material withheld.[3] GFO asserted in its Response that release of the predecisional, deliberative material withheld pursuant to Exemption 5 would have a chilling effect on DOE's ability to address similar matters in the future.

In its Appeal, the Appellant challenges the adequacy of the search that was conducted for responsive documents. Specifically, it cites of number of E-mails which in their text suggest the existence of other responsive documents which were not provided to it. Further, it challenges the application of Exemption 5 to the redacted E-mails and draft documents. The Appellant claims that GFO has failed to identify the deliberative process to which the withheld documents relate. It also asserts in its Appeal that the Report and all of the communications related to the Report are post-deliberative documents. The Appeal asserts that the Report itself is an explanation and defense of an already established policy by the DOE to promote "green" jobs and that these jobs will increase the economy. FOIA Appeal at 13. As such, the Appellant argues, these documents can not be considered predecisional, deliberative documents. Additionally, the Appellant alleges that GFO failed to explain in its Response how decision making would be harmed by release of the withheld information.[4]

II. Analysis

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We

[2] The Response also stated that portions of the E-mails were withheld because they were non-responsive to the Appellant's Request or were protected pursuant to Exemption 6 of the FOIA. The Appellant has not challenged the propriety of the material withheld under Exemption 6 or because it was non-responsive.

[3] The Response noted that of the 556 pages of documents found responsive to the Request, 84 pages were withheld in their entirety and 119 pages were partially redacted. The remainder of the 556 pages was provided to the Appellant in their entirety.

[4] GFO filed a response to the Appellant's Appeal (Appeal Response) on March 16, 2010. We will discuss the Appeal response *infra* at 3.

have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Aurimas Svitojus*, Case No. TFA-0349 (March 8, 2010).[5]

In its Appeal Response, GFO has informed us that it has uncovered several additional responsive E-mails and draft versions of the Report which were not initially provided to the Appellant or were withheld in their entirety. Specifically, two draft versions of the Report which have been previously provided to the public will be provided in their entirety to the Appellant.[6] Additionally, GFO will also provide, in their entirety, E-mails containing comments on the draft Report from two external reviewers – James Heinz of the Political Economy Research Institute and the American Wind Energy Association (AWEA). GFO will also release the attachments (not previously identified) from a May 19, 2009, E-mail (sent 8:41 PM) from Salerno to Tegen, Subject "RE: Spanish job report." [7]

Additionally, GFO located another set of documents attached to a May 19, 2009, E-mail (sent at 3:17 PM). These attachments, consisting of a GAO Report and other documents, will also be provided to the Appellant. GFO also located two additional undisclosed May 19, 2009, E-mails (sent at 3:39 PM and 11:08 PM) which will also be provided to the Appellant in their entirety.[8] The documents and E-mails that GFO will be providing the Appellant are listed in Appendix A.[9]

Given the additional documents that GFO has discovered, as well as GFO's decision to release two withheld drafts of the Report, we will remand this matter to GFO so that it may issue a new determination regarding these documents. Upon receipt and review of these additional documents, Appellant may then, if it wishes, seek OHA review of the adequacy of GFO's search for responsive documents.

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[5] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[6] One of these draft versions, "Comments on Spanish Report_DKGMSTEL_AMG.docx" was identified in GFO's Response and was withheld in its entirety. The other draft version of the Report that GFO will release is entitled "Comments on Spanish Report_DKGMSTEL_J1.docx."

[7] These attachments are: (1) Spanish Jobs Study Coverage.doc; (2) 090410 – Spanish Jobs Study – GWEA.doc; (3) 090410 Spanish Jobs Study.doc; (4) Letter to NYT.doc; (5) Spanish jobs study draft letter to ed.doc.

[8] GFO reviewed its search for responsive documents examining the E-mails Appellant cited in its Appeal as those which suggested the existence of additional responsive documents. As indicated above, GFO did find additional documents suggested by the cited E-mails. In a number of cases, however, no additional documents were found. On remand, GFO may wish to consider providing the Appellant with a summary of its findings regarding the E-mails cited by the Appellant in its Appeal.

[9] GFO has also identified additional documents consisting of additional draft versions of the Report which will be discussed *infra*.

B. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied).

The Exemption 5 privilege cited by GFO, an element of the DOE, in its determination regarding the Memorandum was the deliberative process privilege. Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.*

1. E-mails

We have listed in Appendix B all of the E-mails that GFO identified in its Response which had information redacted pursuant to Exemption 5. Our review of the unredacted versions of all of the E-mails in Appendix B reveals that the withheld material consisted of comments, suggestions for analysis, and editorial reviews of various draft versions of the Report. As such, this material is both predecisional and deliberative. The withheld text is predecisional since these E-mail comments were created before the publication of the final version of the Report. Further, this information is deliberative since it consists of suggestions and proposed analysis for the final version of the Report. Given this, we find that this material is protected under the deliberative process privilege of Exemption 5.

We reach this conclusion in spite of the Appellant's arguments to the contrary. While GFO's response did not specifically identify the deliberative process the withheld information related to, it is apparent from the released text of the E-mails that the deliberative process at issue relates to what should be the final content and analysis to appear in the final version of the Report. Further, we decline to accept the Appellant's characterization of the Report and all related communications as "post-decisional" documents. The fact that a document may address a settled policy issue does not mean that there are no predecisional, deliberative issues to be considered, such as to the document's tone and analytic content.

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. GFO concluded, and we agree, that disclosure of the requested information would have a chilling effect on the DOE's ability to consider similar issues in the future. Public revelation of preliminary employee deliberations regarding controversial issues could reduce the willingness of federal employees to make candid assessments and recommendations. Therefore, release of the withheld Exemption 5 information in the text of the E-mail messages listed in Appendix B would not be in the public interest.

2. Draft Versions of the Report

GFO's Response identified 9 responsive draft versions of the Report which were withheld in their entirety pursuant to Exemption 5.[10] However, Appellant was not informed about a number of other draft versions of the Report which were attached to the E-mails identified in GFO's Response. GFO has provided us a list containing all of the unreleased draft versions of the Report and their associated E-mails.[11] We have listed these drafts (and their associated E-mails) in Appendix C. GFO argues that the draft documents listed in Appendix C should be protected in their entirety by Exemption 5. Our usual practice in such cases would be to remand the case to GFO to issue a new determination letter regarding these newly disclosed draft documents. However, because the Appellant has submitted an extensive Appeal addressing the inapplicability of Exemption 5 to similar documents, we will, for purposes of administrative efficiency, review the applicability of Exemption 5 for all of the draft documents listed in Appendix C.

For our review of this case, we have obtained unredacted versions of all of the draft documents listed in Appendix C. While draft documents are typically the kind of documents protected under the deliberative process privilege, the designation of "draft" does not end the inquiry as to whether Exemption 5 is applicable to such documents. *Arthur Anderson & Co. v. Internal Revenue Service*, 679 F. 2d 254, 257 (D.C. Cir. 1982) (*Arthur Anderson*).

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[10] As mentioned above, one of these identified drafts, a draft version of the Report with comments from a particular reviewer, Comments on Spanish Report_DKGMSTEL_AMG.docx, will be provided in its entirety to the Appellant. *See* Appendix A. Additionally, another draft version of the Report that was not initially identified in GFO's Response, entitled "Comments on Spanish Report_DKGMSTEL_J1.docx," will also be released to the Appellant.

[11] The E-mails themselves were listed in GFO's Response and have been provided to the Appellant in their entirety or in redacted form.

Each of these drafts was created before the issuance of the final version of the Report. Further, a final version of the Report was published. Consequently, these drafts are predecisional documents.

In reviewing any document, including those marked "draft," for which the protection of the deliberative process privilege and Exemption 5 is sought, we must ascertain "whether the document is deliberative in nature." *Arthur Anderson*, 679 F. 2d. at 258. The E-mails attached to each of these drafts either ask for reviewer comments on the attached draft or contain a draft version with reviewer comments. As such, this provides significant evidence that the drafts themselves were part of a collaborative, deliberative review process to produce the final version of the Report. Disclosure of any of the drafts themselves would reveal the thoughts and analyses of the reviewers and authors at a particular date of the drafting process. Given the role the drafts played in the process to create the final version of the Report, we find that each of the draft documents in Appendix C is inherently deliberative. *See Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-339, 2007 WL 915211, at *14 (D.D.C. Mar. 26, 2007) (Court noting that "the drafting process is itself deliberative in nature").

Because we find that all of the draft documents listed in Appendix C are predecisional and deliberative, each of these documents is properly withheld pursuant to Exemption 5. *See Public Employees of Environmental Responsibilities v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) (Court finding that draft "position description" found properly withheld pursuant to Exemption 5 and deliberative process privilege).[12]

We also find that there is reasonably foreseeable harm that would result from discretionary release of the draft Report documents in Appendix C. Federal employees at NREL and GFO could be inhibited from making candid analysis, assessments and reviews of NREL publications and reports if they knew that their comments could be publically revealed. *See Russell v. Department of Air Force*, 682 F. 2d. 1045 at 1048 (D.C. Cir 1982) ("failure to apply the protections of [Exemption 5] to the . . . editorial review process would effectively make such discussions impossible"). Given this harm, we do not find that release of the documents listed in Appendix C would be in the public interest.[13]

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[12] The Appellant in its Appeal challenged the applicability of Exemption 5 to documents which have been shared with entities outside of the federal government. The Appellant cites a number of the E-mails which indicate that information and perhaps attached documents have been shared with non-governmental groups. However, this argument is now moot since GFO is releasing in their entirety the two withheld documents that were either shared with or originated from non-governmental entities. *See* Appendix A, Item Nos. 3 and 4.

[13] The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). We find that GFO complied with the FOIA's segregability requirement by releasing to the Appellant all portions of the E-mails not withholdable under Exemptions 5 and 6. With regard to the draft versions of the Report, we find there are no segregable portions that can be released to the Appellant. What factual material contained in the drafts is inextricably intertwined with the predecisonal deliberative material contained in the draft versions of the Report. *See generally, Mead Data Central, Inc. v. Department of Air Force*, 566 F. 2d 242, 260 (D.C. Cir 1977).

III. Conclusion

Because GFO has located additional responsive documents as listed in Appendix A, we will remand this mater to GFO so that it may issue a new determination regarding these documents. However, with regard to the E-mails in Appendix B and the draft versions of the Report listed in Appendix C, we find that GFO properly redacted the information withheld in those documents. Consequently, the Appeal should be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the Competitive Enterprise Institute on February 25, 2010, OHA Case No. TFA-0354, is hereby granted in part as indicated in Paragraph (2) and is denied in all other respects.

(2) This matter is hereby remanded to the Golden Field Office in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 2, 2010

Appendix A – Documents to be Provided to Appellant by GFO
Case No. TFA-0354

1. E-mail dated June 16, 2009, 3:53 PM, Gopstein to Tegen, Subject: My comments on the NREL Response to Spanish Jobs Report, with attachment, "Comments on Spanish Report_DKGMSTEL_AMG.docx" (previously released to public)
2. E-mail dated August 7, 2009, 1:31 PM, Tegen to Porro, Subject: NREL Response to Spanish Jobs Report, with attachment, "NREL Response to Spanish Jobs Report" (previously released to public)
3. E-mail dated June 17, 2009, 11:59 AM, Issacs (AWEA) to Tegen and Lantz, RE: Looking for comments on our response to the Spanish Jobs Report, with attachment, "Comments on Spanish Report_DKGMSTEL_J1.docx" (previously released to public)
4. E-mail chain, last date August 19, 2009, 2:59 PM, Lantz to Kline and Tegen, FW:comments on NREL Response to Spanish Report; with embedded email dated August 19, 2009, 2:30 PM, Heinz (PERI/UMass) to Lantz, RE: comments on NREL response to Spanish Report
5. E-mail chain, last date May 19, 2009, 3:17 PM, Tegen to Salerno, with GAO report and additional attachments
6. E-mail chain, last date May 19, 2009, 8:41 PM Salerno to Tegen and Issacs, RE:Spanish jobs report, with the following attachments:

    a. Spanish Jobs Study Coverage.doc
    b. 090410 – Spanish Jobs Study – GWEA.doc
    c. 090410 – Spanish Jobs Study.doc
    d. Letter to NYT.doc
    e. Spanish jobs study draft letter to ed.doc

7. E-mail dated May 19, 2009, 3:39 PM, Salerno to Tegen and Lantz, FW:AWEA – re your story on Spanish green jobs study
8. E-mail chain, last date May 19, 2009, 11:08 AM, Lantz to Salerno, RE: Declined: Call with NREL

Appendix B – E-mails with Text Withheld Pursuant to Exemption 5
Case No. TFA-0354

1. E-mail dated May 29, 2009, 1:21 PM, Tegen to Kline
2. E-mail chain, June 1, 2009, 4:58 PM, Tegen to Lantz
3. E-mail chain, June 2, 2009, 7:58 PM, Mosey to Tegen
4. E-mail chain, June 2, 2009, 9:08 AM, Kline to Tegen
5. E-mail chain, June 2, 2009, 9:11 AM, Tegen to Kline
6. E-mail chain, June 2, 2009, 12:30 PM, Tegen to Kline
7. E-mail chain, June 3, 2009, 11:56 AM, Kline to Tegen
8. E-mail, June 18, 2009, 10:32 PM, Tegen to Lantz
9. E-mail chain, June 29, 2009, 8:26 PM, Kline to Tegen
10. E-mail chain, June 29, 2009, 9:00 PM, Kline to Tegen
11. E-mail chain, June 29, 2009, 9:08 PM, Tegen to Kline
12. E-mail chain, June 29, 2009, 9:11 PM, Kline to Tegen
13. E-mail chain, June 30, 2009, 10:18 AM, Tegen to Kline
14. E-mail chain, June 30, 2009, 10:24 AM, Kline to Tegen
15. E-mail chain, June 30, 2009, 10:26 AM, Tegen to Kline
16. E-mail chain, June 30, 2009, 10:46 AM, Kline to Tegen
17. E-mail chain, June 30, 2009, 11:13 AM, Lantz to Tegen
18. E-mail chain, June 30, 2009, 4:07 PM, Lantz to Kline
19. E-mail, July 1, 2009, 9:34 AM, Lantz to Kline
20. E-mail chain, July 1, 2009, 7:23 PM Kline to Tegen
21. E-mail chain, July 2, 2009, 9:19 AM, Kline to Tegen
22. E-mail chain, July 2, 2009, 9:40 AM, Tegen to Kline
23. E-mail chain, July 2, 2009, 9:56 AM, Kline to Tegen
24. E-mail chain, July 2, 2009, 9:56 AM, Tegen to Kline
25. E-mail chain, July 2, 2009, 11:11 AM, Kline to Tegen
26. E-mail chain, July 14, 2009, 7:39 PM, Kline to Arent
27. E-mail chain, July 28, 2009, 8:54 PM, Arent to Kline
28. E-mail, dated August 12, 2009, 1:41 PM, Kline to Tegen
29. E-mail chain, August 19, 2009, 2:59 PM, Lantz to Kline
30. E-mail chain, August 26, 2009, 5:14 PM, Kubik to Tegen

Appendix C – All Withheld Draft Versions of the Report with Associated E-mails*
Case No. TFA-0354

1. E-mail dated May 29, 2009, 1:21 PM, Tegen to Kline, with attachment, "Comments on the Spanish Report_EL_ST.docx"
2. E-mail chain, last date June 2, 2009, 7:58 AM, Mosey to Tegen, with attachment, "Comments on the Spanish Report_EL_ST_1.docx
3. E-mail, dated June 3, 2009, 8:58 PM, Lantz to Newcomb, with attachment, "Comments on the Spanish Report_DKGMSTEL.docx"
4. E-mail chain, last date June 5, 2009, 2:51 PM, Kline to Lantz, with attachment, "DK&GM-Comments on Spanish Report_EL_ST_1.docx"
5. E-mail chain, last date June 9, 2009, 4:08 PM, James to Tegen with attachment, "Comments on Spanish Report_EL_ST_tj.docx"
6. E-mail dated June 18, 2009, 10:32 PM, Tegen to Lantz with attachment, "Comments on Spanish Report_revised 061609.docx"
7. E-mail dated June 29, 2009, 8:39 AM, Lantz to Tegen with attachment, "Comments on Spanish Report-edited-6-25-09.docx"
8. E-mail dated June 29, 2009, 8:26 PM, Kline to Tegen and Lantz with attachment, "DK-Comments on Spanish Report-edited-6-25-09 el.docx"
9. E-mail dated June 30, 2009 4:07 PM Lantz to Kline, with attachment, "Spanish Report Response EL-6-30-09.docx"
10. E-mail dated July 15, 2009, 12:10 PM, Tegen to Arent and Kline, with attachment "Spanish Report Response NREL 7-15-09.docx"
11. Email dated July 29, 2009, 12:40 PM, Kline to Babiuch, with attachment, "Spanish Report Response EL-6-30-09(2).docx"
12. E-mail dated August 7, 2009, 1:31 PM, Tegen to Porra, with attachment, "NREL Response to Spanish Jobs Report"
13. E-mail dated August 13, 2009, 4:33 PM, Lantz to Tegen, with attachment, "NREL Response to Spanish Jobs Report 081309.docx"
14. E-mail dated August 24, 2009, 5:31 PM, Lantz to Tegen, with attachment entitled, "Spanish Jobs Memo FINAL 8.24.09.docx"
15. E-mail dated August 26, 2009, 3:00 PM, Tegen to Kubik, with attachment, "Spanish Jobs Memo Final 8 26 09.docx"

* All associated E-mails have been provided to the Appellant either in their entirety or in redacted form.

March 30, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Natural Resources Defense Council

Date of Filing: March 2, 2010

Case Number: TFA-0355

On March 2, 2010, Natural Resources Defense Council (NRDC) filed an Appeal from a determination issued to it by the Department of Energy's (DOE) Loan Programs Office (LPO). In that determination, LPO responded to a request for information that NRDC filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require LPO to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 2, 2009, NRDC submitted a FOIA request to the FOIA Officer at DOE Headquarters (DOE/FOIA), for "all records in the possession or control of the DOE regarding the following categories of information about the coal-to-liquid facility proposed for Wellsville, Ohio by Baard Energy, also known as Ohio River Clean Fuels, LLC (the "Baard Energy CTL Facility") created, stored, or received after March 17, 2009." *See* Freedom of Information Act Request Regarding the Proposed Baard Energy/Ohio River Clean Fuels Coal-to-Liquid Facility in Wellsville, Ohio, from NRDC (October 2, 2009) (FOIA Request). In its FOIA Request, NRDC specified the records that it sought should relate to the following four categories of information:

1) Any application by Baard Energy for DOE loan guarantees or other DOE assistance programs;
2) Any evaluation by DOE of the Facility as a possible recipient of DOE loan guarantees or other DOE assistance programs;
3) Any communications between Baard Energy and DOE regarding possible DOE loan guarantees or DOE assistance for the Facility; and
4) Any communication between the Ohio Department of Development, the Ohio Air Quality Development Authority, or the Columbiana County Port Authority and the DOE regarding possible DOE loan guarantees or DOE assistance for the Facility.

FOIA Request at 1-2.

DOE/FOIA forwarded the request to the Office of the Chief Financial Officer (OCFO) because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.[1] *See*

[1] In November 2009, the Loan Guarantee Program Office was removed from the auspices of the OCFO and reorganized

Letter from Alexander C. Morris, FOIA Officer, DOE/FOIA, to Joshua Berman, Attorney, NRDC (October 8, 2009).

LPO conducted a search of its records but was unable to locate documents responsive to NRDC's FOIA Request. *See* Letter from Jonathan Silver, Executive Director, LPO, to Joshua Berman, Attorney, NRDC (February 5, 2010) (Determination Letter). On March 2, 2010, the Office of Hearings and Appeals (OHA) received NRDC's Appeal in which it requested an additional search for records responsive to its request. *See* Letter from Joshua Berman to OHA (Appeal Letter). In its Appeal, NRDC argues that "DOE's February 12, 2009 No Records response letter fails to demonstrate that an adequate search was conducted." Appeal Letter at 4. NRDC further argues that "[t]he final response letter both mischaracterizes the records requested in NRDC's original October 2 FOIA request and omits mention of significant categories of information that NRDC requested." *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[2]

In reviewing this Appeal, we contacted LPO to ascertain the scope of its search for responsive documents. *See* E-mail from Avery R. Webster, Attorney-Examiner, OHA, to Jonathan Silver, Executive Director, LPO (March 4, 2010). LPO informed us that it conducted a thorough search of its electronic records database, eDoc,[3] but was unable to locate documents responsive to NRDC's FOIA Request. *See* March 8 E-mail; *see also* E-mail from Wendy Pullium, Senior Consultant, eGlobal Tech, to Avery R. Webster, Attorney-Examiner, OHA, (March 26, 2010). LPO further informed us that it sent an e-mail to LPO employees requesting that each employee conduct a search of their paper and electronic records for documents responsive to NRDC's FOIA Request. *See* March 8 E-mail. This search also failed to produce any responsive documents. Furthermore, according to LPO records, LPO never established contact with the Office of Fossil Energy (FE)

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as the Loan Programs Office under the Office of the Secretary. On December 9, 2009, the LPO received and began processing the NRDC's October 2009 FOIA Request.

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

[3] eDoc is LPO's electronic document management system whereby LPO applicants submit their applications. E-mail from Wendy Pulliam, eGlobal Tech, LPO, to Avery R. Webster, Attorney-Examiner, OHA (March 8, 2010) (March 8 E-mail). eDoc also contains correspondence submitted within and outside of the LPO and supporting application documents. E-mail from Wendy Pulliam, eGlobal Tech, to Avery R. Webster, Attorney-Examiner, OHA (March 25, 2010).

regarding the 2008 Baard Application. *See* March 8 E-mail. Thus, responsive records are not likely located within FE.

Finally, NRDC argues that the LPO's Determination Letter both mischaracterizes the records requested and omits mention of significant categories of information. Appeal Letter at 4. LPO informed us that, by e-mail dated December 4, 2009, it informed its employees that a second FOIA Request was received from NRDC and specifically addressed the four categories of information that NRDC sought in its FOIA Request. *See* E-mail from Wendy Pullium, Senior Consultant, eGlobal Tech, to Loan Program Office Group, dated December 4, 2009 (December E-mail). While LPO admits that it misquoted and omitted pertinent language in its Final Determination Letter, a review of LPO's December E-mail revealed that LPO correctly stated each of the four categories that NRDC outlined in its FOIA Request. *Id.* Thus, in conducting their searches, LPO employees were aware of the specific information that NRDC sought in its FOIA Request and performed appropriate searches. Therefore, we find that the NRDC was not prejudiced by the misquoting of dates and omission of specific categories of information in the LPO's final response to NRDC.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that LPO performed a search reasonably calculated to reveal documents responsive to NRDC's request.

It Is Therefore Ordered That:

(1) The Appeal filed by Natural Resources Defense Council on March 2, 2010, OHA Case No. TFA-0355, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2010

March 22, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry Apodaca
Date of Filing:	March 4, 2010
Case Number:	TFA-0356

On March 4, 2010, Terry Apodaca (Appellant) filed an appeal from a determination issued to her by the National Nuclear Security Administration Service Center (SC) regarding her request for documents that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, SC provided the Appellant with a number of documents, of which two had information withheld pursuant to the FOIA. This Appeal, if granted, would require that SC release the information withheld in the two documents as well as conduct an additional search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under Department of Energy (DOE) regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On September 23, 2009, the Appellant submitted a FOIA request (Request) asking for various categories of documents:

1. Documents in the possession of NNSA Office of Public Affairs (OPA) pertaining to the Appellant's previous FOIA requests for Fiscal Year (FY) 2006 performance award amounts;
2. Documents in the possession of OHA regarding the Appellant's requests for FY 2006 OPA employee performance award amounts and the Appellant's unsuccessful Appeal regarding her FOIA request for those documents;
3. Documents relating to the notification of individuals affected by a release of privacy information by a named employee (Employee 1);
4. Documents relating to any personnel actions taken against Employee 1;
5. Documents in the possession of two named employees (Employee 2 and Employee 3) relating to their notification of Employee 1's release of privacy information;

6. Documents concerning the effect on an OPA employee's performance evaluations resulting from release of personal information by that employee;
7. Documents relating to FY 2007 and FY 2008 performance award amounts for each OPA employee;
8. Documents in the possession of SC's Office of Chief Counsel (OCC) regarding Employee 1's release of privacy information;
9. Documents in the possession of DOE Headquarters' "FOIA Office" regarding Employee 1's release of privacy information;
10. Documents in the possession of NNSA's Office of General Counsel in the District of Columbia regarding Employee 1's release of privacy information;
11. Documents in the possession of the DOE's Office of the Inspector General (in its District of Columbia or Albuquerque, New Mexico offices) regarding SC's improper releases of privacy information from 2004 to the present.

Electronic Mail from Terry Apodaca to William Schwartz, OHA Attorney-Examiner (March 3, 2010) (Appeal).

In its February 2, 2010, final response to the Appellant's Request (Response), SC stated that it could find no documents responsive to Category Nos. 3, 5, 6, 8 and 10. [1] With regard to Category No. 4, SC provided a copy of a November 5, 2009, memorandum (Memorandum) regarding an alleged release of privacy information. Portions of the Memorandum were withheld pursuant to Exemptions 5 and 6. The Response stated that the information withheld pursuant to Exemption 5 consisted of information related to recommendations regarding improvements to internal controls and measures to prevent the release of privacy information. The Response noted that this material was withheld pursuant to the deliberative process privilege applicable to Exemption 5. SC stated in the Response that release of the Exemption 5 information would compromise the deliberative process by which decisions are made at SC. The information withheld in the Memorandum pursuant to Exemption 6 consisted of the name and position of the author of the Memorandum. In response to Category No. 7, SC provided the Appellant with one redacted document (List) which indicated OPA employee performance award amounts for FY 2007 and FY 2008. The Response stated that this information was withheld pursuant to Exemption 6. The Response also stated that all of the material withheld pursuant to Exemption 6 in the Memorandum and the List was withheld to protect the employees from a clearly unwarranted invasion of privacy. SC noted, in the Response, that release of the Exemption 6 withheld information might subject the employees referenced in the material to embarrassment or harassment.

In her Appeal, the Appellant challenges, without providing specific grounds, the adequacy of the search that was conducted for documents responsive to Categories 3, 5, 6, 8, and 10. The Appellant also challenges the withholding of information in the Memorandum since she alleges that the

[1] Category Nos. 2, 9 and 11 were referred to DOE Headquarters to provide a response to the Appellant. SC provided the Appellant with several documents in their entirety pursuant to Category No. 1. The Appellant has not challenged SC's handling of the Request with regard to these categories.

document itself was prepared as a direct result of the Appellant's complaint to the Office of the Inspector General concerning SC's "inability to protect and control personal information." Appeal at 1. The Appellant also challenges the withholding of the information in the List because she asserts that she has already been provided the FY 2006 information by the SC.

II. Analysis

1. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Aurimus Svitojus*, Case No. TFA-0349 (March 8, 2010).

We contacted an official at SC to determine the extent of the search that was conducted for documents responsive to Category Nos. 3, 5, 6, 8 and 10. We were informed that the search for responsive documents pursuant to Category Nos. 3, 5 and 6 were conducted by the Manager of OPA (Manager). The Manager knew from personal knowledge that there were no responsive documents with regard to Category No. 3 since she knew all notifications had been made verbally. With regard to documents responsive to Category No. 5, the Manager had personal knowledge that all notifications were accomplished verbally. For both Category Nos. 3 and 5, there was no expectation that any written notifications existed. With regard to Category No. 6, the Manager searched the OPA employee performance plan files to see if responsive documents existed regarding the effect of an improper release of privacy information on an employee's performance evaluation. No responsive documents were located. Further, employee performance files at the NNSA Office of Capital Management Services' Performance Management and Employee Relations Department were searched for documents responsive to Category No. 6. No such documents were located. *See* Electronic mail from Chris Hamblen, Office of Public Affairs, SC, to Richard Cronin, Attorney-Examiner (March 11, 2010).

Documents responsive to Category No. 8 most likely existed at SC's Office of Chief Counsel (OCC). An official at OCC was asked to conduct a search for responsive documents. The OCC official knew that no such documents existed at OCC and that if such documents existed, she would be the official to maintain such documents. Consequently, the official had no reason to expect that such documents relating to Employee 1's release of privacy information existed. With regard to documents responsive to Category No. 10, a search at the NNSA's Office of General Counsel (NNSA/GC) was performed by a NNSA/GC attorney. The attorney sent an electronic mail to all NNSA/GC attorneys and staff asking that each search for documents responsive to Category No. 10. Additionally, the attorney sent the E-mail to all former NNSA/GC attorneys who now worked at the Department of Energy's Office of General Counsel. No responsive documents were found.

Our review of the search for documents responsive to Categories Nos. 3, 5, 6, 8 and 10 indicates that SC made a search for each category of documents that was reasonably calculated to uncover relevant documents. In each case, SC had a search made of the offices most likely to possess responsive documents. Officials who were most likely to possess information as to where relevant documents existed were consulted in the search effort. Given the information provided to us, we find that SC conducted an adequate search for responsive documents for Category Nos. 3, 5, 6, 8 and 10.

2. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n,* 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied).

The Exemption 5 privilege cited by SC, an element of a government agency, in its determination regarding the Memorandum was the deliberative process privilege. Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink,* 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States,* 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.*

We have reviewed an unredacted copy of the Memorandum. The Memorandum is a report from an

NNSA official to the Acting Director of the NNSA's Office of Internal Controls regarding an alleged inappropriate release by SC of privacy information.[2] The portion of the document that was withheld under Exemption 5 consists of the official's specific recommendations as to how to improve internal controls and prevent the improper release of privacy information. It is apparent from the context of the Exemption 5 withheld material that the material reflects the opinion of the author and is predecisional and deliberative in nature. As such, we find that SC properly withheld the Exemption 5 material in the Memorandum pursuant to the deliberative process privilege.

Appellant's argument that Exemption 5 protection in the Memorandum is lost because her complaint allegedly initiated the creation of the Memorandum is unavailing. As discussed above, the Exemption 5 withheld material meets all of the legal criteria for protection under the deliberative process privilege and Exemption 5. The fact that a document may have been created at the behest of a particular individual is irrelevant to the question of whether Exemption 5 may be properly employed to prevent release of the document.

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. SC concluded, and we agree, that disclosure of the requested information would cause harm to SC's decision-making process. Public revelation of preliminary employee deliberations regarding issues could reduce the willingness of federal employees to make candid assessments and recommendations. Therefore, release of the withheld Exemption 5 information in the Memorandum would not be in the public interest.

3. Exemption 6

The name and job title of the author of the Memorandum was withheld by SC pursuant to Exemption 6. Additionally, the specific amount of the performance awards paid in FY 2007 and 2008 to each of the employees named in the List were also withheld under Exemption 6. The Appellant challenges the propriety of this deletion.

[2] The release of privacy information occurred during the process of providing a response to another FOIA request made by the Appellant.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally NARFE*, 879 F.2d at 874.

With regard to the Memorandum, the withheld information under Exemption 6 consists of the name and job title of the author of the memorandum. In addition to his findings as to his investigation of the incident which resulted in the release of privacy information, the Memorandum contains his specific recommendations as to how to improve internal controls and to reduce the chance of a future release of privacy information. We do not find any significant privacy interest exposed by the release of the identity of the Memorandum's author. Because the author was performing his or her official duties, no specific harm or embarrassment would result from release of the author's name and job title in the context of his or her being the originator of the recommendations contained in the Memorandum.[3] Because there is no privacy interest connected with release of the author's name and job title, this information may not be protected pursuant to Exemption 6. *See NARFE*, 879 F. 2d at 874. Consequently, we find that Exemption 6 was not properly applied to withhold the name and job title of the author of the Memorandum. On remand, SC should either release the name and job title of the author of the Memorandum or issue another determination citing another FOIA exemption upon which the information is to be withheld.

With regard to the amounts of individual OPA employee performance awards that were withheld in the List pursuant to Exemption 6, we find that there is a significant privacy interest. *See, e.g., Terry M. Apodaca*, Case No. TFA-0204 (July 25, 2007) (*Apodaca*); *Robert J. Ylimaki*, Case No. TFA-0651 (Mar. 23, 2001).[4] In *Apodaca*, we found that the embarrassment and jealousy caused by disclosing

[3] In this regard, the specific recommendations themselves are protected from disclosure by Exemption 5.

[4] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

an award recipient's name and the amount of the award may have a "deleterious effect [] . . . on employee morale and workplace efficiency." *Apodaca*, slip op. at 3. On the other hand, release of the performance awards would further the public interest to some extent by shedding light on the way in which the government evaluates its employees. *Apodaca*, slip op. at 3. We believe that this interest is outweighed, though, by the deleterious effects that disclosure could have on employee morale and workplace efficiency. Consequently, we find that release of the bonus amounts would constitute an unwarranted invasion of personal privacy and that SC properly withheld this information under Exemption 6.

III. Conclusion

As discussed above, we find that SC conducted an adequate search for documents responsive to the Appellant's Request. We also find that SC properly withheld information pursuant to Exemption 5 in the Memorandum and Exemption 6 in the List. However, we will remand this matter to SC to either release the name and job title of the author of the Memorandum or to issue another determination citing a FOIA exemption other than Exemption 6 to justify the continued withholding of this information.[5]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Terry Apodaca, OHA Case Number TFA-0356, is hereby granted in part as indicated in Paragraph (2) and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in

[5] The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). We find that SC complied with the FOIA's segregability requirement by releasing to the Appellant all portions of the Memorandum and List not withholdable under Exemptions 5 and 6, with the possible exception of the name and job title of the author of the Memorandum. As indicated above, we have directed SC to again review the releasibility of that information.

which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 22, 2010

April 6, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Ken Olsen

Filing Date: March 12, 2010

Case Number: TFA-0358

This Decision concerns an Appeal from a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to Ken Olsen on February 17, 2010, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In that determination, the BPA disclosed some information and withheld other information under FOIA Exemption 6. This Appeal, if granted, would require the BPA to perform an additional search and either release newly discovered documents or issue a new determination justifying its withholding. It would also require the BPA to reconsider its application of Exemption 6 and either (i) adequately justify its withholding or (ii) not withhold the information under Exemption 6.

I. Background

Mr. Olsen filed a FOIA request with the BPA for documents regarding its communications about salmon restoration on the Columbia and Snake rivers and its expenses from related lobbying and public relations. Request Letter at 1-2.

The BPA issued Mr. Olsen a determination letter and in it disclosed responsive documents. Determination Letter at 1. It also invoked FOIA Exemption 6 to withhold "personal telephone numbers, addresses and social security numbers of individuals. . . ." *Id*. The BPA explained that Exemption 6 allows it to withhold information if doing so "would constitute a clearly unwarranted invasion of personal privacy." *Id*. The BPA concluded "that the public interest in disclosure did not outweigh the privacy interest of the individuals to whom [the information] pertains." *Id*.

In his Appeal, Mr. Olsen challenged the adequacy of the BPA's search. *See* Appeal Letter at 1-2. He stated, in his Appeal, that the "BPA sent a fraction of the material requested." *Id*. at 1. His Appeal also identified certain BPA employees and speculated about the material that he expected the BPA to have disclosed. *Id*. at 1-2.

Mr. Olsen, in his Appeal, also challenged the BPA's withholding under Exemption 6. *Id*. at 2. He asserts that the "BPA improperly withheld public information regarding travel reimbursement for employees . . . including the description of the reason for the travel. . . ." *Id*. He also asserted that the BPA was required to provide a Vaughn index identifying the withheld information and the basis for the exemption. *Id*. at 1.

II. Analysis

A. Adequacy of Search

In responding to a FOIA request, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search conducted was inadequate. *See, e.g., Aurimas Svitojus*, Case No. TFA-0349 (2010).[1]

We contacted the BPA to gather more information to evaluate its search. It stated that it searched the Office of Public Affairs, including Media, Regional Relations, and Public Engagement; the Office of Environment, Fish and Wildlife; and the Office of the General Counsel. E-mail from Christina Brannon, FOIA/ Privacy Act Office, BPA, to David M. Petrush, Attorney-Examiner, OHA, April 2, 2010. It searched e-mails, paper files for the Federal Caucus (an inter-agency group involving all agencies with a role in the Columbia River Basin), electronic and paper correspondence files, hard copy travel expense records, and a shared electronic network. A partial list of search terms included the names of relevant BPA staff, contractors, and lobbyists; the names of groups identified in the FOIA request; the names of salmon industry groups; the names of government agencies involved in salmon issues; the names of specific documents named in the FOIA request and their common abbreviations; and key search terms such as "editorials," "media," "outreach," "litigation," and the name of the judge in a lawsuit referenced in the FOIA request.[2] *Id*.

The BPA also stated that it searched all of the files that were reasonably expected to contain the requested documents. *Id*. Based on its description of the offices that were searched and the search methodologies it used, we agree. Therefore, we find that its search was adequate.

The fact that the BPA did not find responsive documents that Mr. Olsen expected does not render its search inadequate. A requester's "[m]ere speculation that . . . uncovered documents

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

[2] The BPA stated that the subject matter of the FOIA request involved a relatively small number of employees. E-mail from Christina Brannon, FOIA/ Privacy Act Office, BPA, to David M. Petrush, Attorney-Examiner, OHA, April 2, 2010. Further, much of the inter-agency communication took place through conference calls, not written records. It provided agendas and notes from the calls, where responsive. *Id*.

may exist does not undermine the finding that the agency conducted a reasonable search for them." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) (citation omitted).

B. Exemption 6

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). An agency should construe "similar files" broadly, "[T]o cover detailed Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982) (citation and quotations omitted). Exemption 6 "protect[s] individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id*. at 599.

The FOIA has a strong presumption in favor of disclosure. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency has the burden to show that requested information falls within an exemption. *Id*. (citation omitted); *see also News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) (describing the agency's burden as "onerous"). The agency must "narrowly construe[]" Exemption 6. *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citation and quotations omitted).

We must apply a three-step analysis to determine whether the DOE properly invoked Exemption 6. First, we must determine whether disclosing the information compromises a substantial privacy interest. If disclosure does not compromise a substantial privacy interest, the DOE may not withhold the information. Second, we must determine whether disclosing the information is in the public interest. Third, we must balance the substantial privacy interest against the public interest in order to determine whether disclosing the information would constitute a clearly unwarranted invasion of personal privacy. *Ripskis v. Dep't of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

We contacted the BPA to gather more information to evaluate its withholding of the travel reimbursement information. The BPA advised that it withheld this information inadvertently. We will remand the case to the BPA for it to issue a new determination releasing the inadvertently withheld information.[3]

Next, we reject Mr. Olsen's argument that the BPA was required to accompany its withholdings with a Vaughn index. A Vaughn index identifies each responsive document, the exemption invoked to withhold it, and why the exemption applies. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). A Vaughn index is required during litigation. *Id*. However, it is not required at the administrative level. *Alliance for Nuclear Accountability*, Case No. TFA-0013 (2003). When an agency issues a determination denying the release of information, it need only provide a general description of the withheld information and the reason for withholding. *Id*.

[3] The BPA explained that it intended to withhold only the individuals' social security numbers, personal phone numbers, and personal addresses. Because Mr. Olsen did not appeal the withholding of this information, we need not determine whether the BPA withheld it appropriately.

It Is Therefore Ordered That:

(1) The Appeal that Ken Olsen filed on March 12, 2010, OHA Case No. TFA-0358, is granted in part as indicated in Paragraph (2) and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 6, 2010

April 13, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joan S. Sherwood

Date of Filing: March 16, 2010

Case Number: TFA-0359

On March 16, 2010, Joan S. Sherwood filed an Appeal from a determination issued to her on February 22, 2010, by the Department of Energy's Naval Reactors Laboratory Field Office (NRL). That determination was issued in response to a request for information that Ms. Sherwood submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Sherwood asks that NRL conduct an additional search for documents responsive to her request.

I. Background

Ms. Sherwood filed a request for information on behalf of her father, Mr. Francis H. Sherwood, who worked at the Separations Research Unit in Schenectady, New York from December 1954 through June 1955 and at the Hanford Site from 1956 to 1988. In her request, she sought copies of her father's medical records and exposure records. Upon receiving Ms. Sherwood's request, NRL conducted a search, but found no responsive documents. On March 16, 2010, Ms. Sherwood filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Sherwood challenges the adequacy of the search conducted by NRL. *See* Appeal Letter. She asserts that responsive documents may be found in a number of additional locations and asks OHA to direct NRL to conduct a new search for responsive documents.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg*

v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Information Focus on Energy*, 26 DOE ¶ 80,240 (1997).

In reviewing the present Appeal, we contacted officials in NRL to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Sherwood's request might reasonably be located. Upon receiving Mr. Sherwood's request for information, NRL determined that the records sought by Ms. Sherwood would be maintained by the Management and Operating contractor at the Knolls Atomic Power Laboratory, currently Bechtel Marine Propulsion Corporation (BMPC). NRL informed us that BMPC searched for any medical or exposure records or other potentially relevant records in the following departments of the organization: Human Resources, Safety, Medical, Security, and Dosimetry. NRL further informed us that records were searched by name, social security number, date of birth and in multiple spelling variations, and no responsive documents were located. *See* Response from C.P. Nunn, Chief Counsel, NRL, to Kimberly Jenkins-Chapman, OHA (April 5, 2010). Given the facts presented to us, we find that NRL conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Sherwood's request. Accordingly, Ms. Sherwood's Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Joan S. Sherwood, OHA Case No. TFA-0359, on March 16, 2010, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 13, 2010

April 28, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Custom Catalogues OnLine, Inc.

Date of Filing: April 5, 2010

Case Number: TFA-0362

On April 5, 2010, Custom Catalogues OnLine, Inc. (Appellant) filed an appeal from a determination issued to it by the Oak Ridge Office (OR) of the Department of Energy regarding its request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, OR provided the Appellant with a number of documents. However, OR also withheld in their entirety various other documents. This Appeal, if granted, would require that OR release the withheld documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under Department of Energy (DOE) regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On September 23, 2009, the Appellant submitted a FOIA request (Request) asking for copies of any documents referring to Mr. Philip Pulver (Pulver), Custom Catalogs OnLine, "CCOL," CCOL-MDM or "Mobile Data Methods" which were in the possession of or originated from a number of named employees of the DOE's Pacific Northwest Site Office and OR. *See* April 5, 2010, Appeal from Philip Pulver, President, Custom Catalogs OnLine, Inc. at 5.[1]

In its February 19, 2010, response, OR provided the Appellant with a number of documents. However, OR informed the Appellant that "several documents" were being withheld in their entirety pursuant to Exemption 5 and the "attorney work product and/or attorney-client privilege." *See* February 10, 2010, Letter from Gerald G. Boyd, Manager, OR to Philip Pulver (Determination Letter) at 1. OR described the withheld documents as those including correspondence that "reveals the motive of the client in seeking legal advice" or the "advice and thoughts of Office of Chief Counsel personnel" on legal issues. Determination Letter at 1. OR also concluded that discretionary release of the withheld documents would not be in the public

[1]Custom Catalogs OnLine, Inc. is in litigation with Battelle Memorial Institute (Battelle), which currently manages several DOE National Laboratories.

interest since disclosure would have a negative effect on the willingness of attorneys to provide the government with honest and open evaluations on issues. Determination Letter at 2.

In its Appeal, the Appellant makes a number of assertions regarding alleged misconduct at Battelle-managed DOE facilities. The Appellant alleged that release of the documents would shed light on this misconduct and that release of the documents would be in the public interest.[2]

II. Analysis

According to the FOIA, after conducting a search for responsive documents under the FOIA, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id*.

An agency therefore has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *State of New York,* Case No. TFA-0269 (August 19, 2008) *slip op*. at 2-3.[3] Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *Id.* at 3. A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Id*.

For our review of this Appeal, we obtained the documents that OR withheld. After examining these documents, we conclude that OR's determination letter is clearly inadequate to permit the Appellant to file an informed appeal. We find that, in contrast to the Determination Letter's description of withholding "several" documents, in fact, approximately 90 responsive documents were withheld from the Appellant.[4] While OR's description of the material withheld does apply to a significant number of the documents, there are a number of withheld documents, such as apparently commercial documents and filed court pleadings, to which OR's description seems

[2] The Appellant submitted additional submissions on April 8, 21 and 26, 2010, providing additional information regarding his misconduct allegations and his argument that release of the withheld documents would be in the public interest.

[3] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[4] We counted 92 documents (457 pages) in the submissions OR provided us in response to our request for a copy of the withheld documents. However, it is unclear whether some of the documents are included as attachments to Emails or are stand-alone documents.

inapplicable. Additionally, OR's Determination Letter does not specify which Exemption 5 privilege is being applied to each withheld portion of each document.

Consequently, we will remand this matter to OR so that it may issue a new determination letter either adequately justifying the withholding of these previously withheld documents or releasing these documents to the Appellant.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Custom Catalogues OnLine, Inc., OHA Case Number TFA-0362, is hereby granted.

(2) This matter is hereby remanded to the DOE's Oak Ridge Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 28, 2010

May 4, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Donald A. Verrill
Date of Filing:	April 14, 2010
Case Number:	TFA-0364

On April 14, 2010, Donald A. Verrill (the Appellant) filed an Appeal from a final determination issued on March 8, 2010, by the Department of Energy's Idaho Operations Office (IOO). In that determination, IOO responded to a Request for Information, filed on March 2, 2010, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. In its March 8, 2010, Determination Letter, IOO identified and released a number of responsive documents. This Appeal, if granted, would require IOO to release additional responsive material.

I. BACKGROUND

On March 2, 2010, the Appellant submitted a request for "all documents, notes, audio tapes, or any other materials related to circumstances of all investigations, reports, findings and/or decisions regarding [the Appellant's] employment at [the Idaho National Laboratory] INL with [Bechtel Energy Alliance] BEA from a period of time of January 2009 to present." Appellant's Request for Information. The Appellant further indicated that he had been a subject of three investigations by BEA employees.

On March 8, 2010, IOO issued a determination letter (the Determination Letter) identifying and releasing a number of documents, in response to the Appellant's request.[1] Specifically, the Determination Letter released copies of the Appellant's IOO Personnel Security file, BEA Personnel file, and BEA Personnel Security file. Determination Letter at 1. The Determination Letter further indicates that two BEA offices, Safeguards and Security, and Diversity and Employee Relations maintained investigative files concerning the Appellant. The Determination Letter indicated that these files, however, were not agency records and therefore are not subject to the FOIA.

On June 22, 2005, the Appellant submitted the present Appeal in which he contends that the investigative files concerning him that are maintained in BEA's Safeguards and Security, and

[1] IOO redacted personal information concerning a third-party individual because it determined that release of this information would constitute an unwarranted invasion of their privacy. The Appellant does not contest these redactions.

Diversity and Employee Relations offices should be subject to the FOIA. Specifically, the Appellant asserts that (1) he believes that that IOO was directing the three investigations involving him, (2) the IOO was "deliberately using BEA employees to avoid compliance with the FOIA, and (3) a BEA employee was "obtaining information illegally under the name of [the IOO]." Appeal at 1-2. The Appellant does not explain how these assertions, if true, would result in the characterization of the investigative files he seeks as "agency records" under the applicable statute, regulations, or case law.

II. ANALYSIS

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the United States Supreme Court in *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors for determining whether a document was under an agency's control at the time of a request:

1. The intent of the document's creator to retain or relinquish control over the document;

2. The ability of the agency to use and dispose of the record as it sees fit;

3. The extent to which agency personnel have read or relied upon the record; and

4. The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. U.S. Department of Health and Human Services, 87 F.3d 508, 515 (D.C. Cir. 1996). Applying these standards to the case at hand, we conclude that the investigative files maintained by BEA's Safeguards and Security, and Diversity and Employee Relations offices were not created or obtained by the DOE. Nor were these documents under agency control at the time of the request. The investigative files have not been submitted to the agency, subject to its use and disposal, relied upon by the agency, or integrated into the agency's records systems or files. Therefore, we find that they are not "agency records" for purposes of the FOIA.

However, a finding that certain documents are not "agency records" does not end our inquiry. Section 1004.3(e) of the DOE's FOIA regulations states that:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

10 C.F.R. § 1004.3(e). The contract between DOE and BEA provides that the investigative files in question are not the property of the Government, but instead are owned by BEA. Section I.15(b)(1) of DOE Contract No. DE-AC07-05ID14517 states in pertinent part:

> The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
>
> (1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/ health-related records and similar files), and non-employee patient medical/health related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

http://www.id.energy.gov/doeid/INLContract/SEC%20I.doc#_Toc87860986. The investigative files at issue in the present case were created by BEA during its internal investigations of allegations of Equal Employment Opportunity violations and employee theft. These files are "employee relations records" as well as "records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality." Accordingly, the plain wording of the contract between IOO and BEA indicates that the investigative files are the property of BEA and therefore are not subject to public disclosure.

III. CONCLUSION

The investigative files concerning the Appellant maintained in BEA's Safeguards and Security, and Diversity and Employee Relations offices are not "agency records" and are not subject to public disclosure under 10 C.F.R. § 1004.3(e). We therefore affirm the Idaho Operations Office's determination that they are not subject to disclosure under the FOIA or DOE regulations.

It Is Therefore Ordered That:

(1) The Appeal filed by Donald A. Verrill, TFA-0364, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2010

May 4, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Tarek Farag
Date of Filing:	April 15, 2010
Case Number:	TFA-0365

On April 15, 2010, Tarek Farag (Appellant) filed an Appeal from a determination issued to him on March 24, 2010, by the Office of Classification (Classification) of the Department of Energy (DOE). In that determination, Classification responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, Classification identified and released documents responsive to the Appellant's request. The Appellant challenged the adequacy of Classification's search for documents. This appeal, if granted, would require Classification to conduct a further search for responsive documents.

I. Background

On December 2, 2009, the Appellant requested "the information and the reasons upon which the two reviewers from the DOE decided that secrecy is not recommended" in regard to his patent application regarding a method and a process for isotope separation. Request Letter dated December 2, 2009, from Appellant to DOE. On December 9, 2009, the DOE FOIA office sent the request to Classification. On March 24, 2010, Classification released numerous documents responsive to the Appellant's request. Determination Letter dated March 24, 2010, from Andrew P. Weston-Dawkes, Director, Classification, Office of Health, Safety and Security (Determination Letter).

On April 15, 2010, the Appellant appealed the Determination because he did not receive a written explanation regarding the "secrecy not recommended" decision. In his Appeal, he claimed that "two reviewers . . . offered many times to give a **written explanation** of the [secrecy not recommended] decision." Appeal Letter dated April 8, 2010, from Appellant

to Director, Office of Hearings and Appeals (OHA) (Appeal Letter). Also in his Appeal, he asked for the qualifications of the reviewers, including general experience; specialized experience in the nuclear field; and specialized experience in isotope separation techniques, as well as their education. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted Classification to determine what type of search was conducted. In response, Classification indicated that an e-mail had been sent to each of the offices within Classification stating that a FOIA request had been received and asking if each office had any responsive information. Everything that was found to be responsive to the Appellant's request was released to him.

The Appellant challenged the Determination claiming that the two reviewers offered a written explanation of the recommendation. Classification indicated that if the written explanation existed, it would have been produced with the responsive documents released to the Appellant. Furthermore, a person knowledgeable about this matter indicated that no written explanation was ever produced, as evidenced by two e-mails released to the Appellant. In an e-mail to the Patent Office, Classification offered to create a written explanation of why Classification determined that "secrecy was not recommended." E-mail dated April 26, 2010, from Fletcher Whitworth, Classification, to Janet R. H. Fishman, OHA, Attachment at 34. In a return e-mail, the Patent Office indicated that the e-mail explanation from Classification was sufficient and no written explanation was needed. *Id.* at 35. We believe the search that Classification conducted was reasonably calculated to reveal the records responsive to the Appellant's request, including the written explanation if one existed.

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

The FOIA does not require an agency to create documents in response to a request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2); *Terry M. Apodaca*, Case No. TFA-0319 (July 7, 2009); *David B. McCoy*, Case No. VFA-0707 (January 16, 2002); *Barbara Schwarz*, Case No. VFA-0701 (November 5, 2001). Classification stated that no written explanation exists. Classification cannot be required to produce a document that does not exist.

Also in his Appeal, the Appellant asked for the reviewers' qualifications and education. We note that he did not ask for this information in his initial request. We do not permit requesters to expand the scope of their request on appeal. *Cliff Jenkins*, Case No. TFA-0122 (November 7, 2005); *F.A.C.T.S.*, 26 DOE ¶ 80,132 at 80, 578 (1996); *Alan J. White,* 17 DOE ¶ 80,117, at 80,539 (1988); *see also Arthur Scanla*, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). If the Appellant wishes to request this additional information, he must file a new FOIA request seeking those documents.

III. Conclusion

The search that Classification conducted was reasonably calculated to reveal records responsive to the Appellant's request, including the written explanation. In regard to the other information the Appellant requested in his Appeal, this is a broadening of his original request. He must file a new request seeking that information. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tarek Farag, Case No. TFA-0365, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2010

July 7, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Concerned Citizens for Clean Air
Date of Filing:	April 19, 2010
Case Number:	TFA-0366

On April 19, 2010, Mr. John Williams of Concerned Citizens for Clean Air (CCCA) filed an Appeal from a determination issued to the organization on March 25, 2010, by the Corporate Services Division of the Office of Headquarters Procurement Services (Procurement) of the Department of Energy (DOE). Procurement issued the determination in response to a request for documents that CCCA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Procurement perform an additional search for responsive material and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On December 27, 2009, CCCA filed a FOIA request for copies of the applications that five companies filed with DOE for grants, loans or other funding for projects in Mississippi, Florida, Alabama, Louisiana, and Texas. CCNA also asked DOE to explain whether the projects must pay Davis-Bacon prevailing wages. *See* Letter from John Williams of CCCA (December 27, 2009). On March 25, 2010, Procurement informed Mr. Williams that it had searched and found no responsive documents. *See* Letter from Procurement to CCCA (March 25, 2009) (Determination Letter). On April 19, 2010, CCCA filed the present Appeal with the Office of Hearings and Appeals (OHA). In the Appeal, CCCA challenges the adequacy of the search conducted by Procurement and asks OHA to direct Procurement to search again. Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The FOIA states that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). [1] The standard of reasonableness

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

which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See e.g. Doris M. Harthun*, Case No. TFA-0015 (2003).

We contacted Procurement to request additional information so that we could evaluate the search it conducted for responsive records. Procurement informed us that it had conducted a thorough search, but found no responsive records.[2] Procurement then contacted the DOE Headquarters FOIA office (DOE/HQ) for more information about the request and appeal. DOE/HQ assigned the search to the Loan Guarantee Program Office. *See* Electronic Mail Message from Alexander Morris, FOIA Officer, to Valerie Vance Adeyeye, OHA Staff Attorney (June 30, 2010). The Loan Guarantee Program Office located some responsive documents, and those documents are currently being processed. *See* Electronic Mail message from Wendy Pulliam, FOIA Specialist, Loan Guarantee Program Office, to Alexander Morris (June 30, 2010). That office also contacted the requester and gave him an update on the status of the search.

III. Conclusion

After reviewing the record of this case, we find that Procurement conducted a search that was adequate and reasonably calculated to uncover the requested information. However, the DOE Loan Guarantee Program Office has located some responsive material and is currently processing that material. The Loan Guarantee Program Office should release any responsive documents, or issue a determination letter justifying the continued withholding of those documents. Accordingly, this Appeal should be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The FOIA Appeal filed by Concerned Citizens of America on April 19, 2010, OHA Case Number TFA-0366, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Loan Guarantee Program Office of the Department of Energy for processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seekjudicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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[2] The Procurement Analyst who conducted the original search in this case retired from DOE shortly after the determination was issued. *See* Electronic Mail Message from Craig Ashline, Procurement, to Valerie Vance Adeyeye, OHA Staff Attorney (May 6, 2010).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 7, 2010

May 14, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Gary W. Perry
Date of Filing:	April 20, 2010 April 22, 2010
Case Number:	TFA-0367 TFA-0370

This Decision concerns an Appeal Gary W. Perry filed from determinations issued to him by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA), and the DOE's Oak Ridge Office (ORO). In those determinations, NNSA and ORO responded to requests for documents that Mr. Perry submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. NNSA and ORO located some documents responsive to Mr. Perry's request. This Appeal, if granted, would require NNSA and ORO to perform additional searches and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

Mr. Perry filed requests under the Privacy Act with NNSA and ORO for copies of his medical records generated during the course of his employment with a contractor at the DOE's Y-12 site, one of the agency's facilities in Oak Ridge, Tennessee. Specifically, Mr. Perry sought records pertaining to his hearing tests, also known as audiograms. *See* Letter from NNSA to Gary W. Perry (March 4, 2010) (NNSA Determination Letter); Letter from ORO to Gary W. Perry (April 7, 2010) (ORO Determination Letter). In its final response, NNSA indicated that it had jurisdiction over records located at the Y-12 site. A search of Y-12 records yielded some medical records pertaining to Mr. Perry and NNSA enclosed a copy of those records in its final response to Mr. Perry's request. NNSA Determination Letter. ORO also performed a search for responsive documents and provided to Mr. Perry a copy of records located at the Oak Ridge National Laboratory (ORNL). ORO Determination Letter.

Mr. Perry filed an Appeal challenging the adequacy of the searches performed by NNSA and ORO. Appeal Letter, received April 20, 2010; *see also* Memorandum of Telephone Conversation between Gary W. Perry and Diane DeMoura, OHA (April 20, 2010). The portion of the Appeal pertaining to ORO's search was designated as OHA Case Number TFA-0367, and the portion pertaining to NNSA's search was designated as OHA Case Number TFA-0370. Mr. Perry indicated that he believed the medical records he was provided by NNSA and ORO are incomplete because, given the length of his employment at the Y-12 site, his medical records should have included more records of audiograms. *Id.*

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, Case No. VFA-0763 (2002).[*] Accordingly, in analyzing the adequacy of the searches ORO and NNSA conducted in this case, we are guided by the principles we have applied in similar cases under the FOIA.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, Case No. TFA-0015 (2003).

In reviewing this Appeal, we contacted both NNSA and ORO to discuss the searches conducted in response to Mr. Perry's requests.

NNSA informed us that, in responding to Mr. Perry's request, personnel from the Plant Records and Medical departments of the current Y-12 contractor, Babcock & Wilcox Technical Services Y-12, L.L.C. (B&W Y-12), searched their active records for responsive documents, in their records management database, using Mr. Perry's name, social security number and date of birth. E-mail from Carolyn Becknell, NNSA, to Diane DeMoura, OHA (April 22, 2010); *see also* Record of Telephone Conversation between Carolyn Becknell, NNSA, and Diane DeMoura, OHA (May 7, 2010). In addition, both departments searched their archived records. *Id*. NNSA located, and provided to Mr. Perry, the contents of two medical files, one containing 222 pages and the other containing seven pages. E-mail from Carolyn Becknell, NNSA, to Diane DeMoura, OHA (April 22, 2010). NNSA indicated that any existing records of audiograms would be kept in the employee's medical file. Record of Telephone Conversation between

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

Carolyn Becknell, NNSA, and Diane DeMoura, OHA (May 7, 2010). Finally, NNSA indicated that there were no other databases where responsive records may have been located.

After receiving Mr. Perry's Privacy Act request, ORO sent a request for responsive documents to Bechtel Jacobs Company (BJC), which operates the DOE's former K-25 plant at Oak Ridge, and ORNL, formerly known as the DOE's X-10 facility. E-mail from Linda Chapman, ORO, to Diane DeMoura, OHA (April 22, 2010). BJC conducted searches of its four records databases using Mr. Perry's last name and social security number, but found no responsive documents. *Id*. ORNL conducted searches both of records databases and of paper records using Mr. Perry's last name, social security number, and date of birth. ORNL's search yielded four pages of medical records, none of which were records of audiograms. *Id*. ORO provided those four pages to Mr. Perry in ORO's final response to Mr. Perry. *Id*.; *see also* ORO Determination Letter.

Based on this information, it is clear that both NNSA and ORO searched the available databases and paper records using Mr. Perry's personal information in an attempt to locate any responsive documents. We find that NNSA and ORO performed extensive searches reasonably calculated to reveal records responsive to Mr. Perry's request. Therefore, despite not yielding all of the records Mr. Perry sought, the searches were adequate. Accordingly, Mr. Perry's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Gary W. Perry on April 20, 2010, OHA Case No. TFA-0367, is hereby denied.

(2) The Appeal filed by Gary W. Perry on April 22, 2010, OHA Case No. TFA-0370, is hereby denied.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 14, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

May 7, 2010

Appeal

Name of Petitioner:	Reginald A. Harris
Date of Filing:	April 21, 2010
Case Number:	TFA-0368

On April 21, 2010, Reginald A. Harris filed an Appeal from a determination the Department of Energy Office of Human Capital Management (DOE/HC) issued on March 15, 2010. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from DOE/HC position descriptions for Criminal Investigators in the DOE's Office of Security Operations and Office of Special Operations, and position evaluation statements for each position description. In its response to Mr. Harris, DOE/HC released copies of the requested position descriptions, but stated that it "does not distribute position evaluation statements to employees nor to anyone in the Program Offices." Letter from Sarah J. Bonilla, Director, DOE/HC, to Mr. Reginald A. Harris (March 15, 2010). In his appeal, Mr. Harris challenges DOE/HC's withholding of the position evaluation statements he requested. Appeal at 1.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9).

The DOE FOIA regulations provide, in pertinent part, that a determination letter denying a FOIA request must state "the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate." 10 C.F.R. § 1004.7(b)(1). In so doing, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

In the present case, the determination letter that DOE/HC issued in response to Mr. Harris's request cited no exemption under the FOIA authorizing the withholding of position evaluation statements. We therefore will remand this matter to DOE/HC for a new determination. In its determination, as required by the FOIA statute and DOE regulations, DOE/HC must either release the requested position evaluation statements to Mr. Harris or specify the exemption(s) under which it is withholding those documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Reginald A. Harris on April 21, 2010, Case No. TFA-0368, is hereby granted as specified in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of Human Capital Management, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred L. Brown
Deputy Director
Office of Hearings and Appeals

Date: May 7, 2010

May 10, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Martha J. McNeely

Filing Date: April 27, 2010

Case Number: TFA-0371

This Decision concerns the Appeal that Martha J. McNeely filed from a determination that a Department of Energy (DOE) Operations Office issued to her on March 16, 2010. In that determination, the Operations Office responded to her request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the Operations Office to perform an additional search and either release newly discovered records or issue a new determination justifying its withholding.

I. Background

Ms. McNeely filed a PA request for her records at the Operations Office. Request Letter. She seeks medical and dental records from a number of specified entities historically allied with the DOE and its predecessor agencies. She described her medical treatment and provided copies of her birth certificate, social security card, and identification card. *Id*. In response, the Operations Office stated that it did not locate any records. Determination Letter. Ms. McNeely then filed the present Appeal with the Office of Hearings and Appeals (OHA), challenging the adequacy of the Operations Office's search. Appeal Letter.

Ms. McNeely provided two reasons why she believes that the Operations Office's search was inadequate. *Id*. First, "the search was conducted only by name and social security number." She argues that the search should have included various spellings of her name, date of birth, age, address, dates of residency, school attended, and "special cohort groups." Second, "only a computerized search was done and only in two local databases." She argues that the search should have included additional entities historically allied with the DOE and its predecessor agencies as well as files regarding a particular case in federal court. *Id*.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[1] courts have established that an agency must "conduct[] a search reasonably calculated to uncover

[1] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act (PA) requires only that the agency search its systems of records. However, we require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the FOIA.

all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search was inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, Case No. VFA-0098 (1995) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[2]

We contacted the Operations Office to gain additional information to evaluate its search. It stated that subject matter experts searched by name and social security number because the sought-after files are organized by those categories. It need not have searched under variant spellings of Ms. McNeely's name. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). The Operations Office stated that it searched the two databases most likely to have the information that she requested. These databases would have included any records from the specific entities that she named in her request and her Appeal.[3]

Based on the description of the Operations Office's search, we find that it conducted a search that was reasonably calculated to uncover all relevant records and was therefore adequate. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal that Martha J. McNeely filed on April 27, 2010, OHA Case No. TFA-0371, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 10, 2010

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

[3] The Operations Office stated that it searched records that the government owns. When particular contractors left the site, they may have taken their records with them. Ms. McNeely may request records directly from the contractors.

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

May 28, 2010

Appeal

Name of Petitioner:	Matthew W. Jones
Date of Filing:	April 27, 2010
Case Number:	TFA-0373

On April 27, 2010, Mr. John R. Osburn of Bullivant, Houser, Bailey, PC, filed an Appeal on behalf of Mr. Matthew W. Jones (Jones) from a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to him. The determination responded to a request for information Jones filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the responsive information it withheld from Jones.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 22, 2010, Jones filed a FOIA request with BPA seeking the mailing list containing names and addresses of persons to whom BPA sent a copy of "U.S. Department of Energy-Bonneville Power Administration Permission to Enter Property Form Instruction Sheet" on or about January 13, 2010. *See* Determination Letter at 1. In a determination letter, BPA stated it conducted a search of its records and located documents responsive to Jones' request. BPA, however, withheld information in the responsive documents pursuant Exemption 6 of the FOIA. *Id.* On April 27, 2010, Jones filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Jones challenges the withholding of information under Exemption 6 of the FOIA. *See* Appeal Letter. Jones asks that the OHA direct BPA to release the withheld information.

II. Analysis

Exemption 6

In its determination letter, BPA withheld the names and home addresses of landowners who could be affected by the construction of a new transmission line from a responsive document under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

BPA determined that there was a privacy interest in the names and home addresses of landowners who live nearby a proposed transmission line. We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc.*, 15 DOE ¶ 80,115 at 80,537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc.*, 16 DOE ¶ 80,102 at 80,504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,120 at 80,569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,104 at 80,519 (1985). Federal courts have also considered the privacy interests of individuals outside of the context of federal employees and have held that names and home addresses can be protected under Exemption 6. *See Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 356 (1997) (protecting mailing list or recipients of Bureau of Land Management publication). They have also held that specific lists may reveal sensitive information beyond the mere names and addresses of the individual found on the list. *Minnis v. USDA*, 737 F.2d 784, 787 (9th Cir. 1984) ("Disclosure would reveal not only the applicant's names and addresses, but also their personal interests in water sports and the out-of-door."). In this case, we believe that there is a significant privacy interest in the names and addresses of private homeowners who could be affected by a new transmission line. If this information were disclosed to the requester, the disclosure could "cause inevitable harassment and unwarranted solicitation." *See* Determination Letter at 2. We have previously found the potential for harassment of individuals to be sufficient justification for withholding information under Exemption 6. *See, e.g., William Hyde*, 18 DOE ¶ 80,102 (1988).

These considerations govern our determination. We therefore find a real and substantial privacy interest in the names and addresses of the homeowners at issue.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996). According to BPA, disclosure of the information withheld "could subject the individual to whom it pertains to unwanted communications that would intrude into his/her personal life . . . and will not reveal any aspects about the operations or activities of the Government." Determination Letter at 1. The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We fail to see how release of the names and addresses of private homeowners in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the requested names and addresses.

3. Balancing the Interests

As stated earlier, there is a significant privacy interest in this information. In determining whether the disclosure of the identifying information could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989). We agree with BPA and find that the minimal public interest here is far outweighed by the real and identifiable privacy interests of the private homeowners.

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew W. Jones on April 27, 2010, OHA Case No. TFA-0373, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 28, 2010

May 14, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Frank J. Trunk

Filing Date: April 30, 2010

Case Number: TFA-0375

This Decision concerns the Appeal that Frank J. Trunk filed from a determination that the Office of Information Resources (OIR) of the Department of Energy (DOE) issued to him on March 31, 2010. In that determination, the OIR responded to his request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the OIR to perform an additional search and either release newly discovered documents or issue a new determination justifying its withholding.

I. Background

Mr. Trunk filed a FOIA request with an Operations Office for documents regarding the classification status of his technology and patent applications. Request Letter. He believes that secrecy orders were requested for a number of his patent applications and that the Operations Office was consulted. *Id*. The Operations Office forwarded Mr. Trunk's request to the OIR.[1] Determination Letter. The OIR assigned the request to the Assistant General Counsel for Technology Transfer and Intellectual Property. No documents were found. *Id*.

In the present Appeal, Mr. Trunk challenges the adequacy of the OIR's search. Appeal Letter. He attached a document ostensibly showing that the DOE reviewed his patent applications for the United States Patent and Trademark Office (USPTO). He argues that therefore, the DOE must have responsive documents. *Id*.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA), courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search

[1] The Operations Office issued its own determination letter to Mr. Trunk. He may appeal that determination letter separately.

procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search was inadequate. *See, e.g.*, *Butler, Vines and Babb, P.L.L.C.*, Case No. VFA-0098 (1995) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[2]

We contacted the OIR to gain additional information to evaluate the search performed by the Assistant General Counsel for Technology Transfer and Intellectual Property. We learned that the Assistant General Counsel handles all classification issues that the USPTO refers to the DOE.[3] The office searched the intellectual property database because that is the only file reasonably expected to contain the requested documents. It searched by inventor name and serial number, and it found no documents responsive to Mr. Trunk's request.

Based on the description of the search, we find that an adequate search was conducted because the search was reasonably calculated to uncover all relevant documents. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal that Frank J. Trunk filed on April 30, 2010, OHA Case No. TFA-0375, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 14, 2010

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

[3] The Acting Assistant General Counsel stated that the DOE reviewed documents regarding Mr. Trunk, but that review was not done on DOE property – it was done at the USPTO. Therefore, the DOE does not have those documents; the USPTO may have them.

June 1, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Don Baker
Date of Filing:	May 3, 2010
Case Numbers:	TFA-0376 TFA-0384

On May 3, 2010, Don Baker (Appellant) submitted a letter to the Office of Hearings and Appeals. After reviewing the letter, we determined that he was appealing the disposition of two Freedom of Information Act Requests he submitted to the Department of Energy (DOE) Headquarters. The first request, filed on August 31, 2009, was for "a copy of the applications received for [DE-FOA-0000058], including the Application for Federal Assistance SF-424, from these three companies. 1. Southern Company - $197M for Smart Meters 2. Alliant Energy 3. Portland General Electric." Request dated August 31, 2009, from Appellant to DOE Headquarters (August 31, 2009, Request). The Appeal of the disposition of the August 2009 request has been designated as Case No. TFA-0376. The second request, filed on December 16, 2009, was for "a copy of any requests for payment that have been submitted by Southern Company" for the "$165,000,000 in Smart Grid Investment Grants" that the DOE awarded under solicitation numbers DE-FOA-0000058 and DE-FOA-0000036. Request dated December 16, 2009, from Don Baker to DOE Headquarters (December 16, 2009, Request). The Appeal of the disposition of the December 2009 request has been designated as Case No. TFA-0384. These Appeals, if granted, would require DOE Headquarters to release responsive information to the Appellant and would require ORO to conduct a further search for responsive documents.

I. Background

After designating the August 31, 2009, request as number FOIA-2009-000729, DOE Headquarters sent the request to the Office of Electricity Delivery and Energy Reliability. The request was recently referred to the Office of Procurement. E-mail dated May 24, 2009, from Alexander Morris, FOIA Officer, DOE, to Janet R. H. Fishman, Attorney-Examiner,

Office of Hearings and Appeals (OHA), DOE. As of the dated of this Appeal, Procurement has not yet responded to this request. *Id.*
DOE designated the December 16, 2009, request as number HQ-2010-000632-F. On April 8, 2010, after initially sending the request to the Office of the Chief Financial Officer, DOE forwarded the request to the Oak Ridge Office (ORO) of the DOE. Memorandum dated April 8, 2010, from Alexander C. Morris, FOIA Officer, DOE, to Amy Rothrock, FOIA and Privacy Act Officer, ORO. On April 19, 2010, ORO responded to the request stating that no "requests for payment" were found for Southern Company Services relating to the two solicitation numbers the Appellant referenced in his request. Determination Letter dated April 19, 2010, from Elizabeth Dillon, Authorizing Official, ORO, DOE, to Appellant. ORO continued that no award has been made under solicitation DE-FOA-0000058, at this time, and no award was made to Southern Company Services under solicitation DE-FOA-0000036. *Id.*

On May 3, 2010, the Appellant challenged the lack of a response to his August 2009 request, claiming that his FOIA request was for "Applications received for American Recovery and Reinvestment Act (ARRA) funding." Appeal Letter dated April 26, 2010, from Appellant to Director, OHA, DOE. He continued that on August 31, 2009, he requested copies of "Applications received for ARRA funding opportunity DE-FOA-0000058 Smart Grid Investment Grant Program - specifically applications from: Southern Company, Alliant Energy and Portland General Electric." *Id.* Also in the Appeal, he appealed the determination issued to him on April 19, 2010, by the ORO. In that determination, ORO responded to a request for information the Appellant filed in December 2009 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORO stated that it found no documents responsive to the Appellant's request.

II. Analysis

A. Case No. TFA-0376

As we stated in the Background section above, the Appellant's August 31, 2009, request was recently reassigned to the Office of Procurement. E-mail dated May 25, 2010, from Alexander Morris, FOIA Officer, DOE, to Janet R. H. Fishman, OHA. Procurement has not yet responded to this request. *Id.* DOE Regulations allow OHA to consider appeals when the Office to which a FOIA request is made "denied a request for records in whole or in part or has responded that there are no documents responsive to the request." 10 C.F.R. § 1004.8(a). Because DOE has not yet responded to the August 31, 2009, request, this matter is not ripe for our review. The Appellant is permitted to proceed with this matter in federal district court. 5 U.S.C. § 552(a)(6)(C)(i). Therefore, we will dismiss the Appeal,

Case No. TFA-0376, regarding the August 2009 request, and we only need to address ORO's search regarding the Appeal, Case No. TFA-0384.

B. Case No. TFA-0384

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1]

We contacted ORO to determine what type of search was conducted for requests for payments submitted by Southern Company. In response, ORO indicated that the Chief of the Payment Services Branch conducted the search. Attachment 1 to E-mail dated May 12, 2010, from Linda Chapman, FOIA/Privacy Act Officer, ORO, to Janet R. H. Fishman, Attorney-Examiner, OHA. While the Chief has only been in his position for one year, he has 22 years of experience in the ORO Financial Service Center. He searched the DOE Corporate Accounting System for invoice records. *Id.* Unfortunately, the request only contained the requisition numbers, not the award numbers. *Id.* The Chief searched for awards by the vendor's name, Southern Company. *Id.* He found 11 open awards and three closed awards. *Id.* There was only one award, "Smart Grid Investment Grant Program," close to the dollar amount listed in the request, $165,000,000, and it was still open. *Id.* The Chief then searched for invoices received from the vendor on that award and found that no invoices have been received. *Id.* Therefore, no payments have been awarded. *Id.* We believe the search that ORO conducted was reasonably calculated to reveal the records responsive to the Appellant's request.

III. Conclusion

In regard to Case No. TFA-0376, DOE has not yet responded to the August 31, 2009, request, therefore, the matter is not ripe for our review. Accordingly, this Appeal will be dismissed. In regard to Case No. TFA-0384, the search that ORO conducted was reasonably calculated to reveal records responsive to the Appellant's December 16, 2009, request. Accordingly, this Appeal will be denied.

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

It Is Therefore Ordered That:

(1) The Appeal filed by Don Baker, Case No. TFA-0376, is hereby dismissed.

(2) The Appeal filed by Don Baker, Case No. TFA-0384, is hereby denied.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 1, 2010

May 25, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Better Way for BPA

Filing Date: May 11, 2010

Case Number: TFA-0378

This Decision concerns the Appeal that Better Way for BPA (Better Way) filed from a determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued to it on April 28, 2010. In that determination, the BPA responded to Better Way's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In its determination, the BPA withheld information under FOIA Exemption 5. Better Way challenges the BPA's withholding and argues that it performed an inadequate search. If we grant this Appeal, the BPA (i) may not withhold the information under FOIA Exemption 5; and (ii) must perform an additional search and either release newly discovered records or issue a new determination justifying the withholding.

I. Background

From a previous FOIA request, Better Way had received the Agency Decision Framework (Version 6) of the I-5 Corridor Reinforcement Project. Then Better Way requested the following:

1) All versions and revision dates of this document;

2) Which version was presented to the BPA Administrator and when; and

3) That the BPA not withhold financial data.

Request Letter.

Regarding the first request, the BPA released all versions of the Agency Decision Framework. Determination Letter. But the BPA invoked the deliberative process privilege and the attorney-client privilege to redact all of a separate document entitled "Legal Analysis" except its title. The BPA said, "Release of the material . . . could deter an open and candid exchange" between the BPA and its attorneys. It also said that because the document consists of legal analysis, it contains no segregable factual information. *Id*.
Regarding the second request, the BPA responded that it is a question, not a FOIA request. Regarding the third request, the BPA indicated that it had not withheld financial information.

On Appeal, Better Way presents two arguments. First, it challenges the adequacy of the BPA's search. It stated that the BPA must have a document revision, tracking, or archiving system that should turn up additional responsive documents. If the documents were distributed by hard copy, recipients "unlikely . . . destroyed each and every copy they received." Second, Better Way argues that the BPA should not have invoked Exemption 5 to withhold any part of the Legal Analysis. It stated, "It is highly unusual for a complete document to be redacted." *Id*.

On Appeal, Better Way also requested the version numbers of the documents it received, the dates they were created, and when the versions were presented to the BPA Administrator.[1] *Id*.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Adequacy of Search

In responding to a request for information filed under the Freedom of Information Act (FOIA), courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Todd J. Lemire*, Case No. VFA-0760 (2002).[2]

We contacted the BPA to gain additional information to evaluate its search. It stated that the project manager for the Agency Decision Framework conducted the search. He searched his paper and electronic files and contacted 134 people, including all project members and others associated with the project. The search uncovered the original template for the Agency Decision Framework and versions 4, 5, and 6. (To his knowledge, versions 1, 2, and 3 no longer exist.)

Based on the description of the search, we find that an adequate search was conducted because the search was reasonably calculated to uncover all relevant documents. Therefore, we will deny this element of the Appeal.

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[1] We do not address these arguments because we do not have jurisdiction to do so. The FOIA requires the agencies to disclose documents; it does not require the disclosure of information about a document, such as its version number, when it was created, or when a particular employee reviewed it.

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

B. Exemption 5

Better Way argues that the BPA improperly invoked Exemption 5 to withhold information. *See* Appeal Letter.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statute defines "agency" broadly, including "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)).

We find that the withheld information satisfies the first condition because the withheld "Legal Analysis" appears in an intra-agency communication – a memorandum from the BPA's Office of General Counsel to another office within the BPA.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege and the attorney-client privilege. *Klamath*, 532 U.S. at 8 (citations omitted).

1. The Deliberative Process Privilege

An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position . . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id*. The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*.

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

We find that the BPA properly invoked the deliberative process privilege to withhold portions of the document entitled "Legal Analysis." It is predecisional – it precedes the issuance of the final version of the Agency Decision Framework. It is also deliberative – it contains the BPA's evaluation of controlling legal authority as well as an application of that authority to a number of alternative courses of action.

2. The Attorney-Client Privilege

An agency may withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses opinions given by an attorney to a client based upon, and thus reflecting, those facts. *See, e.g., Jernigan v. United States Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, Case No. LFA-0398 (1994).

We find that the BPA properly invoked the attorney-client privilege to withhold portions of the document entitled "Legal Analysis." The document is a confidential communication to the BPA from its attorney in the BPA's Office of General Counsel. Further, the withheld portions contain the attorney's legal opinion regarding a topic upon which the BPA sought professional advice. The redacted portions do not contain social, informational, or procedural communications.

3. Segregability of Factual Information

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

We reviewed the withheld information and did not find any non-exempt, segregable information.

4. Public Interest

If the FOIA exempts information from mandatory disclosure, the DOE should still release it if doing so is in the public interest. 10 C.F.R. § 1004.1.

In this case, the release of the withheld predecisional, deliberative information and the withheld attorney-client information could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions. This would stifle the free exchange of ideas and opinions that is essential to the sound functioning of DOE programs. We do not believe that discretionary release of the properly withheld material would be in the public interest. *State of New York*, Case No. TFA-0274 (2008).

It Is Therefore Ordered That:

(1) The Appeal that Better Way for BPA filed on May 11, 2010, OHA Case No. TFA-0378, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 25, 2010

June 17, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tom Marks

Date of Filing: May 11, 2010

Case Number: TFA-0379

On May 11, 2010, Tom Marks (Appellant) filed an Appeal from a determination issued to him on April 5, 2010, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This appeal, if granted, would require NNSA to release the withheld information to the Appellant.

I. Background

On September 10, 2007, the Appellant filed a request with NNSA for

> 1. FY00-FY08 "salary increase authorization" proposals submitted to LANL and/or the University of California on behalf of Las Alamos National Laboratory (LANL) to NNSA/DOE. These are also referred to as "compensation increase" plans or proposals.
>
> 2. DOE/NNSA "salary increase authorization" responses to LANL/University of California for FY00-FY08.
>
> 3. All [computer] "hot skills" requests or proposals submitted by LANL and/or the University of California on behalf of LANL tot he NNSA/DOE after January 1, 1999.
>
> 4. All DOE/NNSA responses to the request and/or proposals as described in item 3, above, and all authorization for [computer] hot skills compensation to LANL/UC effective after January 1, 1999.

Determination Letter from Carolyn Becknell, NNSA, to Appellant, November 26, 2008 at 1.

On November 26, 2008, NNSA released copies of letters from DOE to contractors approving the Compensation Increase Plans for FY 2000, 2001, 2002, 2004, 2005 2006 and 2008. In its Determination, NNSA stated that the remainder of the responsive records, the Compensation Increase Plans (CIPs) or proposals that would include all authorizations for salary increases and hot skills compensations, were being withheld in their entirety pursuant to Exemptions 2 and 4 of the FOIA. On January 7, 2009, the Appellant appealed, contending that NNSA did not properly support its Exemption 2 and Exemption 4 withholdings. January 7, 2009 Appeal Letter at 1-2. The Appellant also contended that NNSA did not identify the specific exemptions for each redaction in the responsive records. *Id.* at 2. Finally, the Appellant contended that NNSA conducted a flawed analysis to determine if disclosure of the withheld information was contrary tot he public interest. *Id.*

On February 5, 2009, the Office of Hearings and Appeals (OHA) issued a Decision and Order in which it remanded the matter to NNSA to issue another determination regarding the Appellant's original FOIA request and inform the Appellant which specific portions of the documents at issue are being withheld pursuant to which exemption and explain how Exemptions 2 and 4 apply to the withheld material in that document. On April 5, 2010, NNSA issued a new determination in which it withheld, as previously withheld, the CIPs or proposals. According to NNSA, release of this information will interfere with DOE/NNSA's ability to obtain candid advice in the future. *See* April 5, 2010 Determination Letter at 1-2. In his Appeal, the Appellant challenges the application of Exemption 4 to the withheld material and asserts that release of this material is in the public interest. April 5, 2010 Appeal Letter at 2.

II. Analysis

A. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b)(4); 10 C.F.R. §1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks,* 498 F.2d 765 (D.C. Cir. 1974). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, the agency must engage in a more complex analysis, as set forth in *National Parks*.

Under the *National Parks* test, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290 (*citing Washington Post Co. V. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import*

Bank, 464 F. Supp. 804, 806 (D.D.C. 1979). The information NNSA withheld is both commercial and obtained from a person.

In order to determine whether the information is "confidential," the agency must first decide whether the information was voluntarily or involuntarily submitted. In this case, the submitters presented the requested information to the DOE on an involuntary basis, because it required the information as part of a contract it holds with DOE/NNSA. Where the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

In its Determination Letter, DOE/NNSA alleges that the information concerns sensitive, proprietary survey data and Los Alamos National Security, LLC (LANS) has made agreements with vendors to keep this information confidential. Survey companies could decline to allow LANS to participate in future surveys and would impair DOE/NNSA's "ability to review objective survey data to make an informed decision to approve a CIP." April 5, 2010 Determination Letter at 2. In addition, DOE/NNSA asserts that access to the CIP documents would "provide competitors with a window into the LANS compensation process and, where the survey data revealed below-market salaries, would provide an incentive for competitors to raid LANS talent." *Id.* We agree. Release of the information that DOE/NNSA withheld would result in substantial competitive harm to the submitter.

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Martin Becker,* 28 DOE ¶ 80,222 (May 2, 2002)(Case No. VFA-0710). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. 1/

It Is Therefore Ordered That:

(1) The Appeal filed by Tom Marks, OHA Case No. TFA-0379, on May 11, 2010, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (4)(B). Judicial review may be sought

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

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 17, 2010

June 28, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry Martin Apodaca
Date of Filing:	May 11, 2010
Case Number:	TFA-0380

On May 11, 2010, Terry Martin Apodaca filed an Appeal from a determination issued to her by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA withheld information in response to a request for information that Ms. Apodaca (or "Appellant") filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA to release the withheld information.

I. Background

In one of the FOIA requests that she filed on May 18, 2009, Ms. Apodaca requested copies of:

1. All OPA [Office of Public Affairs] personnel actions from May 2007 to the present, including all attached background information and justifications; and

2. Any and all complaints or grievances filed against any member of OPA, including the FOIA/PA team, from May 2007 to present in the possession of OPA, Director's office.

First Request Letter from Terry Apodaca to Carolyn Becknell, FOIA Officer, NNSA (May 18, 2009) (First Request Letter). On October 14, 2009, NNSA issued two determination letters responding to Ms. Apodaca's requests. Letters from Carolyn Becknell, FOIA Officer, NNSA, to Terry Apodaca, October 14, 2009. In the first determination, NNSA released a number of documents, but redacted some information under Exemptions 5 and 6. Among these documents were personnel action documents (Personnel Documents) from which employee salary information had been redacted. In the second determination, NNSA released 53 responsive documents to Ms. Apodaca in whole or in part, but withheld in its entirety a fact-finding report under Exemption 5 and an OPA employee's formal grievance document (Grievance Document) under Exemption 6.

On November 10, 2009, Ms. Apodaca appealed both the first and the second determinations. E-mail from Terry Apodaca, Appellant, to William Schwartz, Attorney-Examiner, OHA, dated November 10, 2009; E-mail from Terry Apodaca, Appellant, to William Schwartz, Attorney-Examiner, OHA, dated November 12, 2009. On December 9, 2009, OHA issued a decision addressing Ms. Apodaca's appeals. In pertinent part, OHA remanded the matter to NNSA to: (1) review and segregate

responsive information contained in the Grievance Document; and (2) review all redacted federal salary information in the Personnel Documents to determine its releasability. *See Terry M. Apodaca*, Case Nos. TFA-0336 and TFA-0337 (2009).[1]

On April 13, 2010, NNSA issued a new determination letter to Ms. Apodaca in which it withheld portions of the Grievance Document pursuant to Exemption 6, claiming that the responsive information could not be released or redacted without concerns about invading the grievant's personal privacy. Letter from Carolyn Becknell, FOIA Officer, NNSA, to Terry Apodaca, April 13, 2010 (April 13 Determination Letter). With regard to the Personnel Documents, NNSA released in their entirety those dated from May 2007 to December 20, 2008, but withheld salary information from the Personnel Documents made effective after December 21, 2008, which concerned salaries determined under the NNSA Demonstration Project.[2] *Id*. at 1. Because of the nature of this new performance-based compensation program, NNSA determined that the withheld salary information could reveal an employee's performance rating. *Id*. at 2. Consequently, NNSA withheld this information pursuant to Exemption 6.

On May 11, 2010, Ms. Apodaca filed this Appeal and challenged NNSA's decision to withhold information under Exemption 6. Ms. Apodaca argues that NNSA failed to segregate and release information in the Grievance Document. E-mail from Terry Apodaca, Appellant, to William Schwartz, Attorney-Examiner, OHA, dated May 11, 2010 (May 11 Appeal). Ms. Apodaca further argues that NNSA improperly withheld salaries in the Personnel Documents. E-mail from Terry Apodaca, Appellant to Avery R. Webster, Attorney-Examiner, OHA, dated May 15, 2010 (Apodaca E-mail). Ms. Apodaca maintains that according to a May 13, 2010, NNSACAST entitled "NNSA DNS Alert No. 005-2010," salary and performance award information is not classified as Personally Identifiable Information (PII) and should, therefore, be released. *Id*.

II. Analysis

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C. F. R. § 1004.10(b)(6). Thus, the purpose of Exemption 6 is to "protect individuals from the

[1] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] The NNSA Demonstration Project was designed by NNSA in consultation with the Office of Personnel Management (OPM) to modify the General Schedule (GS) classification and pay system by identifying several broad career paths, establishing pay bands which may cover more than one grade in each career path, eliminating longevity-based step progression and providing for annual pay adjustments based on performance. Personnel Demonstration Project; Pay Banding and Performance-Based Pay Adjustments in the National Nuclear Security Administration, 72 Fed. Reg. 72776 (December 21, 2007).

injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Wash. Post Co*., 456 U.S. 595, 602 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest, by shedding light on the operations and activities of the government. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Comm.*, 489 U.S. at 762-70.

A. Grievance Document

On remand, NNSA was directed to review the Grievance Document to determine if any of the withheld information could be segregated and released without invading the grievant's personal privacy. *See Terry M. Apodaca*, Case Nos. TFA-0336 and TFA-0337 (2009). The Grievance Document contains a grievance and corresponding documents that were filed by one employee. Upon review, NNSA segregated and released to Ms. Apodaca portions of pages 2, 9, 10 and 16 of the 19-page Grievance Document. April 13 Determination Letter. Citing Exemption 6, NNSA withheld the name and other personally identifying information of the grievant. *Id*. NNSA maintained that release of this information would cause "inevitable harassment and unwanted solicitation" and would not shed light on the operations of the federal government. *Id.*

In her Appeal, Appellant argues that NNSA erred in withholding portions of the Grievance Document that are about her because "there is no basis for withholding information ***about*** me ***from*** me." Apodaca E-mail. Appellant's argument would have more weight if the only privacy interest to be protected in the withheld material was her own. *See Department of Justice v. Reporters Committee for the Freedom of the Press*, 489 U.S. 749 (1989) (effectively holding that agencies should not invoke FOIA exemptions where the only interest sought to be protected is that of the requestor). In the present case, however, we find that any information relating to the Appellant can not be reasonably segregated and released without revealing the identity of the grievant. Accordingly, as discussed below, we find that this material was properly withheld pursuant to Exemption 6.

In reviewing an unredacted copy of the Grievance Document, we find that the withheld material consists of information that would reveal the identity of the grievant. We agree with NNSA that a substantial privacy interest exists regarding the identity of an employee filing a workplace complaint. *See Virginia Johnson*, Case No. VFA-0592, at slip. op. at 3 (August 8, 2000) (*Johnson*), *citing Rothman v. USDA*, No. 94-8151, slip. op. at 6 (C.D. Cal. June 17, 1996) (significant privacy interest in the names of federal employee parties to employment disputes). As for whether release of the information withheld would further the public interest by shedding light on the operations and activities of the Government, we note that the name of the employee who filed the grievance, and other information that could identify him or her, says little if anything additional about the activities

of the Government. *See Johnson*, slip. op. at 4. Given the significant privacy interest in the identity of the employee and the *de minimus* public interest that would be furthered by release of the employee's identity, we find that release of the withheld information in the Grievance Document would be a clearly unwarranted invasion of personal privacy. Consequently, we find that Exemption 6 was properly applied to the Grievance Document.

B. Personnel Documents

In its April 13, 2010, determination, NNSA withheld salary information contained in the Personnel Documents dated on or after December 21, 2008, claiming that the withheld salary information is now tied to the employees' performance rating and cannot be released without also releasing performance-related data. In withholding this information, NNSA found that the "basic pay, locality adjustment, adjusted basic pay, and total salary/award . . . if supplied and combined with other identifying information, could allow one to reasonably deduce the performance rating and award for an individual under the NNSA performance based pay plan." *Id*. at 2. According to NNSA, the unnecessary release of these documents may result in injury and embarrassment to its employees. *Id*.

Our starting point is the federal regulation requiring that certain federal employee information be made available to the public. 5 C.F.R. § 293.311(a). That information includes "present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials). 5 C.F.R. § 293.311(a)(4). That regulation provides an exception where disclosure of the enumerated information (i) would reveal other information that would constitute a clearly unwarranted invasion of personal privacy or (ii) is otherwise protected from disclosure under a FOIA exemption. 5 C.F.R. § 293.311(b).

As the foregoing indicates, under the general rule, NNSA is required to disclose its salaries. 5 C.F.R. § 293.311(a)(4). The argument that pay band salaries may disclose performance award information is unavailing since the general rule requires the disclosure of performance awards. Moreover, we fail to see the basis for an exception from that general rule. The argument that performance award information may allow one to reasonably deduce a performance rating is not unique to the pay band system. In addition, many factors affect the determination of a specific employee's salary within a pay band. Although disclosure of that salary amount might permit conjecture regarding the employee's personnel rating, it certainly would not "reveal" that information. 5 C.F.R. § 293.311(b)(i). For these reasons, the argument is not a basis for an exception from the general rule requiring the disclosure of performance award information.

III. Conclusion

As the foregoing indicates, NNSA properly withheld the redacted information in the Grievance Document pursuant to Exemption 6 of the FOIA. As the foregoing also indicates, the salary information in the Personnel Documents must be released pursuant to 5 C.F.R. § 293.311(a)(4). Therefore, the Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry Martin Apodaca on May 11, 2010, Case No. TFA-0380, is hereby granted as set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall release the Personnel Documents without redacting salary information.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 28, 2010

June 15, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eagle Rock Timber, Inc.

Date of Filing: May 18, 2010

Case Number: TFA-0381

This Decision concerns an Appeal that Eagle Rock Timber, Inc. (ERT) filed from a determination issued to it by the Department of Energy's (DOE) Idaho Operations Office (IOO). In that determination, IOO responded to ERT's requests for documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. IOO identified several responsive documents, and released some records to ERT, but did not release others because the documents were the property of a DOE contractor, Battelle Energy Alliance, LLC (BEA), and, therefore, not agency records subject to disclosure under the FOIA. This appeal, if granted, would require IOO to release the previously-withheld responsive documents.

I. Background

BEA is the managing and operating contractor at the DOE's Idaho National Laboratory (INL). BEA subcontracted ERT to construct the Materials and Fuels Complex (MFC) Radiochemistry Laboratory at INL. On February 22, 2010, and March 15, 2010, ERT submitted FOIA requests for various documents pertaining to the construction project. *See* Letter from Clayton Ogilvie, FOIA Officer, IOO, to Rick R. Gokey, President, ERT (March 5, 2010) (Determination Letter 1); Letter from Timothy B. Jackson, Acting FOIA Officer, IOO, to Rick R. Gokey, President, ERT (April 20, 2010) (Determination Letter 2).

In response to ERT's requests, IOO issued determination letters identifying various documents and releasing documents to ERT, some in their entirety and some with information withheld pursuant to an exemption under the FOIA. *Id*. In addition, IOO identified two other types of documents as responsive to ERT's FOIA requests: (1) "MFC RCL GPP (C.R.20.20.11/C.R.30.20.11) monthly reports section of INL IFM Programs Projects Monthly Reports, from MFC Radio Chemistry Laboratory conception through January 2010;" and (2) "Non-conformance reports (NCRs) with final dispositions issued [by] BEA QA to MFC Radiochemistry Laboratory project team." Determination Letter 1. However, IOO did not

provide these documents to ERT because they were records which were the property of BEA, not DOE, and therefore, they were not subject to release under the FOIA. *Id*.

On May 18, 2010, ERT submitted the present Appeal in which it contends that the documents that IOO withheld are subject to disclosure under the FOIA. ERT's principal arguments are that (1) the requested documents are generated by BEA "in accordance with its contract and transmitted to the [DOE] and the requested documents are therefore the property of the government;" and (2) the requested records fall within the definition of government property under the Department of Energy Acquisition Regulations (DEAR), 48 C.F.R. 970.5232-3 ("Accounts, Records, and Inspection"). Appeal at 2.

II. Analysis

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

(1) The intent of the document's creator to retain or relinquish control over the document;

(2) The ability of the agency to use and dispose of the record as it sees fit;

(3) The extent to which agency personnel have read or relied upon the record; and

(4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010).[1]

As an initial matter, while processing this Appeal, IOO informed us that BEA intends to release to ERT the documents identified as "MFC RCL GPP (C.R.20.20.11/C.R.30.20.11) monthly reports section of INL IFM Programs Projects Monthly Reports, from MFC Radio Chemistry Laboratory conception through January 2010." Consequently, the portion of this Appeal pertaining to those documents is moot and shall be dismissed.

Regarding the NCRs, we conclude that the records were not created or obtained by the DOE, nor were they under DOE control at the time of the FOIA requests. BEA generates the NCRs to "identify areas of concern regarding the work of its subcontractors." E-mail from Mary McKnight, Attorney-Advisor, IOO, to Diane DeMoura, Attorney-Examiner, OHA (June 2, 2010). BEA has never transmitted the NCRs to DOE or indicated any intent to relinquish control of the records to DOE. *Id*. Further, because the NCRs have not been submitted to the DOE, DOE employees have not read or relied upon the records, the DOE does not have the ability to

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

use or dispose of the records, and the records have not been integrated into the DOE's record system or files. *Id.* Therefore, we find that the NCRs are not "agency records" for purposes of the FOIA.

However, a finding that certain documents are not "agency records" does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C § 552(b).

10 C.F.R. § 1004.3(e). Section I.15(b)(3) of the contract between DOE and BEA, DOE Contract No. DE-AC07-05ID14517 (DEAR § 970.5204-3, "Access To And Ownership of Records"), identifies as property of BEA "records relating to any procurement action by the contractor, except for records that under 48 C.F.R. § 970.5232-3, Accounts, Records, and Inspection, are described as property of the government.[2] *See* http://www.id.doe.gov/doeid/INLContract/INL-Contract.htm.

Applying the provisions of the contract between the DOE and BEA to the case at hand, it is clear that the NCRs are the property of BEA, not the DOE. BEA maintains these records as part of its subcontractor procurement system, and they are not considered government records under the DEAR § 970.5204-3 ("Access To And Ownership of Records"). Further, the DOE has not specified the NCRs in its contract with BEA as government records under DEAR § 970.5232-3 ("Accounts, Records, and Inspections"). Accordingly, the NCRs are not subject to public disclosure.

It Is Therefore Ordered That:

(1) The Appeal filed on May 18, 2010, by Eagle Rock Timber, Inc., OHA Case No. TFA-0381, is hereby dismissed in part and denied in part, as set forth in paragraphs (2) and (3) below.

(2) The portion of the Appeal pertaining to the withholding of "MFC RCL GPP (C.R.20.20.11/C.R.30.20.11) monthly reports section of INL IFM Programs Projects Monthly Reports, from MFC Radio Chemistry Laboratory conception through January 2010" is hereby dismissed.

[2] Section I. 43(d) of the contract (DEAR § 970.5232-3) states, in pertinent part, that "except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination under this contract and final audits of account hereunder."

(3) The portion of the Appeal pertaining to "Non-conformance reports (NCRs) with final dispositions issued [by] BEA QA to MFC Radiochemistry Laboratory project team" is hereby denied.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 15, 2010

June 17, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Tarek Farag

Date of Filing: May 25, 2010

Case Number: TFA-0385

This Decision concerns a Motion for Reconsideration of a Decision and Order filed with the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) by Tarek Farag. In this Motion, Mr. Farag requests that OHA modify a Decision and Order that we issued in response to an Appeal Mr. Farag filed under a Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. *See Tarek Farag*, Case No. TFA-0365 (2010).[*]

I. Background

Mr. Farag filed a FOIA request on December 2, 2009, in which he requested "the information and reasons upon which the two reviewers from the DOE decided that secrecy is not recommended" in regard to his patent application pertaining to a method and a process for isotope separation. *Tarek Farag*, Case No. TFA-0365, at 1 (2010). On March 24, 2010, the DOE Office of Classification (Classification) issued a determination in which it released to Mr. Farag numerous documents responsive to his request. *Id.* Mr. Farag appealed Classification's determination, challenging the adequacy of Classification's search for responsive records. Specifically, Mr. Farag based his Appeal on the fact that he did not receive a written explanation regarding the "secrecy not recommended" decision, even though two reviewers offered many times to give a written recommendation for the decision. *Id.* Mr. Farag also requested in his Appeal the qualifications of the reviewers who made the "secrecy not recommended" decision. *Id*.

OHA denied Mr. Farag's Appeal. In considering the Appeal, OHA assessed the scope of Classification's search for documents responsive to Mr. Farag's request. Classification informed OHA that Mr. Farag's FOIA request was forwarded to each office within Classification and all responsive records that the offices located were released to Mr. Farag. In addition, Classification informed OHA that, although the Classification reviewers were willing to provide a written explanation regarding the decision, a written explanation for the "secrecy not recommended" was deemed unnecessary and, therefore, never created. OHA concluded that Classification's

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

search "was reasonably calculated to reveal the records responsive to [Mr. Farag's] request, including the written explanation if one existed." *Id*. at 2. OHA further noted that the FOIA does not require an agency to create documents in response to a request. *Id*. at 3 (internal citations omitted). In addition, OHA stated that requesters are not permitted to expand the scope of a FOIA request on Appeal, but must file a new FOIA request for those documents. *Id*. Mr. Farag had not requested information pertaining to the reviewers' qualifications in his initial FOIA request and, therefore, must file a new FOIA request for those documents. *Id*.

In his Motion for Reconsideration, Mr. Farag asserts that "a request pursuant to FOIA is not limited only to information stored in written format and the definition of documents is believed to extend to all possible formats for keeping information." Motion at 1. He continues, "If the ["secrecy not recommended"] reasons existed in a non-written format, like oral or human-brain format, it could be transformed easily into a written format, or should have been stored in written or electronic format." *Id*. In addition, Mr. Farag maintains that even if he did not request the reviewers' qualifications in his initial FOIA request, "it is more economical for the DOE to provide them or supplement the previous answer to save the time and resources [necessary] to examine a new request." *Id*. at 2.

II. Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. See 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g., Citizen Action New Mexico*, Case No. TFA-0215 (2007). In reviewing such requests for reconsideration, we may look to OHA's procedural regulations regarding modification or rescission of its orders. *See* 10 C.F.R. Part 1003, Subpart E; *see also Terry M. Apodaca*, Case No. TFA-0237 (2007). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application "demonstrates that it is based on significantly changed circumstances." 10 C.F.R. § 1003.55(b)(1).

Significantly changed circumstances includes "the discovery of material facts that were not known or could not have been known" at the time of the original proceeding; "the discovery of a law, rule, regulation … that was in effect" at the time of the original proceeding "and which, if such had been known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome;" or "a substantial change in the facts or circumstances upon which an outstanding or continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between the issuance of such order and the date of the application [for modification or rescission] and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R § 1003.55(b)(2).

Applying these standards to the case at hand, we find that Mr. Farag has not presented any evidence in his Motion warranting modification or rescission of our prior decision in *Tarek Farag*, Case No. TFA-0365 (2010). Mr. Farag's argument that the reviewers' explanations for the "secrecy not recommended" decision is subject to the FOIA, despite having never been committed to any tangible or searchable format, does not demonstrate "significantly changed circumstances." Specifically, Mr. Farag's argument is not evidence of a discovery of pertinent

material facts unknown at the time of the Appeal, the discovery of an applicable law unknown at the time of the Appeal, or a substantial change in facts or circumstances. Rather, this argument is a restatement by Mr. Farag of the arguments he made in his Appeal. Similarly, Mr. Farag's assertions regarding the efficiency of providing him the information he requested in his Appeal pertaining to the reviewers' qualifications, despite the fact that he never made a FOIA request for that information, does not meet the standard of "significantly changed circumstances" as set forth above.

In sum, Mr. Farag's Motion for Reconsideration is an attempt to reargue the merits of his case, rather than a demonstration of "significantly changed circumstances" warranting modification or rescission of our decision in *Tarek Farag*, Case No. TFA-0365 (2010). Consequently, the Motion should be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Tarek Farag on May 18, 2010, OHA Case No. TFA-0385, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 17, 2010

June 21, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	James J. Byron
Date of Filing:	May 26, 2010
Case Number:	TFA-0386

On May 26, 2010, James J. Byron filed an appeal from a determination issued to him by the Richland Operations Office of the Department of Energy (DOE) regarding a request for documents that he submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to Mr. Byron's FOIA Request, Richland provided him with a number of documents, including some from which information was withheld pursuant to the FOIA. Mr. Byron also asserts that Richland produced one page that is not legible, and did not produce all documents that are responsive to his request. This Appeal, if granted, would require that Richland release the information it withheld from five specified pages, provide a more legible copy of a sixth page, and perform a new search for additional responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. At issue in this Appeal is Exemption 6.

I. Background

On April 1, 2010, Mr. Byron submitted a FOIA request for employment records from the Hanford Site for Earl Leo Kirkwood, now deceased, who worked at the Site from 1943 through 1984. On April 22, 2010, Richland issued a determination letter regarding the request, in which it stated that it was releasing to Mr. Byron a copy of Mr. Kirkwood's employment record and a copy of his radiation exposure record. Richland deleted from his radiation exposure record the names, social security numbers and other personal identifiers of other individuals, relying on Exemption 6 of the FOIA. It further explained that AdvanceMed Hanford, which maintains the Hanford Site's medical records, would send Mr. Kirkwood's medical record to Mr. Byron directly.

In his Appeal, the Appellant challenges Richland's determination on three fronts. First, he contends that Richland "erroneously deleted" information from five pages that were provided to him, and he seeks unredacted copies of those pages. Second, he requests a better copy of one page of medical information that he found to be "unreadable." Finally, he requested a new search for documents that were created on or within five working days following specified dates, on which he believed Mr. Kirkwood was affected by radiation exposure incidents.

II. Analysis

1. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally NARFE*, 879 F.2d at 874.

In the course of this Appeal, we obtained unredacted copies of the five pages of exposure records from which Mr. Byron contends Richland erroneously deleted information. The information that was deleted from those pages consists of the names and other personal identifiers of individuals other than Mr. Kirkwood. Those personal identifiers include their payroll numbers, social security numbers, file numbers, the names and locations of their employers, and the starting and ending dates of their visits to a facility. They do not contain any information that relates to Mr. Kirkwood in any way. Applying the three-step analysis outlined above to the information that was withheld from Mr. Byron, we first determine that the individuals whose information was not disclosed have a significant privacy interest in having their anonymity preserved, particularly because these records link the individuals to exposure to unnamed substances. Next, we consider whether release of the individuals' names and identities would further the public interest by shedding light on government operations. We fail to see how disclosure of the identities of specific individuals would cast more light on government activities than that which is already revealed in the numerical values of exposure readings that were not withheld from Mr. Byron. Balancing the significant privacy interest of the individuals listed on these pages against a public interest that is minimal at best, we conclude that the public interest in the learning the identities of the individuals is outweighed by their privacy interest. Consequently, we find that release of the names and identities of other individuals listed on the same pages as Mr. Kirkwood would constitute an unwarranted invasion of personal privacy, and that Richland properly withheld this information under Exemption 6.

2. Unreadable Document

After we received Mr. Byron's Appeal, we referred his request for a more legible copy of one document, a medical examination report, to Richland. The Richland FOIA Officer undertook an

inspection of the original document and secured a new, fully legible copy, which was sent to Mr. Byron by certified mail on June 7, 2010. E-mail Message from Dorothy Riehle, Richland FOIA Officer, to William M. Schwartz, Staff Attorney, Office of Hearings and Appeals, June 8, 2010. This matter is now fully resolved.

3. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Aurimus Svitojus*, Case No. TFA-0349 (March 8, 2010).

We contacted Richland to determine the extent of the search that was conducted for documents responsive to Mr. Byron's request. At the Hanford Site records holding area, which stores all archive and historical records on past employees, subject matter experts conducted a search of both index cards and an electronic database. The Office of Radiation and Health Technology of the Pacific Northwest National Laboratory searched for and located Mr. Kirkwood's radiation exposure record. AdvanceMed Hanford, Inc., a contractor that maintains medical records on past and present employees also searched its records and located Mr. Kirkwood's medical records. The searches in all three locations employed both Mr. Kirkwood's name and his social security number, and all responsive documents that were located were then provided to Mr. Byron. E-mail Message from Dorothy Riehle, Richland FOIA Officer, to William M. Schwartz, Staff Attorney, Office of Hearings and Appeals, June 2, 2010.

Our review of the search for documents responsive to Mr. Byron's request indicates that Richland conducted a search that was reasonably calculated to uncover relevant documents. It searched the offices most likely to possess responsive documents. Officials who were most likely to possess information as to where relevant documents existed were consulted in the search effort. Given the information provided to us, we find that Richland conducted an adequate search for responsive documents and produced copies of all those documents for Mr. Byron.

III. Conclusion

As discussed above, we find that Richland conducted an adequate search for documents responsive to Mr. Byron's request. We also find that Richland properly withheld information pursuant to Exemption 6 from five pages of exposure reports. Finally, Richland has produced a more legible copy of one page that Mr. Byron identified as unreadable.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James J. Byron, Case Number TFA-0386, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 21, 2010

July 16, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American Small Business League

Date of Filing: June 15, 2010

Case Number: TFA-0388

On June 15, 2010, the American Small Business League (ASBL) filed an Appeal from a determination issued to it on April 14, 2010, by the Department of Energy (DOE) Office of Economic Impact and Diversity (ED) in response to a request for documents that ASBL submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/ED release any responsive material to ASBL.

I. Background

On March 15, 2010, ASBL requested that ED provide "copies of any, all, each and every video taken from the question and answer portion of the Plenary Session on "Teaming" from Wednesday, June 25, 2008 from 11:15 a.m. to 12:30 p.m., from the Department of Energy's 9th Annual Small Business Conference." Letter from ASBL to Office of Hearings and Appeals (OHA) (June 1, 2010) (Appeal). ED issued a determination letter explaining that it did not locate any responsive material. Letter from ED to ASBL (April 14, 2010) (Determination Letter).

On April 30, 2010, ASBL sent a letter to OHA appealing the ED response. However, this appeal was deficient because it did not contain a copy of the determination letter being appealed, as required by DOE regulations. *See* 10 C.F.R. §1004.8(b). On June 8, 2010, ASBL sent another letter to OHA appealing the determination. We advised ASBL that the appeal was deficient under our regulations because it did not contain a copy of the determination letter in question. *See* Letter from Valerie Vance Adeyeye, OHA Staff Attorney, to ASBL (June 10, 2010). On June 15, 2010, ASBL cured the deficiency and properly filed this appeal.

In its appeal, ASBL asks OHA to order ED to release a copy of the video of the conference session referenced above. If this appeal were granted, ED would be required to conduct another search for the video of the Teaming session held on June 25, 2008, at the 9th Annual Small Business Conference.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The FOIA states that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). [1] The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See e.g. Doris M. Harthun*, Case No. TFA-0015 (2003).

We contacted the DOE FOIA office and ED for additional information so that we could evaluate the search for responsive records. ED stated that no responsive documents existed because ED did not videotape the question-and-answer session referenced by ASBL in its request. *See* Electronic Mail Message from Alexander Morris, FOIA Officer, to Valerie Vance Adeyeye, OAH Staff Attorney (June 30, 2010); Electronic Mail Message from Andy Diaz, ED to Alexander Morris, FOIA Officer (April 12, 2010). ED did not provide any further information about the session. Although the requester saw cameras at the conference, there is no evidence that the session in question was actually recorded. Accordingly, this appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by American Small Business League on June 15, 1010, OHA Case Number TFA-0388, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 16, 2010

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

June 28, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Southeastern Legal Foundation, Inc.
Date of Filing:	June 8, 2010
Case Numbers:	TFA-0389

On June 8, 2010, Southeastern Legal Foundation, Inc., (Appellant) filed an Appeal from a determination issued to it on April 27, 2010, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ). In that determination, DOE/HQ denied the Appellant's request for expedited processing of the request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ expedite the processing of the Appellant's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of request in certain cases. 5 U.S.C. § 552(a)(6)(E).

On April 12, 2010, the Appellant requested records that relate to federal funding for research on global climate change. Specifically, the Appellant sought applications; awards, grants or funding notifications; accompanying and subsequent correspondence with applicants or recipients; denials or deferrals; and any agreements entered by the funding grantee in furtherance of or in conjunction with such research. Request E-mail dated April 12, 2010, from Shannon L. Goessling, Executive Director, Appellant, to DOE/HQ. The Appellant also requested expedited processing because "research grants are subject to expiration and because agency regulations or statutory provisions that are promulgated as a result of research are subject to change upon further development of research." *Id.*

On April 27, 2010, DOE/HQ denied the Appellant's request for expedited processing, arguing that the request did not establish any urgency to inform the public that would warrant expedited treatment. Determination Letter dated April 27, 2010, from DOE/HQ to Appellant at 2. Further, DOE/HQ concluded that the Appellant did not identify any imminent threat to the life or physical safety of an individual. *Id.* at 2.

On June 8, 2010, the Appellant submitted this Appeal of DOE/HQ's denial of expedited processing. The Appellant asks that the Office of Hearings and Appeals (OHA) order DOE/HQ to expedite the processing of its FOIA request. Appeal Letter dated June 3, 2010, from Appellant to Director, OHA.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up in line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v). It is obvious that the present request does not involve information which could reasonably be expected to pose an *imminent* threat to the life or safety of an individual. Therefore, our analysis in this case will examine the second situation – the "urgency to inform."

In order to determine whether a requester has demonstrated an "urgency to inform" and, hence, a "compelling need," courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

Courts have found sufficient urgency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Dep't of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See, e.g., Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 65 (D.D.C. 2006) (granting expedited processing based on public need for requested material concerning visitors to vice presidential offices and degree to which

lobbyists influenced policy discussions during ongoing investigation prior to election); *Gerstein v. CIA,* No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress); *American Civil Liberties Union v. Dep't of Defense*, No. C-06-01698 WHA, 2006 WL 1469418, at *6 (N.D. Cal. May 25, 2006) (granting expedited processing for information related to a "breaking news story," *i.e.*, a story that would lose value if it were delayed).

Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Al-Fayed,* 254 F.3d at 310 (finding that there is no evidence of a substantial public interest in plaintiff's allegations and that plaintiff did not demonstrate any significant adverse consequences if expedited processing was denied); *Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester's failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Dep't of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of "current exigency"). *See also Eugenie Reich*, Case No. TFA-0187 (2007) (denying request for expedited processing because journalist did not establish urgency and did not make clear that the requested information would not be useful to her if processed within the time frame of a normal FOIA request).

In its Appeal, the Appellant argues that rather than following the standard set forth by the court in *Al-Fayed*, we should follow the standard set forth by the court in *Edmonds v. FBI*, 2002 WL 32539613 (D.D.C. 2002). We must reject the Appellant's argument. The standard set forth in *Edmonds* is whether the matter (1) is the subject of widespread and exceptional media interest and (2) calls into question the integrity of the government and, therefore, affects public confidence. *Id.* The *Edmonds* court was, however, interpreting regulations set forth by the Department of Justice (DOJ), regarding how that agency would evaluate expedited processing requests. *See id.* at *3. In *Edmonds*, the court found that the DOJ regulations fell outside and went beyond the FOIA's definition of "compelling need." *Id. Edmonds* is inapposite in the present case since the DOE does not have similar regulations. Consequently, we must reject the Appellant's argument and will apply the standards for expedited processing set forth in *Al-Fayed*.

The Appellant also argues that the information requested will shed light on the "anthropogenic global warming or climate change." Appeal Letter at 2. The Appellant argues that if the regulatory scheme contemplated regarding this issue were fully implemented, devastating consequences would follow. *Id.* at 2-3. The Appellant claims that it will use the requested information to ensure that the grant and research process implemented in producing and supporting the "anthropogenic global warming or climate change" regulations are free from taint. *Id.* at 3.

After reviewing the record of this case, we find that the Appellant has not established a compelling need for expedited processing of its request. First, the Appellant has not established that the requested information is a matter of *current* exigency to the American public. It is true that global warming or climate change affects the entire American public. However, "[t]he public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the "urgency to inform"] standard." *Al-Fayed*, 254 F.2d at 310. Substantial interest on the part of the American public does not amount to exigency. *Electronic Privacy Info. Ctr.*, 322 F. Supp. 2d at 5. Second, the Appellant has not made clear that the requested information will not be useful if processed within the time frame of a normal FOIA request (*i.e.,* 20 working days). The fact that research grants are subject to expiration and regulations and statutory provision are promulgated as a result of the research does not demonstrate the requisite urgency. The Appellant has not presented any "significant adverse consequence" to a recognized interest if expedited processing of this request were denied. *See Al-Fayed*, 254 F.3d at 311; *American Civil Liberties Union*, 2006 WL 1469418 at *8. Accordingly, the Appellant's argument that expedited processing is necessary is speculative.

For the reasons stated above, we find that the Appellant has not demonstrated a compelling need for expedited processing of its FOIA request. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Southeastern Legal Foundation, Inc., Case No. TFA-0389, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 28, 2010

July 7, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nuclear Watch New Mexico

Date of Filing: June 9, 2010

Case Number: TFA-0390

Nuclear Watch New Mexico (NWNM) filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) of the Department of Energy issued on March 8, 2010. In that determination, NNSA withheld documents that NWNM requested under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Appeal, if granted, would require the DOE to release the documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

In its request, NWNM sought access to a copy of the FY 2009 Performance Evaluation Report (PER) for Los Alamos National Security, LLC's management and operation of the Los Alamos National Laboratory under DOE contract no. DE-AC52-06NA25396. In its determination letter, NNSA identified eight documents that it deemed to be responsive to NWNM's request. NNSA withheld all of these documents in their entirety under Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3). Specifically, NNSA determined that Exemption 3 is applicable because the PERs are "source selection information" (that is, information that is used by an agency to evaluate a bid or proposal during the process of awarding a competitively-bid contract), and that the Procurement Integrity Act, 41 U.S.C. § 423 (PIA), forbids the release of source selection information.

In its Appeal, NWNM alleges that similar documents were released in previous years, and questions what it perceives to be a change in that disclosure policy. NWNM also argues that the PIA was intended to protect the integrity of competitive bidding processes, and not to shield for-profit NNSA contractors from public accountability. Appeal at 2.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the PIA is a statute to which Exemption 3 is applicable. *See, e.g., U.S. Ecology, Inc.,* 25 DOE ¶ 80,153 (1995); *Federal Sources, Inc*., 24 DOE ¶ 80, 141 (1994). NWNM has not persuaded us that this determination is erroneous, and for the reasons set forth below, we conclude that the arguments raised in their Appeal are without merit.

As an initial matter, even if NWNM's unsupported allegation that, in prior years, the NNSA released other PERs, is true, that does not preclude NNSA from invoking Exemption 3 in this case. Nothing in the FOIA requires the NNSA to release documents that it is required by other statutes to withhold, simply because similar documents may have erroneously been released in the past. The determinative issue is whether NNSA correctly applied Exemption 3 in this case, and we conclude that it did.

The PIA prohibits knowing disclosure of "contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(a)(1). The statute, quoted in pertinent part, defines "source selection information" as "any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly . . . (J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the federal agency procurement to which the information relates." We have been informed that the DOE Secretary's duly authorized designate, David Boyd, Deputy Director of the Office of Procurement & Assistance Management, determined that release of these particular documents would jeopardize the integrity of the Federal procurement process. *See* memorandum of July 1, 2010 telephone conversation between Shelly Turner, NNSA, and Robert Palmer, OHA Senior Staff Attorney. NWNM does not dispute that the PERs are source selection information.

NWNM does argue, however, that the PIA was never intended to shield NNSA contractors from public accountability. The appellant's contention appears to be that since it is a public interest group, and not a potential competitor for a Federal contract, it should be granted access to the requested documents.

We do not agree. First, the PIA does not draw a distinction between releases of the specified information to public interest or other groups and releases to potential bidders. Second, the statute's definition of "source selection information" excludes information that has "been previously made

available to the public or disclosed publicly." Consequently, release of these documents to NWNM would fatally compromise the DOE's ability to withhold these documents from future competitors for Federal contracts. Finally, nothing would prevent NWNM from publishing these PERs or publicizing them in any way that it saw fit, including ways that could result in competitors for Federal contracts gaining access to the information.

The NNSA properly applied Exemption 3 in withholding the eight PERs. We will therefore deny NWNM's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Nuclear Watch New Mexico, Case Number TFA-0390, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 7, 2010

July 20, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	American Small Business League
Date of Filing:	June 23, 2010
Case Number:	TFA-0394

On June 23, 2010, the American Small Business League (Appellant) filed an Appeal from a determination issued to it on June 2, 2010, by the Golden Field Office (Golden) of the Department of Energy (DOE). In that determination, Golden responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, Golden identified and released portions of documents responsive to the Appellant's request. This Appeal, if granted, would require Golden to release additional information responsive to the Appellant's request.

I. Background

On March 11, 2010, the Appellant requested copies of "[a]ny, all, each and every contract signed by Contracting Officer Tammie M. Lawler for the last quarter of Fiscal Year 2009. Specifically, the pages that contain the Contractor/Vendor Name, dollar amount obligated, PIID, IDVPIID numbers, Contracting Officer Business Size Determination." Request E-Mail dated March 11, 2010, from Kevin Baron, Appellant, to DOE. On June 2, 2010, Golden released 584 pages of "copies of the database entry forms for all contracts signed by Contracting Officer Tammie M. Lawler for the last quarter of Fiscal Year 2009." Determination Letter dated June 2, 2010, from Derek Passarelli, Acting Deputy Manager and Chief Counsel, Golden, to Appellant. A number of the 584 pages were redacted under Exemptions 5 and 6 of the FOIA.

On June 23, 2010, the Appellant appealed the Determination, claiming that it did not agree to modify its request to seek only the database entry forms relating to the contracts. Appeal Letter received June 23, 2010, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE. The Appellant further asked that all the information originally requested be provided in full. *Id.* In addition, the Appellant challenged the applicability of Exemptions 5 and 6 to some information in the database entry forms.

II. Analysis

The Appellant requested "copies of contracts signed by Tammie M. Lawler." Golden provided "copies of database entry forms for all contracts signed by Tammie M. Lawler," stating that the Appellant had agreed to modify its request in that manner. We contacted the Appellant who told us that he does not remember modifying the request. Memorandum of Telephone Conversation dated July 12, 2010, between Appellant and Janet R. H. Fishman, Attorney-Examiner, OHA. The Appellant still wants copies of the contracts. *Id.* Given the lack of any written approval of a modification of the request, we will remand the matter to Golden for it to address the Appellant's request for copies of the contracts signed by Tammie Lawler.

The Appellant also challenged Golden's withholding of information under Exemptions 5 and 6. As indicated above, the Appellant maintains that he requested the contracts not the database entry forms. Accordingly, we need not address the withholdings from the database entry forms. As also explained above, we are remanding the matter to Golden to process the request for the contracts.

III. Conclusion

We will remand this Appeal to Golden for it to release copies of the contracts requested by the Appellant or to issue a determination letter justifying any withholding. Accordingly, this Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by American Small Business League, Case No. TFA-0394, is hereby granted in part as set forth in the following paragraph.

(2) The Appeal is remanded to the Golden Field Office to address the Appellant's request for copies of the identified contracts.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 20. 2010

July 23, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Tri-Valley CAREs
Date of Filing:	June 30, 2010
Case Number:	TFA-0395

On June 30, 2010, Tri-Valley CAREs perfected an Appeal from a determination the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC) issued on May 6, 2010.[1] The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from NNSA/SC the Mission Need Gap Information Sheet for the Target Fabrication Facility (TFF) and all background and related documents on which the Mission Need Gap Information Sheet relied. Appeal at 1. On May 6, 2010, NNSA/SC issued a determination to the Appellant in which it released 11 documents in their entirety that it had identified as responsive to the request. Letter from Carolyn A. Becknell, Freedom of Information Act Officer, Office of Public Affairs, NNSA/SC, to Appellant (May 6, 2010). In its Appeal, Tri-Valley CAREs challenges the adequacy of NNSA/SC's search for responsive documents and seeks better or more recent versions of some of the documents that were produced. Specifically, the Appellant stated that NNSA/SC failed to provide:

- the Mission Need Gap Information Sheet itself, though it did provide a number of supporting documents;
- any documents that reflect a NEPA [National Environmental Protection Act] review of the facility, though documents provided specifically indicate that such a review would be undertaken;
- a final version of a document entitled "Program Requirements for the TFF", though a draft version was provided; and
- a final version of a document entitled "Mission Need Statement for the Target Fabrication Facility.

Appeal at 2. In addition, the Appellant seeks a more legible copy of a document entitled "Document No. 3." *Id.*

[1] The Office of Hearings and Appeals received a submission from Tri-Valley CAREs on June 28, 2010, that was deemed incomplete because it lacked a copy of the determination letter from which Tri-Valley was taking its appeal. Upon receipt of the determination letter, the submission was considered complete and ready to be addressed.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Natural Resources Defense Council*, Case No. TFA-0127 (2005).[2] The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore contacted the FOIA division of the NNSA/SC's Office of Public Affairs, which obtained information regarding the search that was performed in this case from those responsible for the search. Many knowledgeable personnel searched for documents responsive to this request at the Lawrence Livermore National Laboratory (LLNL), where the TFF was a conceptual project that was never funded. E-mail from Kathryn Craft Rogers, LLNL Representative to the NNSA Livermore Site Office's Staff Relations Division, to Christina Hamblen, Office of Public Affairs, NNSA/SC, (July 19, 2010). Ms. Craft Rogers explained that program leaders, facility managers, directors, and a chief scientist searched their respective files for the documents the Appellant now seeks on appeal and found no versions other than those that have already been provided to the Appellant. *Id.* She also stated that the interim documents provided to the Appellant would not have been put in final form unless the project was funded, which it was not; for the same reason, a NEPA review was never conducted. *Id.* In addition, none of the cognizant managers or scientists who were consulted believes that a Mission Need Gap Information Sheet was ever created. *Id.* Finally, after checking with ten people regarding Document No. 3, Ms. Craft Rogers stated that the facility has no version, more legible or not, other than the one that was already provided to the Appellant. *Id.*

After reviewing the record in this case, we find that NNSA/SC performed a search reasonably calculated to reveal all documents responsive to the Appellant's request. Accordingly, Tri-Valley CAREs's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs on June 30, 2010, Case No. TFA-0395, is hereby

[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 23, 2010

July 21, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	American Small Business League
Date of Filing:	July 1, 2010
Case Number:	TFA-0397

On July 1, 2010, American Small Business League (Appellant) filed an Appeal from a determination issued to it on June 14, 2010, by the Naval Reactors Laboratory Field Office (NRLFO) of the Department of Energy (DOE). In that determination, NRLFO responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NRLFO indicated that it had no documents responsive to the Appellant's request. The Appellant challenged the adequacy of NRLFO's search for documents. This appeal, if granted, would require NRLFO to conduct a further search for responsive documents.

I. Background

On May 19, 2010, the Appellant requested "copies of any, all, each and every contract awarded by Anthony J. DeNapoli from January 1, 2008 to April 1, 2008 where the value of each contract was in excess of $1 million." Request E-mail dated May 19, 2010, from Appellant to DOE. On June 14, 2010, NRLFO responded to the Appellant that it had no documents responsive to the Appellant's request. Determination Letter dated June 14, 2010, from C. P. Nunn, Chief Counsel, NRLFO, to Appellant (Determination Letter).

On July 1, 2010, the Appellant appealed the Determination, claiming that he had seen copies of contracts with Mr. DeNapoli's name that were in excess of $1 million. Appeal Letter received July 1, 2010, from Kevin Baron, Director of Government Affairs, Appellant, to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted NRLFO to determine what type of search was conducted. In response, NRLFO indicated that Mr. DeNapoli searched NRLFO's contract division's core and contract database for any contract awarded during the requested time period where the value of the contract was in excess of $1 million. Memorandum dated July 16, 2010, from NRLFO to Janet Fishman, Attorney-Examiner, OHA. Mr. DeNapoli determined that NRFLO awarded only two contract in excess of $1 million during the requested time period. *Id.* Both contracts were awarded by Mr. DeNapoli's supervisor, a fact that Mr. DeNapoli confirmed by viewing the signature copies of the contracts and verifying that he did not sign those contracts. *Id.* To confirm that Mr. DeNapoli was correct, he forwarded copies of the contracts to NRLFO's chief counsel who confirmed that Mr. DeNapoli did not sign the contracts in question. *Id.*

As noted above, the Appellant claims that he has viewed copies of contracts with Mr. DeNapoli's name on them that were in excess of $1 million. Nonetheless, Mr. DeNapoli is the person most knowledgeable about what contracts he has signed. Further, he searched the database that contained information about all contracts awarded by NRLFO. We cannot explain why the Appellant claims to have seen documents that are responsive to his request, nor need we do so. We believe that NRLFO's search was reasonably calculated to uncover responsive information.

III. Conclusion

The search that NRLFO conducted was reasonably calculated to reveal records responsive to the Appellant's request. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

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

(1) The Appeal filed by American Small Business League, Case No. TFA-0397, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 21, 2010

September 3, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Steven R. Schooley

Filing Date: July 9, 2010

Case Number: TFA-0398

This Decision concerns the Appeal that Steven R. Schooley filed from a determination that the Environmental Management Consolidated Business Center (EMCBC) of the Department of Energy (DOE) issued to him on June 11, 2010. In that determination, the EMCBC responded to Mr. Schooley's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The EMCBC withheld information under FOIA Exemptions 3, 4, 5, and 6. Mr. Schooley challenges the adequacy of the EMCBC's search, the adequacy of the determination letter, and every withholding. If we grant this Appeal, the EMCBC would be required to (i) conduct a new search and either release any newly discovered information or justify its withholding; (ii) issue a new determination; and (iii) release information that it withheld under FOIA Exemptions 3, 4, 5, and 6.

I. Background

In 1983, the DOE hired a contractor to manage its Uranium Mill Tailing Remedial Action Project (UMTRA). The contractor hired a sub-contractor to work on a certain site. Following termination of the subcontract, litigation began based on claims and counter claims between the contractor and the subcontractor. The trial court entered a multi-million dollar judgment against the contractor. The contractor sought reimbursement from the DOE. The question of reimbursement has been the subject of protracted litigation. *See* EMCBC-00459.

Mr. Schooley requested information about the UMTRA contract. Determination Letter. (He limited his request to documents created since May 1, 2006. *Id*.) The EMCBC released some information and withheld other information under FOIA Exemptions 3, 4, 5, and 6. *Id*. Documents with withheld information generally fall into two broad groups: documents discussing litigation strategy[1] and documents discussing litigation costs.[2] The EMCBC withheld

[1] These include documents EMCBC-00060 – EMCBC-00106 – EMCBC-00107; EMCBC-00317 – EMCBC-00320; EMCBC-00459 – EMCBC-00460; EMCBC-00477 – EMCBC-00478; EMCBC-00488 – EMCBC-00492; EMCBC-00507 – EMCBC-00508; EMCBC-00510 – EMCBC-00511; EMCBC-00513 – EMCBC-00517; EMCBC-00519 – EMCBC-00522; EMCBC-00561 – EMCBC-00563; EMCBC-00565 – EMCBC-00567;

information in the first group under Exemption 5 (with information in one document withheld under Exemption 6) and withheld information in the second group under Exemptions 3, 4, 5, and 6.

On Appeal, Mr. Schooley challenged the adequacy of the EMCBC's search, the adequacy of its determination, and every withholding. Appeal Letter at 1-2.

II. Analysis

A. Adequacy of the Search

In his Appeal, Mr. Schooley complained that "various documents reference attachments but the attachments were not produced nor is their absence explained." Appeal Letter at 2.

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness . . . does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Todd J. Lemire*, Case No. VFA-0760 (2002).[3]

We contacted the EMCBC to gain additional information to evaluate its search. It stated that the FOIA Officer contacted the Contracting Officers responsible for the UMTRA contract. The Contracting Officers searched and reviewed paper files and electronic databases, including the internal network drive. These included the contract administration file and related e-mails. The EMCBC released information that was responsive and not withheld under an exemption.

Based on the description of the search, we find that the EMCBC conducted an adequate search because its search was reasonably calculated to uncover all relevant documents. In these cases, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982). Therefore, we will deny this element of the Appeal.

EMCBC-00587 – EMCBC-00588; EMCBC-00615 – EMCBC-00616; EMCBC-00618 – EMCBC-00622; EMCBC-00624 – EMCBC-00626; and EMCBC-00639 – EMCBC-00650.

[2] These include documents EMCBC-00009 – EMCBC-00027; EMCBC-00034 – EMCBC-00047; EMCBC-00109 – EMCBC-00147; EMCBC-00155 – EMCBC-00316; EMCBC-00321; EMCBC-00337; EMCBC-00339 – EMCBC-00448; EMCBC-00461 – EMCBC-00466; EMCBC-00486 – EMCBC-00487; and EMCBC-00668 – EMCBC-00673.

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

B. Adequacy of the Determination Letter

In his Appeal, Mr. Schooley complained that the EMCBC's "document withholdings and non-disclosures are insufficiently supported nor factually justified." Appeal Letter at 2.

A determination letter must (1) describe the results of the search; (2) indicate which information was withheld; (3) specify the exemption or exemptions invoked; and (4) explain briefly how the exemption applies. *Tom Marks*, Case No. TFA-0288 (2009).

The EMCBC issued Mr. Schooley a determination letter that includes a 38-page *Vaughn* index, which describes the subject matter of all responsive documents; organizes the documents by serial numbers stamped onto the documents; lists the number of pages of each document; identifies the exemption or exemptions invoked; and explains how the exemptions apply. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Because these features meet the *Tom Marks* requirements, we find that the EMCBC issued Mr. Schooley an adequate determination letter.

C. The FOIA Exemptions

The FOIA requires federal agencies to disclose information upon request unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

Mr. Schooley challenged every withholding as "overbroad . . . and improper." Appeal Letter at 1.

1. Exemption 3

The EMCBC invoked Exemption 3 to withhold the taxpayer identification numbers that appear in the documents that the firms submitted to the EMCBC.

Exemption 3 protects information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3).

Federal law requires employers to protect taxpayer identification numbers. *See* 26 U.S.C. 6103, *et seq*. An agency may invoke Exemption 3 to withhold information that is confidential under 26 U.S.C. § 6103(a). *Tax Analysts v. Internal Revenue Serv.*, 410 F.3d 715, 717 (D.C. Cir. 2005). Therefore, the EMCBC properly invoked Exemption 3 to withhold the taxpayer identification numbers.

2. Exemption 4

The EMCBC invoked Exemption 4 to withhold billing rates, rate multipliers, and accounting and routing numbers from one or more firms.

Exemption 4 protects trade secrets from disclosure. 5 U.S.C. § 552(b)(4). Exemption 4 also protects information that is commercial or financial, obtained from a person, and privileged or confidential. *Id*.

Information is "commercial" if "it serves a 'commercial function' or is of a 'commercial nature.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations omitted). "Person" includes individuals, partnerships, corporations, associations, and public or private organizations other than an agency. *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (applying the definition of person in 5 U.S.C. § 551(2)).

The definition of "confidential" depends on whether the information was voluntarily or involuntarily submitted to the agency. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). In determining whether a document was submitted voluntarily or involuntarily, the agency must rely upon "legal authority, rather than the parties' beliefs or intentions. . . ." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001).

Voluntarily submitted information is confidential if the submitter would not customarily release it to the public. *Critical Mass Energy Project*, 975 F.2d at 879. The agency invoking Exemption 4 has the burden of proving the submitter's custom. *Id*. Involuntarily submitted information is confidential if releasing it is likely to impair the government's ability to obtain necessary information or cause substantial harm to the submitter's competitive position. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). "Conclusory and generalized allegations of substantial harm . . . cannot support an agency's decision to withhold requested documents." *Pub. Cit. Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

In reviewing the EMCBC's *Vaughn* index and the documents themselves, we could not determine whether the information withheld under Exemption 4 was submitted to the EMCBC voluntarily or involuntarily. We will, therefore, remand this matter for the EMCBC to issue a new determination that explains whether the information was submitted voluntarily or involuntarily and the application of Exemption 4 to the documents responsive to Mr. Schooley's request.

3. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statute defines "agency" broadly, including "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the

Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)).

A communication between an agency and a private party is also an intra-agency communication when the "common interest" doctrine applies. *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord Klamath*, 532 U.S. at 10. The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-283. "[I]n a limited sense," the private party "becomes a part of the enterprise that the agency is carrying out." *Id*. at 280. Therefore, the communications "can be understood as 'intra-agency' for the purposes of Exemption 5." *Id*.

In *Hunton & Williams*, a technology company sued a manufacturer for patent infringement. *Id*. at 274. A trial court enjoined the manufacturer from making the infringing product. During the appeal, the agency and the manufacturer exchanged litigation-related information. The technology company filed a FOIA request for the communications between the agency and the manufacturer. *Id*. at 275. Under Exemption 5, the agency invoked a privilege to withhold the communications. On appeal, the technology company argued that the agency improperly withheld the communications because they were not inter-agency or intra-agency communications. *Id*. at 276-77.

The court held that under the common interest doctrine, the communications between the agency and the manufacturer were considered intra-agency communications. *See id*. at 282. The agency and the manufacturer shared an interest in the government's continued use of the manufacturer's products and decided to exchange information to further that goal. Therefore, the agency and the manufacturer "could rely on one another's advice, secure in the knowledge that privileged communications would remain just that." *Id*. at 282-83.

Here, the EMCBC is a federal agency that shares a common interest with a private party (the contractor). As in *Hunton & Williams*, the EMCBC and the private party share a mutual interest in limiting damage to the EMCBC from a trial decision adverse to the private party. Also, as in *Hunton & Williams*, the EMCBC and the private party decided to share litigation information to further that goal.[4] Therefore, the litigation-related communications are intra-agency communications for purposes of Exemption 5. For this reason, we find that the litigation-related information satisfies *Klamath*'s first condition.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," such as the attorney-client privilege, the attorney work product privilege, or the deliberative process privilege. *Klamath*, 532 U.S. at 8 (citations omitted).

a. *The Attorney-Client Relationship*

An agency has an attorney-client relationship with an attorney for a private party when the common interest doctrine applies to the communications. *Hanson*, 372 F.3d at 292-93.

[4] This fact is apparent from reviewing the redacted documents that the EMCBC submitted for our review.

We find that the EMCBC has an attorney-client relationship with the contractor's attorneys because, as explained above, the common interest doctrine applies to the litigation-related communications between the EMCBC and the contractor.

b. *The Attorney-Client Privilege and the Attorney Work Product Privilege*

The EMCBC invoked the attorney-client privilege and the attorney work product privilege to withhold information in both groups of documents.[5]

An agency may withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The privilege protects only those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). It applies to facts that a client gives to the attorney and opinions that the attorney gives to the client. *See, e.g., Jernigan v. United States Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege protects the attorney-client relationship – it encourages full disclosure to attorneys so that they can render effective legal assistance. *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988).

The attorney work product privilege "is distinct from and broader than the attorney-client privilege." *In re Columbia/ HCA Health-Care Corp. Billing Practices Lit.*, 293 F.3d 289, 294 (6th Cir. 2002). It protects "documents or tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. . . ." FED. R. CIV. P. 26(b)(3). The privilege protects the litigation process itself – it "shelters the mental process of the attorney, providing a privileged area within which [the attorney] can analyze and prepare [the] client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

i. The Litigation Strategy Documents

We find that the EMCBC properly invoked the attorney-client privilege and the attorney work product privilege to withhold the litigation strategy information in the first group of documents. Disclosing it would reveal the facts that the agency and the contractor provided to their attorneys and the opinions that they received. It would also reveal the analysis that the attorneys used to advise whether and how to continue the litigation.

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[5] An agency may also invoke the attorney-client privilege and the attorney work product privilege under Exemption 4. *See, e.g., Varnadore & Freels*, Case No. LFA-0375 (1994).

The EMCBC stated that certain information "could be protected" under the deliberative process privilege – information in Documents EMCBC-00293 – EMCBC-00295; EMCBC-00349 – EMCBC-00350; EMCBC-00356 – EMCBC-00362; EMCBC-00388; EMCBC-00406; EMCBC-00411 – EMCBC-00413; EMCBC-00418; EMCBC-00422 – EMCBC-00426; EMCBC-00437. We need not address the deliberative process privilege because the EMCBC did not invoke it and because we have found that these documents were properly withheld under other privileges.

ii. The Attorney Invoice Statements

The attorney-client privilege protects "correspondence, bills, ledgers, statements, and time records which . . . reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided. . . ." *Clarke v. Amer. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (citations omitted). But it does not protect the identity of the client, the amount of the fees, the identification of payment by case file name, and the general purpose of the work performed. *Id*.

Following *Clarke*, we find that the EMCBC may not invoke the attorney-client privilege to withhold the identity of the client or clients, the identification of payment by case file name, the amount of fees, or the general purpose of the work performed. Similarly, we find that the EMCBC may not invoke the attorney work product to withhold this information because disclosing it would not reveal the mental process that an attorney used to analyze the case.

However, information describing the specific purposes of the work performed may be protected by the attorney-client and the attorney work product privileges. We will, therefore, remand for the EMCBC to issue a new determination stating whether the attorney-client or the attorney work product privileges protect any information describing the specific purposes of the work performed.

4. Exemption 6

The EMCBC invoked Exemption 6 to withhold information in a number of documents. In the first group, it withheld a personal phone number. In the second group, it withheld a personal phone number, a personal e-mail address, employee identification numbers, and phone numbers called during the course of litigation.

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. The Washington Post Co.*, 456 U.S. 595, 599 (1982).

We must apply a three-step analysis to determine whether the DOE properly withheld information under Exemption 6. First, we must determine whether disclosing the information compromises a significant privacy interest. If we do not identify a privacy interest, the DOE may not withhold the information. *Ripskis v. Dep't of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, we must determine whether releasing the information would further the public interest by shedding light on government operations and activities. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, we must balance the privacy interest against the public interest to determine whether releasing the information would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Releasing the personal e-mail address, personal phone numbers, employee identification numbers, and numbers called during the course of litigation would compromise significant

privacy interests. Because it would shed little or no light on government activities, releasing that information would constitute a clearly unwarranted invasion of personal privacy. Therefore, we find that the EMCBC properly invoked Exemption 6.

D. Public Interest

If the FOIA exempts information from mandatory disclosure, the DOE should still release it if doing so is in the public interest. 10 C.F.R. § 1004.1.

The release of information withheld under the attorney-client privilege and the attorney work product privilege could adversely affect the agency's ability to defend its interests in litigation. Therefore, the release of this information would not further the public interest.[6]

It Is Therefore Ordered That:

(1) The Appeal that Steven R. Schooley filed on July 9, 2010, OHA Case No. TFA-0398, is granted in part, as set forth in Paragraph (2), below, and denied in all other respects.

(2) This matter is remanded to the Environmental Management Consolidated Business Center, which shall issue a new determination that (i) states whether the information withheld under Exemption 4 was submitted to it voluntarily or involuntarily and how Exemption 4 applies; and (ii) evaluates whether it can release, consistent with this Decision, those portions of the attorney invoice statements that identify the client, the amount of fees, the payment by case file name, and the purpose of the work performed.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 3, 2010

[6] The "public interest" test set forth in 10 C.F.R. § 1004.1 does not apply to documents withheld under Exemptions 3, 4, and 6.

August 11, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alliance to Protect Nantucket Sound

Date of Filing: July 9, 2010

Case Number: TFA-0399

On July 9, 2010, the Alliance to Protect Nantucket Sound ("the Alliance") filed an appeal from a determination issued to it on June 22, 2010, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In that determination, LGPO responded to a request for documents that the Alliance filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO identified several documents responsive to the Alliance's request and released those documents with some information withheld pursuant to Exemptions 4 and 6 of the FOIA. The Alliance challenged the withholding of information under Exemption 4. The Alliance further challenged the adequacy of LGPO's search for responsive documents. This appeal, if granted, would require LGPO to release the withheld information to Alliance, to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

On December 23, 2009, the Alliance filed a FOIA request for information pertaining to the Cape Wind project. Specifically, the Alliance requested that "DOE release all records relating to any potential grants, loans, loan guarantees, or any other federal funding assistance for the Cape Wind project," including "any correspondence, meeting minutes, memoranda, emails, reports, or other records regardless of form." *See* Letter from Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), July 9, 2010 (Appeal) at 1.

On June 22, 2010, LGPO released three documents: Cape Wind 2006 Pre-Application, Volume I; Cape Wind 2006 Pre-Application, Volume II; and, Cape Wind 2009 Application. *See* Letter from David G. Frantz, Director, LGPO, to Sandy Taylor, Alliance to Protect Nantucket Sound, June 22, 2010 (Determination Letter). Each of the three documents was released with portions withheld pursuant to Exemptions 4 and 6 of the FOIA. *Id.* LGPO stated that the portions of the documents withheld under Exemption 4 contained commercial or financial information, the release of which "would give competitors an advantage in the future by providing insight on resources available to the applicant." *Id.* In addition, LGPO stated that the information withheld under Exemption 6 was comprised of "very sensitive personal information," including social

security numbers, and the release of the information would be a clearly unwarranted invasion of personal privacy. *Id.*

The Alliance filed the instant Appeal on July 9, 2010. In its Appeal, the Alliance challenged the adequacy of LGPO's search for responsive documents. Appeal at 1. As a basis for this challenge, the Alliance noted that, although it requested all records related to any potential federal funding assistance for the Cape Wind Project, LGPO released only the pre-application and application submitted by Cape Wind, L.L.C., but no correspondence or other documents. The Alliance maintains that other documents must exist "because the [DOE] had to communicate both internally and with the applicant about this application." *Id.* at 2. The Alliance further challenges LGPO's withholding of information under Exemption 4.[1]

II. Analysis

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[2]

In processing this Appeal, we contacted LGPO to discuss the scope of the search for responsive records. LGPO informed us that a member of the LGPO FOIA team, with guidance from LGPO employees assigned to the Cape Wind project, searched the internal network drive on which LGPO maintains its records.[3] The LGPO employee individually searched each record in the following file folders on its internal drive: (1) "W:\LGP\Solicitation FY09-Renewables\Application Submissions\Round III\Cape Wind" and (2) "W:\LGP\Solicitation FY09-Renewables\Correspondence." *See* E-Mail from Wendy Pulliam, FOIA Specialist, LGPO, to Diane DeMoura, Attorney-Examiner, OHA, August 3, 2010. The search yielded only the three documents released to the Alliance. *Id.*

Based on this information, we find that LGPO performed a search reasonably calculated to reveal records responsive to the Alliance's request, despite the absence of correspondence related to the Cape Wind project. Therefore, the search was adequate.

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[1] The Alliance did not challenge LGPO's withholding of information under Exemption 6. Therefore, the Exemption 6 withholdings are outside the scope of this Appeal and will not be considered.

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

[3] LGPO's paper records are identical copies of the electronic documents. All incoming documents are submitted to LGPO electronically and in paper form. All outgoing documents are also scanned and stored electronically. *See* E-Mail from Wendy Pulliam, FOIA Specialist, LGPO, to Diane DeMoura, Attorney-Examiner, OHA, August 3, 2010. LGPO did not perform a separate search of the paper records because it would be a duplication of efforts. *Id.*

B. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

LGPO withheld portions of the three documents it released to the Alliance pursuant to Exemption 4 of the FOIA. LGPO claimed that the redacted information is commercial or proprietary information. The Alliance challenged the appropriateness of LGPO's use of Exemption 4 as justification for withholding the redacted information.

An agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *Environmental Defense Institute*, Case No. TFA-0289 (2009); *see also F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996). A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Id*.

If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *See Environmental Defense Institute*, Case No. TFA-0289 (2009) (*citing Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA")).

Our review of the Determination Letter issued to the Alliance indicates that LGPO failed to provide a specific explanation as to how Exemption 4 applied to the information withheld in the three released documents. In the Determination Letter, LGPO, after restating the language of the

exemption, states "Portions deleted from the documents enclosed contain 'commerical' or 'financial' information that relates to business activities. In addition, proprietary business strategy, organization information, and confidential client information have also been redacted. The release of such information would give competitors an advantage in the future by providing insight on resources available to the applicant."

We find that the justification given in the Determination Letter was insufficient for two reasons. First, various types of information in the three released documents were withheld under Exemption 4, including names of potential investors, projected costs, and projected timelines. LGPO did not distinguish among the different types on information in providing its justification for the withholdings. Second, LGPO did not explain in any detail the type of competitive harm to which Cape Wind, L.L.C., would be subjected should each type of information be released. Rather, it generally stated that release of the information would give the firm's competitors an unfair advantage. This is a conclusory or generalized statement of the kind which courts have previously found unacceptable. Consequently, LGPO's Determination Letter was inadequate with regard to its Exemption 4 withholding.

In cases where an office does not provide an adequate determination with respect to a FOIA request, we usually remand the request to that office with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. Accordingly, we will remand the matter to LGPO so that it can issue another determination explaining how Exemption 4 applies to the various types of withheld material in the three released documents.

III. Conclusion

We find that LGPO conducted an extensive search for documents reasonably calculated to reveal records responsive to the Alliance's request. Therefore, the search was adequate. However, LGPO did not provide an adequate determination with respect to its withholdings of information pursuant to Exemption 4 of the FOIA. Therefore, we will grant the Appeal in part and remand the matter back to LGPO for a further determination on the Exemption 4 withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed on July 9, 2010, by the Alliance to Protect Nantucket Sound, OHA Case No. TFA-0399, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Loan Guarantee Program Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 11, 2010

August 9, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Association of Home Builders

Date of Filing: July 14, 2010

Case Number: TFA-0401

On July 14, 2010, the National Association of Home Builders (Appellant) filed an appeal from two determinations issued to it by the Office of Energy Efficiency (EE) and the FOIA/Privacy Act Group (FOIA/PA) of the Department of Energy (DOE) regarding a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In their responses to the Appellant's FOIA Request, EE and FOIA/PA each stated that EE possessed no responsive documents.[1] This Appeal, if granted, would require that EE conduct an additional search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under DOE regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On April 12, 2010, the Appellant submitted the FOIA Request, essentially asking for any document that contains the formulas, equations or methodologies used by DOE to evaluate the projected energy savings to be obtained by incorporating DOE's proposals for changes to 2012 International Energy Conservation Code (IECC).[2]

[1] EE's determination was dated July 7, 2010. The FOIA/PA determination was dated July 25, 2010. Both determinations stated that EE had conducted a search and could not locate any responsive records. The FOIA/PA determination included additional information stating that the Appellant's request had been forwarded to the DOE Operations Office in Oak Ridge, Tennessee, which maintains files under the jurisdiction of the Pacific Northwest National Laboratory (PNNL) in order that an additional search for documents could be conducted. For the purposes of this Appeal we will consider both of these determinations as one.

[2] As described in the Appellant's Appeal, the International Code Council (ICC) publishes every three years an updated edition of the IECC. The IECC is a model code that local governments and other stakeholders can use in developing local building codes and standards. Appeal at 2. A federal statute mandates that DOE participate in the model national codes development process and that DOE help states adopt and implement progressive energy codes.

In its Appeal, the Appellant cites numerous sources indicating that DOE has determined that its proposed revisions to the 2012 IECC would produce an energy savings of 30.6% when compared to the 2006 version of the IECC. Among the sources cited by the Appellant was a study entitled *An Estimate of Residential Energy Savings From IECC Change Proposals Recommended for Approval at the ICC's Fall, 2009, Initial Action Hearings* (2012 Energy Study) produced for the DOE by PNLL.[3] Given DOE's assertion of a numeric energy saving value for its 2012 IECC proposals, the Appellant concludes that a specific methodology or formula to calculate this value must exist at DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (*Truitt*). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Aurimas Svitojus*, Case No. TFA-0349 (March 8, 2010).[4]

To evaluate the search made for documents responsive to the Appellant's request, we contacted the Project Manager for Energy Code Development at DOE's Office of Energy Efficiency. That official informed us that he is the project manager responsible for DOE's participation in the IECC revision process. *See* Memorandum of Telephone Conversation between Ronald B. Majette, Project Manager and Richard Cronin, Attorney-Examiner, Office of Hearings and Appeals (July 23, 2010). He also informed us that all of the calculations and computer modeling regarding the determination of energy savings that would result from adoption of the 2012 DOE proposals were performed by PNNL. The results of PNNL's calculations were summarized in the 2012 Energy Study which found that the proposed DOE code changes would result in a calculated savings of 30.6%. This was the basis for DOE's assertions regarding the energy savings of the 2012 DOE proposed code changes. The Manager informed us that while he

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See 42 U.S.C. § 6833(d). DOE is also required to review whether the proposed IECC revisions would improve energy efficiency in residential buildings as compared to the previous IECC edition and publish this determination in the Federal Register. 42 U.S.C. § 6833(a)(5)(A) (the Energy Conservation and Production Act, as amended).

[3] The 2012 Energy Study may be referenced at http://www.energycodes.gov/IECC/documents/residential-savings-estimate.iecc-2012-proposals.6-may-2010.pdf.

[4] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

believes that he had the authority to collect the raw data and modeling tools PNNL used in making its calculations, he never requested or took possession of such data or tools. He conducted a search of his E-mails to see if he had nonetheless requested or obtained such information from PNNL. He found no documents that contained responsive information.

We find that EE conducted a search reasonably calculated to find responsive documents. It contacted the Project Manager, the individual most likely to possess information regarding responsive documents. The Project Manager had personal knowledge that the information requested by the Appellant was not maintained at EE or DOE Headquarters. Further, he made a search of his E-mail files to confirm that he had not requested or obtained the requested documents. Thus, we find that EE made an adequate search for responsive documents and that Appellant's July 14, 2010, FOIA Appeal should be denied.[5]

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the National Association of Home Builders, OHA Case Number TFA-0401, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 9, 2010

[5] In this regard, we note that Appellant's FOIA Request was also forwarded to the DOE's Oak Ridge Office so that a search of records under the jurisdiction of PNNL could be made. When the Appellant receives a determination regarding this search, it may file a FOIA Appeal regarding that determination with this office.

August 9, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Tri-Valley CAREs

Date of Filing: July 19, 2010

Case Number: TFA-0402

On July 19, 2010, Tri-Valley CAREs (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) Service Center. In that determination, NNSA responded to a Request for Information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NNSA released portions of a responsive document, but withheld other portions of this document under FOIA Exemptions 3 and 6. This Appeal, if granted, would require NNSA to release only those portions of the document witheld under Exemption 6 to the Appellant.

I. BACKGROUND

On September 8, 2008, the Appellant filed a request for information with NNSA seeking a copy of the "Defense Program Advisory Group's study of the secondary components of nuclear weapons." Appeal at 1. On June 2, 2010, NNSA issued a determination letter (the Determination Letter) releasing a copy of a responsive document entitled "Secondary Lifetime Assessment Study" (the Study) to the Appellant. However, NNSA withheld portions of this document under FOIA Exemptions 3 and 6. On July 19, 2010, the Appellant submitted the present Appeal. Because our consideration of NNSA's withholdings under Exemption 3 in this case requires consultation with the DOE's Office of Classification, we determined that bifurcation of the present Appeal would allow for a more timely consideration of NNSA's withholdings under Exemption 6. NNSA's withholdings under Exemption 6 will therefore be considered in the present decision (OHA Case No. TFA-0402). Our consideration of NNSA's withholdings under Exemption 3 will be considered in a separate decision under OHA Case No. TFC-0004.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls

under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 6 is at issue in the present case.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Turning to the present case, NNSA, invoking FOIA Exemption 6, redacted the names of contractor employees from the copy of the Secondary Lifetime Assessment Study it released to the Appellant. The Appellant contends that the NNSA improperly withheld information under Exemption 6. Specifically, the Appellant contends that one of the individuals whose identity was protected, identified in the redacted copy of the Study as "DP-22," was in fact a federal employee. It also contends that the NNSA withheld some contractor employees' identities while releasing others, and was therefore inconsistent in its application of Exemption 6. Appeal at 2.

One of the individuals whose name was withheld was in fact a federal employee, as contended by the Appellant. July 29, 2010, Electronic Mail message from Karen Laney, Information Programs Specialist, NNSA Service Center Office of Public Affairs to Steven Fine, Senior Attorney, Office of Hearings and Appeals. It is well settled that, absent special circumstances, civilian federal employees have no expectation of privacy regarding their names. 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public); see also *FLRA v. U.S. Dep't of Commerce*, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992) (noting that performance awards "have traditionally been subject to disclosure"); *Core v. USPS*, 730 F.2d 946, 948 (4th Cir. 1984) (finding no substantial invasion of privacy in information identifying successful federal job applicants). Accordingly, we are remanding this portion of the Appeal to the NNSA with instructions to either release the name of the federal employee identified as DP-22, or issue a new determination letter explaining the special circumstances creating a privacy interest in this individual's name.

It is well settled that the release of an individual's name to the public implicates a privacy

interest under the FOIA. *Associated Press v. DOJ*, 549 F.3d 62, 65 (2d Cir. 2008). Therefore, NNSA correctly concluded that the contractor employees whose names appear in the Study have a legitimate expectation of privacy under the FOIA. NNSA did release the names of three contractor employees, the principal authors of the study, as their names may frequently be found in the public domain associated with the reports they have authored. July 29, 2010, Electronic Mail message from Karen Laney, Information Programs Specialist, NNSA Service Center Office of Public Affairs to Steven Fine, Senior Attorney, Office of Hearings and Appeals.

It is clear that release of the names of contractor employees, who assisted the Study's principal investigators would not further the public interest by shedding light on the operations and activities of the Government. Release of the names of weapons designers, consultants, engineers and proofreaders would contribute little, if any, to public understanding of the issues addressed in the Study or any other matter of public concern. Because we have found a privacy interest in the names of the contractor employees and no public interest in their disclosure, we find that release of the contractor employee's names would constitute a clearly unwarranted invasion of personal privacy.

III. CONCLUSION

For the reasons set forth above, we are remanding that portion of the Appeal concerning the name of the Federal employee identified as "DP-22" to the NNSA for further processing in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, Case No. TFA-0402, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the National Nuclear Security Administration Service Center for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 9, 2010

August 11, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Southern Alliance for Clean Energy

Date of Filing: July 19, 2010

Case Number: TFA-0403

On July 9, 2010, the Southern Alliance for Clean Energy ("SACE") filed an appeal from a determination issued to it on June 22, 2010, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In that determination, LGPO provided a partial response to a request for documents that SACE filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO identified three documents responsive to a portion of SACE's request and released those documents with some information withheld pursuant to Exemption 4 of the FOIA. The Alliance challenged the withholding of information under Exemption 4. This appeal, if granted, would require LGPO to release the withheld information to SACE.

I. Background

On March 25, 2010, SACE filed a FOIA request for information pertaining to "DOE's issuance of conditional commitments for loan guarantees for the construction and operation of two nuclear reactors at Vogtle Electric Generating Plant in Burke County, Georgia." *See* Letter from Mindy Goldstein, Turner Environmental Law Clinic, Emory University School of Law, to Poli A. Marmolejos, Director, Office of Hearings and Appeals, July 19, 2010 (Appeal) at 1.[1] Among the records SACE requested were "all records pertaining to the issuance to [Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, or the City of Dalton [collectively, "SNC"] of a term sheet, or the drafting of any final or proposed term sheet for SNC, that sets forth the general terms and conditions under which DOE may issue a loan guarantee to [Vogtle Electric Generating Plant]." *Id*.

On July 6, 2010, LGPO released copies of three Loan Guarantee term sheets, one issued to each of the following: Georgia Power Company, Municipal Electric Authority of Georgia, and, Oglethorpe Power Corporation. *See* Letter from David G. Frantz, Director, LGPO, to Mindy Goldstein, Turner Environmental Law Clinic, Emory University School of Law, July 6, 2010 (Determination Letter). Each of the three documents was released with portions withheld pursuant to Exemption 4 of the FOIA. *Id*. LGPO stated that the portions of the documents

[1] SACE is represented in this matter by the Turner Environmental Law Clinic at the Emory University School of Law in Atlanta, Georgia.

withheld under Exemption 4 contained commercial or financial information, the release of which "would give competitors an advantage in the future by providing insight on resources available to the applicant." *Id*.

SACE filed the instant Appeal on July 19, 2010. In its Appeal, SACE maintains that LGPO failed to provide an adequate justification for its withholdings under Exemption 4. Appeal at 2-3. SACE further maintains that LGPO improperly applied Exemption 4 to the withheld information. *Id*. at 3-5.

II. Analysis

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

LGPO withheld portions of the three documents it released to the SACE pursuant to Exemption 4 of the FOIA. LGPO claimed that the redacted information is commercial or proprietary information. SACE challenged the adequacy of the justification, as well as the appropriateness of LGPO's use of Exemption 4 as justification for withholding the redacted information.

An agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *Environmental Defense Institute*, Case No. TFA-0289 (2009);[2] *see also F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996). A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Id*.

If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result.

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

Smith, Pachter, McWhorter & D'Ambrosio, Case No. VFA-0515 (1999). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *See Environmental Defense Institute*, Case No. TFA-0289 (2009) (*citing Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976)).

Our review of the Determination Letter issued to SACE indicates that LGPO failed to provide a specific explanation as to how Exemption 4 applied to the information withheld in the three released documents. In the Determination Letter, LGPO, after restating the language of the exemption, states,

> Portions deleted from the documents enclosed contain 'commerical' or 'financial' information that relates to business activities, as well as identities of applicants who have a legitimate argument that publication of unsuccessful participation in this process could cause harm to their competitive position. In addition, proprietary business strategy, organization information, and confidential client information have also been redacted. The release of such information would give competitors an advantage in the future by providing insight on resources available to the applicant.

Determination Letter at 1.

We find that the justification given in the Determination Letter was insufficient for two reasons. First, various types of information in the three released documents were withheld under Exemption 4, including, but not limited to, prepayment provisions, representations and warranties, loan amortization provisions, and loan fees and expenses. LGPO did not distinguish among the different types on information in providing its justification for the withholdings. Second, LGPO did not explain in any detail the type of competitive harm to which the submitters of the withheld information would be subjected should each type of information be released. Rather, it generally stated that release of the information would give the firm's competitors an unfair advantage. This is a conclusory or generalized statement of the kind which courts have previously found unacceptable. Consequently, LGPO's Determination Letter was inadequate with regard to its Exemption 4 withholding.[3]

In cases where an office does not provide an adequate determination with respect to a FOIA request, we usually remand the request to that office with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. Accordingly, we will remand the matter to LGPO so that it can issue another determination explaining how Exemption 4 applies to the various types of withheld material in the three released documents.

[3] Given our determination regarding the adequacy of LGPO's justification, we need not address at this time the applicability of Exemption 4 to the withheld information.

III. Conclusion

LGPO did not provide an adequate justification for its withholdings of information pursuant to Exemption 4 of the FOIA. Therefore, we will grant the Appeal in part and remand the matter back to LGPO for a further determination on the Exemption 4 withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed on July 19, 2010, by the Southern Alliance for Clean Energy, OHA Case No. TFA-0403, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Loan Guarantee Program Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 11, 2010

August 17, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Natural Resources Defense Council

Date of Filing: July 23, 2010

Case Number: TFA-0404

On July 23, 2010, the Natural Resources Defense Council (NRDC) filed an appeal from a determination issued to it on June 24, 2010, by the Department of Energy's Idaho Operations Office (DOE-ID). In that determination, DOE-ID responded to a request for documents that NRDC filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

On January 5, 2010, NRDC filed a FOIA request for all records in the possession or control of the Idaho National Laboratory (INL) pertaining to a proposed coal-to-liquid facility being developed by Ohio River Clean Fuels, LLC (ORCF). Letter from Joshua Berman, NRDC, to Clayton Ogilvie, FOIA Officer, DOE-ID (January 5, 2010). In a partial response issued on February 9, 2010, DOE-ID released two documents responsive to NRDC's request. Letter from Timothy B. Jackson, Acting FOIA Officer, DOE-ID, to Joshua Berman (February 9, 2010). On April 29, 2010, DOE-ID released additional responsive documents and also provided NRDC a "list of all the documents that are being released or are currently under review, organized by year." Letter from Clayton Ogilvie to Joshua Berman (April 29, 2010). The list, entitled "Richard Boardman Email For Baard Energy," contains references to several hundred email messages dated from October 16, 2006, to January 5, 2010.

On June 24, 2010, DOE-ID issued a final response to NRDC's request, in which it stated that the "requested information" was exempt from release under Exemption 4 of the FOIA. Letter from Clayton Ogilvie to Joshua Berman (June 24, 2010). DOE-ID further stated that some of the documents at issue were "exempt from release" pursuant to the "Access to and Ownership of Records" clause in the contract between the DOE and Battelle Energy Alliance, LLC (BEA), the contractor that operates INL for the DOE. *Id.*

In its Appeal, NRDC argues that DOE-ID failed to adequately justify its withholding of information under FOIA Exemption 4. Appeal at 4-7. NRDC also contends that, in the list of documents that DOE-ID provided with its April 29, 2010, partial response, DOE-ID erroneously identified certain documents as "[n]ot pertinent to NRDC request." *Id.* at 7-9. Finally, the Appellant notes that this list of documents states that emails were "not archived for period between 03/02/2007 to 04/17/2008," and that "DOE should provide some explanation for why all records from this critical period were not located and reviewed." *Id.* at 9.

II. Analysis

A. Emails Not Archived Between March 2, 2007, and April 17, 2008

As noted above, the list of documents that DOE-ID provided with its April 29, 2010, letter to NRDC stated that emails were not archived from between March 2, 2007, and April 17, 2008. In its Appeal, NRDC states that the "DOE has offered no explanation as to why over 13 months of Dr. Boardman's e-mails were not archived." Appeal at 9. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about an agency's operations. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

Nonetheless, in responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We therefore asked DOE-ID for information regarding its search for the emails in question. On May 13, 2010, INL informed DOE-ID that Dr. Boardman had asked computer support personnel to search his hard drive for all archive files, and that while the support personnel found an archive file dated April 18, 2008, "they were not able to recover email from the file." Email from Dorraine C. Burt, INL, to Clayton Ogilvie (May 13, 2010). Dr. Boardman also stated that he had received no indication that the archive file could be "recovered either on my desktop file or from routine system backups." *Id.* Based on the information provided, we find that INL and Dr. Boardman conducted a search reasonably calculated to uncover the emails in question.

B. Whether the Documents at Issue are Subject to the FOIA or the DOE FOIA Regulations

DOE-ID's final response to NRDC's request states that at least some of the records identified as responsive to its request are "property of the contractor and therefore not subject to the FOIA." Letter from Clayton Ogilvie to Joshua Berman (June 24, 2010).[1] Whether a document requested under the FOIA is subject to that statute or to the DOE FOIA regulations is a threshold question that DOE-ID should have addressed in its determination prior to its consideration of whether the documents at issue would be exempt from release under a particular FOIA exemption. Moreover, as we explain below, DOE-ID's determination did not sufficiently explain the basis for its conclusion that these documents were "not subject to the FOIA."

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were

[1] Since the filing of the present Appeal, DOE-ID has stated that, in fact, *all* of the responsive documents identified in the list provided to the requester are the property of BEA. Email from Clayton Ogilvie to Steven Goering, OHA Staff Attorney (July 30, 2010).

created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *See Eagle Rock Timber,* Case No. TFA-0381 (2010) (setting forth the factors to consider in determining whether a document was under an agency's control at the time of a request).

In addition, the DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C § 552(b).

10 C.F.R. § 1004.3(e).

Though DOE-ID's determination letter does not cite this section of the DOE regulations, its statement that the documents at issue are "property of the contractor" appears to address the application of this provision. Nonetheless, DOE-ID's determination letter clearly does not apply the required full analysis set forth above in finding that the documents are "not subject to the FOIA." We will therefore remand this matter to DOE-ID for a new determination on this issue, which will allow the requester to formulate a meaningful argument should it choose to appeal a determination that the documents at issue are not subject to the FOIA or the DOE FOIA regulations. *See Joseph M. Santos,* Case No. TFA-0113 (2005) ("a reasonably specific justification of a withholding . . . aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal").

C. Whether the Documents at Issue are Exempt from Release Under FOIA Exemption 4

FOIA Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); see *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In the present case, DOE-ID withheld several hundred documents from the requester under Exemption 4, stating that "the requested information consists of documents generated under a Cooperative Research and Development Agreement (CRADA) between Battelle Energy Alliance and Baard Energy, and is exempt from release pursuant to Exemption 4 . . . because it consists of privileged and confidential commercial information constituting work done for others/clients, which is held in confidence."

First, the fact that a document was created under a CRADA does not, in itself, exempt a document from disclosure under the FOIA. *See John Michael Unfred, P.C.*, Case No. VFA-0581 (2000) (upholding determination releasing non-exempt portions of CRADA documents). Beyond this, DOE-ID's determination letter merely parroted the language of the FOIA statute by stating, in conclusory fashion, that the documents at issue contain "privileged and confidential commercial information . . . ." We have previously found that such a statement does not provide a sufficient basis for a determination withholding information under Exemption 4. *Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter to DOE-ID for a new determination explaining how Exemption 4 applies to withheld material).

For example, if an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *See Environmental Defense Institute*, Case No. TFA-0289 (2009) (*citing Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA")).

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009). We agree with the appellant that DOE-ID's June 24 determination letter did not adequately justify its withholding of information under FOIA Exemption 4.

In cases where an office does not provide an adequate determination with respect to a FOIA request, we usually remand the request to the office with instructions to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. We have already determined above that this case should be remanded for consideration of whether the documents in question are subject to the FOIA or DOE FOIA regulations. If DOE-ID finds that the documents are subject to either the statute or the regulations, DOE-ID should then set forth an adequate basis for its withholding of any information in the documents under Exemption 4.

D. Documents Identified by DOE-ID as Not Pertinent to NRDC's Request

Finally, regarding documents identified as "[n]ot pertinent to NRDC request" in the list provided with DOE-ID's April 29, 2010, letter to NRDC, DOE-ID's new determination should specify whether it now considers those documents to be responsive to NRDC's request, particularly in light of NRDC's clarification of its request in its May 25, 2010, email to DOE-ID. Email from Josh Berman to Clayton Ogilvie (May 25, 2010).

III. Conclusion

For the reasons explained above, we will remand this matter to DOE-ID for a new determination addressing whether the documents at issue are subject to the FOIA or the DOE FOIA regulations and, if so, either releasing those documents in their entirety or providing a sufficient justification for the withholding of any information that it finds to be exempt from disclosure. In making a determination that information is exempt from disclosure, DOE-ID should be mindful of the requirement of the FOIA that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b).

It Is Therefore Ordered That:

(1) The Appeal filed on July 23, 2010, by the Natural Resources Defense Council, OHA Case No. TFA-0404, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Idaho Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 17, 2010

August 9. 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Luca Gratton
Date of Filing:	July 26, 2010
Case Number:	TFA-0405

On July 26, 2010, Luca Gratton (Appellant) filed an Appeal from a determination issued to him on June 17, 2010, by the Savannah River Operations Office (SRO) of the Department of Energy (DOE). In that determination, SRO responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, SRO did not release any documents, indicating the documents requested were the property of a DOE contractor, Savannah River Nuclear Solutions, LLC (SRNS), and, therefore, not agency records subject to disclosure under the FOIA. This Appeal, if granted, would require SRO to release the requested documents.

I. Background

SRNS is the managing and operating (M&O) contractor at SRO. In 2009, the DOE published an Acquisition Forecast[1/] indicating SRNS intended to solicit a subcontract for program management, project management, and system engineering services. On May 29, 2010, the Appellant requested information regarding a solicitation notice, including:

> 1. A comprehensive List of Records maintained by the DOE and/or SRNS, LLC that are directly and specifically associated with the solicitation notices, solicitations and requests for proposal for the acquisition(s) directly emanating from the Forecast. . . .

[1/]The Acquisition Forecast allowed SRNS to inform small businesses of forthcoming subcontracting opportunities. Email dated June 16, 2010, from Craig Armstrong, SRO, to Pauline Conner, SRO.

2. One complete copy of the final version of the Notice of Solicitation for the acquisition(s) directly associated with the Forecast. . . .

> 3. One complete copy of the final version of the Request for Proposal for the acquisition(s) directly associated with the Forecast. . . .
>
> 4. A written debrief of the disposition of the acquisition(s) and contract award(s) directly associated with the Forecast. . . .

Request Letter dated May 29, 2010, from Appellant to DOE. In response to the Appellant's request, SRO issued a determination letter indicating that the documents the Appellant was requesting are not agency records, and therefore, not subject to release under the FOIA. Determination Letter dated June 17, 2010, from Lucy M. Knowles, Authorizing Official, SRO, to Appellant. SRO also stated that it neither owns nor possesses responsive documents. *Id.*

On July 26, 2010, the Appellant submitted the present Appeal in which he contends that the requested documents are subject to disclosure under the FOIA. Appeal Letter received July 26, 2010, from Appellant to Director, Office of Hearings and Appeals, DOE. He claims that the documents must be in the possession of DOE because the Contracting Officer (CO) is required to oversee many aspects of the contract between SRO and SRNS. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[2/]

We contacted SRO to determine if it had any documents responsive to the Appellant's request, as the Appellant argues in his Appeal. SRO responded as follows:

> [The Appellant] is under the impression that work authorizations issued to an M&O contractor would include specific instructions on subcontracting requirements. This is not the case since the work authorizations issued under the prime M&O contract contain broad

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

> baseline level descriptions of overall work scope. The contractor has the responsibility of determining the specific elements of the generalized work scope to be performed and which of those elements need to be subcontracted out versus performed with existing prime contractor resources. Therefore, the contracting officer did not issue subcontract-specific work authorizations or instructions under this prime DOE contract and [SRO] does not possess the records in question as they are the property of the commercial contractor performing the prime M&O work scope.

E-mail dated August 2, 2010, from Pauline Conner, SRO, to Janet R. H. Fishman, OHA, forwarding an e-mail from Craig Armstrong, CO, to Pauline Conner. The CO had previously informed SRO that he did not have any documents responsive to the request. E-mail dated June 16, 2010, from Craig Armstrong to Pauline Conner.

The Appellant argues that various provisions of the contract between SRNS and DOE would require SRO to have possession of the information he is requesting. We disagree. For example, the Appellant contends that under Clause H.35(b), the CO must be notified in writing of the subcontractor entity performing any work that is specified in the Statement of Work, if that work in not performed directly by SRNS. Appeal Letter at 3. However, the provision states "[t]he Contractor shall take no action to replace components of the Offeror named in (a) above without the prior written approval of the CO." Section H.35(b) of the contract between DOE and SRNS, DOE Contract No. DE-AC09-08SR2240. *See* http://www.srs.gov/sro/srnscontracmodm001.pdf. This does not indicate that every subcontract must be approved in writing, only that replacement of the three subcontractors mentioned in the contract must be approved in writing. Further, the Appellant contends that Clause H-46 of the contract indicates that the CO must have documents responsive to his request. Appeal Letter at 3. A clear reading of the clause shows that at no time is the Contractor required to inform the CO in *writing* about subcontracts. The clause states in pertinent part, "the contractor shall ensure that any required prior notice and description of the subcontract is given to the CO and any required consent is received." Section H-46 of the contract between DOE and SRNS, DOE Contract No. DE-AC09-08SR2240.

As the foregoing indicates, we disagree with the Appellant's argument that the DOE must have possession of the information he is requesting. A thorough reading of the clauses upon which he relies does not support his arguments. SRO's response of August 2, 2010, confirms our position. The CO, who has responded to our questions regarding this Appeal, is the person most knowledgeable about whether responsive documents exist. Therefore, any search that SRO conducted was reasonably calculated to uncover the requested documents.

III. Conclusion

SRO has conducted a search reasonably calculated to uncover the information requested by the Appellant. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Luca Gratton, Case No. TFA-0405, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 9, 2010

August 23, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Melvin C. Miller, Jr.
Date of Filing:	July 27, 2010
Case Number:	TFA-0406

On July 27, 2010, Melvin C. Miller, Jr., filed an Appeal from a determination that the Oak Ridge Office (ORO) of the Department of Energy (DOE) issued on July 13, 2010. The determination responded to a request for information Mr. Miller filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

Mr. Miller requested from ORO all records regarding his mother, Mable D. Miller. On July 13, 2010, ORO issued a determination to Mr. Miller in which it released one document, an employment card that was located in ORO's Records Holding Area. Letter from Amy L. Rothrock, Authorizing Official, to Appellant (July 13, 2010). In his Appeal, Mr. Miller challenges the adequacy of ORO's search for responsive documents, asserting that Ms. Miller worked at the Oak Ridge facility for more than 250 hours. Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Natural Resources Defense Council*, Case No. TFA-0127 (2005).[*] The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

We therefore contacted the FOIA/Privacy Act Office of the ORO regarding the search that was performed in this case. Because Mr. Miller had indicated in his request that his mother had worked at ORO's K-25 and X-10 sites, the FOIA/Privacy Act Office requested that those sites search for medical, personnel, payroll, radiation exposure, and industrial hygiene records regarding Ms. Miller.

[*] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

E-mail from Linda G. Chapman, FOIA/Privacy Act Office, ORO, to William M. Schwartz, Staff Attorney, Office of Hearings and Appeals (August 11, 2010). That office also requested that the Records Holding Area and the Oak Ridge Associated Universities conduct searches of their records, as they maintain files dating back to 1943, including files on former employees. *Id.* Manual searches were conducted of paper files, and computerized searches were performed on databases, using Ms. Miller's name, date of birth, and Social Security number. *Id.*

The only document found that contained any information about Ms. Miller indicated that she had worked for JA Jones Construction Company, which ORO believes was a contractor performing services for the Atomic Energy Commission (AEC), a predecessor agency of the DOE, during the 1940s. *Id.* The accepted practice for such contractors was, and is, that they take their records with them when their contract with the AEC or DOE ends. In light of these circumstances, it is reasonable to conclude that the DOE has no additional records on Ms. Miller.

After reviewing the record in this case, we find that ORO performed a search reasonably calculated to reveal all documents responsive to the Appellant's request. Accordingly, Mr. Miller's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Melvin C. Miller, Jr., on July 27, 2010, Case No. TFA-0406, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 23, 2010

August 25, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Custom Catalogues OnLine, Inc.

Date of Filing: July 28, 2010

Case Number: TFA-0407

On July 28, 2010, Custom Catalogues OnLine, Inc. (Appellant) filed an appeal from a determination issued to it by the Oak Ridge Office (OR) of the Department of Energy regarding its request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, OR provided the Appellant with a number of documents. However, OR also withheld in part and in their entirety other documents. This Appeal, if granted, would require that OR release the information withheld in these documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under Department of Energy (DOE) regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On September 23, 2009, the Appellant submitted a FOIA request (Request) asking for copies of any documents referring to Mr. Philip Pulver (Pulver), Custom Catalogs OnLine, "CCOL," CCOL-MDM or "Mobile Data Methods" which were in the possession of or originated from a number of named employees of the DOE's Pacific Northwest Site Office and OR. *Custom Catalogues OnLine, Inc.*, Case No. TFA-0362 (April 28, 2010) slip. op. at 1 (*CCOL*).[1] In response to this FOIA Request (Response I), OR provided the Appellant with a number of redacted and unredacted documents, and it justified withholding portions of documents or entire documents by citing Exemption 5 and the attorney-client and attorney work product privileges. The Appellant appealed and, in our decision in *CCOL*, we remanded the case to OR so that it could issue a more detailed determination which adequately justified its withholding of information in the identified responsive documents. *CCOL* at 3.

[1] During the pendency of its FOIA request, Custom Catalogs OnLine, Inc. was in litigation with Battelle Memorial Institute (Battelle), a non-profit corporation, and the Pacific Northwest National Laboratory (PNNL), *Pulver v. Battelle* (*Pulver*). Battelle currently manages several DOE National Laboratories including PNNL. The Appellant has informed us that this litigation has recently ended. See E-mail from Phillp Pulver, CCOL, to Richard Cronin, Staff Attorney, OHA (August 11, 2010).

On July 1, 2010, OR issued another determination regarding the Appellant's Request (Response II). In Response II, OR released several documents that were previously withheld pursuant to Response I and released additional portions of other documents that were previously withheld in their entirety. As for the documents and redacted portions of documents still withheld from the Appellant in Response II, OR cited Exemption 5 and the attorney-client and attorney work product privileges to justify its withholding of this material. Response II listed these documents under five "Enclosures."[2] Enclosure 1 consisted of 64 documents that were provided in their entirety to the Appellant. The remaining Enclosures listed documents that were withheld in their entirety or listed the redacted documents which were provided to the Appellant and cited the Exemption 5 privilege that justified the withholdings. These Enclosures are listed below:

Enclosure 1	64 Documents released in entirety
Enclosure 2	11 Documents withheld in their entirety (attorney work product privilege)
Enclosure 3	Two Documents withheld in part (attorney work product privilege)
Enclosure 4	13 Documents withheld in their entirety (attorney-client privilege)
Enclosure 5	Seven Documents withheld in part (attorney-client privilege)

In its Appeal, the Appellant makes a number of assertions regarding alleged misconduct at Battelle-managed DOE facilities. The Appellant alleges that release of the documents would shed light on this misconduct and that release of the documents would be in the public interest.[3] The Appellant also argues that because its litigation with Battelle and PNNL has ended, the two privileges asserted by OR are no longer applicable.[4]

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[2] Each enclosure numbers its documents sequentially beginning with the number one.

[3] The Appellant submitted four E-mails on August 11, 17 and 24, 2010, providing additional information regarding his misconduct allegations and his argument that release of the withheld documents would be in the public interest.

[4] The Appellant notes that in CCOL, we referenced that there were 457 pages of responsive material contained in approximately 92 documents. However, the Appellant asserts that in Response II only references 277 pages and 97 documents. In our review of the documents at issue, we now count 430 pages. Our prior total of 457 pages was erroneous based upon a misreading of an E-mail that was provided to us describing the documents at issue and the number of pages to be sent to our office via several E-mails. *See* E-mail from Linda G. Chapman, Legal Assistant, Privacy Act Office, OR to Richard Cronin, Staff Attorney, OHA (April 12, 2010); E-mail from Linda G. Chapman, Legal Assistant, Privacy Act Office, OR to Richard Cronin, Staff Attorney, OHA (August 3, 2010). Further, as we stated in CCOL, it was uncertain exactly how many documents were present because of the format in which we received the documents.

The Appellant also states that, in Response II, it only received 177 pages and was informed that 106 pages were being withheld in their entirety. Consequently, the Appellant alleges that OR failed to account for a significant number of pages from the original total of 430 pages. OR informed us that it provided the Appellant with 183 pages of text and withheld 104 pages in their entirety. The remaining pages, totaling 143 pages, consisted of duplicates of documents already accounted for to the Appellant, OR-created coversheets, or blank pages and thus were not included in Response II. E-mail from Linda G. Chapman, Legal Assistant, Privacy Act Office, OR to Richard Cronin, Staff Attorney, OHA (August 3, 2010). A comparison of the copies of the documents sent to us by OR for review in the first appeal and the present appeal indicates that there are a large number of duplicate documents initially identified by OR. All documents referenced in OR's first response have been accounted for in OR's most recent response (after subtracting the blank and duplicative documents).

II. Analysis

In the present case, we are asked to review the propriety of OR's use of Exemption 5 and the attorney-client and attorney work product privileges to withhold parts of or entire documents.

1. Exemption 5 and the Attorney-Client and Attorney Work Product Privileges

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). In the present case OR has cited the attorney-client and attorney work product privileges to justify its withholding of material pursuant to Exemption 5.[5]

a. Attorney-Client Privilege

An agency may withhold information under the attorney-client privilege if it is a "confidential communication . . . between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses opinions given by an attorney to a client based upon, and thus reflecting, those facts. *See, e.g.*, *Jernigan v. United States Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g.*, *Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Power Wire Constructors*, Case No. TFA-0312 (May 27, 2009).[6]

[5] In its communications with OR during the pendency of this appeal, OR indicated to the Appellant that some of the documents it was considering withholding may contain "trade secret" or "commercial and financial" information. *See* E-mail from Linda G. Chapman, Legal Assistant, Privacy Act Office, OR, to Richard Cronin, Staff Attorney, OHA (August 3, 2010). However, upon review, OR determined that release of the documents containing such information would not cause harm if released. Consequently, these documents were released in their entirety to the Appellant.

[6] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

b. Attorney Work Product Privilege

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

2. Exemption 5's Intra-Agency Requirement

As noted above, a threshold requirement for the application of Exemption 5 is that a document must be an inter-agency or intra-agency communication. In the present case, many of the documents at issue originated from DOE attorneys and were sent to DOE officials. Consequently, they meet this requirement. Exemption 5 applies to these documents if an applicable privilege (attorney-client or attorney work product) also applies to them.

However, a number of draft pleadings and communications originated from Battelle's outside counsel for the *Pulver* litigation or PNNL/Battelle legal staff. Nonetheless, a communication between an agency and a private party is also an intra-agency communication when the "common interest" doctrine applies. *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord Klamath*, 532 U.S. at 10. The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-283. "[I]n a limited sense," the private party "becomes a part of the enterprise that the agency is carrying out." *Id*. at 280. Therefore, the communications "can be understood as 'intra-agency' for the purposes of Exemption 5." *Id*.

In the present case, Battelle and PNNL shared litigation information with DOE pursuant to DOE's contractual right to monitor Battelle's litigation expenses for which DOE may be liable and its option to take charge of the litigation itself. *See* Contract No. DE-AC05-76RL01830 Clause I-100 (DEAR 970.5228-1 Insurance-Litigation and Claims) Section (l). Consequently, we find that the communications originating from Battelle and PNNL were conducted pursuant to a "common interest" and thus these communications also satisfy the intra-agency requirement of Exemption 5.

3. Applicability of the Attorney-Client and Attorney Work Product Privileges

a. Enclosure 2

Enclosure 2 consists of 11 documents withheld in their entirety under the attorney work product privilege. The documents are draft pleadings and interrogatories and legal analyses on issues

such as the statute of limitations and options for settlement prepared by counsel concerning the litigation in *Pulver*. From our review of this material, it is apparent that it was prepared in anticipation of the *Pulver* litigation. As such, this material is properly protected by the attorney work product privilege and Exemption 5. However, a number of these analyses were transmitted via E-mail. The E-mail address headers (i.e., From:, Sent:, To:, Cc:, Subject:) and the signature blocks at the end of the E-mails do not consist of attorney work product material. Additionally, there is a small amount of E-mail text that does not refer to or relate to legal subjects. Specifically, the first complete sentence on page 2 of Document No. 5 (beginning with ("Thanks so much") is not attorney work product material. In Document No. 8, the first two E-mails in the chain do not contain attorney work product material (both e-mail texts beginning with ("Thanks"). In Document No. 9, the sentence beginning with "Hope" is also not attorney work product material. The first two complete sentences in Document No. 10 beginning with "Good morning" and "Thank you" are not attorney work product material. Consequently, we will remand this matter to OR. OR, on remand, should either release the Enclosure 2 material noted above to the Appellant or withhold it using another relevant Exemption.

b. Enclosure 3

Enclosure 3 consists of two documents in which portions were withheld pursuant to the attorney work product privilege.[7] Document No. 1 is a draft memorandum in opposition to plaintiff's motion to strike declaration. Document No. 2 is a draft of a letter to be sent to opposing counsel concerning discovery issues. Both documents contain legal analysis produced by attorneys for Battelle and PNNL. All of this material was prepared in anticipation of the *Pulver* litigation. Given this, the material is protected under the attorney work product privilege. Consequently, we find that OR properly withheld these documents.

c. Enclosure 4

Enclosure 4 consists of 13 documents withheld in their entirety pursuant to the attorney-client privilege. The vast majority of the material consists of communication to and from counsel to PNNL officials concerning litigation strategy, utilization of outside counsel, litigation status reports and attorney analysis and opinions regarding *Pulver*. Consequently, we find that the vast majority of the material withheld in Enclosure 4 is protected by the attorney-client privilege. However, there are E-mail headers and signature blocks which are not protected by attorney-client privilege since they do not refer to any type of legal matter. Also, there is a small amount of E-mail text which does not refer or relate to legal matters and is therefore outside the attorney-client privilege. In Document No. 1 the first E-mail message (beginning with "Jim") does not appear to by protectable by the privilege. In Document No. 3 the first three E-mails on page 1 contain only non-legal informational communications and do not contain attorney-client material. The first page of Document Nos. 4 through 6 contains E-mail text related to scheduling a meeting and thus do not seem to be protectable by the attorney-client privilege. In Document Nos. 7 and 8, page 2 (for both documents), the E-mail text sentence beginning "Thank" is not attorney-client material. Likewise, the E-mail text contained in the first E-mail on page 1 of

[7] Both documents were attached to separate E-mails. The associated E-mails were provided to the Appellant in their entirety.

Document No. 10 (beginning with the word "Sold,") relates to scheduling a meeting and does not contain any attorney-client materials. In the second E-mail on page 1, document 11, the sentence beginning "The call in number" concerns a telephone conference call meeting and does not appear to contain attorney-client material. *See Clarke v. Amer. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (attorney-client privilege protects documents that "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided"); *National Resources Defense Counsel v. U.S. Dep't of Defense*, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (attorney-client privilege requires that documents reflect confidential communications between agency and its attorney, not merely that they be exchanges between an agency and its attorneys). OR, on remand, should either release to the Appellant the non-attorney-client privilege Enclosure 5 material noted above or withhold it using another relevant Exemption, if one exists.

d. Enclosure 5

Enclosure 5 consists of 7 documents of which portions of each document were withheld pursuant to the attorney-client privilege. These documents consist of discussion between counsel and PNNL officials regarding litigation status, proposed strategies and a litigation-related FOIA request. As such, this information was properly withheld pursuant to Exemption 5 and the attorney-client privilege. However, as discussed above, the E-mail headers and signature blocks contained in these documents are not protected by the privilege. Additionally, the text in two E-mails, Talbot to Drew, sent January 17, 2007 at 3:03 pm, and Talbot to Cooke, sent January 17, 2007 at 2:04 pm, contained in Document Nos. 4, 5 and 6 are not protected by the attorney-client privilege. The Talbot/Drew E-mail itself only seeks to inform an official at the Office of Science at DOE Headquarters about the sender's request for information regarding the processing of a FOIA request. The Talbot/Cooke E-mail is the request itself. Neither E-mail text contains information of the type that the attorney-client privilege was meant to protect. Consequently, the text of these E-mails is not protectable pursuant to Exemption 5 and the attorney-client privilege. OR, on remand, should either release to the Appellant the Enclosure 5 material noted above that is not protected by the attorney-client privilege or withhold it using another relevant Exemption.

e. Appellant's Arguments Regarding Privileges

The Appellant asserts that, because the *Pulver* litigation has now concluded, any documents formerly protected by the attorney-client or attorney work product privileges are no longer protected. This argument is unavailing. The protection of the attorney work product privilege is maintained even if the litigation which prompted its creation never materializes. *See FTC v. Grolier Inc.*, 462 U.S. 19, 26-28 (1983) (under Exemption 5 attorney work product privilege is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared). Likewise, the attorney-client privilege is not limited to the existence of litigation. *See Rein v. U.S. Patent and Trademark Office*, 553 F. 3d 353, 377 (4th Cir. 2009) (noting that privilege "extends beyond communications in contemplation of particular litigation to communications regarding 'an opinion on the law'"). Consequently, we reject the Appellant's argument regarding the non-applicability of these privileges.

4. Public Interest Determination

Nonetheless, the DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Appellant has presented evidence which he believes exposes impropriety by Battelle and PNNL and alleges that this shows the significant public interest in releasing the withheld material. However, the Appellant's evidence is somewhat speculative. Further, even if established, it would not outweigh the immense public interest protected by the attorney-client and attorney work product privileges. The Supreme Court, in the civil discovery context, has emphasized the public policy underlying the attorney-client privilege – "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Supreme Court also has recognized the significant public interest in ensuring the effective operation of counsel through the attorney work product privilege. *Hickman*, 329 U.S. at 510-11 (1947). Given the important public interests protected by the attorney-client and attorney work product privileges, we conclude that discretionary release of the withheld materials would not be in the public interest.

III. Conclusion

As discussed above, the vast majority of the material withheld by OR in the present case was properly withheld pursuant to Exemption 5 and the attorney work product and attorney-client privileges. Since there is a small portion of material that was not appropriately classified as attorney-client or attorney work product privileged material, we will remand this matter to OR for release of this information or the issuance of a new determination letter justifying withholding of this material. Consequently, the Appellant's appeal should be granted in part.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Custom Catalogues OnLine, Inc., OHA Case Number TFA-0407, is hereby granted in part as set forth in Paragraph 2 below.

(2) This matter is hereby remanded to the DOE's Oak Ridge Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 25, 2010

Concurrence

RAC:rac

Cronin _____

August 23, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Sandra L. Spencer
Date of Filing:	July 29, 2010
Case Number:	TFA-0408

On July 29, 2010, Sandra L. Spencer filed an Appeal from a determination that the Office of Information Resources (OIR) of the Department of Energy (DOE) issued on July 13, 2010. The determination responded to a request for information Ms. Spencer filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

I. Background

Ms. Spencer requested from the DOE all employment records regarding her husband, Victor R. Spencer, while he was employed at the DOE's Rocky Flats site. On July 13, 2010, OIR issued a determination to Ms, Spencer in which it stated that it was unable to find any documents responsive to her request. Letter from Alexander C. Morris, Freedom of Information Act (FOIA) Officer, to Appellant (July 13, 2010). In her Appeal, Ms. Spencer challenges the adequacy of the DOE's search for responsive documents. Appeal at 1.

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The DOE requires a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, Case No. VFA-0771 (November 29, 2002).[*] Accordingly, in analyzing the adequacy of the search conducted by OIR, we are guided by the principles we have applied in similar cases under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Natural Resources Defense Council*, Case No. TFA-0127 (November 16, 2005). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as

[*] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In reviewing the present Appeal, we contacted OIR regarding the search that was performed in this case. Because Ms. Spencer had indicated in her request that her husband had worked at the Rocky Flats site, a DOE facility that has since closed, OIR requested that the Office of Legacy Management (OLM), which is the repository for Rocky Flats records, conduct a search for records responsive to her request. In response to our inquiries, OLM provided the following information. Using the search terms "Spencer," "Victor," and his Social Security number, OLM searched both paper and electronic records contained in the Privacy Act system of records that contained records regarding the following subjects: grievances, personnel records of former contractor employees, worker advocacy, payroll and leave, training, medical files, employee assistance programs, radiation exposure, occupational and industrial accident reports, legal files, personnel security clearance files, FOIA and Privacy Act requests, and physical fitness tests. E-mail from Tamara Wilson, OLM, to William Schwartz, Staff Attorney, Office of Hearings and Appeals (August 17, 2010).

According to OLM, Ms. Spencer had indicated in her request that her husband had worked for two companies while at the Rocky Flats site, Swinerton & Walberg and J.A. Jones Management Services. *Id.* At Rocky Flats, as at many sites, the DOE contracted with a management and operating (M&O) contractor to operate the site with DOE oversight. That M&O, or prime, contractor in turn entered into contracts with smaller contractors, or subcontractors, to accomplish routine or specific tasks. *Id.* Although records of employees of prime contractors were often maintained as DOE records, the accepted practice for subcontractors was, and is, that they maintain their own records. Because Mr. Spencer worked for two subcontractors and not for the prime contractor, it is reasonable to conclude that the DOE has no additional records regarding him.

After reviewing the record in this case, we find that OLM performed a search reasonably calculated to reveal all documents responsive to the Appellant's request. Accordingly, Ms. Spencer's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Sandra L. Spencer on July 29, 2010, Case No. TFA-0408, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos

Director
Office of Hearings and Appeals

Date: August 23, 2010

August 27, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Frances R. Stokes
Date of Filing:	August 2, 2010
Case Number:	TFA-0409

On August 2, 2010, Frances R. Stokes filed an appeal from a determination issued to her by the Savannah River Operations Office of the Department of Energy (DOE) regarding a request for documents that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to Ms. Stokes's FOIA Request, Savannah River provided her with a number of documents, including some from which information was redacted pursuant to the FOIA. This Appeal, if granted, would require that Savannah River release to Ms. Stokes the information it did not provide in its response to her request.

I. Background

On June 20, 2010, Ms. Stokes submitted a FOIA request for seven categories of records from the Savannah River Plant pertaining to her late husband, James L. Forrest, who worked at the Plant from 1952 through 1968. On July 12, 2010, Savannah River issued a determination letter regarding the request, through which it released to Ms. Stokes copies of Mr. Forrest's exposure records, employee appraisals, vacation and leave records, and transfer records. The letter also informed Ms. Stokes that Savannah River withheld portions of the radiation exposure records and personnel records it released to her pursuant to Exemption 6 of the FOIA, explaining that the information it withheld concerned other individuals. In her Appeal, Ms. Stokes challenges Savannah River's determination to the extent that it withheld information from her. She contends in her Appeal that at least some of the withheld information may be disclosed to her without compromising the identity of others.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). The documents from which Savannah River redacted information responded to the portions of Ms. Stokes's request that concerned Mr. Forrest's exposure records and personnel records. The radiation exposure records from which information was redacted are periodic (usually monthly) reports of exposure garnered from film badges worn by workers. A single page of each report contains unique information about several workers, including their names and employee numbers, as well as numerical values related to each worker's badge readings. The personnel records from which information was redacted consist of two pages: on one, 12

individuals, including Mr. Forrest, were listed as promoted as of March 29, 1965; on the other, dated May 8, 1967, three individuals, including Mr. Forrest, are listed by name and position.

We have reviewed each page of each document from which a portion was redacted from the copies provided to Ms. Stokes. On each page, all the information that related to Mr. Forrest was released to Ms. Stokes, and all the information that was redacted and not released to Ms. Stokes was similar information about other individuals. Because Ms. Stokes's request was for information about Mr. Forrest, we have determined that she received all the information contained on those pages that was responsive to her request. Because the redacted information concerned individuals other than Mr. Forrest, that information was not responsive to Ms. Stokes's request. We have previously found that non-responsive material is not subject to disclosure under the FOIA. *Environmental Defense Institute,* Case No. TFA-0295 (2009); *Northwest Technical Resources, Inc.,* Case No. VFA-0611 (2000).*

We note that Savannah River cited Exemption 6 of the FOIA as justification for its withholding information from Ms. Stokes. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We have determined that Savannah River released to Ms. Stokes all of the information that was responsive to her request, i.e., all of the information pertaining to Mr. Forrest that fell within the seven categories of her request. Because Savannah River did not withhold any responsive information from Ms. Stokes, we need not consider Savannah River's application of Exemption 6 in this matter.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Frances R. Stokes, Case Number TFA-0409, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 27, 2010

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* Decisions issued by the Office of Hearings and Appeals (OHA) after November 16, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.ohw.doe.gov/search.htm.

August 31, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Reginald A. Harris
Date of Filing:	August 16, 2010
Case Number:	TFA-0411

On August 16, 2010, Reginald A. Harris filed an Appeal from a determination the Department of Energy Office of Human Capital Management (DOE/HC) issued on July 14, 2010. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The Appellant requested from DOE/HC position descriptions for Criminal Investigators in the DOE's Office of Security Operations and Office of Special Operations, and position evaluation statements for each position description. This request was the subject of a prior Appeal that Mr. Harris filed with our office regarding a determination DOE/HC issued on March 15, 2010. In that determination, DOE/HC released copies of the requested position descriptions, but stated that it "does not distribute position evaluation statements to employees nor to anyone in the Program Offices." Letter from Sarah J. Bonilla, Director, DOE/HC, to Reginald A. Harris (March 15, 2010). In ruling on the Appeal, we noted that DOE/HC's determination letter cited no exemption under the FOIA authorizing the withholding of position evaluation statements, and remanded the matter to DOE/HC for a new determination, either releasing the requested position evaluation statements to Mr. Harris or specifying the exemption(s) under which it is withholding those documents. *Reginald A. Harris*, Case No. TFA-0368 (2010).[1]

On July 14, 2010, DOE/HC issued a new determination, stating that it was withholding the requested position evaluation statements "pursuant to Exemption 2 of the FOIA." Letter from Sarah J. Bonilla to Mr. Reginald A. Harris (July 14, 2010) (Determination Letter) at 1. In his present Appeal, Mr. Harris argues that the position evaluation statements fall outside the scope of Exemption 2, and therefore should be released. Appeal at 2-5.

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9).

As interpreted by the courts, Exemption 2 encompasses two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). "Low 2," invoked by DOE/HC in the present case, is based upon "the rationale that the very task of processing and releasing certain data would be an administrative burden unjustified by any genuine public benefit." *James L. Schwab,* Case No. LFA-0316, 23 DOE ¶ 80,144 (1993) (*citing* Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982)); *see also Carbe v. ATF*, No. 03-1658, 2004 WL 2051359, at *6 (D.D.C. Aug. 12, 2004) ("'Low 2' information refers to internal procedures and practices of an agency where disclosure would constitute an administrative burden unjustified by any genuine and significant public benefit.").

The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "low two" category: The agency seeking to withhold information under "low two" must be able to show that (1) the requested information is "predominantly internal," and (2) "the material relates to trivial administrative matters of no genuine public interest." *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992).

In its determination, DOE/HC states that "low 2" applies to the documents it withheld "since the evaluation statements are not considered to be an official part of the position description and are for use by the Human Resources Office to document the analysis of the position descriptions." Determination Letter at 1. Though not using the words "predominantly internal," DOE/HC's determination appears to apply the first prong of the two-part test described above.

The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam). We have reviewed the documents in question, which explain the basis for the classification of certain Criminal Investigator positions at particular General Schedule (GS) grade levels. As these documents clearly do not purport to regulate activities or set standards of the type described in *Cox*, we find that the information contained in the documents is "predominantly internal."

DOE/HC's determination, however, does not address the second requirement for withholding information under "low 2," that the information at issue "relates to trivial administrative matters of no genuine public interest." Moreover, aside from what the federal courts have required to justify withholding under Exemption 2, the DOE FOIA regulations provide that the Department "will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. The regulations further require that a determination letter denying

a FOIA request must contain "a statement of why a discretionary release [*e.g.*, under Section 1004.1] is not appropriate." 10 C.F.R. § 1004.7(b)(1).

Because DOE/HC's determination does not address the public interest in disclosure of the information requested by the Appellant, either as part of its stated basis for withholding the information under Exemption 2, or in explaining why discretionary release is not appropriate as required by the DOE regulations, we must again remand this matter to DOE/HC for a new determination. In its determination, DOE/HC must either release the requested position evaluation statements to Mr. Harris or provide an adequate justification for withholding the information, along with a statement as to why a discretionary release of the requested information would not be appropriate.

More specifically, if DOE/HC concludes that the information must be withheld under "low 2," its determination must address the public interest in the information at issue, and how the "very task of processing and releasing" the eleven pages of information at issue would impose "an administrative burden unjustified by any genuine public benefit." *Schwab*, 23 DOE at 80,610-11 ("the administrative burden of reproducing a single sheet of paper is low")*; see also Fonda v. CIA*, 434 F. Supp. 498, 503 (D.D.C. 1977) (finding that where administrative burden is minimal and it would be easier to release information at issue, policy underlying Exemption 2 does not permit withholding).

It Is Therefore Ordered That:

(1) The Appeal filed by Reginald A. Harris on August 16, 2010, Case No. TFA-0411, is hereby granted as specified in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of Human Capital Management, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 31, 2010

August 31, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Linda S. Bramlett
Date of Filing:	August 17, 2010
Case Number:	TFA-0412

On August 17, 2010, Linda S. Bramlett filed an appeal from a determination issued to her by the Savannah River Operations Office of the Department of Energy (DOE) regarding a request for documents that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to Ms. Bramlett's request for information, Savannah River provided her with a number of documents, including some from which information was redacted pursuant to the FOIA. This Appeal, if granted, would require that Savannah River release to Ms. Bramlett the information it did not provide in its response to her request.

I. Background

On May 3, 2010, Ms. Bramlett sent a request by e-mail to the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Resources (HHR) for records relating to her late husband's claim with that agency. On June 8, 2010, the CDC forwarded records to the DOE that it determined were DOE records and pertained to Ms. Bramlett's request, for the DOE to make a determination regarding the release of those records to Ms. Bramlett. On July 7, 2010, the DOE Headquarters' FOIA Officer referred those documents, all of which were radiation exposure records, to the Savannah River Operations Office for a review and determination of releasability under the FOIA. On July 13, 2010, Savannah River issued a determination letter regarding those documents that the CDC had referred to the DOE, through which it released to Ms. Bramlett copies of her husband's radiation exposure records. The letter also informed Ms. Bramlett that Savannah River withheld portions of the exposure records it released to her pursuant to Exemption 6 of the FOIA, explaining that the information it withheld concerned the name, social security number, and levels of radiation exposure of one or more individuals. In her Appeal, Ms. Bramlett challenges Savannah River's determination to the extent that it withheld information about her husband from her. She also requests copies of her husband's employment records, as she contends that the CDC is relying on incorrect information about his employment history.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). The radiation exposure records from which Savannah River redacted information are periodic (quarterly or monthly) reports of exposure garnered from film badges worn

by workers. A single page of each report contains unique information about several workers, including their names and social security numbers, as well as numerical values related to each worker's badge readings.

We have reviewed each page of each document from which a portion was redacted from the copies provided to Ms. Bramlett. On each page, all the information that related to Mr. Bramlett was released to Ms. Bramlett, and all the information that was redacted and not released to Ms. Bramlett was similar information about other individuals. Because Ms. Bramlett's request was for information about her husband, we have determined that she received all the information contained on those pages that was responsive to her request. Because the redacted information concerned individuals other than Mr. Bramlett, that information was not responsive to Ms. Bramlett's request. We have previously found that non-responsive material is not subject to disclosure under the FOIA. *Environmental Defense Institute*, Case No. TFA-0295 (2009); *Northwest Technical Resources, Inc.*, Case No. VFA-0611 (2000).*

We note that Savannah River cited Exemption 6 of the FOIA as justification for its withholding information from Ms. Bramlett. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We have determined that Savannah River released to Ms. Bramlett all of the information that was responsive to her request, i.e., all of the information pertaining to her husband, contained on those pages from which information was redacted. Because Savannah River did not withhold any responsive information from Ms. Bramlett, we need not consider Savannah River's application of Exemption 6 in this matter.

In her Appeal, Ms. Bramlett also requests copies of her husband's employment records. Savannah River did not review any employment records when processing its determination, because the documents the CDC referred to the DOE contained no employment records. The scope of this Appeal is limited to the documents about which Savannah River issued its determination, which consisted only of radiation exposure records received from the CDC. If Ms. Bramlett wishes to obtain information from the DOE that has not yet been the subject of a FOIA request, she may request that information—in this case, her husband's employment records—by filing a request for them with the DOE pursuant to the FOIA.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Linda S. Bramlett, Case Number TFA-0412, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 31, 2010

September 29, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The News-Gazette

Date of Filing: September 9, 2010

Case Number: TFA-0417

On September 9, 2010, Mr. Thomas J. Kacich, on behalf of The News-Gazette in Champaign, Illinois, filed an Appeal from a determination issued by the Department of Energy (DOE) Office of Information Resources (OIR), in response to a request for documents that Mr. Kacich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of Mr. Kacich's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On August 12, 2010, Mr. Kacich filed a FOIA request with OIR for records pertaining to the FutureGen and FutureGen 2.0 Projects, clean energy projects focused on creating near-zero emissions coal-fueled power plants. Specifically, Mr. Kacich requested all reports and correspondence written by and to three senior DOE officials regarding the FutureGen and FutureGen 2.0 projects. Request Email from Thomas J. Kacich, The News-Gazette, to OIR (August 12, 2010). Mr. Kacich identified himself as a representative of the news media and requested expedited processing because "significant questions have been raised about why changes were made to the original FutureGen project that had been approved by the DOE and the FutureGen Alliance." *Id*. Mr. Kacich added, "the DOE has set a deadline of [September] 30 for applications for FutureGen 2.0 and some Illinois communities are believed to be interested in applying. This reporting could help those communities and their residents understand how and why FutureGen has evolved into a significantly new proposal. It is imperative that these documents be released quickly so applicants and taxpayers are fully aware of the revisions." *Id.*

On August 18, 2010, OIR denied Mr. Kacich's request for expedited processing on the grounds that the request did not satisfy the requirements for expedited processing. Determination Letter

from OIR to Mr. Kacich (August 18, 2010). Specifically, OIR found that Mr. Kacich's request did not set forth material establishing any threat to the life or safety of an individual that would justify expedited processing. *Id*. at 2. OIR further determined that Mr. Kacich did not identify "any actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner." *Id*.

On September 9, 2010, Mr. Kacich submitted this Appeal of OIR's denial of expedited processing. In his Appeal, Mr. Kacich asked that OHA order OIR to expedite the processing of his FOIA request. Appeal Letter from Thomas Kacich to OHA (received September 9, 2010).

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person preference over previous requesters, by moving his or her request "up in line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when the failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs if the requester is primarily engaged in disseminating information and has an "urgency to inform" the public about an activity of the federal government. 5 U.S.C. § 552(a)(6)(E)(v). The request at issue in this Appeal clearly does not involve information which could reasonably be expected to pose an imminent threat to the life or safety of an individual. Therefore, our analysis turns to the second situation – the "urgency to inform."

In order to determine whether a requester has demonstrated an "urgency to inform" and, thus, a "compelling need," we consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C.Cir. 2001); *see also Southeastern Legal Foundation, Inc.*, Case No. TFA-0389 (2010);[*] *Center for Investigative Reporting*, Case No. TFA-0200 (2007).

Courts have found sufficient urgency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have also demonstrated urgency in several other ways. *See, e.g., Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006) (granting expedited processing based on public need for requested material to inform voters prior to upcoming election); *Gerstein v. CIA*, No, C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress); *American Civil Liberties Union v. Dep't of Defense*, No. C-06-01698 WHA, 2006 WL 1469418, at *6

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

(N.D. Cal. May 25, 2006) (granting expedited processing for information related to a "breaking news story," *i.e.*, a story that would lose value if it were delayed).

Conversely, courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Al-Fayed v. CIA*, 254 F.3d at 310 (finding that there is no evidence of a substantial public interest in plaintiff's allegations and that plaintiff did not demonstrate any significant adverse consequences if expedited processing was denied); *Electronic Privacy Info. Ctr. v. Dep't of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of plaintiff's FOIA request did not make a story a matter of "current exigency"). *See also Eugenie Reich*, Case No. TFA-0187 (2007) (denying request for expedited processing because journalist did not establish urgency and did not make clear that the requested information would not be useful to her if processed within the time frame of a normal FOIA request).

In his Appeal, Mr. Kacich reiterated his belief that there exists a compelling need for expedited processing of his request. He stated that the DOE set a deadline of September 30, 2010, for communities to apply to be a partner in the FutureGen 2.0 project. He added, "those communities – all in downstate Illinois and many within the circulation area of The News-Gazette – need to know how and why FutureGen has evolved into an entirely different project in the last few months … the release of these documents would help shed light on that process and perhaps keep communities from getting involved in a costly and time-consuming process that they may later regret." Appeal at 2. Mr. Kacich further asserted that "no other area media outlet is pursuing this story as aggressively as The News-Gazette" and that if he did not receive the requested records quickly, "no one else will provide the critically important coverage that [The News-Gazette] is providing." *Id*.

After reviewing the record of this case, we find that Mr. Kacich has not established a compelling need for expedited processing of his request. Mr. Kacich maintains that it is possible that some communities within his newspaper's circulation area may wish to apply to be partners in FutureGen 2.0 and, therefore, they need more information about the evolution of the project prior to the September 30, 2010, application deadline. This supposed public interest comprises a very narrow section of the American public and is speculative in nature. Therefore, we cannot find that the request concerns a matter of current exigency to the American public or that processing the request within the time frame of a normal FOIA request would compromise a significant recognized interest. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed on September 9, 2010, by The News-Gazette, OHA Case No. TFA-0417, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 29, 2010

November 8, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mathieu Brener
Date of Filing:	September 10, 2010
Case Number:	TFA-0418

On September 10, 2010, Mathieu Brener (Appellant) filed an Appeal from a determination issued to him on August 10, 2010, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information that the Appellant had filed for under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified and released nine documents responsive to the Appellant's request. The Appellant challenges NNSA/SC's withholding of 27 computer files. This appeal, if granted, would require NNSA/SC to release the withheld files to the Appellant.

I. Background

On June 25, 2009, the Appellant requested "all documents, files and notebooks, including digital and paper, that were in the Los Alamos National Laboratory office of Mathieu Brener, . . . at 5 p.m. on January 14, 2008. This includes files on the computer in the office, the documents that were in the white binders, and the lab notebook." E-Mail Request dated June 25, 2009, from Appellant to FOIA Services. On April 10, 2010, NNSA/SC sent a partial response to the Appellant. E-Mail dated September 21, 2010, from Karen Laney, NNSA/SC, to Janet Fishman, Office of Hearings and Appeals (OHA). An April 20, 2010, submission narrowed the scope of the original request. *Id.* On August 10, 2010, NNSA/SC issued its final determination to the Appellant, releasing nine documents in full. Determination Letter dated August 10, 2010, from Carolyn Becknell, FOIA Officer, NNSA/SC, to Appellant (Determination Letter). NNSA/SC stated that the remaining computer files include:

> manuals, data files and measurements, bitmaps, spreadsheets, etc., that have the potential to be harmful by revealing advanced nuclear technology. It is believed that if any of the information was released, it could cause significant harm to the Agency's nuclear nonproliferation program; it could benefit adversaries by helping them identify possible program impacts and vulnerabilities, as well as provide them the opportunity to target these facilities. This information is predominantly internal and has not been released to the public. Disclosure of this information could possibly expose this department, as well as other departments/organizations, to a "significant risk of circumvention of agency regulations or statutes."

Id. at 3. Accordingly, NNSA/SC withheld the 27 files in their entirety.

On September 10, 2010, the Appellant appealed, contending that the 27 withheld computer files are not withholdable under Exemption 2. He maintained that the computer files were created for his Ph.D. research in conjunction with the Nuclear Engineering and Radiological Science Department at the University of Michigan. Appeal Letter dated September 10, 2010, from Appellant to Director, OHA. Accordingly, he claims that the computer files are not "predominantly internal," a prerequisite to Exemption 2 applicability. *Id.* at 2. Further, he claims that the information in the files is very similar to previously published science, and the topics and science have been cleared for unlimited public release. *Id.* Finally, he singles out two computer files that were withheld, claiming that one, Sudoku.llb, is a Sudoku puzzle solver, and the other, MCNPViewer.llb, is "custom written user interface to a widely available nuclear simulation program." *Id.*

In response to the Appeal, NNSA/SC advised us that it continued to believe that the files were withholdable under Exemption 2. NNSA/SC stated that the information had not been publicly released. NNSA/SC further stated that, in some cases, the files contained numbers or possibly computer software that could result in the disclosure of exempt information. NNSA/SC also stated that "it would take a great deal of [information technology's (IT)] time and expertise to determine exactly what these files are." E-mail dated September 21, 2010, from Karen Laney, NNSA/SC, to Janet Fishman, OHA.

II. Analysis

It appears to us that NNSA/SC's application of an exemption to some of the documents was premature. A preliminary question is whether a record is an "agency record" and, therefore, subject to the FOIA.

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record." An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v.*

Tax Analysts, 492 U.S. 136, 144-45 (1989). Whether computer software is an agency record depends on the particular nature and functionality of the software at issue. *Compare Gilmore v. Dep't of Energy*, 4 F. Supp. 2d 912, 920-21 (N.D. Cal 1998) (holding that video conferencing software developed by privately owned laboratory was not a record under FOIA because it was "not designed to be . . . responsive to any particular database" and "does not illuminate anything about [the agency's] structure or decision making process), *with Cleary, Gottlieb, Steen & Hamilton v. HHS*, 844 F. Supp. 770, 781-82 (D.D.C. 1993) (concluding that software program was a record because it was "uniquely suited to its underlying database" such that "the software's design and ability to manipulate the data reflect the [agency's study]," thereby "preserving information and 'perpetuating knowledge'") (quoting *DiViaio v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978)).

As an initial matter, we question whether the file labeled as "Sudoku.llb" is an agency record. The Appellant claims that the file is a Sudoku puzzle solver. If it is what the Appellant alleges it to be, such a file does not appear to us to illuminate anything about DOE's structure or decision-making process. Rather, it may well be Mr. Brener's own personal file. To the extent that the remaining files are computer software files, they may or may not be agency records. Accordingly, we are remanding the request to NNSA/SC to determine whether the computer files at issue here fit within the definition of an agency record discussed above.

To the extent that NNSA/SC believes it has sufficient information about a computer file to determine that it is an "agency record," NNSA/SC can then determine whether it has sufficient information to apply an exemption.[*/] To the extent that NNSA/SC does not have sufficient information to make those determinations, NNSA/SC will need to perform further review. With respect to the applicability of a FOIA exemption, we note that the Appellant also claims in his Appeal that the withheld information is publicly available. As an example of his claim, he states that he provided some of the information to a university faculty in connection with his dissertation. That statement, however, does not end the inquiry. Courts have established rules for determining whether an agency has waived its right to use one of the FOIA exemptions to withhold requested information. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Generally, the government may not rely on an otherwise valid exemption to justify withholding information that *officially* has entered the public domain. *See, e.g., Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). To have been "officially" disclosed, information must have been disclosed

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[*/] NNSA/SC implied that one of the files is classified and another contains proprietary information. September 21, 2010, E-mail. Yet, it withheld all the information under Exemption 2. We believe NNSA/SC should closely examine the files before making a blanket claim that the information is exempted under Exemption 2. NNSA/SC should consider whether the information is withholdable under a more appropriate exemption.

under circumstances in which an authorizing government official allowed the information to be made public. *See, e.g., Wolf v. CIA*, 473 F.3d 370, 379-80 (D.C. Cir. 2007). Under the facts in this record, release by the Appellant to university faculty does not appear to be a release by an authorized government official.

Finally, the Appellant objects to NNSA/SC's release of the nine documents in paper format, rather than electronic form. Since the implementation of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, agencies have been required to provide the record to a requester in "any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). The Appellant's objection herein implies that he wants the files in electronic format. June 25, 2009, Request E-mail. Therefore, on remand, NNSA/SC should release the computer files in electronic form, unless there is uncertainty regarding their content. If NNSA/SC believes that release of the files in electronic form would allow the Appellant to access exempt information that is not readily apparent to the NNSA/SC IT professionals, NNSA/SC can release the documents in paper format. *Cf. Sussman v. USMS*, No. 03-0610, 2005 WL 3213912, at *5 (D.D.C. Oct. 13, 2005) (allowing an agency to withhold information related to databases because disclosure could allow fugitives to circumvent procedures and avoid detection); *Truesdale v. U.S. Dep't of Justice*, No. 03-1332, 2005 WL 3273093 *7 (D.D.C. July 22, 2005) (finding that, pursuant to Exemption 2, ATF properly withheld data related to software applications and routing codes because release could allow individuals to circumvent computer system and interfere with law enforcement operations).

III. Conclusion

NNSA/SC should consider what information is contained in the responsive computer files. After reaching a conclusion on that matter, NNSA/SC should determined whether the files are agency records as defined by the case law discussed above. If it determines that the documents are agency records, NNSA/SC should release the computer files or justify the application of an exemption. Despite the Appellant's claim, NNSA/SC has not waived its right to apply a FOIA exemption, because NNSA/SC did not officially release the information. Finally, any information NNSA/SC deems releasable must be released in the format requested by the Appellant, if possible. Therefore, we will grant the Appeal in part and remand the matter to NNSA/SC for a new determination as outlined in the Decision above.

It Is Therefore Ordered That:

(1) The Appeal filed by Mathieu Brener, Case No. TFA-0418, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November , 2010

October 13, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry Apodaca

Date of Filing: September 13, 2010

Case Number: TFA-0419

On September 13, 2010, Terry Apodaca (Appellant) filed an Appeal from a determination issued to her on August 19, 2010, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). In that determination, OIG responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, OIG identified 16 documents, and released 14 documents,[1/] responsive to the Appellant's request. OIG withheld portions of most of the released documents. The Appellant challenges OIG's withholdings. This appeal, if granted, would require OIG to release the withheld information to the Appellant.

I. Background

On June 21, 2010, the Appellant requested "all Inspector General documents involved in their investigation of my complaint in November 2009." Request E-Mail dated June 21, 2010, from Appellant to Alexander Morris, FOIA Officer. On August 19, 2010, OIG released 14 documents to the Appellant. OIG redacted portions from most of the 14 documents, contending that the redacted information is exempt from disclosure under FOIA Exemptions 6 and 7(C). Determination Letter dated August 19, 2010, from Sandra D. Bruce, Assistant Inspector General for Inspections and Special Inquiries, OIG to Appellant (Determination Letter). OIG also withheld Document 16 in its entirety claiming that since the Appellant provided the document to OIG, OIG would not be returning a copy to the Appellant. *Id.*

[1/] We will refer to the documents by number. One document was sent to another DOE office for processing as the document originated in that office. The second document was not released to the Appellant because she had provided it to OIG.

On September 13, 2010, the Appellant appealed, first contending that names and titles of federal employees are releasable. Appeal at 1. Second, she claimed that OIG withheld two responsive documents that were mentioned in another document. *Id.* Third, she claimed that OIG withheld information that she had provided to OIG. *Id.* Fourth, she stated that it is not clear what information was withheld from some of the documents. *Id.* Finally, she challenged the withholding of Document 16 in its entirety. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 6 and 7(C) are at issue in this case.

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); *see also* 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes," if release of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see also* 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether information may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C.

Cir. 1989) (*NARFE*). The second step is that the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 769 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the information either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally NARFE,* 879 F.2d at 874; *Ripskis v. Dep't of Hous. and Urban Dev.,* 746 F.2d 1, 3 (D.C. Cir 1984).

Exemption 7(C) applies to a much narrower class of documents than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Both Exemptions 6 and 7(C) require a balancing of the personal privacy interest in the information proposed for withholding against the public interest in the same information. There are, however, two significant differences between Exemption 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of personal privacy."

Pursuant to the provisions of Exemption 7(C), we have examined investigations conducted by OIG in response to complaints by individuals, as in this case, and found that they constitute law enforcement activities. *See Ken Hasten*, Case No. TFA-0353 (2010).[2/] Since the information at issue in this case meets Exemption 7(C)'s threshold test, we need only examine OIG's actions pursuant to the standard of Exemption 7(C), *i.e.*, whether release of the withheld material could reasonably be expected to result in an unwarranted invasion of personal privacy. *See, e.g., J.G. Truher*, Case No. VFA-0245 (1997).

B. The Appellant's Arguments

First, the Appellant contends that OIG improperly withheld the names and titles of federal employees. OIG asserted a privacy interest in the identities of the individuals. The Determination letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C).

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

> Individuals involved in OIG enforcement matters, which in this case includes subjects, witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 1. The courts have routinely found that information identifying law enforcement personnel can be withheld. *Concepcion v. FBI*, 606 F. Supp. 2d 14, 39 (D.D.C. 2009); *Amuso v. Dep't of Justice*, 600 F. Supp. 2d 78, 96-97 (D.D.C. 2009) (finding agency's decision to withhold names of agency personnel amply supported by case law). This Office has likewise found a significant privacy interest in maintaining the confidentiality of OIG employees. *Ashok K. Kaushal*, Case No. VFA-0529 (1999). Therefore, we will deny the Appeal regarding the federal employee names and job titles.

Secondly, the Appellant claims that she was not provided with two documents that are referred to in Document 2. According to OIG, Document Number 2 contains a typographical error when referring to March 26, 2010, correspondence. Memorandum of September 21, 2010, Conversation between Ruby Len, OIG, and Janet Fishman, OHA. The correct date should be March 25, 2010. *Id.* A copy of that document is included as Document 3. *Id.* The other document that the Appellant is claiming she did not receive was released to her as Document 4. *Id.* Therefore, we will deny this part of the Appeal as the information already has been released to the Appellant.

Thirdly, the Appellant complains that the information that was withheld pursuant to Exemptions 6 and 7(C) from a number of the released documents was provided to OIG by the Appellant. In considering this argument in an earlier case, we held that a requester's status as the author, or in this case the originator, of the requested documents is irrelevant to our review under the FOIA. *David E. Ridenour*, Case No. VFA-0411 (1998); *W.F. Lawless*, 13 DOE ¶ 80,109 at 80,540 (1985). Subsequently to the *Lawless* case, the Supreme Court held that the "identity of the requesting party" has "no bearing on the merits" of a FOIA request with the exception of certain cases involving a claim of privilege. *Reporters Committee*, 489 U.S. at 771. Consequently, the Appellant's argument is without merit. Therefore, we will deny this part of the Appellant's Appeal.

Fourthly, the Appellant contends that OIG did not adequately describe the other withheld information. An agency has an obligation to properly justify its withholding of information under the FOIA. In utilizing Exemptions 6 and 7(C) to withhold the information that was responsive to the Appellant's request, OIG identified the withheld material as "names and information that would tend to disclose the identity of certain individuals." We reviewed unredacted copies of the 16 documents. Beyond the federal employees' names and titles that were withheld, we identified other information that may not be withholdable. For example, one withholding was the name of another DOE office. There is no apparent privacy interest in that name of a DOE office. As another example, words surrounding

names were redacted. Again, we can not see an apparent privacy interest in these words. Further, we do not believe OIG properly identified the material withheld. The FOIA requires that information be identified in a sufficiently descriptive manner to allow the Appellant to make a cogent argument on Appeal. The description of "information that would tend to disclose the identity of certain individuals," is not sufficiently descriptive. We will remand this matter for OIG to better describe the redacted information and to carefully review those redactions to determine whether a significant privacy interest exists in the words that were redacted.

Finally, the Appellant complains that information that she provided to OIG was not released to her. OIG stated that "Document 16 is not being processed back to you because it was addressed to you, written by you or has already been provided to you. The document is the package you submitted to OIG Hotline entitled 'Supporting Documentation,' dated November 6, 2009." Determination Letter at 2. We understand OIG's argument that the Appellant already possesses the document. We recognize that if the Appellant obtained the requested information through the FOIA, OIG is not required to release the information to her again. *Diane C. Larson*, Case No. TFA-0178 (2006). Unless Document 16 was released to the Appellant through a previous FOIA request, OIG should process that portion of her request concerning Document 16. 5 U.S.C. § 552(d). Therefore, we will remand this to OIG for a new determination concerning the release of Document 16.

III. Conclusion

OIG properly withheld the names and titles of those involved in the instant OIG investigation. Therefore, we will deny that part of her Appeal. Second, we will deny those parts of the Appeal relating to the Appellant's claim that two documents were not released to her, as the documents were included with the determination. Third, we will deny that part of the Appeal in which the Appellant claimed that information was redacted that she provided to OIG. Finally, we will remand this matter for OIG to more precisely describe other information withheld from the documents and for a new determination regarding Document 16. Therefore, we will grant the Appeal in part and remand the matter to OIG for a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry Apodaca, Case No. TFA-0419, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 13, 2010

October 4, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Natural Resources Defense Council

Date of Filing: September 15, 2010

Case Number: TFA-0421

On September 15, 2010, the Natural Resources Defense Council (NRDC) filed an appeal from a determination issued to it on September 2, 2010, by the Department of Energy's Idaho Operations Office (DOE-ID). In that determination, DOE-ID responded to a request for documents that NRDC filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

On July 22, 2010, NRDC filed a FOIA request for certain records in the possession or control of the Idaho National Laboratory (INL) pertaining to a proposed coal-to-liquid facility being developed by Ohio River Clean Fuels, LLC (ORCF). Letter from Joshua Berman, NRDC, to Clayton Ogilvie, FOIA Officer, DOE-ID (July 22, 2010). In an August 11, 2010, response, DOE-ID released three documents responsive to NRDC's request, but stated that the other records sought by NRDC were not subject to the FOIA. Letter from Clayton Ogilvie to Joshua Berman (August 11, 2010). On September 2, 2010, DOE-ID issued a "revised final response," further explaining that the documents not being released were not agency records subject to release under the FOIA, nor were they property of the government under the "Access to and Ownership of Records" clause in the contract between the DOE and Battelle Energy Alliance, LLC (BEA), the contractor that operates INL for the DOE, such that they would be subject to release under the DOE FOIA regulations. Letter from Clayton Ogilvie to Joshua Berman (September 2, 2010).

In its Appeal, NRDC contends that the records in question "are within the possession of INL, an 'agency' as defined under FOIA, and therefore qualify as agency records subject to FOIA regardless of whether BEA maintains legal ownership or control of the records." Appeal at 4.

II. Analysis

A. Whether the Documents at Issue are Agency Records Subject to the FOIA

Our threshold inquiry in this case is whether the documents in question are agency records and thus subject to the FOIA under the criteria set out by the federal courts. The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents are "agency records" subject to the FOIA. That analysis involves a

determination (1) whether the organization is an "agency" for purposes of the FOIA and, if not, (2) whether the requested material is nonetheless an "agency record." *See, e.g.*, *Faye Vlieger*, Case No. TFA-0250 (2008); *Eugenie Reich*, Case No. TFA-0213 (2007). [1]

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). In *United States v. Orleans*, 425 U.S. 807 (1976) (*Orleans*), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which an entity must be considered a federal agency as follows: "[T]he question here is not whether the [entity] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Orleans*, 425 U.S. at 815. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) *(Forsham*).

We have routinely applied this analysis in our prior cases addressing whether an entity is an "agency" for purposes of the FOIA. *See, e.g.*, *Vlieger*. Specifically with regard to INL, we have previously found that a contractor responsible for the management and operation of INL "is clearly not an 'agency' as that term is defined in the FOIA." *Moore Brower Hennessy & Freeman, P.C.*, Case No. VFA-0393 (1998) (citing *William Kuntz III*, Case No. VFA-0105, 25 DOE ¶ 80,157 (1995)).

In its Appeal, NRDC provides us no basis for departing from our established precedent in these cases. Instead, it quotes the statutory definition of "agency" and points to legislative history that supports a broad reading of that term, Appeal at 5, neither of which is helpful in resolving the specific issue presented in this case. NRDC also contends that, "at all times pertinent to NRDC's request INL has held itself out as being subject to FOIA." *Id.* The appellant states that INL maintains a FOIA reading room and has a FOIA officer, and that its employees have ".gov" email addresses and government identification badges, and "are routinely recognized as government employees for purposes of obtaining government employee rates for travel expenses." *Id.* Assuming, *arguendo*, the accuracy of the Appellant's description of INL and its employees, none of this information is relevant to the application of the standard set forth by the Court in *Orleans* and *Forsham*. Applying this standard, and consistent with our prior cases, we find that, though INL is owned by the government, it is operated by BEA, a private contractor, and its day-to-day operations are not supervised by the DOE. Therefore, neither INL nor BEA is an "agency" for purposes of the FOIA.

Although INL is not an agency for the purposes of the FOIA, the requested documents could nonetheless be considered "agency records" if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). However, the documents in question were created by BEA, not DOE, and have not been obtained by DOE. Letter from Clayton Ogilvie to Joshua Berman (September 2, 2010) at 1; Letter from Clayton Ogilvie to Joshua Berman (August 11, 2010) at 1.
Nonetheless, in its Appeal, NRDC contends that DOE has "unlimited rights" in the documents at issue, citing a provision of the Cooperative Research and Development Agreement (CRADA)

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

between BEA and Baard Energy, LLC, one of the documents released by DOE-ID in response to NRDC's request. Appeal at 3 n.1. In response, DOE-ID states that, "although the CRADA provides that DOE has unlimited rights in Generated Information, DOE has not sought to exercise those rights, nor has it taken possession or control of the documents sought." E-mail from Mary McKnight, Office of Chief Counsel, DOE-ID, to Steven Goering, Office of Hearings and Appeals (September 24, 2010).

DOE-ID notes the similarity of the facts in the present case to those in *Forsham*, where the agency had a "right of access to the data," but had "not exercised its right either to review or to obtain permanent custody of the data." *Forsham*, 445 U.S. at 173. Under these circumstances, the Court held that "the FOIA applies to records which have been in fact obtained, and not to records which merely could have been obtained." *Id.* at 186. We agree with DOE-ID, and find here that any rights DOE may have in the documents at issue do not render those documents agency records for FOIA purposes so long as DOE has chosen not to exercise its rights. We therefore find that these documents are not agency records subject to the FOIA.

B. Whether the Documents at Issue are Subject to Release Under the DOE FOIA Regulations

A finding that certain documents are not "agency records" does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C § 552(b).

10 C.F.R. § 1004.3(e). Section I.15(b)(3) of the contract between DOE and BEA identifies as property of BEA "records relating to any procurement action by the contractor, except for records that under 48 C.F.R. § 970.5232-3, Accounts, Records, and Inspection, are described as property of the government; . . . ."[2] Management and Operation of the Idaho National Laboratory (INL), Contract No. DE-AC07-05ID14517, http://www.id.doe.gov/doeid/INLContract/INL-Contract.htm.

Applying the provisions of the contract between the DOE and BEA to the case at hand, it is clear that the documents at issue in this case are the property of BEA, not the DOE. The documents, e-mails pertaining to a facility being developed under an agreement between BEA and a subcontractor, clearly relate to a "procurement action" by BEA and are not among those described as property of the government under 48 C.F.R. § 970.5232-3. E-mail from Mary McKnight, Office of Chief Counsel, DOE-ID, to Steven Goering, Office of Hearings and Appeal (September 28, 2010). As such, the documents are not subject to release under the DOE FOIA regulations.

[2] Section I. 43(d) of the contract (DEAR § 970.5232-3) states, in pertinent part, that "except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination under this contract and final audits of account hereunder."

In sum, for the reasons set forth above, we find that the e-mails requested by NRDC are neither agency records subject to the FOIA nor are they subject to release under the DOE FOIA regulations. Therefore, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on September 15, 2010, by the Natural Resources Defense Council, OHA Case No. TFA-0421, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 4, 2010

October 19, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Jon E. Lux
Date of Filing:	September 28, 2010
Case Number:	TFA-0423

On September 28, 2010, Jon E. Lux (Appellant) filed an Appeal from a determination issued to him on September 14, 2010, by the Department of Energy's (DOE) Golden Field Office (Golden). In that determination, Golden responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. This appeal, if granted, would require Golden to release the withheld information to the Appellant.

I. Background

On August 25, 2010, the Appellant filed a request for a subcontract awarded by the Alliance for Sustainable Energy, LLC ("the Alliance"), which is the management and operating (M&O) contractor for DOE's National Renewable Energy Laboratory (NREL). Specifically, the Appellant stated that NREL "issued a RFP [on] March 2010 for Learning Management System and Online Course Development Capabilities." The Appellant requested "a copy of the contract between DOE NREL and the awardee." *See* FOIA Request, DOE Exhibit A. Because the request specifically identified the document as a contract resulting from an NREL Request for Proposals (RFP), Golden's FOIA Officer contacted NREL to determine whether such a responsive document existed. Golden Response at 2. On September 14, 2010, Golden issued a determination explaining that the requested subcontract was a contractor-owned, rather than a Government-owned document and was therefore not subject to disclosure under the FOIA. *Id.* Golden further stated that it has never had a copy of the requested document in its possession. *Id.*

In his Appeal, the Appellant states that "it is difficult to understand how a contracted (sic) awarded to the Alliance for Sustainable Energy as a result of DOE request for proposal (RFP), in March of 2010 (solicitation 40432PS) be deemed to not be created or obtained by DOE" and "Additionally, it is difficult to understand how the contract was not under the control of DOE at time of FOIA request." *See* Appeal Letter.

II. Analysis

A. Whether the Documents at Issue are Agency Records Subject to the FOIA

Our threshold inquiry in this case is whether the documents in question are agency records and thus subject to the FOIA under the criteria set out by the federal courts. The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents are "agency records" subject to the FOIA. That analysis involves a determination: (1) whether the organization is an "agency" for purposes of the FOIA and, if not, (2) whether the requested material is nonetheless an "agency record." *See, e.g., Faye Vlieger*, Case No. TFA-0250 (2008); *Eugenie Reich*, Case No. TFA-0213 (2007). 1/

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f). In *United States v. Orleans*, 425 U.S. 807 (1976) (*Orleans*), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which an entity must be considered a federal agency as follows: "[t]he question here is not whether the [entity] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Orleans*, 425 U.S. at 815. *See Ciba-Geigy Corp.* v. *Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme court ruled that the *Orleans* standard provided the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980).

We have routinely applied this analysis in our prior cases addressing whether an entity is an "agency" for purposes of the FOIA. *See, e.g., Vlieger.* In addition, we have previously found that a contractor responsible for the management and operation of a DOE-owned laboratory "is clearly not an 'agency' as that term is defined in the FOIA." *Moore Brower Hennessy & Freeman, P.C.*, Case No. VFA-0393 (1998) (citing *William Kuntz III*, Case No. VFA-0105, 25 DOE ¶ 80, 157 (1995)).

In its Appeal, the Appellant provided us no basis for departing from our established precedent in these cases. Instead, the Appellant has not made a distinction between the subcontract he requested, which he describes as being awarded by NREL/the Alliance in June 2010, and the M&O contract between DOE and the Alliance. He has requested a subcontract awarded by the Alliance and not awarded by DOE. Applying the above standard, and consistent with our prior cases, we find that, although NREL is owned by the government, it is operated by Alliance, a private contractor, and its

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

day-to-day operations are not supervised by the DOE. Therefore, neither NREL nor the Alliance is an "agency" for purposes of the FOIA.

Although NREL is not an agency for the purposes of the FOIA, the requested subcontract could nonetheless be considered an "agency record" if it (1) was created or obtained by an agency, and (2) is under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). However, the document in question was created by the Alliance, not DOE, has not been obtained by DOE and was not under DOE control at the time of the FOIA request. *See* Golden Response. We therefore find that the subcontract is not an agency record subject to the FOIA.

B. Whether the Subcontract at Issue is Subject to Release Under the DOE FOIA Regulations

A finding that certain documents are not "agency records" does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

10 C.F.R. § 1004.3(e). Clause I.111(b)(3) of the contract between DOE and the Alliance identifies as property of the Alliance "records relating to any procurement action by the Contractor, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, are described as the property of the Government." *See* Clause 111(b)(3) in DOE's M&O Contract with the Alliance, http://www.eere.energy.gov/golden/Reading_Room.aspx.

Applying the provisions of the contract between the DOE and the Alliance to the case at hand, it is clear that the subcontract at issue in this case is the property of the Alliance, not the DOE. The subcontract is clearly a procurement record of the Alliance and is not among those described as property of the government under 48 CFR 970.5232-3. *See* Golden Response. As such, the document is not subject to release under the DOE FOIA regulations. In sum, for the reasons set forth above, we find that the requested subcontract is neither an agency record subject to the FOIA nor is it subject to release under the DOE FOIA regulations. Therefore, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Jon E. Lux, OHA Case No. TFA-0423, on September 28, 2010, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 19, 2010

October 28, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alliance to Protect Nantucket Sound

Date of Filing: October 1, 2010

Case Number: TFA-0424

On October 1, 2010, the Alliance to Protect Nantucket Sound ("the Alliance") filed an appeal from a determination issued to it on September 2, 2010, by the Department of Energy (DOE) Loan Guarantee Program Office (LGPO). In that determination, LGPO responded to a request for documents that the Alliance filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO identified several documents responsive to the Alliance's request and released those documents with some information withheld pursuant to Exemptions 4 and 6 of the FOIA. The Alliance challenged the withholding of information under Exemption 4 and the justification LGPO provided for withholding the information. The Alliance further challenged the adequacy of LGPO's search for responsive documents. This appeal, if granted, would require LGPO to release the withheld information to the Alliance, to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

On December 23, 2009, the Alliance filed a FOIA request for information pertaining to the Cape Wind Project, a proposed wind-generating facility to be built off the coast of Cape Cod, Massachusetts. Specifically, the Alliance requested that "DOE release all records relating to any potential grants, loans, loan guarantees, or any other federal funding assistance for the Cape Wind project," including "any correspondence, meeting minutes, memoranda, emails, reports, or other records regardless of form." *See* Letter from Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), July 9, 2010 (July Appeal) at 1.

On June 22, 2010, LGPO responded to the Alliance's request. *See* Letter from David G. Frantz, Director, LGPO, to Sandy Taylor, Alliance to Protect Nantucket Sound, June 22, 2010 (June Determination). In the June Determination, LGPO indicated that it located responsive documents, and that those documents were enclosed with the determination letter. The responsive documents were the following: Cape Wind 2006 Pre-Application, Volume I; Cape Wind 2006 Pre-Application, Volume II; and, Cape Wind 2009 Application. *Id*. Each of the three documents was released with portions withheld pursuant to Exemptions 4 and 6 of the

FOIA. *Id*. LGPO stated that the portions of the documents withheld under Exemption 4 contained commercial or financial information, the release of which "would give competitors an advantage in the future by providing insight on resources available to the applicant." *Id*. In addition, LGPO stated that the information withheld under Exemption 6 was comprised of "very sensitive personal information," including social security numbers, and the release of the information would be a clearly unwarranted invasion of personal privacy. *Id*.

The Alliance filed an Appeal from the June Determination on July 9, 2010. In that Appeal, the Alliance challenged the adequacy of LGPO's search for responsive documents. July Appeal at 1. As a basis for the challenge, the Alliance noted that, although it requested all records related to any potential federal funding assistance for the Cape Wind Project, LGPO released only the pre-application and application submitted by Cape Wind, L.L.C. ("Cape Wind"), but no correspondence or other documents. The Alliance maintained that other documents must exist "because the [DOE] had to communicate both internally and with the applicant about this application." *Id*. at 2. The Alliance further challenged LGPO's withholding of information under Exemption 4. [1]

On August 11, 2010, OHA issued a decision regarding the July Appeal. *See Alliance to Protect Nantucket Sound*, Case No. TFA-0399 (2010).[2] In that case, we determined that LGPO's search for responsive records was reasonably calculated to reveal records responsive to the Alliance's request. *Id*. at 2. We therefore concluded that, despite the absence of correspondence pertaining to the Cape Wind project, the search for records was adequate. Consequently, we denied that portion of the July Appeal. *Id*. With regard to LGPO's withholding of information under Exemption 4, we concluded that the June Determination provided an inadequate justification for the withholdings. *Id*. at 4. We remanded the matter back to the LGPO in order for it to "issue another determination explaining how Exemption 4 applies to the various types of withheld material in the three released documents." *Id*.

In accordance with the instructions in our August 11, 2010, decision, LGPO issued a new determination in which it provided additional detail as to the applicability of Exemption 4 to certain information deleted in the released documents. *See* Letter from David G. Frantz, Director, LGPO, to Sandy Taylor, Alliance to Protect Nantucket Sound, September 2, 2010 (September Determination). Specifically, LGPO identified the types of withheld information as "project cost, financing plans and business strategies, procurement plans, and marketing plans and analysis." *Id*. at 1-2. LGPO stated that release of such information would cause substantial harm to Cape Wind's competitive interests. *Id*. at 2. Specifically, LGPO determined that release of cost and financing information would "provide an unfair advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against [Cape Wind]." *Id*. Disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to [Cape Wind], in addition to allowing vendors unlicensed use of Cape Wind's original work product." *Id*. Finally, LGPO

[1] The Alliance did not challenged LGPO's withholding of information under Exemption 6. Therefore, the Exemption 6 withholdings are not relevant to the instant proceeding.

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

found that releasing project costs, financing information, and market analysis "would enable potential customers to exert undue leverage with regards to purchasing [Cape Wind's] product." *Id*.

The Alliance filed the instant Appeal on October 1, 2010. In its Appeal, the Alliance reiterated its challenge to the adequacy of the LGPO's search for responsive records. *See* Letter from Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA), October 1, 2010 (October Appeal) at 1. In addition, the Alliance challenged the adequacy of the September Determination, arguing that LGPO has failed to specifically identify each responsive document that it withheld and the grounds for doing so. Finally, the Alliance challenged LGPO's withholding under Exemption 4 of two specific pieces of information from the released records: (1) the amount of Cape Wind's loan request and (2) the name of Cape Wind's financial backer. *Id*.

II. Analysis

A. Adequacy of the Search

With respect to the adequacy of LGPO's search for responsive records, we considered this issue in our August 11, 2010, decision, concluding that the search was adequate. *See Alliance to Protect Nantucket Sound*, Case No. TFA-0399 (2010) at 2. In this case, the Alliance has merely restated its argument from its July Appeal regarding the adequacy of LGPO's search for responsive documents. The Alliance has not provided any new information that warrants reconsideration of our previous holding on this issue.[3] Accordingly, the issue of the adequacy of the search falls outside the scope of this Appeal.

B. Adequacy of the September Determination

We consider now the Alliance's arguments that LGPO failed to specifically identify each responsive document that it withheld and the factual and legal grounds for doing so. An agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *Environmental Defense Institute*, Case No. TFA-0289 (2009); *see also F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996). A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Id*.

[3] Although the DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order, we have, in prior cases, used our discretion to consider motions for reconsideration where circumstances warrant. 10 C.F.R. § 1004.8; *see also Citizen Action New Mexico*, Case No. TFA-0215 (2007). In reviewing such requests for reconsideration, we may look to OHA's procedural regulations regarding modification or rescission of its orders. *See* 10 C.F.R. Part 1003, Subpart E; *see also Terry M. Apodaca*, Case No. TFA-0237 (2007). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application "demonstrates that it is based on significantly changed circumstances." 10 C.F.R. §1003.55(b)(1).

In both the June and September Determinations, LGPO indicated that its search yielded responsive documents and that those documents accompanied the Determinations. We find this sufficient to indicate that the documents LGPO released to the Alliance comprised the responsive documents yielded by its search for records. In addition, relevant to this proceeding, the information in the released documents withheld under Exemption 4 is clearly marked and the grounds for the applicability of the exemption were explained in the accompanying determination letter. Our review of the September Determination issued to the Alliance indicates that LGPO provided additional detail regarding the information withheld under Exemption 4, pursuant to the instructions in our August 11, 2010, decision. Therefore, we find that the September Determination is adequate.

C. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, Cape Wind was required to submit the documents in question as part of its participation in the agency's loan application process. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under Exemption 4, the first requirement is that the withheld information be "commercial or financial."[4] The information submitted by Cape Wind, *i.e.*, project cost, financing plans and business strategies, procurement plans, and marketing plans and analysis, *etc.*, clearly satisfies the definition of commercial or financial information.

The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C.

[4] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

1979); *see also Niagara Mohawk Power Corp*., Case No. VFA-0591 (2000). Cape Wind, a limited liability company, satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the application process for the project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. The question, then, turns to whether release of the information would likely result in substantial competitive harm to the submitters of the information.

LGPO determined that release of the commercial and financial information contained in Cape Wind's loan applications would likely cause the company substantial competitive harm by granting undue advantage to Cape Wind's competing power suppliers, power vendors and potential customers. Given the competitive aspect of the project and the very specific nature of the commercial and financial information contained in the loan application, we agree with LGPO's assessment that the release of the information would likely result in substantial competitive harm to Cape Wind. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents.

With regard to the Alliance's challenge to two specific Exemption 4 withholdings – the amount of Cape Wind's loan request and the name of Cape Wind's financial backer, we find the Alliance's arguments to be unpersuasive. Regarding the amount of Cape Wind's loan request, the Alliance maintains that "this type of information has been deemed unprotected from disclosure." October Appeal at 2. In support of its argument, the Alliance cited a recent Second Circuit decision, *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 601 F. 3d 143 (2d Cir. 2010), and its companion case, *Fox News Network, L.L.C. v. Board of Governors of the Federal Reserve System*, 601 F. 3d 158 (2d Cir. 2010).[5] Unlike the Second Circuit cases cited above, which involved documents pertaining to loans granted by the Federal Reserve Bank to private banks, the documents at issue in this proceeding pertain not to a granted loan or loan guarantee, but rather to an unsuccessful application. This case is analogous to cases involving unsuccessful bidders for government contracts, in which we have held that an unsuccessful bidder has a greater interest in confidentiality than a successful bidder awarded a government contract. *See IBEW Local 125*, Case No. VFA-0695 (2001); *see also Raytheon Co. v. Dep't of the Navy*, 1989 WL 550581 (D. D. C.) (in which the Court determined that there existed a difference in the expectations of confidentiality between successful bidders and

[5] In those cases, the Court found that documents pertaining to loans made by the Federal Reserve Bank to private banks, including the identities of the borrowing banks, loan amounts, loan origination and maturation dates, and collateral securing the loans, were not protected from disclosure. The Court based its rulings on the fact that such information was not "obtained from" the borrowing banks within the meaning of Exemption 4, but rather was generated by the Federal Reserve Bank upon its decision to grant the loans. *See Bloomberg L.P.*, 601 F. 3d at 148. These cases are easily distinguishable from the instant proceeding. In this case, there is no question that the withheld information was generated by and obtained from Cape Wind in the course of its application for a loan guarantee from the DOE, rather than generated by the agency.

unsuccessful bidders for government contracts). We therefore find that the requested loan amount of an unsuccessful applicant is confidential and properly withheld under Exemption 4.

Finally, we find no merit in the Alliance's argument that LGPO should release the name of Cape Wind's financial backer. As a basis for its argument, the Alliance maintains that "the Department of the Interior has previously released the identity of what appears to have been the project's financial backer … ." October Appeal at 3. Having carefully reviewed the documents at issue in this case, we find that no document identifies Cape Wind's financial backer. This fact was confirmed by LGPO. *See* E-mail from Wendy Pulliam, LGPO, to Diane DeMoura, OHA, October 22, 2010. The FOIA does not require an agency to create documents. 5 U.S.C. 552; 10 C.F.R. § 1004.4(d)(1), (2). *See also Tarek Farag*, Case No. TFA-0365 (2010); *Terry M. Apodaca*, Case No. TFA-0319 (2009). Therefore, we find that LGPO cannot be required to produce a document that does not exist.

D. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal case law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency may withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Tom Marks*, Case No. TFA-0379 (2010). Accordingly, we may not consider whether the public interest warrants discretionary release of the information we have deemed properly withheld under Exemption 4.

III. Conclusion

We find that there are no grounds in the October Appeal supporting reconsideration of our holding in *Alliance to Protect Nantucket Sound*, Case No. TFA-0399 (2010), regarding the adequacy of the search that LGPO conducted for documents responsive to the Alliance's request. In addition, we find that the September Determination issued by LGPO properly identified the responsive documents, the withheld information, and the grounds for each withholding, and was, therefore, adequate. Finally, we find that LGPO properly applied Exemption 4 to the withheld information. Therefore, the instant Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 1, 2010, by the Alliance to Protect Nantucket Sound, OHA Case No. TFA-0424, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 28, 2010

November 12, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: October 6, 2010

Case Number: TFA-0426

On October 6, 2010, the National Security Archive (NSA) filed an appeal from determinations issued to it on July 21, 2010, and September 23, 2010, by the Department of Energy's (DOE) Office of the Executive Secretariat (ES) and Office of Policy and International Affairs (PI), respectively. In those determinations, ES and PI responded to requests for documents that NSA filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In their determinations, ES and PI responded that they did not locate any records responsive to NSA's request. NSA filed an Appeal challenging the adequacy of the searches. This appeal, if granted, would require ES and PI to perform additional searches for responsive records, and to either release any newly discovered documents or issue new determination letters justifying the withholding of those documents.

I. Background

NSA filed three FOIA requests with DOE's Office of Information Resources (IR), the office responsible for receiving FOIA requests at DOE Headquarters, for records pertaining to the United States' preparations for participation in the sixth, seventh, eighth, and seventeenth sessions of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC). *See* Letter from Robert A. Wampler, Ph. D., NSA, to Poli A. Marmolejos, Director, OHA (October 6, 2010) (Appeal). IR forwarded the requests to ES and PI for searches for documents responsive to NSA's requests. In separate determinations, ES and IR, responding for PI, informed NSA that the searches yielded no responsive documents. *See* Letter from Alexander C. Morris, IR, to Robert A. Wampler, Ph. D., NSA (September 23, 2010).

NSA filed the instant Appeal challenging the adequacy of the searches performed by ES and PI. *See* Appeal at 1. In its Appeal, NSA contends that the searches were limited in scope, and questioned whether the offices searched retired records maintained by the DOE at the Federal Records Center. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[1]

In reviewing this appeal, we contacted ES and PI to ascertain the scope of their searches. ES informed us that, because the requested records were generated during a past administration, it forwarded NSA's requests to the Office of History and Heritage Resources (HHR).[2] E-mail from Cindy Luckett, ES, to Diane DeMoura, OHA (October 8, 2010). HHR conducted a search of its electronic database, which lists most of the records maintained by HHR, including all HHR records held at the Federal Records Center.[3] E-mail from Terry Fehner, HHR, to Diane DeMoura, OHA (October 13, 2010). In conducting its search, HHR searched the database using search terms such as "global warming," "climate change," "UNFCCC," and "COP." *Id*. The search yielded records which were "either outside the [designated] timeframe or not relevant to the request." *Id*.

PI forwarded NSA's requests to the Office of Climate Change Policy and Technology (CCP&T), a division of PI. E-Mail from Edith Horne, PI, to Diane DeMoura, OHA (October 7, 2010). CCP&T conducted a search of its electronic files, which "are organized according to UNFCCC events." CCP&T searched for records pertaining to the COP sessions identified by NSA in its FOIA requests, as well as relevant meetings of two subsidiary organizations of the COPs, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA). E-mail from Elmer Holt, PI, to Diane DeMoura, OHA (October 26, 2010). The search yielded no responsive records. *Id*. In addition, CCP&T identified former PI employees working in other DOE organizations and inquired as to whether they had any relevant documents and received no positive responses. *Id*. Finally, PI indicated that while some "very old" PI records are maintained at the Federal Records Center, CCP&T does not have any records there. *See* Record of Telephone Conversation between Edith Horne, PI, and Diane DeMoura, OHA (October 26, 2010).

Based on this information, we find that ES and PI performed extensive searches reasonably calculated to reveal records responsive to NSA's FOIA requests, despite the absence of

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

[2] HHR is a division of ES whose primary responsibility is to preserve the agency's historic records and artifacts and coordinate the transfer of the records to the National Archives and Records Administration.

[3] As to any records not included in its electronic database, HHR performs a manual search of the paper records if it believes they are likely to include potentially responsive documents not captured in the electronic database. In this case, HHR determined that any potentially responsive records would be included in its electronic database and, therefore, a manual search was unlikely to uncover any records responsive to the request.

responsive records. Therefore, the search was adequate. Accordingly, NSA's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 6, 2010, by National Security Archive, OHA Case No. TFA-0426, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 12, 2010

November 19, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Association of Home Builders

Date of Filing: October 14, 2010

Case Number: TFA-0428

On October 14, 2010, the National Association of Home Builders (the Appellant) filed an appeal from a September 15, 2010, determination issued to it by the Oak Ridge Office (OR) of the Department of Energy (DOE) regarding a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its September 14, 2010, determination letter (Determination Letter), OR provided the Appellant with a number of electronic copies of responsive documents. However, the Appellant believes that many more responsive documents exist. This Appeal, if granted, would require that OR conduct an additional search for responsive documents.

I. Background

On April 12, 2010, the Appellant submitted a FOIA Request to DOE Headquarters (DOE/HQ), essentially asking for any document that contains the formulas, equations or methodologies used by DOE to evaluate the projected energy savings to be obtained by incorporating DOE's proposals for changes to the 2012 International Energy Conservation Code (IECC).[1] Included in this request were the formulas, equations and methodologies used to calculate the increase in energy efficiency that the proposed 2012 IECC edition (incorporating DOE's proposals) would produce when compared to the 2006 IECC (2012 versus 2006) and the increase of energy efficiency that the 2009 IECC edition produced versus the 2006 IECC edition.

DOE/HQ subsequently transferred the request to OR so that a search could be made of Pacific Northwest National Laboratory (PNNL) records. PNNL had performed the calculations regarding the proposed energy savings projected for the DOE proposals. *See NAHB, slip op*. at 2.[2] On August 18, 2010, the Appellant received an E-mail from OR. Appeal at 4-5. The E-mail

[1] The International Code Council (ICC) publishes every three years an updated edition of the IECC. The IECC is a model code that local governments and other stakeholders can use in developing local building codes and standards. Appeal at 2. A federal statute mandates that DOE participate in the model national codes development process and that DOE help states adopt and implement progressive energy codes. *See* 42 U.S.C. § 6833(d). DOE is also required to review whether the proposed IECC revisions would improve energy efficiency in residential buildings as compared to the previous IECC edition and publish this determination in the Federal Register. 42 U.S.C. § 6833(a)(5)(A) (the Energy Conservation and Production Act, as amended). *See National Association of Home Builders*, Case No. TSO-0401 (August 9, 2010) *slip op*. at 1 n.2 (*NAHB*).

[2]Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case

message indicated that OR had identified six types of documents including several hundred files. The OR message also stated the possibility that E-mails and other documents pertaining to a cursory DOE/PNNL estimate of the energy savings resulting from the 2009 IECC versus the 2006 IECC might also exist. Appeal at 5. The Appellant was later informed via telephone that a search for responsive documents might cost $3,000 and require 80 hours of PNNL employee time. During this conversation, OR asked if the Appellant wished to narrow its request to reduce the time and expense of processing its request. The Appellant narrowed its previous request and asked for the following types of documents:

- "Input" and "output" files used in the calculations for DOE's energy savings analysis (i.e., the "EnergyGauge.enb" files, DOE-2 ".bdl" files, and scripts[3]) and the resulting summary reports for each of the 15 "Climate Zone Representative Cities" referenced in the DOE publication *An Estimate of Residential Energy Savings From IECC Change Proposals Recommended for Approval at the ICC's Fall, 2009, Initial Action Hearings* (2012 Energy Study)[4] (Item 1).
- Documents and information regarding the assumptions PNNL made for purposes of calculating the energy efficiency improvements from the 2012 IECC and the 2006 IECC with regard to: window area, duct distribution efficiency, lighting, air leakage and mechanical ventilation (Item 2).
- Documents and information that provide the formula or equation that PNNL used to calculate the claim in the 2012 Energy Study that enactment of DOE's proposed revisions for the 2012 IECC would result in an 30.6% savings in energy usage (Item 3).

On September 9, 2010, OR indicated that the reduced scope of the Appellant's request would result in charges of $2,196.11 and require 32 hours of employee review time. Appellant agreed to pay this expense.

In its Determination Letter, OR responded to the newly reduced request by providing the Appellant two Excel spreadsheet files copied onto a compact disk.

In its Appeal, the Appellant challenges the extent of the search that was made for responsive documents. The Appellant points out that OR's August 18 E-mail indicated the existence of hundreds of potentially responsive documents yet OR provided but two. Given this fact, the Appellant believes that OR's search for responsive documents must have been inadequate.

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number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[3] DOE-2 is a building energy analysis program developed at DOE's Lawrence Berkeley National Laboratory. *See* http://www.doe2.com.

[4] This document is available at http://www.energycodes.gov/IECC2012/documents/residential-savings-estimate.iecc-2012-proposals.6-may-2010.pdf.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (*Truitt*). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Aurimas Svitojus*, Case No. TFA-0349 (March 8, 2010). To evaluate the search made for documents responsive to the Appellant's request, we contacted OR officials. OR informed us that its August 18, 2010, E-mail, relying upon an official at the DOE's Richland site office, erroneously stated the number of responsive documents potentially available. Upon contacting PNNL officials who performed the actual 2012 versus 2006 calculations, OR discovered that the number of potentially responsive documents in existence was significantly less.

A. Item 1

OR was informed that with regard to the requested input and output files used to calculate the 2012 IECC versus 2006 IECC calculation (Item 1), these files were erased before the Appellant's request to save storage space. If they were ever needed, such files could be recreated by re-running the calculation. *See* Memorandum of Telephone Conversation between, Amy Rothrock, Authorizing Official, OR, and Richard Cronin, Staff Attorney, OHA (November 1, 2010); E-mail from Steven Cooke, counsel, PNNL (September 8, 2010) (Response). We also spoke to a Senior Development Engineer at PNNL who had personal knowledge of the 2012 versus 2006 calculation. He confirmed that all of the discrete input and output files were destroyed. *See* Memorandum of Telephone Conversation between Todd Taylor, Senior Development Engineer, Manager of Research and Development in Building Energy Codes, PNNL (November 2, 2010). He informed us that his team used a computer program, EnergyGage, to create an intermediate computer file that his team modified to work within PNNL's template system. This intermediate template computer file is inputted into another computer program, DOE-2, to perform the actual calculations of the energy savings. He also informed us that using a Table of Parameters and Values (reflecting the 2012 IECC and the 2006 IECC) with the intermediate template file might extract input information requested in the Item 1 request. Memorandum of Telephone Conversation between Todd Taylor, Senior Development Engineer, Manager of Research and Development in Building Energy Codes, PNNL, and Richard Cronin, Staff Attorney, OHA (November 4, 2010).

While the specific input and output files could be recreated by PNNL rerunning the DOE-2 program using the intermediate template computer file, the FOIA does not require agencies to create documents. *See, e.g., Arlie Bryan Siebert*, Case No. TFA-0137 (February 24, 2006). However, the intermediate template file has potentially responsive Item 1 input data.

Consequently, we will remand this matter so that OR and PNNL can determine if this data can be extracted from the intermediate template file.[5]

B. Item 2

With regard to Item 2, documents and information regarding the assumptions that PNNL made regarding specified variables (window area, duct efficiency, lighting, air leakage rates, and mechanical ventilation), PNNL informed OR officials that there were no existing responsive documents other than those already publicly published in the DOE's energy code website, which were the figures used in the calculations. With regard to window area, PNNL stated that the 2012 versus 2006 calculation was based upon a window-to-wall ratio of 15 percent as described in the publicly available document "Eliminating Window-Area Restrictions in the IECC."[6] Response at 4. PNNL also reported that it did not use a specific "duct distribution efficiency" value in its calculation but instead used a direct estimate of 12 percent reduction in heating and cooling energy use as a result of using the proposed 2012 IECC. This methodology was described on page 12 of the 2012 Energy Study. A "duct distribution efficiency" value was not used since the 2006 IECC has no duct test requirements. Response at 4. PNNL also stated that it did not include lighting in its 2012 versus 2006 calculation. As to the air leakage rates employed in the calculation, using standard efficiency HVAC equipment, these rates were discussed in the 2012 Energy Study beginning at page 13.[7] Response at 5. The assumption regarding Mechanical Ventilation employed in the 2012 versus 2006 study was also specifically described on page 14 of the 2012 Energy Study. Response at 4-5.

With regard to the search conducted for documents responsive to Item 2, we find that OR conducted an adequate search. OR contacted PNNL officials most directly involved in the preparation of the 2012 versus 2006 study. These officials, who were responsible for the calculations, indicated that PNNL did not possess any responsive documents other than those documents that were posted on the energycodes.gov web site. Thus, because the only responsive Item 2 documents were prospectively posted on the DOE Energy Code web site, OR was not required to provide these documents to the Appellant pursuant to the FOIA. *See* 5 U.S.C. § 552(a)(3)(A) (excluding from subsection (a)(3) [requirement to provide documents under a FOIA

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[5] PNNL has informed us that the intermediate template file may contain proprietary commercial information from the EnergyGage software. However, it may be possible to create software to extract the input data from the file without revealing proprietary information possibly protectable under Exemption 4. The programming necessary to conduct the search for the input data is not the equivalent of creation of a new record. *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000). Further, the creation of software to retrieve information is required under the FOIA unless the creation of the search software would require "unreasonable efforts" or would "substantially interfere" with agency's computer system. *Id.*; 5 U.S.C. § 552(a)(3)(C). On remand, OR and PNNL should provide the Appellant with the input information retrievable within the intermediate template file or provide a detailed explanation as to why the creation of a program to extract the input data would require unreasonable efforts or would substantially interfere with agency's computer system.

[6] This document is available at http://www.energycodes.gov/implement/pdfs/wwr_elimination.pdf.

[7] The Response noted that for high efficiency HVAC equipment, the leakage rates were 7 air changes per hour at 50 Pascals (ACH50) for climate zones 1 and 2 and 5 air changes for climate zones 3-8. It is uncertain if this set of assumptions was described in the 2012 Energy Study.

Request] those records which are "made available" under subsections (a)(1) [specified information about an agency] or (a)(2) [documents likely to become the subject of repeated FOIA requests]). In sum, we find that OR's search for responsive Item 2 documents was adequate.

C. Item 3

In response to Item 3, OR disclosed two Excel spreadsheets aggregating the results and summarizing the final calculations that total the 2012 versus 2006 energy savings. OR has informed us that after contacting PNNL officials concerning this request, the only responsive documents found were these two spreadsheets. The actual equations used to calculate the energy savings are embedded in various cells of these spreadsheets but no other responsive documents were found. Given OR's inquiry as to the PNNL officials most likely to have knowledge concerning the 2012 versus 2006 calculation, we find that it conducted an adequate search for items responsive to Item 3 of the Appellant's request.

III. Summary

We find that OR conducted a search reasonably calculated to find responsive documents regarding Items 2 and 3. With regard to Item 1, we find that additional responsive information may exist in the intermediate template file. Consequently, as discussed above, we will remand this matter to OR so that an additional search may be undertaken for Item 1 material. Consequently, the Appellant's appeal should be granted.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the National Association of Home Builders, OHA Case Number TFA-0428, is hereby granted.

(2) This matter is hereby remanded to the Oak Ridge Office in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 19, 2010

November 15, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Russell Carollo
Date of Filing:	October 15, 2010
Case Number:	TFA-0430

On October 15, 2010, Russell Carollo (Appellant) filed an Appeal from a determination issued to him on October 7, 2010, by the Oak Ridge Office of Scientific and Technical Information (OSTI) of the Department of Energy (DOE). In that determination, OSTI responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, OSTI identified and released numerous documents responsive to the Appellant's request, some of which had information redacted under Exemption 4. The Appellant challenges OSTI's withholding of information from five documents. This Appeal, if granted, would require OSTI to release the withheld information to the Appellant.

I. Background

On June 9, 2010, the Appellant filed a request with OSTI for various documents, including correspondence, e-mails, memos, FOIA requests, and records of gifts – "related in any way to services . . . counsel or advice provided by Google, its representatives, surrogates or subcontractors and/or discussions about the possibility of providing the same" for 2008 to 2010. Request Letter dated June 9, 2010, from Appellant to Alexander Morris, FOIA Officer, DOE. On October 7, 2010, OSTI released all the 2010 e-mails to the Appellant. Determination Letter dated October 7, 2010, from Brian Hitson, Associate Director, OSTI, to Appellant. In addition, OSTI released five 2008 e-mails in their entirety and withheld portions of five other 2008 e-mails on the ground that they consisted of proprietary information. *Id.*

On October 15, 2010, the Appellant appealed, contending first that a number of the e-mails with portions withheld were sent by a DOE employee, not a private company. Appeal

Letter received October 15, 2010, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE. Secondly, he argued that any "reasonably segregable" portions of the documents should be released, especially since "the process of segregation is not unreasonable for a request involving only a dozen or so responsive documents" and release of segregable information would assist in his Appeal. *Id.* Finally, he contended that the response refers to non-disclosure agreements that were not provided in the determination. *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 4 is at issue in this case.

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause

substantial harm to the competitive position of the person from whom the information was obtained. *National Parks,* 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

We have reviewed the e-mails withheld by OSTI.[1/] We believe the information was "voluntarily submitted" by Google. Because we find that information was voluntarily submitted by Google, the *Critical Mass* test is applicable. These documents would be protected from disclosure by Exemption 4 if they contain information which Google would not customarily release to the public. The e-mails contain technical information regarding Google products. We find it highly unlikely that Google would customarily make such potentially sensitive information available to the public. Consequently, we believe that OSTI properly applied Exemption 4 to the e-mails.

In making this determination, we considered the Appellant's argument that e-mails that originated with a DOE employee cannot contain information withholdable under Exemption 4. We disagree. The proper focus is on the content of the withheld information. In this case, the withheld portions of the e-mails restate information sent by Google to DOE. The information is not *new* information, but rather Exemption 4 information submitted by Google to DOE and reworded by the DOE employee. Therefore, the fact that the e-mails originated with a DOE employee does not affect our conclusion that the withheld information is exempt from disclosure pursuant to Exemption 4.

B. Segregation

The Appellant also argues that OSTI did not attempt to segregate any portion of the information as required under the statute. As support for this argument, he states that given the limited number of documents, segregation should not be difficult.[2/] As we stated above, we did review the information withheld by OSTI. We believe that some segregation may be possible. For example, names and telephone numbers of DOE and Google employees and the statement at the bottom of the e-mails that the information is confidential appear not to be protected by Exemption 4. We will remand the matter to OSTI to determine if segregation of the factual information in the five e-mails is possible.

C. Adequacy of the Justification

[1/] Contrary to the Determination Letter, three of the e-mails were withheld in their entirety by OSTI. The other two were withheld in part.

[2/] In addition, the Appellant states that release of some of the segregable information would assist him in formulating his appeal. If non-exempt information is segregable, it should be released regardless of whether it assists the requestor in formulating an appeal.

The Appellant's last argument is that the information provided to him "appears to refer to non-disclosure agreements" that were not provided to him.[3/] Appeal Letter. Our review of the information withheld shows that in addition to a non-disclosure agreement that was withheld from the Appellant, there are other attachments to e-mails that were not addressed by OSTI. OSTI needs to determine if the attachments are responsive to the Appellant's request. If the attachments are responsive, OSTI needs to properly justify their withholding. Because they are documents separate from the e-mails, they must be addressed individually. We will remand the matter to OSTI for a proper justification for any documents attached to the e-mails that were withheld. On remand, OSTI should identify the documents and issue a new determination either releasing the attachments or justifying their withholding.

III. Conclusion

OSTI properly withheld the redacted information under Exemption 4 of the FOIA. However, OSTI should have more thoroughly segregated factual information from the information it redacted. Further, OSTI should have specifically addressed the attachments to the withheld e-mails, if those attachments are responsive to the Appellant's request. Therefore, we will grant the Appeal in part and remand the matter to OSTI for a further determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Russell Carollo, Case No. TFA-0430, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Scientific and Technical Information of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

[3/] Although the Appellant refers to more than one non-disclosure agreement, we only see evidence of one such agreement. On remand, OSTI should clarify the number of agreements.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 15, 2010

November 17, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	National Security Archive
Date of Filing:	October 20, 2010
Case Numbers:	TFA-0432 TFA-0433 TFA-0435 TFA-0436

On October 20, 2010, the National Security Archive (Appellant) filed four Appeals from determinations issued to it on September 30, 2010, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In those determinations, OIR responded to four requests for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determinations, OIR found documents responsive to the Appellant's requests. In its Appeals, the Appellant challenges the adequacy of OIR's searches for documents. The Appeals, if granted, would require OIR to conduct further searches for responsive documents.

I. Background

On June 9, 2010, the Appellant requested documents related to the 10th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) held in Buenos Aires, Argentina, in December 2004. Request Letter dated June 9, 2010, from Robert A. Wampler, Appellant, to Carolyn Lawson, FOIA/Privacy Act Group, DOE. On June 16, 2010, the Appellant requested documents related to the 11th COP, which was also the first COP serving as the Meeting of the Parties to the Kyoto Protocol, held in Montreal, Canada, in November and December 2005.[1/] Request Letter dated June 16, 2010, from Robert A. Wampler, Appellant, to Carolyn Lawson, FOIA/Privacy Act Group, DOE. On July 8, 2010, the Appellant requested documents related to the 13th and 14th COP held in Bali and Pozana, Poland, in December 2007 and

[1/] In his request letter, the Appellant asks for documents related to "the tenth Conference of the Parties (COP-10) to the eleventh Conference of the Parties (COP 11)." We believe this to be a typographical error.

2008, respectively. Request Letters dated July 8, 2010, from Robert A. Wampler, Appellant, to Carolyn Lawson, FOIA/Privacy Act Group, DOE.
On September 30, 2010, OIR responded to these requests in four separate letters. For the 10th COP, OIR found five responsive documents. Determination Letter dated September 30, 2010, from Alexander C. Morris, FOIA Officer, OIR, DOE, to Appellant. For the 11th COP, OIR found four responsive documents. Determination Letter dated September 30, 2010, from Alexander C. Morris to Appellant. For the 13th COP, OIR found six responsive documents. Determination Letter dated September 30, 2010, from Alexander C. Morris to Appellant. For the 14th COP, OIR found two responsive documents. Determination Letter dated September 30, 2010, from Alexander C. Morris to Appellant.

On October 20, 2010, the Appellant appealed all four Determinations, claiming that the records he is requesting would be held by the Washington National Records Center. Appeal Letter received October 20, 2010, from Appellant, to Poli A. Marmelejos, Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[2/]

We contacted OIR to determine what type of searches were conducted. In response, OIR indicated that all four requests were sent to the Office of Policy and International Affairs (PI) to conduct a search for responsive documents. PI stated that it conducted a search of its electronic files, which are organized according to UNFCCC events. Memorandum of Telephone Conversation dated November 15, 2010, between Janet Fishman, OHA, and Elmer Holt, PI. PI searched for records pertaining to the COP sessions identified by the Appellant in its requests. *Id.* The only documents responsive to the four requests were released to the Appellant. *Id.* PI also stated that no search of the Washington National Records Center was conducted because PI never forwarded any documents to the Center for storage. E-mail dated November 4, 2010, from Elmer Holt, PI, to Janet Fishman, OHA.

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

In addition, PI identified former PI employees working in other DOE organizations and inquired as to whether they had any relevant documents and received no positive responses. November 15, 2010, Telephone Memorandum.

OIR also stated that the Office of the Executive Secretariat (ES), the Office of Science (SC) and the Office of Energy Efficiency (EE) were contacted to determine if they would have any responsive documents. None of those offices found responsive documents. ES explained that the records located at the Washington National Records Center were included in this search. E-mail dated November 9, 2010, from Terry Fehner to Janet Fishman. All of these offices stated that PI would be the office most likely to have responsive documents. E-mail dated October 26, 2010, from Joan Ogbazghi to Janet Fishman.

Based on the foregoing, we believe that OIR's search was reasonably calculated to uncover responsive information.

III. Conclusion

As the foregoing indicates, the search that OIR conducted was reasonably calculated to reveal records responsive to the Appellant's requests. Accordingly, these Appeals will be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by National Security Archive, Case Nos. TFA-0432, TFA-0433, TFA-0435, and TFA-0436, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 17, 2010

November 19, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Another Way BPA

Date of Filing: October 22, 2010

Case Number: TFA-0437

On October 22, 2010, Another Way BPA (Appellant) filed an appeal from a determination issued to it by the Bonneville Power Administration (BPA) regarding the request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, BPA provided the Appellant with a number of documents. However, BPA also withheld portions of other documents. This Appeal, if granted, would require that BPA conduct another search for additional responsive documents and release the information withheld in the previously provided documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under DOE regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 2, 2010, the Appellant submitted a FOIA Request (Request) asking for all documents that refer to potential environmental issues and plans to mitigate these issues for proposed power line segment numbers 46A, 47, 48, and 50-59 as shown on a specified map illustrating proposed electric transmissions lines for the BPA's "I-5 Corridor Reinforcement" project.[1] The Appellant also requested all documents that reference the "required extensive line rebuilding in and around the Sherwood area" for all segment options that are available to go to the existing Pearl substation in Wilsonville, Oregon.[2]

[1] The I-5 Corridor Reinforcement project is a proposed project to build a new 500-kilovolt transmission line to reinforce the power grid in southwest Washington State. *See* BPA web site describing project at http://www.bpa.gov/corporate/i-5-eis/. The proposed routes for the transmission line would begin in Castle Rock, Washington, and extend to a new electric substation in Troutdale, Oregon.

[2] The Pearl substation in Wilsonville, Oregon, was initially considered for the terminus for the new line but was rejected in favor of a terminus at a proposed new substation to be located in Troutdale, Oregon. *See*

On July 1, 2010, BPA issued its determination (Determination) regarding the Appellant's Request. In its Determination, BPA provided the Appellant with a number of documents some of which had portions of text withheld pursuant to Exemptions 5 and 6. In its Appeal, the Appellant makes no specific arguments regarding BPA's determination other than to state "BPA has on two occasions ignored my requests to provide the data as requested."[3] Appeal at 1.

II. Analysis

In the present case, we are asked to review the adequacy of BPA's search and the propriety of BPA's use of Exemptions 5 and 6 to withhold parts of documents.

1. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Aurimas Svitojus*, Case No. TFA-0349 (March 8, 2010).[4]

We contacted officials at BPA to ascertain the extent of the search that was conducted for responsive documents. BPA requested that the project manager (Project Manager) for the I-5 Corridor Reinforcement Project conduct a search for responsive documents. E-mail from Paul Mautner, Office of Chief Counsel, BPA, to Richard Cronin, Staff Attorney, OHA (November 2, 2010) (Mautner E-mail). The Project Manager then sent an e-mail to each of the individuals on the I-5 Corridor Reinforcement Project Team, asking them to search all of their paper and electronic documents for responsive documents. He also spoke to several "key" members of the team and asked them if they had knowledge of any additional locations where responsive documents might be kept. All responsive documents were identified and provided, in whole or in redacted form, to the Appellant. Mautner E-mail at 1.

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http://www.bpa.gov/corporate/i-5-eis/documents/Why_all_the_route_options_go_from_Castle_Rock_to_Troutdale_.pdf.

[3] In using the phrase "two occasions," the Appellant is likely referring to a previous FOIA request it filed prior to the request at issue in this case. *See* E-mail from Laura Atterbury, FOIA/Privacy Act Office, BPA, to Richard Cronin, Staff Attorney, OHA (October 28, 2010).

[4] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Given the facts presented to us, we conclude that BPA conducted an adequate search for responsive documents. BPA consulted with the Project Manager most familiar with the requested documents. The Project Manager caused a search to be made of the records of all of the I-5 Corridor Reinforcement Project Team members.[5] We find that this search was reasonably calculated to uncover responsive documents. Consequently, we find that BPA conducted an adequate search under the FOIA for documents responsive to the Appellant's request.

2. Information Withheld under Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). The Exemption 5 privileges cited by BPA in its determination were the deliberative process and attorney-client privileges. BPA cited both privileges in withholding all of the Exemption 5 material. Because, as discussed below, we find that the withheld Exemption 5 material is subject to the attorney-client privilege, and thus protected by Exemption 5, we need not consider whether the deliberative process privilege is also applicable to the withheld information.

An agency may withhold information under the attorney-client privilege if it is a "confidential communication . . . between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses opinions given by an attorney to a client based upon, and thus reflecting, those facts. *See, e.g.*, *Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege also encompasses communications between attorneys that reflect client-supplied information. *See, e.g.*, *Green v. IRS*, 556 F. Supp 79, 85 (N.D. Ind. 1982). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 291, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Power Wire Constructors*, Case No. TFA-0312 (May 27, 2009).

[5] BPA also informed us that part of the Appellant's FOIA request refers to proposed power line route segments in Oregon identified in a September 14, 2009 map. Because field work identified potential problems with this route, BPA dropped these segments from further consideration. Mautner Response at 1. With regard to the portion of the request asking for documents related to line rebuilding in the Sherwood area, BPA subsequently dropped from consideration proposed line relocation for segments 81-85 and 89. Mautner Response at 1.

The material withheld pursuant to Exemption 5 consists of communications between a BPA attorney and BPA officials concerning possible consequences under the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.*, with regard to elimination of further consideration regarding a proposed route for the I-5 Corridor Reinforcement Project. As such, this communication consists of facts and legal opinions arising from those facts shared between BPA and its lawyer. The material withheld pursuant to Exemption 5 is thus properly protected pursuant to the attorney-client privilege and Exemption 5.

3. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally NARFE*, 879 F.2d at 874.

The material withheld pursuant to Exemption 6 consisted of personal phone numbers and E-mail addresses of BPA employees. As such, we find that there is a significant privacy interest connected with this information. Release of this information could subject these employees to unwanted intrusions at their homes. Further, we find that little, if any, light would be shed on the operations and activities of BPA by revelation of this information. The personal phone numbers and E-mail addresses do not in themselves relate to any description of BPA's activities as a government entity. Because we find that there is a large privacy interest connected to the withheld Exemption 6 material and there is little public interest that would be furthered by the release of this information, we conclude that release of the material withheld pursuant to Exemption 6 would constitute a clearly unwarranted invasion of personal privacy. Consequently, that material was properly withheld pursuant to Exemption 6.

4. Public Interest Determination

Nonetheless, the DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. With regard to the Exemption 5 material, the Supreme Court, in the civil discovery context, has emphasized the public policy underlying the attorney-client privilege – "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Given the important public interests protected by the attorney-client privilege, we conclude that discretionary release of the Exemption 5 withheld materials would not be in the public interest.[6]

III. Conclusion

As discussed above, we find that BPA conducted an adequate search for responsive documents under the FOIA. Further, we find that the material BPA withheld pursuant to Exemption 5 was properly withheld pursuant to the attorney-client privilege. The material withheld pursuant to Exemption 6 was also properly withheld. Consequently, the Appellant's appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Another Way BPA, OHA Case Number TFA-0437, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 19, 2010

[6] Because the analysis of the applicability of Exemption 6 already considers the public interest in release of the Exemption 6 withheld material, we need not make a separate public interest determination regarding discretionary release of the Exemption 6 material.

January 21, 2011

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: SACE

Date of Filing: October 26, 2010

Case Number: TFA-0442

This Decision concerns an Appeal that was filed by the Southern Alliance for Clean Energy (SACE) in response to a determination that was issued to it by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In that determination, the LGPO replied to a request for documents that SACE submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The LGPO released certain documents to SACE with portions of those documents deleted. This Appeal, if granted, would require that the LGPO release some of the withheld information. [1]

I. BACKGROUND

In its FOIA request, SACE sought access to documents pertaining to the LGPO's issuance of conditional commitments for loan guarantees for the construction and operation of two nuclear reactors in Burke County, Georgia. Specifically, SACE requested access to three categories of documents.

1. All fully executed term sheets between the DOE and four utilities and one municipality (collectively referred to in the request as "SNC") setting forth the agreed upon terms of the loan guarantees and the obligations of SNC;

2. All fully executed Definite Agreements (as defined in the term sheets) between the DOE, the Federal Finance Bank and SNC, setting forth the agreed upon terms and conditions of the loan guarantees and the obligations of SNC; and

3. All records pertaining to the issuance of the loan guarantees not otherwise covered by another specified FOIA request.

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[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

In its response dated September 24, 2010, the LGPO identified three documents as being responsive to SACE's request. The documents are conditional loan commitment letters to three of the specified utilities. The LGPO invoked Exemption 4 of the FOIA in withholding portions of these documents. Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). The LGPO determined that the withheld material was sensitive and proprietary commercial information that was maintained in confidence by the utilities, and that the release of the material would place the utilities at a significant competitive disadvantage.

In its Appeal, SACE contests the adequacy of the LGPO's determination letter and the LGPO's application of Exemption 4. With regard to the determination letter, SACE contends that the LGPO's letter fails to explain in any detail the type of competitive harm to which the submitters of the withheld information would be subjected should each type of information be released. Furthermore, SACE argues that much of the withheld content of the conditional loan commitment letters consists of provisions that were imposed upon the utilities by the DOE, and were therefore not "obtained from a person" within the meaning of the Exemption. Finally, SACE contends that standard contract provisions, such as indemnity and hold harmless clauses, choice of law provisions and affirmative covenants, were also withheld, and that these provisions are not privileged or confidential and do not normally contain commercial or financial information of the type that is protected by Exemption 4.

II. Analysis

As previously stated, Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R.§ 1004.10(b)(4) . Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret,"a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC,* 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds,* 164 F.3d 37 (D.C. Cir. 1999) (*Lepelletier*). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g., Stone v. Export-Import Bank,* 552 F.2d 132, 137 (5th Cir. 1977); *Nadler v. FDIC,* 92 F.2d 93, 95 (2nd Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, 27 DOE ¶ 80,225 (August 31, 1999) (Case No. VFA-0517). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the

information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

The Exemption serves to protect submitters of commercial or financial information to the federal government from the adverse effects of unwarranted public disclosure of that information, and it correspondingly provides the federal government with an assurance that such information will be reliable. However, federal entities themselves are not "persons" for purposes of Exemption 4, and any commercial information of the federal government is not shielded from mandatory disclosure by this exemption. *See, e.g., Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404; *Nadler*, 92 F.2d at 95 (term "person" includes "an individual, partnership, corporation, association, or public or private organization *other than an agency*" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2000)) (italics added).

A. Adequacy of the Determination

In an earlier decision issued to SACE regarding a previous FOIA request for much of the same information, we concluded that the LGPO's determination letter was deficient because it did not adequately justify that Office's application of Exemption 4. *Southern Alliance for Clean Energy*, Case No. TFA-0403 (2010). In that decision, we said that a "determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document." *Id.* at 2. We further stated that if an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Id.* at 3. We identified two flaws the LGPO's determination. First, we found that LGPO did not distinguish among the different types of withheld information in providing its justifications, and we concluded that its statement that release of the information would give competitors an unfair advantage was impermissably vague and conclusory. *Id.*

In contrast to that determination, in this case the LGPO did provide a justification for each category of information that was withheld. Moreover, although the descriptions of the competitive harm that would result from the release of the withheld information were brief, they were adequate to communicate the basis for the LGPO's withholdings and to permit a meaningful appeal. We find that the LGPO's determination letter was adequate.

B. Exemption 4

SACE further contends that because certain provisions of the conditional commitments were included at the insistence of the DOE, they did not originate with the utilities, and were therefore not "obtained from a person" within the meaning of Exemption 4.

The federal courts have held that the fact that particular information was the subject of negotiation with the federal government does not necessarily preclude a finding that it was "obtained from a person" within the meaning of Exemption 4. Rather, the courts have looked to the identity of the party from whom the information originated. *See, e.g., Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., William E. Logan, Jr. & Associates,* Case No. VFA-0484 (1999); *Research Focus, L.L.C.*, Case No. TFA-0247 (2008).

In the present case, we have been informed that although the provisions in question were the subject of negotiations between the DOE and the three utilities, the utilities were the source of the information that was withheld. *See* memorandum of January 21, 2011 telephone conversation between Wendy Pulliam, LGPO, and Robert Palmer, Senior Staff Attorney, Office of Hearings and Appeals. Based on this information, we conclude that the withheld information was obtained from a "person" within the meaning of Exemption 4.

Finally, SACE contends that the LGPO improperly withheld standard contract provisions such as indemnity and hold harmless clauses, choice of law provisions and affirmative covenants. As an initial matter, our examination of the three conditional commitment letters, including the portions withheld, reveals that these provisions are not "standard," in that they differ significantly from letter to letter. This no doubt reflects the differences in the input received from the three utilities during the negotiation process.

Furthermore, since the term "commercial or financial information" has been broadly construed to include any information relating to business or trade, *Lepelletier*, it is clear that the provisions in question, which set forth terms under which loan guarantees for the construction of nuclear facilities might be granted, are "commercial or financial." The final issue for consideration is whether the withheld information is "privileged or confidential." We must therefore determine whether the LGPO properly concluded that the material withheld is "confidential." Since the utilities' participation was required in order to obtain the conditional loan guarantees, the withheld information was submitted on an involuntary basis. Therefore, the information is "confidential" for Exemption 4 purposes if its release is likely to either (i) impair the government's ability to obtain

necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. We believe that the withheld information meets the second prong of the *National Parks* test.

In the wholesale market (*e.g.*, sales of electricity to other utilities and co-ops and to municipalities), and in sales to large commercial and industrial customers, the three utilities face competition. Some of the affirmative covenants contain information from which certain project costs of the facilities to be constructed can be extrapolated. Release of cost information to competitors would provide them with an unfair advantage, and release of such information to potential wholesale customers would provide leverage in negotiations with the three utilities. Moreover, release of the financing terms agreed to by the three utilities would give other potential lenders insight into the terms that they might be willing to agree to in negotiations, thereby compromising the utilities' ability to obtain future financing on favorable terms. This disadvantage would not be shared by the utilities' competitors, and would therefore affect the utilities' ability to compete on an equal footing. Because release of the provisions in question would likely result in substantial competitive harm, we conclude that the LGPO properly applied Exemption 4. SACE's Appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by SACE on October 26, 2010 (Case No. TFA-0442) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 21, 2011

November 23, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Bowers

Date of Filing: October 26, 2010

Case Number: TFA-0443

On October 26, 2010, Glen Bowers filed an appeal from a determination issued to him on April 9, 2010, by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA), in response to a request for documents that Mr. Bowers filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, NNSA responded that it did not locate any records responsive to Mr. Bowers' request. In his appeal, Mr. Bowers challenges the adequacy of NNSA's search. This appeal, if granted, would require NNSA to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In March 2007, Mr. Bowers filed a FOIA request with NNSA for employment records pertaining to his late father. Letter from Carolyn A. Becknell, NNSA, to Glen Bowers, April 9, 2010 (Determination) at 1. In its May 2007 response, NNSA informed Mr. Bowers that its search for documents yielded no records responsive to his request. *Id.* Mr. Bowers appealed that determination to OHA. *Id.* In an October 2007 decision, OHA concluded that NNSA's search for records was adequate and denied Mr. Bowers' Appeal. *See Glen Bowers*, Case No. TFA-0222 (2007).[1] In September 2009, Mr. Bowers submitted additional information to the DOE Office of Information Resources (OIR), the office responsible for receiving FOIA requests at DOE Headquarters, and OIR forwarded the new information to NNSA. Determination at 1. Based on the new information, NNSA reopened Mr. Bowers' case and conducted a new search for responsive documents. *Id.* In its April 2010 determination, NNSA indicated that each of the NNSA Site Offices (Kansas City Site Office, Livermore Site Office, Los Alamos Site Office, Nevada Site Office, Pantex Site Office, Sandia Site Office, and Y-12 Site Office) performed searches for records using the additional information and located no responsive records. *Id.*

Mr. Bowers filed the instant appeal challenging the adequacy of NNSA's search for documents.[2] *See* Letter from Glen Bowers to OHA, dated September 2, 2010 (Appeal) at 1. In his Appeal, Mr.

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

[2] OHA received an appeal from Mr. Bowers of NNSA's April 9, 2010, Determination Letter on September 24, 2010. OHA dismissed that appeal on the grounds that it was untimely. *Glen Bowers*, Case No. TFA-0422. Upon receipt of

Bowers contends that NNSA's search was inadequate because it did not include a search of records pertaining to the DOE's Rocky Flats Site in Golden, Colorado, where he alleges his father worked for a DOE contractor. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).

In reviewing this appeal, we contacted NNSA to ascertain the scope of its search for responsive documents. NNSA informed us that, in performing a search for documents, it contacted the NNSA Site Offices to request a search for records, and the Site Offices conducted searches of their records databases. *See* Email from Carolyn A. Becknell, NNSA, to Diane DeMoura, OHA (November 2, 2010). NNSA's records management personnel further noted that NNSA does not maintain records pertaining to the DOE's Rocky Flats Site.[3] Based on this information, we find that NNSA performed an extensive search reasonably calculated to reveal records responsive to Mr. Bowers' FOIA request, despite the absence of any responsive records. Therefore, the search was adequate. Accordingly, Mr. Bowers' Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 26, 2010, by Glen Bowers, OHA Case No. TFA-0443, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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the dismissal, Mr. Bowers submitted documentation establishing that he did not receive NNSA's April 9, 2010, Determination Letter until August 10, 2010, and maintaining that he timely filed his first appeal. Given those circumstances, OHA accepted jurisdiction over the instant appeal.

[3] Records pertaining to the Rocky Flats Site are maintained by, and fall within the jurisdiction of, the DOE's Office of Legacy Management (OLM). Therefore, those records are not covered by the determination at issue in this appeal. In addition, we contacted OIR to determine whether it forwarded Mr. Bowers' request to OLM. OIR informed us that OLM performed a search for documents and issued a determination letter to Mr. Bowers on September 30, 2009.

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 23, 2010

December 6, 2010

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Christine Sullivan Foster
Date of Filing:	October 28, 2010
Case Number:	TFA-0444

On October 28, 2010, Christine Sullivan Foster filed an Appeal from a determination issued to her on September 17, 2010, by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE). Oak Ridge issued the determination in response to a request for documents that Ms. Foster submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Oak Ridge perform an additional search for responsive material and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On September 7, 2010, Ms. Foster filed a FOIA request for copies of all employment records related to her father William L. Sullivan, who worked at Oak Ridge between 1943 and 1945. Letter from Amy Rothrock, Authorizing Official, Oak Ridge, to Christine Sullivan Foster (September 17, 2010) (Determination Letter). On September 17, 2010, Oak Ridge informed Ms. Foster that after a thorough search it was unable to find any records, and consequently denied the request. *See* Determination Letter. On October 28, 2010, Ms. Foster filed the present Appeal with the Office of Hearings and Appeals (OHA). Letter from Christine S. Foster to Director, OHA (October 28, 2010) (Appeal). In the Appeal, Ms. Foster states that her father worked at Oak Ridge over 60 years ago during the construction of the facility and that she has been unable to obtain records of his employment. Appeal at 1. She challenges the adequacy of the search conducted by Oak Ridge and asks OHA to direct Oak Ridge to conduct a new search for responsive documents. *Id.*

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The FOIA states that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Gary Maroney*, Case No. TFA-0267 (2008). [1] The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files;

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

instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See e.g. Doris M. Harthun*, Case No. TFA-0015 (2003).

We contacted Oak Ridge to request additional information so that we could evaluate its search for Mr. Sullivan's records. Oak Ridge assured this office that it had conducted a thorough search, and provided additional details regarding the search. Electronic mail message from Amy Rothrock, Oak Ridge, to Valerie Vance Adeyeye, OHA (November 12, 2010). According to Oak Ridge, the employees searched the following locations: (1) the Oak Ridge plants; (2) the Y-12 NNSA plant; (3) the Oak Ridge Associated Universities; (4) the DOE Records Holding Area [2]; (5) a historical database of contractor employees from 1940-1996; and (6) Energy Employees Occupational Illness Compensation Program claims filed since 2001. The employees searched electronically using finding aids and full text records on individuals and also performed hand searches of paper files retrieved by identifier. *Id.* They were unable to find any documents related to Mr. Sullivan.

III. Conclusion

After reviewing the record of this case, we find that Oak Ridge conducted a search that was adequate and reasonably calculated to uncover the requested information. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The FOIA Appeal filed by Christine Sullivan Foster on October 28, 2010, OHA Case Number TFA-0444, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 6, 2010

[2] In the DOE Records Holding Area, they searched employment and personnel security clearance information from employees in the 1940s.

December 20, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American Small Business League

Date of Filing: October 28, 2010

Case Number: TFA-0445

On October 28, 2010, the American Small Business League (ASBL) filed an appeal from a determination issued to it on September 27, 2010, by the Department of Energy's (DOE) Golden Field Office (GFO). In that determination, GFO responded to a request for documents that ASBL submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to ASBL's FOIA request, GFO identified and released a number of documents as responsive to the request, but withheld portions of the documents pursuant to FOIA Exemptions 5 and 6. This appeal, if granted, would require GFO to release the withheld information to ASBL.

I. BACKGROUND

On March 11, 2010, ASBL submitted a FOIA request for "any, all, each and every contract signed by Contracting Officer Tammie M. Lawler for the last quarter of Fiscal Year 2009. Specifically, the pages that contain the Contractor/Vendor Name, dollar amount obligated, PIID and IDVPIID numbers, Contracting Officer Business Size Determination." *See* Letter from Kevin Baron, ASBL, to OHA Director (June 16, 2010) (June Appeal) at 1. On June 2, 2010, GFO responded to ASBL's request for "copies of the database entry forms for all contracts signed by Contracting Officer Tammie M. Lawler for the last quarter of Fiscal Year 2009." Letter from Derek Passarelli, GFO, to Kevin Baron, ASBL (June 2, 2010) (June Determination) at 1. GFO released 584 pages of responsive documents, 230 pages of which contained redactions pursuant to FOIA Exemptions 5 and 6. *Id*. at 4. ASBL appealed the June Determination, maintaining that GFO mistakenly believed that ASBL agreed to narrow the scope of its FOIA request and that, therefore, GFO did not provide an adequate response to the request. June Appeal at 1. In a July 2010 Decision, finding no written evidence that ASBL agreed to narrow the scope of its request, we remanded the matter back to GFO in order that ASBL's original, broader FOIA request be processed. *See American Small Business League*, Case No. TFA-0394 (2010).[1]

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

On September 27, 2010, GFO issued a new determination in response to ASBL's FOIA request. Letter from Derek Passarelli, GFO, to Kevin Baron, ASBL (September 27, 2010) (September Determination). In the September Determination, GFO identified 2,021 pages of documents as responsive to ASBL's request, releasing 1,627 pages in their entirety and 394 pages with portions withheld pursuant to FOIA Exemptions 5 and 6. *Id*. at 2, 6. The responsive documents "consist of copies of all contracts signed by Contracting Officer Tammie M. Lawler for the last quarter of Fiscal Year 2009, each of which was awarded to acquire Merit Review services for DOE's Golden Field Office." *Id*. at 2. The withheld information consists of "the identities and other personal identifying information of individuals retained to provide Merit Review services." *Id*.

On October 28, 2010, ASBL appealed the September Determination. *See* Letter from Kevin Baron, ASBL, to OHA Director (October 28, 2010) (October Appeal). In the October Appeal, ASBL maintains that "the information contained in the documents is public information; therefore, it does not represent an invasion of privacy of either individuals or of internal agency business" and "should not be redacted." *Id*. at 1.

II. ANALYSIS

A. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.*

A federal district court has previously considered the exact Exemption 5 issue before us in this case – namely, whether information identifying Merit Review Committee members is shielded from release by Exemption 5.[2] In that case, which also involved GFO's withholding of information identifying Merit Review Committee members, the court determined that this type of information is predecisional because it was prepared to assist the GFO official responsible for selecting the committee members and deliberative because it relates to the process used by the official. *See Reilly v. Dep't of Energy*, 2007 WL 4548300 (N.D. Ill. Dec. 18, 2007) at *5.

[2] We have reviewed unredacted copies of the documents GFO released to ASBL. As indicated above, the withheld portions of the documents include the identities and other personal identifying information of non-federal employees contracted by GFO to provide Merit Review services.

Therefore, the information is exempt from public disclosure pursuant to FOIA Exemption 5. *Id*. Similarly, we have previously held that information identifying merit review evaluators is properly withheld under Exemption 5 because release of such information would compromise the integrity of the deliberative process. *See Minneapolis Star Tribune*, Case No. TFA-0091 (2005). In that case, we concluded that "releasing the names of individuals who participate in the deliberative process might discourage them from fully and frankly communicating their opinions and recommendations, exactly the result that the privilege's authors sought to prevent." *Id*. at 3.

We find no merit in ASBL's assertion that the information withheld in the released documents is public and should not be redacted. As noted above, we find that the release of this information would have a chilling effect upon the agency. The ability and willingness of merit review evaluators to make honest and open recommendations in the future could well be compromised. If evaluators were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions, the very service that they were retained to provide. Accordingly, we find that the names and other information identifying the Merit Review Committee members were properly withheld under Exemption 5.

The DOE regulations provide that the DOE should nonetheless release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. GFO concluded, and we agree, that disclosure of the requested information would cause harm to GFO's decision-making process by hampering the agency's selection of appropriate recipients for federal funding. Therefore, release of the withheld Exemption 5 information in the documents released to ASBL would not be in the public interest.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989); *see also Ripskis v. Dep't of Hous. and Urban Dev*., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public

interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

In this case, GFO determined that release of the withheld information would result in the invasion of significant personal privacy interests. Specifically, GFO found that the release of the information would disclose personal information of the Merit Review evaluators, who are DOE contractor employees, and potentially lead to "disappointed financial assistance applicants seeking similar information in order to impose uninvited and unwanted contacts on Merit Review evaluators in the future." September Determination at 4. We agree. We have consistently held the release of personal identifying information constitutes a "real and substantial threat to employees' privacy." *See Robert D. Reilly*, Case No. TFA-0166 (2006) (internal citations omitted). Moreover, because the Merit Review Committee members whose identities are at issue in this case are non-federal contractor employees, there is a significant privacy interest in maintaining their confidentiality. In addition, we have held in the past that the potential for harassment of individuals is sufficient justification for withholding information under Exemption 6. *Id*.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id*.; *see also Nat'l Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

In the present case, we find that the public interest in the withheld information at issue here is minimal at best. ASBL has not established how release of the identities of the Merit Review Committee members would serve any public interest. We find that release of the personal identifying information of the Committee members would reveal little, if anything, to the public about the workings of the government and could subject the individuals to considerable harassment. Therefore, after weighing the significant privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities and other personal information of the non-federal employees relevant to ASBL's request could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. Therefore, GFO properly withheld the information under Exemption 6.

C. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that GFO

complied with the FOIA by releasing to ASBL all factual, non-deliberative portions of the documents that do not compromise the personal privacy interests identified above.

III. Conclusion

As discussed above, we find that GFO properly withheld information pursuant to Exemptions 5 and 6 in the documents it released to ASBL. Moreover, GFO complied with the requirements of the FOIA by releasing to ASBL all non-exempt portions of the responsive documents.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the American Small Business League, OHA Case Number TFA-0445, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 20, 2010

December 1, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Bob Warren, P.A.

Date of Filing: November 12, 2010

Case Number: TFA-0446

On November 12, 2010, Bob Warren, P.A., (Appellant) filed an Appeal from a determination issued to him on October 6, 2010, by the Savannah River Operations Office (SRO) of the Department of Energy (DOE). In that determination, SRO responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, SRO released nine documents responsive to the Appellant's request. In his Appeal, the Appellant challenges the adequacy of SRO's search for documents. The Appeal, if granted, would require SRO to conduct a further search for responsive documents.

I. Background

On September 23, 2010, the Appellant requested documents about Kerry C. Baxley, regarding all incidents during his employment including:

- an October 4, 1997, sludge sounding incident
- a June 14, 1997, Gang Valve incident at F Tank Farm
- the sludge contamination incident, at H Tank Farm, in the mid-1990s
- the slurry pump removal incident, at H Tank Farm, 1992 or 1993
- any glove box contamination incidents in the B Line, F Area
- any special hazmat investigations (1990-2000)
- Radiation Survey Log Sheets (1990-2000)
- Incident Critiques, Records and Reports (1990-2000)

Request Letter dated September 23, 2010, from Bob Warren, to Lucy Knowles, Authorizing Official, SRO. On September 28, 2010, the Appellant narrowed the last three items to "any incident report, and its associated Radiation Survey Log Sheet, Critique and/or special Hazmat Investigation, in which Mr. Baxley was involved, specifically both F and H Tank

Farms . . . in the years 1992 through 1997." Letter dated September 28, 2010, from Bob Warren, to Pauline Conner, FOIA Officer, SRO.

On October 6, 2010, SRO responded to this request, releasing to the Appellant nine documents responsive to the first two items of his request. Determination Letter dated October 6, 2010, from Lucy Knowles, SRO, to Appellant. In response to items three through eight, SRO indicated that the SRO's Occurrence Reporting and Processing System (ORPS) contains information concerning incidents, but does not contain the names or any other personally identifiable information of employees involved in any events or incidents. *Id.* Therefore, SRO had no responsive information for items three through eight. *Id.*

On November 12, 2010, the Appellant appealed, claiming that he did not receive copies of urine analyses and documents relating to a June 14, 1997, Gang Valve incident at the F Tank Farm. Appeal Letter received November 12, 2010, from Bob Warren, P.A., to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted SRO to determine what type of search was conducted. In response, SRO indicated that the Savannah River Nuclear Solutions (SRNS) Dosimetry Records Program Manager, Health Physics Services, conducted a search to locate any incident documents involving Kerry Baxley. E-mail dated November 16, 2010, from Pauline Conner, SRO, to Janet Fishman, OHA. Based on that search, which used keywords "Kerry Baxley" and his Social Security Number (SSN), SRNS located the responsive incident documents. *Id.* SRNS Classified Operations Department also conducted a search using Mr. Baxley's name and SSN. *Id.* It found no responsive documents. *Id.* ORPS contains all incident reports between 1991 and the present, but it does not contain any personally identifiable information. *Id.* Therefore, no documents were found that referenced Mr. Baxley. *Id.* SRO

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

also searched the Electronic Data Warehouse Storage system, which contains documents for all of SRO since 1945. *Id.* No responsive documents were located. *Id.*

As we stated above, "the standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller*, 779 F.2d at 1384-85. Based on the foregoing, we believe that SRO's search was reasonably calculated to uncover responsive information. Therefore, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Bob Warren, P.A., Case No. TFA-0446, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 1, 2010

December 20, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Walter Tamosaitis
Date of Filing:	November 22, 2010
Case Number:	TFA-0448

On November 22, 2010, Dr. Walter Tamosaitis (Appellant) filed an Appeal from a determination issued to him on October 25, 2010, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). In that determination, OIG responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, OIG identified two documents responsive to the Appellant's request. OIG withheld portions of the first document. The Appellant challenges OIG's withholdings. This appeal, if granted, would require OIG to release the withheld information to the Appellant.

I. Background

On October 12, 2010, the Appellant requested "a copy of the report that investigated his termination from the WTP project in Hanford, WA." Request E-Mail dated October 12, 2010, from Appellant to FOIA-Central@hq.doe.gov. On October 25, 2010, OIG released two documents to the Appellant. OIG redacted portions of one of the documents, stating that the redacted information is exempt from disclosure under FOIA Exemptions 6 and 7(C). Determination Letter dated October 25, 2010, from Sandra D. Bruce, Assistant Inspector General for Inspections and Special Inquiries, OIG to Appellant (Determination Letter).

On November 22, 2010, the Appellant appealed, first contending that the OIG failed to support its assertions with any of the required analysis for withholding the requested information. Appeal Letter received November 22, 2010, from Appellant to Director, Office of Hearings and Appeals (OHA). Second, he claimed that the redactions and deletions went beyond the redaction of names and titles, and thus the redactions were outside the scope of the cited exemptions. *Id.* Finally, he claimed that the OIG failed to provide any rationale for the assertion that release of the names of the persons in the report is "not in the public interest." *Id.*

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 6 and 7(C) are at issue in this case.

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also* 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes," if release of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see also* 10 C.F.R. § 1004.10(b)(7)(iii).[1/]

In order to determine whether information may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). The second step is that the agency must determine whether release

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[1/] In its Appeal, the Appellant claims that the document released to him is a "review" not an "investigation" and therefore, not covered by Exemption 7(C). This argument is without merit because the document was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7)(C).

of the information would further the public interest by shedding light on the operations and activities of the government. *See Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 769 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the information either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally NARFE,* 879 F.2d at 874; *Ripskis v. Dep't of Hous. and Urban Dev.,* 746 F.2d 1, 3 (D.C. Cir 1984).

Exemption 7(C) applies to a much narrower class of documents than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Both Exemptions 6 and 7(C) require a balancing of the personal privacy interest in the information proposed for withholding against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of personal privacy."

Pursuant to the provisions of Exemption 7(C), we have examined investigations conducted by OIG in response to complaints by individuals, as in this case, and found that they constitute law enforcement activities. *See Ken Hasten*, Case No. TFA-0353 (2010).[2/] Since the information at issue in this case meets Exemption 7(C)'s threshold test, we need only examine OIG's actions pursuant to the standard of Exemption 7(C), *i.e.*, whether release of the withheld material could reasonably be expected to result in an unwarranted invasion of personal privacy. *See, e.g., J.G. Truher*, Case No. VFA-0245 (1997).

B. The Appellant's Arguments

First, the Appellant contends that OIG failed to support its assertions with any of the required analysis for withholding the requested information. OIG asserted a privacy interest in the identities of the individuals. The Determination Letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C).

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

> Individuals involved in OIG enforcement matters, which in this case includes subjects, witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 1. Contrary to the Appellant's assertion, the foregoing language is sufficient to explain the OIG rationale for the withholdings. *See, e.g., Ken Hasten*, Case No. TFA-0353 (2010).

Moreover, our review of the documents indicated that the individuals whose names were withheld are actual or prospective sources. OHA has found a significant privacy interest in maintaining the confidentiality of OIG witnesses. *J.G. Truher*, Case No. VFA-0245 (1997). We have found there is a strong privacy interest in the names and related identifying information of sources and witnesses. Sources and witnesses have an obvious privacy interest in remaining anonymous. *See James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,109 at 80,524 (1990). Furthermore, the public interest favors protecting the identities of sources and witnesses, rather than disclosing them, to insure that witnesses continue to provide information voluntarily for law enforcement investigations, without fear of retribution. *See generally King v. Dep't of Justice*, 830 F.2d 210, 232-36 (D.C. Cir 1987). Since there are strong privacy and public interests in protecting these identities, we find that the OIG properly withheld the names of its sources.

Second, the Appellant claims that the redactions and deletions went beyond the redaction of names and titles. Appeal Letter at 1. As indicated above, we have reviewed the document to determine what information was redacted. As also indicated above, the Appellant is correct that some additional words were redacted that are not names and titles. There were some verbs withheld, along with a couple of clauses. The OIG stated to us that release of the withheld information could lead to discovery of a person's identity. E-mail dated December 2, 2010, from Ruby Len, OIG, to Janet Fishman, OHA. After reviewing the documents and the OIG's arguments, we agree with OIG that the other withheld information could lead to a determination of the person's identity. Therefore, we will uphold the OIG withholding of the information from the first document.

Finally, the Appellant claims that the OIG failed to provide any rationale for the assertion that release of the names of the persons in the report is "not in the public interest." Appeal Letter at 1. We disagree. In cases involving material determined to be exempt from mandatory disclosure under Exemptions 6 and 7(C), we do not make the usual inquiry as required by 10 C.F.R. § 1004.1 into whether release of the material would be in the public interest. The second step in an Exemptions 6 and 7(C) analysis considers whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm.*, 489 U.S. 769. The final step in the

analysis weighs the privacy interests against the public interest. Therefore, rationale is already intertwined in the analysis that led to the withholding of the information.

III. Conclusion

First, we have concluded that the OIG properly justified the withholdings of the names and identifying information of those involved in the instant OIG investigation. Second, the redactions of the other information were not outside the scope of the cited exemptions. Finally, although the OIG did not provide a separate statement that release of the names of the persons in the report is "not in the public interest," that rationale is intertwined with the Exemptions 6 and 7(C) analysis. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Walter Tamosaitis, Case No. TFA-0448, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 20, 2010

December 14, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	National Security Archive
Date of Filing:	November 23, 2010
Case Number:	TFA-0449

On November 23, 2010, the National Security Archive (Appellant) filed an Appeal from a determination issued to it on October 25, 2010, by the Office of Information Resources (OIR) of the Department of Energy (DOE). In that determination, OIR responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, OIR located four documents responsive to the Appellant's request. In its Appeal, the Appellant challenges the adequacy of OIR's search for documents. The Appeal, if granted, would require OIR to conduct a further search for responsive documents.

I. Background

On May 20, 2010, the Appellant requested documents related to the 9th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) and the Nineteenth Session of the COP's Subsidiary Body for Implementation and Subsidiary Body for Scientific and Technological Advice held in Milan, Italy, in December 2003. Request Letter dated May 20, 2010, from Robert A. Wampler, Appellant, to Carolyn Lawson, FOIA/Privacy Act Group, DOE.

On October 25, 2010, OIR responded to this request, releasing three responsive documents.[1/] Determination Letter dated October 25, 2010, from Alexander C. Morris, FOIA Officer, OIR, DOE, to Appellant. On November 23, 2010, the Appellant appealed the

[1/] The Determination Letter states that four responsive documents were located. One of the four documents originated at the Department of State and was sent there for a determination on its releasability. Determination Letter dated October 25, 2010, from Alexander C. Morris, FOIA Officer, OIR, to Appellant.

Determination, claiming that the search was insufficient and that the records he is requesting would be held by the Washington National Records Center. Appeal Letter received November 23, 2010, from Appellant, to Poli A. Marmelejos, Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[2/]

We recently issued a Decision to the Appellant regarding a similar request for information from the 10th, 11th, 13th, and 14th COP. *National Security Archive*, Case Nos. TFA-0432, *et al.*, (2010). As in those cases, we contacted OIR to determine what type of search was conducted. In response, OIR indicated that similar to Case Nos. TFA-0432, *et al.*, the request was sent to the Office of Policy and International Affairs (PI) to conduct a search for responsive documents. As in the previous cases, PI stated that it conducted a search of its electronic files, which are organized according to UNFCCC events. E-mail dated December 1, 2010, from Elmer Holt, PI, to Janet Fishman, OHA, referencing Memorandum of Telephone Conversation dated November 15, 2010, between Janet Fishman, OHA, and Elmer Holt, PI, filed in Case No. TFA-0432. PI searched for records pertaining to the 9th COP session. *Id.* The only documents responsive to the request were either released to the Appellant or sent to the Department of State for a determination. *Id.* PI also stated that no search of the Washington National Records Center was conducted because PI never forwarded any documents to the Center for storage. December 1, 2010, E-mail referencing E-mail dated November 4, 2010, from Elmer Holt, PI, to Janet Fishman, OHA, filed in Case No. TFA-0432. In addition, PI identified former PI employees working in other DOE organizations and inquired as to whether they had any relevant documents and received no positive responses. December 1, 2010, E-mail referencing November 15, 2010, Telephone Memorandum.

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

Also, as in the previous cases, OIR also stated that the Office of the Executive Secretariat (ES) was contacted to determine if it would have any responsive documents. E-mail dated November 24, 2010, from Alexander C. Morris, FOIA Officer, OIR, to Janet Fishman, OHA. ES did not find any responsive documents. ES explained that the records located at the Washington National Records Center were included in this search. E-mail dated November 24, 2010, from Terry Fehner, ES, to Janet Fishman, OHA, referencing E-mail dated November 9, 2010, from Terry Fehner, ES, to Janet Fishman, OHA, filed in Case No. TFA-0432.

Based on the foregoing, we believe that the search was reasonably calculated to uncover responsive information. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive, Case No. TFA-0449, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 14, 2010

December 21, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ruth Gravitt

Date of Filing: November 30, 2010

Case Number: TFA-0451

On November 30, 2010, Ruth Gravitt filed an Appeal from a determination issued to her on October 22, 2010, by the Department of Energy's Oak Ridge Office (Oak Ridge). That determination was issued in response to a request for information that Ms. Gravitt submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Gravitt asks that Oak Ridge conduct an additional search for documents responsive to her request.

I. Background

Ms. Gravitt filed a request for information in which she sought the employment, medical, personnel security, and radiation exposure records pertaining to her father, William J. Gravitt. In her request, Ms. Gravitt indicated that her father worked, *inter alia*, at the Oak Ridge K-25 plant. Upon receiving Ms. Gravitt's request, Oak Ridge conducted a search of its legacy files and the K-25 record repositories. Oak Ridge stated that it located a work history record and employment data in its legacy files, but did not locate any responsive records at K-25. On November 30, 2010, Ms. Gravitt filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Gravitt challenges the adequacy of the search conducted by Oak Ridge. *See* Appeal Letter. She asserts that responsive documents may be found in other locations and asks OHA to direct Oak Ridge to conduct a new search for responsive documents.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Doris M. Harthun*, Case No. TFA-0015 (2003). [*] The FOIA, however, requires that a search be

[*] [illegible] 19, 1996, [illegible]

reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate.

In reviewing the present Appeal, we contacted FOIA officials in Oak Ridge to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Gravitt's request might reasonably be located. As stated above, upon receiving Ms. Gravitt's request for information, Oak Ridge conducted a search of its legacy files in its Records Holding Area. The Records Holding Area contains historical data on employees. Oak Ridge indicated that it also searched the K-25 record repositories. They conducted both manual and computer searches using several search aids including Ms. Gravitt's father's name, date of birth and social security number, and were unable to locate responsive material other than a work history record and employment data in its legacy files. The work history record indicated that Mr. Gravitt worked as an operator for the K-25 plant from 1944 through 1946. However, the K-25 record repositories only contain records dating back to the early 1950s. *See* Record of Telephone Conversation between Amy L. Rothrock, Oak Ridge, and Kimberly Jenkins-Chapman, OHA (December 21, 2010). Given the facts presented to us, we find that Oak Ridge conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Gravitt's request. Accordingly, Ms. Gravitt's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ruth Gravitt, OHA Case No. TFA-0451, on November 30, 2010, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 21, 2010

[illegible]

December 21, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Walter Tamosaitis
Date of Filing:	December 2, 2010
Case Number:	TFA-0452

On December 2, 2010, Dr. Walter Tamosaitis (Appellant) filed an Appeal from a determination issued to him on November 4, 2010, by the Richland Operations Office (Richland) of the Department of Energy (DOE). In that determination, Richland responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, Richland identified numerous documents responsive to the Appellant's request.[1/] This Appeal, if granted, would require Richland to conduct a further search for responsive information.

I. Background

On September 27, 2010, the Appellant requested "a copy of any and all records, electronic or otherwise, relating to, generated in connection with or pertaining to [the Appellant]." Request Letter dated September 27, 2010, from Appellant to Dorothy Riehle, FOIA Officer, Office of Communications, Richland. On November 4, 2010, Richland released three packets of documents to the Appellant. Determination Letter dated November 4, 2010, from Dorothy Riehle, FOIA Officer, Richland, to Appellant (Determination Letter).

On December 2, 2010, the Appellant appealed, challenging the adequacy and reasonableness of Richland's search. Appeal Letter received December 2, 2010, from Appellant to Director, Office of Hearings and Appeals (OHA). To support his claim that additional information should have been located, the Appellant states that he wrote a letter to the Defense Nuclear Facilities Safety Board (DNFSB) that resulted in an investigation and a visit to the Hanford Nuclear Site (Hanford) by the DOE Office of Health, Safety, and

[1/] Richland withheld from the Appellant's radiation exposure records the names, Social Security Numbers (SSN), and any other personal information of other individuals as non responsive to the request. The Appellant is not challenging those withholdings.

Security (HSS). *Id.* at 6. As a result of this letter, he also claims there was extensive media interest in his termination and the contents of his letter to the DNFSB. *Id.* at 4-6.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted Richland to determine what type of search was conducted. In response, Richland indicated that a computerized search was conducted using the Appellant's name, Social Security Number (SSN), and job title and area. E-mail dated December 6, 2010, from Dorothy Riehle, FOIA Officer, Richland, to Janet Fishman, OHA. Richland searched the files of the Office of River Protection (ORP); Bechtel National, Inc. (BNI); the Pacific Northwest National Laboratory; AdvanceMed Hanford, Inc.; DOE's Office of Security and Emergency Services; DOE's Office of Employee Concerns; and Hanford's archive databases. Determination Letter at 2. Within ORP, the public affairs, congressional, and DOE program offices were searched. December 6, 2010, E-mail.

In his Appeal, the Appellant states that HSS visited the Hanford site as a result of a letter he wrote to the DNSFB. He claims that in response to that visit, there should be some responsive information. In the Determination Letter, Richland noted that it forwarded the request to DOE Headquarters for a search of HSS and the Office of Environmental Management.[1/] It is possible that the responsive information the Appellant is seeking is located at DOE Headquarters and not at Richland; any such information would be outside the scope of the Determination Letter and this Appeal.

Further, the Appellant states that there was extensive media coverage of his termination and letter to DNSFB. He claims that the public relations and communications department at DOE keeps a careful record of any media story affecting operations at Hanford. Appeal Letter at 5. As indicated above, Richland stated that the search of ORP included the public

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

[3/]We have confirmed with DOE Headquarters that it is processing the request. E-mail dated December 20, 2010, from Alexander C. Morris, FOIA Officer, to Janet Fishman, OHA.

affairs, congressional, and DOE program offices, but found no responsive documents. December 6, 2010, E-mail.

Based on the foregoing, we believe that Richland's search was reasonably calculated to uncover responsive information. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Walter Tamosaitis, Case No. TFA-0452, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 21, 2010

March 3, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Scott A. Hodes, Esq.

Date of Filing: December 7, 2010

Case Number: TFA-0453

This Decision concerns an Appeal that was filed by Scott A. Hodes, Esq. in response to a determination that was issued to him by the Department of Energy's (DOE/HQ) Headquarters and Oak Ridge Operations Office (DOE/OR). In that determination, DOE/HQ replied to a request for documents that Mr. Hodes submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. DOE released certain documents to Mr. Hodes, some in their entirety and some with portions deleted. This Appeal, if granted, would require that DOE release the withheld information. [1]

I. Background

In an October 2009 letter to DOE/HQ and DOE/OR, Mr. Hodes requested copies of: (1) the complete agreement or agreements reached between DOE and the private firms for Oak Ridge to continue production of Cf-252 at Oak Ridge High Flux Isotope Reactor (HFIR)[2]; (2) all correspondence between DOE and the private firms concerning the agreement for DOE to continue production of Cf-252 at the HFIR; and (3) any other records concerning the agreement between DOE and the private firms about the agreement for DOE to continue the production of Cf-252 at the HFIR, including but not limited to the following matters: (a) Cf-252 costs and pricing to agreement customers and other users; (b) terms of agreement for selling Cf-252; (c) conditions of use; and (d) availability. *See* Letter from Scott Hodes to Director, OHA (December 7, 2010) (Appeal) at 1; Letter from DOE to Scott Hodes, November 19, 2010 (Determination) at 1.

[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] Californium-252 (Cf-252) is a radioactive neutron source with widespread industrial uses. It is produced in high-energy research reactors. Cf-252 has a short decay period, or "half-life," of 2.6 years, and supplies must be replenished regularly. Cf-252 has various commercial uses including oil well exploration, reactor startup and testing during nuclear fuel manufacture, cancer therapy, and thickness gauging. *See* Californum-252 Fact Sheet Nuclear Energy Institute (July 2009); http://qsa-global.com/sources/industrial-isotopes/californium-252.aspx. DOE sells the Cf-252 to members of a consortium (the "private firms" mentioned in the request), and the members of the consortium then sell the Cf-252 to their customers.

In its response dated October 29, 2009, DOE/HQ replied that DOE/HQ was closing its request because any responsive records would be under the jurisdiction of DOE/OR. See Appeal at 2. On December 1, 2009, DOE/OR stated that it found no responsive records and that any responsive records should be maintained by DOE/HQ. *Id.* In December 2009, DOE/HQ reopened the request and in August 2010, DOE/HQ released some responsive records to Mr. Hodes. DOE/HQ informed Mr. Hodes that other responsive documents had been sent to submitters for their approval and that additional release would occur after the submitter notice process was complete. *Id.*

On November 19, 2010, DOE/HQ made a final release of documents. Several documents were redacted under FOIA Exemption 4. According to DOE/HQ, the redacted material consisted of "contract cost agreements, dates of contract agreements and deliveries, amounts of products delivered or received, total costs of products, maintenance or production, and financial costs." *See* Appeal at 2; Determination at 2.

In this Appeal, Mr. Hodes contests the withholding of responsive material under Exemption 4. He argues that: (1) the withheld material is not trade secret information covered by Exemption 4; (2) the withheld material is not obtained from a person because much of the withheld information came from the government; (3) the withheld information is not privileged or confidential because the government's ability to obtain necessary information in the future would not be harmed by the release of the withheld information; and (4) release of the information would not harm the competitive position of any of the companies that are part of the consortium because the consortium members already know what the withheld information contains. *See* Appeal at 3.

II. Analysis

A. Exemption 4

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R.§ 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983).

If the material does not constitute a "trade secret," a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g.*, *Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999) (*Lepelletier*). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g.*, *Stone v. Export-Import Bank*, 552 F.2d 132, 137 (5th Cir. 1977); *Nadler v. FDIC*, 92 F.2d 93, 95

(2nd Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, 27 DOE ¶ 80,225 (August 31, 1999) (Case No. VFA-0517). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission,* 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Exemption 4 serves to protect submitters of commercial or financial information to the federal government from the adverse effects of unwarranted public disclosure of that information, and it correspondingly provides the federal government with an assurance that such information will be reliable. However, federal entities themselves are not "persons" for purposes of Exemption 4, and any commercial information of the federal government is not shielded from mandatory disclosure by this exemption. *See, e.g., Board of Trade v. Commodity Futures Trading Commission,* 627 F.2d 392, 404; *Nadler,* 92 F.2d at 95 (term "person" includes "an individual, partnership, corporation, association, or public or private organization *other than an agency*" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2000))) (italics added).

1. The withheld material is not trade secret information

Mr. Hodes argues that "despite the assertions of the DOE, the withheld material is not trade secret information covered by FOIA Exemption 4." Our review of the determination letter concludes that DOE has not asserted that the withheld material is trade secret information. In fact, the Determination Letter states that "[t]he exemption covers two broad categories of information in federal agency records: 1) trade secrets, *and* 2) information that is (a) commercial and financial, and (b) obtained from a person, and (c) privileged and confidential." Determination at 2 (emphasis added). Thus, DOE/HQ made no assertion that the withheld material is trade secret information.[3]

2. The withheld material is obtained from a person

Mr. Hodes further contends that much of the withheld information came from the government and was therefore not "obtained from a person" within the meaning of Exemption 4. *See* Appeal at 3.

The federal courts have held that the fact that particular information was the subject of negotiation with the federal government does not necessarily preclude a finding that it was "obtained from a person" within the meaning of Exemption 4. Rather, the courts have looked to

[3] The information sought is clearly "commercial" in nature because it relates to agreements between DOE and the consortium regarding costs and pricing.

the identity of the party from whom the information originated. *See, e.g., Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., William E. Logan, Jr. & Associates*, Case No. VFA-0484 (1999); *Research Focus, L.L.C.*, Case No. TFA-0247 (2008); *SACE*, Case No. TFA-0442 (2011).

In the present case, we have been informed that although the material in question was the subject of negotiations between the DOE and the members of the consortium, the consortium members were the source of the information that was withheld. *See* Memorandum of February 25, 2011, telephone conversation between Lauren Smith, Office of Science, and Valerie Vance Adeyeye, Staff Attorney, Office of Hearings and Appeals. Our review of the correspondence in the file confirms the key role of the consortium members in providing the source information that was withheld from disclosure. Based on this information, we conclude that the withheld material was obtained from a "person" within the meaning of Exemption 4.

3. The withheld information is privileged or confidential and its release would harm the competitive position of the private firms

Mr. Hodes also argues that the withheld information is not "privileged or confidential." We must therefore determine whether DOE/HQ properly concluded that the material withheld is "confidential." Because the consortium members were required to participate in the negotiations in order to purchase the Cf-252, the withheld information was submitted on an involuntary basis. Therefore, the information is "confidential" for Exemption 4 purposes if its release is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. We believe that the withheld information meets the second prong of the *National Parks* test.

Mr. Hodes argues that the members of the consortium do not face any competition from any entity outside of the consortium and therefore the release of the withheld information would not cause them any competitive harm. Thus, he contends that all prospective competitors already know the contents of the withheld information. He states that "any competitive harm has already occurred by the creation of the consortium itself." *See* Appeal at 3. DOE argues that the withheld information would reveal information to competitors about the isotope usage, distribution, and/or packaging methods of the consortium members. *See* Determination at 2. We conclude that release of the withheld information would likely result in substantial competitive harm to the members of the consortium. The redacted information contains costs of products, maintenance and production, dates of deliveries, and contract cost agreements. Release of cost information to competitors would provide them with an unfair advantage, and release of such information to

potential Cf-252 customers would provide leverage in future negotiations with the consortium members.

Although it is true that the consortium members know the contents of the withheld information, there is no evidence that the current members of the consortium are the only entities interested in purchasing Cf-252 from DOE. Thus, we cannot conclude that the members are themselves their only competition. Further, the private entities that are members of the consortium provide a wide range of other products and services and have competitors for those functions. Release of this proprietary data would give those competitors insight into an important part of the business strategy and financial structure of each consortium member. Finally, release of the terms agreed to by the consortium members could give other competitors insight into the terms that they might be willing to agree to in negotiations, thereby compromising the negotiation strategies of the members in the future. This disadvantage would not be shared by their competitors, and would therefore affect the members' ability to compete on an equal footing. Because release of the material in question would likely result in substantial competitive harm, we conclude that DOE/HQ properly applied Exemption 4. Mr. Hodes' Appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Scott Hodes on December 7, 2010 (Case No. TFA-0453) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 3, 2011

January 14, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	FOIA Group, Inc.
Date of Filing:	December 9, 2010
Case Number:	TFA-0454

On December 14, 2010, the FOIA Group, Inc. (Appellant) perfected an Appeal from a determination issued to it on December 7, 2010, by the Office of Procurement and Assistance Management (Procurement) of the Department of Energy (DOE). In that determination, Procurement responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, Procurement withheld the requested information. In its Appeal, the Appellant challenges Procurement's withholding. The Appeal, if granted, would require Procurement to release the requested information.

I. Background

On June 13, 2010, the Appellant requested "[a]ll Final Contractor Performance Rating Reports . . . for the most recently available 3 year period." Request E-mail dated June 13, 2010, from Appellant to DOE. On December 7, 2010, Procurement responded to this request, withholding all responsive information pursuant to Exemption 3 of the FOIA. Determination Letter dated December 7, 2010, from Patrick M. Ferraro, Acting Director, Procurement, DOE, to Appellant.

On December 14, 2010, the Appeal was finalized with our receipt of the Determination Letter. E-Mail from Alexander C. Morris, FOIA Officer, Office of Information Resources, DOE, to Janet Fishman, Office of Hearings and Appeals (OHA). In the Appeal, the Appellant claimed that first, Procurement erred by not segregating the specific rating scores. Appeal E-Mail dated December 9, 2010, from Appellant to (OHA). Second, the Appellant claimed that President Obama's new FOIA doctrine requires a presumption of openness when administering the FOIA. *Id.* at 2.

II. Analysis

Exemption 3 of the FOIA allows agencies to withhold information if specifically authorized by another federal statute. However, the authorizing statute must satisfy one of two criteria. It must either (i) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establish particular criteria for withholding or refer to particular types of information to be withheld. 5 U.S.C. § 552(b)(3). The Supreme Court has established a two-prong standard of review for Exemption 3 cases. *See CIA v. Sims*, 471 U.S. 159, 167 (1985). First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. *Id.* at 167. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute. *Id.*

We have previously found that the Procurement Integrity Act (PIA), 41 U.S.C. § 423, is a statute of exemption as contemplated by Exemption 3. *See U.S. Ecology, Inc.*, 25 DOE ¶ 80,153 at 80,632 (1995); *Energy Research Corp.*, 21 DOE ¶ 80, 130 at 80,600 (1991). The PIA is a federal statute that contains language specifically prohibiting the authorizing official from releasing protected information. In the PIA, Congress referred to the type of information that must be withheld as "source selection information." 41 U.S.C. § 423(a)(1). However, Congress carefully identified documents that make up source selection information. 41 U.S.C. § 423 (f)(2)(A)-(J).

Our next question is whether the information requested in this case falls under the definition of the PIA of "source selection information." In pertinent part, the Act states

> The term "source selection information" means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly.

41 U.S.C. § 423(f)(2). According to Procurement, the information requested is completed *during* the performance of a contract, *not* for the purpose of evaluating a bid or proposal to *enter into* a contract with the DOE. E-Mail dated January 12, 2011, from Edward Marceau to Janet Fishman, OHA, DOE. Therefore, we do not believe that this requested information falls under the definition of "source selection information," as defined in the PIA.

We note that Procurement also cites a provision in the Federal Acquisition Regulations (FAR) to withhold the requested information under Exemption 3. The FAR is not a statute and we cannot find any judicial support that it can be used under Exemption 3 to withhold information. Therefore, we will remand the matter to Procurement for a new determination either releasing the requested information or issuing a new justification that cites a statutory basis for withholding the information.

III. Conclusion

For the reasons stated above, we will grant the Appeal and remand the matter to Procurement for a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by FOIA Group, Inc., Case No. TFA-0454, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Procurement and Assistance Management of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 14, 2011

January 21, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Terry Martin Apodaca
Date of Filing:	December 13, 2010
Case Number:	TFA-0455

On December 13, 2010, Terry Martin Apodaca filed an appeal from a determination issued to her by the National Nuclear Security Administration Service Center (NNSA) of the Department of Energy (DOE). In that determination, NNSA withheld some information responsive to a request for information that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to Ms. Apodaca's request for information, NNSA provided her with a single document it created which contained some of the information she requested. This Appeal, if granted, would require that NNSA release to Ms. Apodaca the information it did not provide in its response to her request.

I. Background

In her July 1, 2010, request to NNSA, Ms. Apodaca sought the following information regarding employees of NNSA's Office of Public Affairs for the years 2007 through 2010: their names, positions, performance award amounts, and yearly salary amounts. Attached to its December 7, 2010, determination letter in response to that request, NNSA provided a document that listed, by year, the name and position of each employee in its Office of Public Affairs. It did not provide the amount of each employee's performance award amount, but rather invoked Exemption 6 of the FOIA to withhold that information. Nor did it print out each employee's annual salary; instead, it provided a link to a website, http://php.app.com/fed_employees/search.php, on which the requester could obtain that information. In her Appeal, Ms. Apodaca challenges NNSA's application of Exemption 6 to withhold performance award amounts. She also challenges NNSA's determination to the extent that it referred her to a public website to obtain annual salary amounts, which she found to be inaccurate with regard to herself and another employee.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of*

Scientology of California v. Department of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

1. Performance Awards

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of person privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Thus, the purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the informant would further the public interest, by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 86 n.5, 87 (2d Cir. 1991). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Ripskis*, 746 F.2d at 3.

In its December 7, 2010, determination, NNSA withheld the amounts of performance awards granted to each employee of the Office of Public Affairs during the years 2007 through 2010, claiming that the "NNSA performance-based pay plan [implemented on March 16, 2008] ties the amount of the awards directly to performance appraisals." It thus contended that "release of the award amounts would be tantamount to releasing the performance ratings" for those employees. Finally, it determined that an employee's personal privacy interest in his or her performance rating outweighed any public interest in that information, and concluded that disclosure of that information would therefore "constitute a clearly unwarranted invasion of personal privacy."

A federal regulation requires that certain federal employee information be made available to the public. 5 C.F.R. § 293.311(a). That information includes "present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)." 5 C.F.R. § 293.311(a)(4). The regulation provides an exception, however, where disclosure of the enumerated information (i) would reveal other information that would constitute a clearly unwarranted invasion of personal privacy or (ii) is otherwise protected from disclosure under a FOIA exemption. 5 C.F.R. § 293.311(b). Under a general application of that regulation, NNSA would be required to disclose the performance award information that Ms. Apodaca has requested. However, NNSA contends that it may not disclose that information because the first clause of the regulation's exception provision applies: disclosing an employee's performance award amount would reveal the employee's performance rating, which would constitute a clearly unwarranted invasion of the employee's personal privacy.

As an initial step in our analysis, we find that disclosure of an employee's performance rating would constitute a clearly unwarranted invasion of personal privacy. First, an employee has a legitimate expectation of privacy in his or her performance rating. *See, e.g., Terry M. Apodaca,* Case No. TFA-0204 (July 25, 2007).* In addition, as NNSA stated in its determination letter, disclosure of favorable ratings may lead to jealousy or harassment just as disclosure of poor ratings may cause embarrassment. In either situation, the employee has a strong privacy interest in his or her rating. Finally, while disclosure of personnel ratings may shed some minimal light on the government's operations, this public interest is clearly outweighed by "the deleterious effects that disclosure could have on employee morale and workplace efficiency." *See Tomscha v. General Svcs. Admin.,* 2005 WL 3406575 (2d Cir. 2005) (release of justification for performance-based award constitutes more than *de minimis* invasion of privacy, which outweighs public interest in disclosure, particularly in the absence of evidence of improper award).

In this case, NNSA has convinced us that there is in fact a mathematical linkage between the performance award amounts and the performance ratings, such that a person armed with the former data could reasonably calculate the latter. An employee whose performance award amount falls between 4 and 7 percent of his or her salary must have, under the current NNSA pay plan, received a rating of Significantly Exceeds Expectations, while one who was granted an award in the amount of 3 percent or less must have received Fully Meets Expectations as his or her rating. Therefore, the performance rating of those employees who received performance awards can be mathematically derived from the amount they received. As for those who received no performance award, they may have received any of three ratings: Fully Meets Expectations, Needs Improvement, or Fails to Meet Expectations. Their failure to receive a performance award reveals that they did not receive a rating of Significantly Exceeds Expectations. Although a specific rating cannot be derived mathematically from the failure to receive a performance award, there is a strong privacy interest in what can be derived: that those employees performed at a merely acceptable or less successful level. Consequently, an employee's performance award amount, or failure to receive a performance award, reveals information about his or her performance rating. Because we have determined that disclosure of performance ratings would constitute a clearly unwarranted invasion of personal privacy, we conclude that disclosure of the performance award amounts generated under the NNSA pay plan that applied to the years 2007 through 2010 likewise constitute a clearly unwarranted invasion of personal privacy, and were properly withheld from disclosure under Exemption 6.

As stated above, the DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 6, however, we do not make the subsequent inquiry into the public interest as required by 10 C.F.R. § 1004.1, because consideration of the public interest is intertwined in the balancing-test portion of the analysis.

2. Annual Salaries

In response to Ms. Apodaca's July 2010 request for annual salaries of all Office of Public Affairs employees "for 2007 to present," NNSA stated in its determination that the information "for the years 2007-2009 is in the public domain and may be viewed at" the website listed above, which

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

belongs to the Asbury Park (N.J.) Press. Ms. Apodaca objects to NNSA's response, because she asserts that the salaries listed at that website are inaccurate.

When responding to a request for information, an agency is generally required under the FOIA to release responsive documents in its possession. If the agency has already placed the responsive information in the public domain, however, it need not produce that information in response to a FOIA request. *Crews v. IRS*, No. 99-8388, 2000 WL 900800 at *6 (C.D. Cal. April 26, 2000). In this case, NNSA has not placed the requested annual salary information in the public domain. The website indicates that the source of the annual salary data was the U.S. Office of Personnel Management (OPM). We asked NNSA for clarification on this matter. We have been informed that the DOE updates salary information continually and sends current salary information to OPM for each pay period. In light of that information, the information on the public website, obtained from OPM, reflects NNSA's records only until any salary information is updated in NNSA's records. Absent a showing that OPM provides biweekly updates to the public website, I cannot conclude that the salary information on the website mirrors the salary information in NNSA's records, which is the subject of Ms. Apodaca's request. Consequently, we will remand this aspect of the request to NNSA to demonstrate why OPM's release of its data regarding federal employees' salaries constitutes a release of NNSA information into the public domain. In the event that NNSA cannot so demonstrate, it should identify documents responsive to this portion of the request and release those documents. *See Terry Martin Apodaca*, Case No. TFA-0380 (June 28, 2010).

Moreover, NNSA has failed in one respect to respond to Ms. Apodaca's request. In the document it provided to Ms. Apodaca with its determination letter, it provided the link to the Asbury Park Press website in lieu of providing actual figures for the 2010 salaries for the listed employees. Although that website contains OPM salary information for the years 2007, 2008, and 2009, it does not provide similar information for 2010. Consequently, NNSA has not responded to that portion of Ms. Apodaca's request. We will remand this aspect of the request for a response.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry Martin Apodaca, Case Number TFA-0455, under the Freedom of Information Act, is hereby granted as set forth in Paragraph 2 below and denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center (NNSA), which shall issue a new determination in accordance with the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 21, 2011

February 8, 2011

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Reed M. Benet

Date of Filing: January 12, 2011

Case Number: TFA-0456

This Decision concerns an Appeal that Reed M. Benet filed from a determination issued to him by the Department of Energy's (DOE) Office of Science, Chicago Office (hereinafter referred to as (SC-CH)). In that determination, SC-CH responded to Mr. Benet's requests for documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. SC-CH determined that the information requested by Mr. Benet was not in the possession of the DOE and was the property of a DOE contractor, UChicago Argonne, LLC (UCA), and, therefore, not agency records subject to disclosure under the FOIA. This appeal, if granted, would require SC-CH to direct UCA to release the responsive information.

I. Background

UCA is the contractor that operates the DOE's Argonne National Laboratory (ANL). On November 22, 2010, Mr. Benet submitted a FOIA request to the SC-CH seeking information relating to 14,000 registered users of the GREET system[1] maintained by Dr. Michael Wang at ANL. Specifically, Mr. Benet requested a list of these registered users and all associated information available on them from the GREET system registration process. *See* E-mail from Mr. Benet to Miriam R. Legan, FOIA Officer, SC-CH.

[1] GREET system is an abbreviation for "The Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model" system. It is a multidimensional spreadsheet model in Microsoft Excel that allows researchers and analysts to fully evaluate energy and emission impacts of advanced vehicle technologies and new transportation fuels on a full fuel-cycle/vehicle-cycle basis. It was developed by ANL under the sponsorship of the DOE's Office of Energy Efficiency and Renewable Energy (EERE). It is a public domain model and is available free of charge for anyone to use. *See* http://greet.es.anl.gov.

In response to Mr. Benet's request, SC-CH issued a determination letter stating that it conducted a search of its office and the Argonne Site Office and located no responsive records. SC-CH stated that it also requested that UCA conduct a search for responsive records. UCA responded stating that pursuant to Clause 1.98(b)(5) of its prime contract with DOE, DE-AC02-06CH11357, records related to the technology transfer clause, including executed license agreements, are contractor-owned, not agency-owned records. SC-CH stated that it agreed with UCA's assertion that the responsive records are electronic license agreement records, and therefore, are contractor-owned records not subject to the FOIA. Accordingly, SC-CH stated that the DOE had no records responsive to Mr. Benet's request. *See* December 6, 2010, SC-CH Response to Mr. Benet.

On January 12, 2011, Mr. Benet submitted the present Appeal in which he contends that the records that SC-CH withheld are subject to disclosure under the FOIA. Mr. Benet's principal arguments are that:

> (1) Dr. Wang's statements on the ANL website that GREET was funded by the DOE EERE, and his statement in a November 21, 2010 e-mail to Mr. Benet that GREET development has been supported by DOE since 1995 are sufficient to indicate that the GREET system may be "work for hire" that should be found to be the property of the DOE.
>
> (2) The contract Clause I.98(b)(5)(i) cited by UCA is overbroad and detrimental to the prime purposes of the FOIA, which is to allow public oversight of the DOE's oversight of UCA's operation of ANL.[2]
>
> (3) The license agreement that registered users of the GREET system must agree to accept is not a true license agreement but merely a registration process. This is because there is no consideration given by registered users of the GREET system. There is no valid contract and therefore no license.
>
> (4) UCA's use of terms, titles, language, capitalization, and structure in its copyright statement, provisions related to an Open Source Software License, and its Privacy Notice are extremely haphazard and flawed, and do not properly invoke Clause I.98(b)(5)(i) of UCA's contract with the DOE.
>
> (5) DOE and UCA are estopped from claiming that information supplied by registered users of the GREET system cannot be disclosed under the FOIA because the GREET system contains a Privacy Notice indicating that personal information supplied by registrants will not be shared with anyone "except when required by law enforcement investigation." A "law enforcement investigation" includes a FOIA request for information.

[2] Mr. Benet refers to ANL rather than UCA in his appeal filing. Because the SC-CH finds that the GREET system is owned by UCA, ANL's operating contractor, we will refer to UCA rather than ANL in summarizing and discussing Mr. Benet's contentions.

(6) In a December 10, 2010, telephone conversation, Ms. Legan allegedly told Mr. Benet that the provisions of the Privacy Act applied to the information that he was requesting from the GREET system, and was a basis for SC-CH's denial of his request. Mr. Benet asserts that the application of the Privacy Act to the requested information contradicts the SC-CH's position that the requested information is not an agency record, and both rationales should therefore be rejected.

(7) Even if the OHA Director finds that the GREET system is the property of UCA, he should use his discretion to order UCA to release the information because such release would serve the public interest and would advance the mission of ANL.

Appeal at 2-12.

II. Analysis

A. Whether the Documents at Issue are Agency Records Subject to the FOIA

Our threshold inquiry in this case is whether the documents in question are agency records and thus subject to the FOIA under the criteria set out by the federal courts. The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents are "agency records" subject to the FOIA. That analysis involves a determination: (1) whether the organization is an "agency" for purposes of the FOIA and, if not, (2) whether the requested material is nonetheless an "agency record." *See, e.g., Faye Vlieger*, Case No. TFA-0250 (2008); *Eugenie Reich*, Case No. TFA-0213 (2007).[3]

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f). In *United States v. Orleans*, 425 U.S. 807 (1976) (Orleans), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which an entity must be considered a federal agency as follows: "[t]he question here is not whether the [entity] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Orleans*, 425 U.S. at 815. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provided the appropriate basis for ascertaining whether an organization is

[3] OHA FOIA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia/foia11.asp.

an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980).

We have routinely applied this analysis in our prior cases addressing whether an entity is an "agency" for purposes of the FOIA. *See, e.g., Vlieger*. In addition, we have previously found that a contractor responsible for the management and operation of a DOE-owned laboratory "is clearly not an 'agency' as that term is defined in the FOIA." *Moore Brower Hennessy & Freeman, P.C.*, Case No. VFA-0393 (1998) (*citing William Kuntz III*, Case No. VFA-0105, 25 DOE ¶ 80,157 (1995)). In his Appeal, Mr. Benet provided us no basis for departing from our established precedent in these cases. Applying the above standard, and consistent with our prior cases, we find that, although ANL is owned by the government, it is operated by UCA, a private contractor, and its day-to-day operations are not supervised by the DOE. Therefore, neither ANL nor UCA is an "agency" for purposes of the FOIA.

Although ANL is not an agency for the purposes of the FOIA, the requested information could nonetheless be considered an "agency record" if it (1) was created or obtained by an agency, and (2) is under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). UCA, not DOE, created the GREET system and its user registration software, and, as discussed below, the information that UCA has collected from registered users has not been obtained by the DOE. With respect to agency control of requested records, courts have identified four relevant factors for an agency to consider when determining whether the agency has control over a document: (1) the intent of the record's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the extent to which the record is integrated into the agency's recordkeeping system or files. *Consumer Federation of America v. USDA*, 455 F.3d 283, 288 n.7 (D.C. Cir. 2006). We contacted SC-CH for further information regarding its determination. SC-CH confirmed that during its search for responsive records, UCA stated that it had no intention to relinquish its ownership and ongoing control of the GREET system registered user information. The SC-CH further stated that the DOE does not have the ability to use and dispose of the registered user information, because the DOE's access to the GREET system is the same as other registered users, and does not include access to this information. SC-CH also stated that it conducted a diligent inquiry, and could find no instance where DOE personnel read or relied upon the GREET system registered user information, and the information has not been integrated into the DOE's recordkeeping system or files in either hard copy or electronic format. Memorandum of February 4, 2011 telephone conversation between Ms. Legan and Kent S. Woods, Attorney-Examiner, OHA. We therefore find that the requested information contained in the GREET system is not an agency record subject to the FOIA.

B. Whether the GREET System Information at Issue is Subject to Release Under the DOE FOIA Regulations

A finding that certain information is not an "agency record" does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

10 C.F.R. § 1004.3(e). Clause 1.98(b)(5) of the contract between DOE and UCA identifies as property of UCA certain records pertaining to the technology transfer provisions of the contract, including

> executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

See Clause 1.98(b)(5) in DOE's Prime Contract with UCA, http://www-db.library.anl.gov/db1/prime/download/DDD/prime_009_098_000_000_000.pdf

Applying the provisions of the contract between the DOE and UCA to the case at hand, it is clear that the information on registered users of the GREET system requested by Mr. Benet is the property of UCA, not the DOE. The information on registered users is electronic license agreement information. As such, it is not subject to release under the DOE FOIA regulations.

With respect to Mr. Benet's contentions in his Appeal, we reject his assertion that Dr. Wang's statements concerning DOE funding and support for UCA's development of the GREET system require that the GREET system be treated as the property of the DOE under the FOIA. As discussed above, the DOE/UCA contract permits UCA to assert ownership and control of certain technology which it develops and maintains to support its functions as a DOE contractor. License agreements such as those executed by the registered users of UCA's GREET system are specifically identified as UCA property in the DOE/UCA contract. The courts have recognized such contract provisions in determining what constitutes an agency record under the FOIA. *See Tax Analysts v. Dep't of Justice*, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), *aff'd*, 107 F.3^{d} 923 (D.C. Cir. 1997) (unpublished table decision).

Nor do we find any merit in Mr. Benet's assertion that Clause 1.98(b)(5) of the DOE/UCA contract is overbroad and detrimental to the FOIA's interest in public oversight of the operation of ANL. The GREET system was developed and copyrighted by UCA, and it is appropriate for license agreements involving UCA's copyrighted software to be the property of UCA. We also reject Mr. Benet's unsupported assertion that because UCA does not charge fees to users of the GREET system, those users are not licensees of the GREET system. The GREET system license agreement places specific restrictions on the use of the GREET system software that the licensed users of the GREET system agree to follow. We also find that the record in this matter clearly indicates that SC-CH invoked UCA's ownership and control of the information requested by Mr. Benet as the sole basis for denying his request. In any event, if Ms. Legan at any time

asserted that the Privacy Act was applicable to the information requested by Mr. Benet, it would not prevent the DOE from making a finding that the requested information was not an agency record.

We also reject Mr. Benet's assertion that UCA's use of "terms, titles, language, capitalization, and structure" in its online Software License and its Privacy Notice are extremely haphazard and flawed, and do not properly invoke Clause I.98(b)(5)(i) of UCA's contract with the DOE. We have reviewed the Software License, and find that its language is unambiguous, and that it properly acknowledges the DOE's sponsorship and license rights as required by Clause 1.112(e)(3)(v) of the DOE/UCA contract. The meaning of the Privacy Notice also is clear. Although it states that personal information supplied by registrants will not be shared with anyone "except when required by law enforcement investigation", we find no basis for Mr. Benet's assertion that this exception should be interpreted to make personal information supplied by GREET system registrants subject to release under the FOIA.

In sum, for the reasons set forth above, we find that the requested information on registered users of the GREET system is neither an agency record subject to the FOIA, nor is it subject to mandated or discretionary release under the DOE FOIA regulations. Therefore, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on January 12, 2011, by Reed M. Benet, OHA Case No. TFA-0456, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 8, 2011

May 20, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mathieu Brener
Date of Filing:	February 7, 2011
Case Number:	TFA-0459

On February 7, 2011, Mathieu Brener (Appellant) filed an Appeal from a determination issued to him on January 6, 2011, by the National Nuclear Security Administration Service Center (NNSA) of the Department of Energy (DOE). In that determination, NNSA responded to a remand from this Office. Underlying the remand was the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, NNSA released one document in electronic format that had previously been released in paper form and withheld the electronic format of the other eight documents that had previously been released to him in paper form. NNSA again withheld 27 computer files. The Appellant challenges NNSA's withholding of 27 computer files and NNSA's failure to release the electronic version of the eight documents previously released in paper form. This Appeal, if granted, would require NNSA to release the withheld files to the Appellant.

I. Background

On June 25, 2009, the Appellant requested "all documents, files and notebooks, including digital and paper, that were in the Los Alamos National Laboratory office of Mathieu Brener, . . . at 5 p.m. on January 14, 2008. This includes files on the computer in the office, the documents that were in the white binders, and the lab notebook." E-Mail Request dated June 25, 2009, from Appellant to FOIA Services. On April 10, 2010, NNSA sent a partial response to the Appellant. E-Mail dated September 21, 2010, from Karen Laney, NNSA, to Janet Fishman, Office of Hearings and Appeals (OHA). An April 20, 2010, submission narrowed the scope of the original request. *Id.* On August 10, 2010, NNSA issued its final determination to the Appellant, releasing nine documents in their entirety. Determination Letter dated August 10, 2010, from Carolyn Becknell, FOIA Officer, NNSA, to Appellant (Determination Letter). On September 10, 2010, the Appellant appealed,

contending that the 27 withheld computer files were not withholdable under Exemption 2. Appeal Letter dated September 10, 2010, from Appellant to Director, OHA. In response to that Appeal, OHA remanded the matter to NNSA. The remand decision stated that, given NNSA's concern that it did not know what was contained in the 27 computer files, NNSA could not determine whether the files were agency records or not. *Mathieu Brener*, Case No. TFA-0418 (2010).[1/] OHA reasoned that once NNSA determined whether the computer files were agency records, it could then either release the files or apply an exemption to justify their withholding. *Id.* OHA also found that, in the absence of special circumstances, the documents released in paper form must also be released to the Appellant in the format that he was requesting, *i.e.*, electronic format. *Id.*

On January 6, 2011, NNSA issued a new determination to the Appellant. Determination Letter dated January 6, 2011, from Carolyn Becknell, FOIA Officer, and Tracy Loughead, Manager, Office of Public Affairs, to Appellant. In that determination, NNSA stated that of the nine documents released to the Appellant in paper form, NNSA was able to release one document to the Appellant in electronic form. *Id.* Next, NNSA determined that two of the remaining 27 documents were not agency records. *Id.* Finally, NNSA withheld the remaining 25 documents under Exemption 2. *Id.*

On February 7, 2011, the Appellant filed this Appeal. The Appellant argues that NNSA did not explain why it found two documents not to be agency records. Appeal Letter received February 7, 2011, from Appellant, to Director, OHA, at 2 . Next, in regard to the documents released in paper form only, the Appellant argues that "since most of these files are meant to be run on a computer, providing them only in hard format does diminish their value." *Id. at 3.* Finally, the Appellant argues that Exemption 2 does not apply to the withheld documents because they are neither "related solely to the internal personnel rules and practices of an agency" nor "predominantly internal." *Id.* at 1.[2/]

II. Analysis

A. Agency Records

The Appellant's first argument is that NNSA did not explain its determination that two documents were not agency records. In his Appeal, he maintains that the files were work-related. We agree that NNSA must provide an explanation of why it is claiming the documents are not agency records. As we stated in our previous decision, an "agency

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

[2/] There are also a number of extraneous arguments in the Appeal that we need not address.

record" is a record that is either created or obtained by an agency, and under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). NNSA must explain on remand whether these documents reside in an agency computer or a contractor computer. If they reside in a contractor computer, NNSA must determine whether the files are contractor, agency, or personal records. If they are in an agency computer, then they are either agency records or personal records. An analysis under the *Kissinger* standard would be appropriate to make that determination. *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980). We will remand the matter to NNSA to address the Appellant's arguments that the documents were work-related.

B. Electronic Format Documents

Next, the Appellant objects to NNSA's failure to release the electronic version of eight documents released in paper form. Since the implementation of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, agencies have been required to provide the record to a requester in "any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Therefore, on remand, NNSA should release the computer files in electronic form, unless there is uncertainty regarding their content. If NNSA believes that release of the files in electronic form would allow the Appellant to access exempt information, NNSA must properly justify the withholding of the electronic format documents, as it would justify the withholding of any document.

C. Exemption 2

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). In this regard, it is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 2 is at issue in this case.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). Over the years, the courts interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). *See also Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*). NNSA asserted that the information at issue in the present case falls within the second category, "high two" information. The information NNSA withheld included 25 computer files consisting of manuals, data files, and measurements. NNSA argued that release of these files could allow terrorists or other malefactors to identify possible program impacts and vulnerabilities and allow them the opportunity to target facilities involved in the nuclear nonproliferation program. Determination Letter at 2.

On March 7, 2011, the Supreme Court held that agencies can no longer rely on Exemption 2 to withhold information under the "high two" category. *Milner v. Dep't of the Navy*, 562 U.S. ___ (2011), slip op. at 6-10. The Court reasoned that the plain meaning of Exemption 2 limits its application to "personnel" matters.[3/] *Milner*, slip op. at 6. Therefore, NNSA can no longer rely on "high two" to withhold the requested information. Accordingly, we will remand the matter to NNSA for a new determination.

III. Conclusion

NNSA must support its claim that two of the documents are not agency records. Second, NNSA must justify withholding the electronic format of the eight documents that it released only in paper format. Finally, NNSA can no longer rely on "high 2" to withhold the requested information. Therefore, we will grant the Appeal in part and remand the matter to NNSA for a new determination as outlined in the Decision above.

It Is Therefore Ordered That:

(1) The Appeal filed by Mathieu Brener, Case No. TFA-0459, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

[3/] The Court also noted that "the Government has other tools at hand to shield national security information and other sensitive materials." *Milner*, slip. op. at 18.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 20, 2011

March 15, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Margaret A. Christopherson

Date of Filing: February 23, 2011

Case Number: TFA-0462

On February 23, 2011, Margaret A. Christopherson filed an appeal from a determination issued to her on January 13, 2011, by the Department of Energy's (DOE) Richland Operations Office (RO), in Richland, Washington, in response to a request for documents that Ms. Christopherson filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. RO identified several documents responsive to Ms. Christopherson's request and released those documents to her with some information withheld pursuant to Exemption 6 of the FOIA. In her appeal, Ms. Christopherson challenges the adequacy of RO's search. This appeal, if granted, would require RO to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In November 2010, Ms. Christopherson filed a FOIA request with RO for records pertaining to her late father. Letter from Dorothy Riehle, RO, to Margaret A. Christopherson, January 13, 2011 (Determination Letter) at 1. In its January 2011 response, RO informed Ms. Christopherson that its search for documents yielded several documents. *Id.* RO released to Ms. Christopherson copies of her late father's employment, radiation exposure, and medical records. *Id.* Ms. Christopherson filed the instant appeal challenging the adequacy of RO's search for documents.[1] *See* Letter from Margaret A. Christopherson to OHA, dated February 15, 2011 (Appeal) at 1. In her Appeal, Ms. Christopherson contends that RO should have located more extensive medical records pertaining to her late father. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we

[1] RO withheld under Exemption 6 certain portions of Ms. Christopherson's late father's radiation exposure record that identified other individuals. Ms. Christopherson did not challenge RO's withholding of information under Exemption 6. Therefore, the Exemption 6 withholdings are not relevant to the instant proceeding.

apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).[2]

In reviewing this appeal, we contacted RO to ascertain the scope of its search for responsive documents. RO informed us that the search for responsive records "was conducted by those within the agency who are most familiar with the subject matter of [the] request, in locations where documents would most likely be found." Email from Dorothy Riehle, RO, to William Schwartz, OHA (February 25, 2011). Specifically, RO conducted "a manual and electronic search (using name and [social security number]) of the files and databases for the Hanford Site archive, Pacific Northwest National Laboratory, and AdvanceMed Hanford." *Id*. RO did not locate any records pertaining to Ms. Christopherson's late father other than those it has already released to her and knows of "no other locations to search." *Id*. Based on this information, we find that RO performed an extensive search reasonably calculated to reveal records responsive to Ms. Christopherson's FOIA request, despite the fact that the search did not yield the records that she seeks. Therefore, the search was adequate. Accordingly, the instant Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on February 23, 2011, by Margaret A. Christopherson, OHA Case No. TFA-0462, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 15, 2011

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

May 25, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: Tri-Valley CAREs

Filing Date: February 25, 2011

Case Number: TFA-0463

This Decision concerns the Appeal that Tri-Valley CAREs filed from a determination that the National Nuclear Security Administration (NNSA) issued to it on January 14, 2011. In that determination, the NNSA responded to Tri-Valley CAREs' request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The NNSA withheld information under FOIA Exemptions 1, 2, and 6. Tri-Valley CAREs challenges the withholdings under Exemptions 1 and 2. In this Decision, we address the withholding under Exemption 2.

I. Background

In May 2008, Tri-Valley CAREs submitted a revised FOIA request with the Lawrence Livermore National Laboratory (LLNL) for a document titled "B368 Select Agent Risk and Threat Assessment," dated July 14, 2005. Determination Letter, Jan. 14, 2011. A search was conducted by the Livermore Site Office (which oversees the LLNL), and the document was found. It was disclosed to Tri-Valley CAREs after information was redacted under Exemptions 1, 2, and 6. *Id*. Tri-Valley CAREs does not appeal the withholding under Exemption 6. It appeals the withholding under Exemption 1, but we address that issue in case TFC-0008. (OHA addresses that issue separately because Exemption 1 concerns classified information, which requires consultation with the DOE's Office of Classification.) Tri-Valley CAREs also appeals the withholding under Exemption 2, which we address here.

The NNSA withheld information under the "High 2" category of Exemption 2. *Id*. (It did not withhold information under the "Low 2" category.) The disclosed document details the security plan – and its weaknesses – of a sensitive building. The NNSA explained that it withheld the information because releasing it "could assist potential adversaries in targeting and gaining unauthorized access to select agents or toxins. . . ." *Id*. at 2.

II. Analysis

A. The FOIA Exemptions

The FOIA requires federal agencies to disclose information upon request unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

1. Exemption 2

Under Exemption 2, an agency may withhold information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). In 1981, the D.C. Circuit found that Exemption 2 covers not only information related to "personnel rules and practices," such as pay and duty hours (Low 2), but information of "predominant internality," where "disclosure significantly risks circumvention of agency regulations or statutes" (High 2). *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981).

On March 7, 2011, the Supreme Court held that agencies can no longer rely on Exemption 2 to withhold information under the "high 2" category. *Milner v. Dep't of the Navy*, 562 U.S. ___ (2011), slip op. at 6-10. The Court reasoned that the plain meaning of Exemption 2 limits its application to "personnel" matters. *Milner*, slip op. at 6.[1] Therefore, NNSA can no longer rely on "high 2" to withhold the requested information.

Here, the NNSA followed the long-standing *Crooker* decision to withhold security-related information about a sensitive site by invoking High 2. Then *Milner* was decided, which rejected the reasoning of *Crooker* and made clear that the agencies may no longer withhold this information by invoking High 2; indeed, High 2 no longer exists. Therefore, we will remand this matter to the NNSA. It must issue a new determination in which it either releases the requested information or justifies its withholding on a basis other than High 2.

It Is Therefore Ordered That:

[1] The Court also noted that "the Government has other tools at hand to shield national security information and other sensitive materials." *Milner*, slip. op. at 18.

(1) The Appeal that Tri-Valley CAREs filed on February 25, 2011, OHA Case Number TFA-0463, is hereby granted as specified in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall issue a new determination according to the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 25, 2011

March 18, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Petitioner: Bryan Cave LLP

Date of Filing: February 25, 2011

Case Number: TFA-0464

This Decision concerns an Appeal that was filed by Bryan Cave LLP (Cave) in response to a determination that was issued to it by the Department of Energy's (DOE) National Energy Technology Laboratory (NETL). In that determination, the NETL replied to a request for documents that Cave submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The NETL released certain documents to Cave with portions of those documents withheld. This Appeal, if granted, would require that the NETL release the withheld information. In the alternative, Cave requests that this matter be remanded to NETL for the issuance of a new determination letter with a more detailed explanation for the withholdings. [*]

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); *see also* 10 C.F.R. § 1004.10(b)(1)-(9).

I. BACKGROUND

In its FOIA request, Cave sought access to documents not covered by an earlier request pertaining to "the award to Remy International, Inc. in response to the Funding Opportunity Notice: Electric Drive Vehicle Battery and Component Manufacturing Initiative." February 4, 2011, FOIA Request at 1. In its response, the NETL identified several documents as being responsive to this request, including the award document and several progress reports. NETL provided these documents to

[*] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Cave with portions withheld pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552 (b)(4). In its Appeal, Cave challenges the adequacy of the NETL's determination. Specifically, Cave argues that the NETL has failed to provide its justifications for withholding material in sufficient detail to allow for a meaningful appeal.

II. Analysis

An agency has an obligation to ensure that its determination letters (i) adequately describe the results of searches, (ii) clearly indicate which information was withheld, and (iii) specify the exemption or exemptions under which the information was withheld. *Environmental Defense Institute*, Case No. TFA-0289 (2009); *see also F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services*, Case No. VFA-0235 (1996). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, a requester may not be able to formulate a meaningful appeal. *Id.*

In this case, the NETL justified its application of Exemption 4 to the withheld material by stating that "certain information has been . . . withheld from release pursuant to [the Exemption], which protects 'trade secrets and commercial or financial information obtained from a person and privileged or confidential,' the disclosure of which would be likely to cause substantial competitive harm to the company involved. A discretionary release of this type of information cannot be made by the Agency. Specifically, the redacted information in the application pertains to the company's technical approach to the project described in the progress reports." We find this justification to be deficient in several respects.

First, the NETL did not specify whether it found the withheld material to consist of "trade secrets" or "commercial or financial information." If an agency determines that the material consists of "trade secrets" for purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If, however, the withheld information is not a "trade secret," a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999) (*Lepelletier*). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g., Stone v. Export-Import Bank,* 552 F.2d 132, 137 (5th Cir. 1977); *Nadler v. FDIC,* 92 F.2d 93, 95 (2nd Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, Case No. VFA-0517 (1999). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was

voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission,* 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. Information submitted during the process of competing for government grants is considered to have been involuntarily submitted, since the grants generally would not be awarded in the absence of that information.

Second, NETL's determination is conclusory in that it did not describe the competitive harm that would result from release of the information, or how that harm would come about. If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing that such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No, VFA-0515 (1999). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *See Environmental Defense Institute*, Case No. TFA-0289 (2009) (*citing Public Citizen Health Research Group v. Food and Drug Administration,* 704 F.2d 1280, 1291 (D.C. Cir. 1983)); *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976).

We will therefore remand this matter to the NETL for the issuance of a new determination letter. In this determination, the NETL should either release the withheld material, withhold material under Exemption 4 using the analysis set forth above, or withhold material under a different exemption. If the NETL determines that release of the information would likely result in substantial competitive harm to the submitter, it should describe that harm in as much detail as possible and set forth its reasons for believing that such harm would likely result.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Bryan Cave LLP on February 25, 2011 (Case No. TFA-0464) is hereby granted as set forth in paragraph (2).

(2) This matter is hereby remanded to the National Energy Technology Laboratory for the issuance of a new determination letter in accordance with the guidelines set forth in this decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos

Director

Office of Hearings and Appeals

Date: March 18, 2011

April 25, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Environmental Defense Institute

Date of Filing: March 14, 2011

Case Number: TFA-0465

On March 14, 2011, the Environmental Defense Institute (EDI) filed an appeal from a determination issued to it on February 8, 2011, by the Department of Energy's (DOE) Idaho Operations Office (IOO). In that determination, IOO responded to a request for documents that EDI submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to EDI's FOIA request, IOO identified and released several documents as responsive to the request, but withheld portions of the documents pursuant to FOIA Exemption 3. This appeal, if granted, would require IOO to release additional information to EDI, or to issue a new determination letter providing justification for withholding the information.

I. BACKGROUND

On June 23, 2010, EDI filed a FOIA request with IOO seeking numerous documents pertaining to the DOE's Advanced Test Reactor (ATR) facility, located at the DOE's Idaho National Laboratory. Letter from Chuck Broscious, EDI, to Clayton Ogilvie, IOO (June 23, 2010) (Request Letter). Specifically, EDI requested:

(1) ATR Safety Analysis Reports;

(2) Un-reviewed Safety Questions and Deficiency Reports between 2007 and the present;

(3) Occurrence Reports dated 2007 to the present;

(4) ATR-related Independent Engineering Consultant analysis reports between 2006 and the present;

(5) ATR-related Engineering Design File reports between 2007 and the present; and,

(6) All internal reports "cited/referred to in DOE-Idaho-Bi-Weekly Operations Summary/INL Website Updates."

Request Letter at 2-4. Under each category, EDI specified several individual documents and indicated that its request should be interpreted "to include but not [be] limited to" those specific documents within each category. *Id.* Because EDI had made prior FOIA requests to IOO for ATR-related documents, the Request Letter also states, "if [IOO] believe[s] that any of the documents requested … have already been released to [EDI], please identify the document in question and we will double-check our files to ensure that we have a copy." *Id*. at 1.

On February 8, 2011, IOO issued a determination to EDI in which it identified and released some documents responsive to EDI's request. Letter from Clayton Ogilvie, IOO, to Chuck Broscious, EDI (February 8, 2011) (Determination Letter). Specifically, with respect to category (1) above, IOO did not release the updated reports in their entirety. Instead, it released the portions of the documents that had been added or revised since EDI's previous FOIA request. One of the documents contained information withheld under FOIA Exemption 3. *Id*. at 2. IOO also indicated that it had previously provided to EDI the responsive documents in category (2). *Id*. With respect to category (3), IOO released one document, "Unplanned Shutdown of the ATR due to Higher than Normal Stock Effluent Radiation," and noted that all other responsive documents had already been provided to EDI. *Id*. at 2-6. IOO also indicated that it had previously provided all responsive documents falling within category (4). *Id*. at 6-7. Under category (5), IOO identified and released two documents, "EDF07634 Investigation of ATR Vessel Venting at Temperatures Greater than 200 degrees F" and "TEV-291 Basis for the Removal of Two Electrical Heaters and the Relocation of Two Smoke Detectors Blocking Adjacent Sprinkler Heads in TRA-621." *Id*. at 7. Finally, with respect to category (6), IOO stated, "DOE-HQ-ORPS office processes these documents on their own schedule and publishes them to the ORPS website when they have completed their work." *Id*.

EDI appealed the Determination Letter on several grounds. Letter from Chuck Broscious, EDI, to OHA (received March 14, 2011) (Appeal). First, EDI maintains that IOO inappropriately narrowed the scope of its request. Specifically, EDI states, "IOO arbitrarily and incorrectly interpreted our FOIA request as only the updated portions of requested documents, rather than our stated request for the complete updated reports and their respective Table[s] of Contents." Appeal at 2. EDI further challenges IOO's response to its request in category (6) above. EDI notes that the DOE-ORPS website is "demonstrably incomplete and is non-responsive when IOO has the original Occurrence Reports." *Id*. Finally, EDI specifically challenges IOO's withholding of certain information under Exemption 3. *Id.*

Because our consideration of IOO's withholdings under Exemption 3 in this case requires consultation with the DOE's Office of Classification, we determined that bifurcation of the present Appeal would allow for a more timely consideration of EDI's remaining arguments. Those arguments will therefore be considered in the present decision (OHA Case No. TFA-0465). We will consider IOO's withholdings under Exemption 3 in a separate decision, issued under OHA Case No. TFC-0009.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types

of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). An agency seeking to withhold information pursuant to a FOIA exemption has the burden of proving that the information falls under the claimed exemption. *See Tri-Valley CAREs*, OHA Case No. TFA-0402 (2010) (*citing Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)).[1] The DOE FOIA regulations provide, in pertinent part, that a determination letter denying a FOIA request must state "the reason for denial, containing a reference to the specific exemption under the [FOIA] authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate." 10 C.F.R. § 1004.7(b)(1). In so doing, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

In the instant case, as its initial argument EDI alleges that IOO improperly narrowed the scope of its request. EDI's request spanned numerous documents, including the current or updated versions of several documents which it received in response to previous FOIA requests. With respect to those documents that had changed since being released to EDI, IOO released only the portions representing changes or additions to the documents. EDI maintains that this was an incorrect interpretation of its request. We agree. To the extent that EDI's request comprised the exact same documents previously released to it, IOO was correct in responding that those documents were "already provided." However, where a document responsive to EDI's request is different from those previously released, including any document that has revisions or additions, the entire document must be processed in response to the FOIA request. Accordingly, we are remanding this portion of the Appeal to IOO with instructions that it either release the documents in their entirety to EDI or issue a new determination justifying the withholding of the documents or any portion thereof.

With respect to the reports requested in category (6) above, IOO neither released the documents to EDI, nor cited any exemption justifying the withholding of those documents. Therefore, we remand this portion of the Appeal for a new determination. *See Reginald A. Harris*, OHA Case No. TFA-0368 (2010). In its determination, as required by the FOIA and DOE regulations, IOO must either release the requested reports to EDI or specify the applicable exemption under which it is withholding those documents. Although the FOIA generally requires that an agency release responsive documents in its possession, the agency need not release information that it has already placed in the public domain. *See Terry Martin Apodaca*, OHA Case No., TFA-0455 (2011) (*citing Crews v. IRS*, No. 99-8388, 2000 WL 900800 at *6 (C.D. Cal. April 26, 2000)). Therefore, IOO should identify in its determination which, if any, of the documents are already in the public domain.

It Is Therefore Ordered That:

(1) The Appeal filed by the Environmental Defense Institute, Case Number TFA-0465, is hereby granted as set forth in paragraph (2) below.

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

(2) This matter is hereby remanded to the Idaho Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 25, 2011

April 1, 2011

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: USA Today

Date of Filing: March 22, 2011

Case Number: TFA-0466

This Decision concerns an Appeal that was filed by USA Today in response to a determination issued to it by the Department of Energy's (DOE) Office of Information Resources (hereinafter referred to as "OIR"). In that determination, OIR denied USA Today's request for expedited processing of the request for information that the newspaper filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that OIR process USA Today's FOIA request on an expedited basis.

In its request, USA Today sought "a complete export of [DOE] data submitted to the Real Property Asset Management Database, as required by Executive Order 13327 of February 4, 2004." Request at 1. The newspaper further requested that its filing be processed in an expedited manner. In its determination, OIR found that USA Today's request did not satisfy the FOIA's criteria for expedited processing. USA Today then filed the Appeal at issue here.

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of other, earlier, requests. Therefore, the FOIA provides that expedited processing is to be provided only when the requester demonstrates "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. 5 U.S.C. § 552(a)(6)(E)(v)(I). The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the Federal Government. 5 U.S.C. § 552(a)(6)(E)(v)(II). In this case, USA Today does not claim that failure to expedite the processing of its request will pose an imminent threat to the life or physical

safety of an individual. Rather, it argues that, as a disseminator of information about an activity of the federal government, it has an urgency to inform the public about that activity.

In order to determine whether a requester has demonstrated an "urgency to inform" and, hence, a "compelling need," we must consider at least three factors: (i) whether the request concerns a matter of current exigency to the American public; (ii) whether the consequences of delaying a response would compromise a significant recognized interest; and (iii) whether the request concerns federal government activity. *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). The federal courts have found sufficient urgency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006); *see also Southeastern Legal Foundation*, Case No. TFA-0389 (2010). Requesters have demonstrated urgency in several ways. *See, e.g.*, *American Civil Liberties Union v. Department of Defense*, No. C-06-01698 WHA (slip op.) 2006 WL 1469418 (N.D. Cal. May 25, 2006) (granting expedited processing for information related to a "breaking news story," *i.e.*, a story that would lose value if it were delayed).

Applying these criteria to the case at hand, we conclude that USA Today has not demonstrated an "urgency to inform" within the meaning of the FOIA. In its Appeal, the newspaper points out that in a June 10, 2010, memorandum to federal agencies, President Obama required the agencies to identify government-owned real estate that could be disposed of in order to save money. Appeal at 1. USA Today also states that in a briefing at the White House on Wednesday, March 2, 2011, the Deputy Director of the Office of Management and Budget outlined the administration's plan to establish an independent commission to consider the disposal of unneeded federal property. *Id.* at 2. Although measures to reduce federal spending could certainly be considered a matter of public interest, that interest does not appear to be associated with a specific time frame. In addition, an initiative that was set forth in a June 10, 2010, memorandum and released to the media on that date can hardly be called a "breaking news story." Therefore, the request does not appear to concern a matter of current exigency as that term has been interpreted by the federal courts. Moreover, the newspaper has failed to show that a significant recognized interest would be compromised in the absence of expedited processing. USA Today's Appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by USA Today on March 22, 2011, OHA Case Number TFA-0466, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 1, 2011

April 11, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Barry W. Minnfee
Date of Filing:	March 22, 2011
Case Number:	TFA-0467

On March 22, 2011, Barry W. Minnfee (Appellant) filed an Appeal from a determination issued to him on February 18, 2011, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge responded to a request for information the Appellant filed under the Privacy Act (FOIA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In its determination, Oak Ridge did not locate any documents responsive to the Appellant's request. This Appeal, if granted, would require Oak Ridge to conduct another search for responsive information.

I. Background

On January 18, 2011, the Appellant requested DNA in an aggravated robbery case, number 49-678-D, Minnfee v. State of Texas. Request Letter dated January 18, 2011, from Appellant to FOIA Officer, Office of Science and Technical Information, Oak Ridge. On February 18, 2011, Oak Ridge responded to the request, stating that it had no responsive documents. Determination Letter dated February 18, 2011, from Elizabeth Dillon, FOIA Officer, Oak Ridge, to Appellant. On March 22, 2011, the Appellant appealed, challenging the adequacy of Oak Ridge's search. Appeal Letter received March 22, 2011, from Appellant to Director, Office of Hearings and Appeals (OHA).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord*

Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

We contacted Oak Ridge to determine what type of search was conducted. In response, Oak Ridge indicated that a computerized search was conducted, using the Appellant's name. E-mail dated March 28, 2011, from Elizabeth Dillon, FOIA Officer, Oak Ridge, to Janet Fishman, OHA. Oak Ridge searched the files of the Personnel Security Office. *Id.* Oak Ridge further advised us that the Appellant has never been employed by Oak Ridge or one of its "contractor organizations, i.e. UT-Battelle, LLC, Oak Ridge National Laboratory nor the Oak Ridge Associated Universities." *Id.* Further, Oak Ridge confirmed that it has never possessed or retained any DNA records or any records on any criminal cases. E-mail dated March 29, 2011, from Elizabeth Dillon to Janet Fishman.

Based on the foregoing, we believe that Oak Ridge's search was reasonably calculated to uncover responsive information. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Barry W. Minnfee, Case No. TFA-0467, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 11, 2011

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

April 27, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Snake River Alliance
Date of Filing:	March 23, 2011
Case Number:	TFA-0468

On March 23, 2011, the Snake River Alliance (Appellant) filed an Appeal from a determination issued to it on February 9, 2011, by the Idaho Operations Office (DOE-ID) of the Department of Energy (DOE). In that determination, DOE-ID responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, DOE-ID discretionarily released seven documents responsive to the Appellant's request. This Appeal, if granted, would require DOE-ID to conduct another search for responsive information.

I. Background

On January 10, 2011, the Appellant requested "[a]ll records related to the January 6, 2011, Memorandum of Agreement [Memorandum of Agreement] Concerning Receipt, Storage, and Handling of Research Quantities of Commercial Spent Nuclear Fuel at the Idaho National Laboratory between the [DOE] and the State of Idaho." Request E-mail dated January 10, 2011, from Appellant to Clay Ogilvie, FOIA Officer, DOE-ID. On February 9, 2011, DOE-ID responded to the request discretionarily releasing seven responsive documents relating to the Memorandum of Agreement negotiated by Battelle Energy Alliance, LLC, (BEA), but signed by DOE and the State of Idaho. Determination Letter dated February 9, 2011, from Clayton Ogilvie, FOIA Officer, DOE-ID, to Appellant (Determination Letter). On March 23, 2011, the Appellant appealed, challenging the adequacy of DOE-ID's search. Appeal Letter received March 23, 2011, from Appellant to Director, Office of Hearings and Appeals (OHA).

II. Analysis

A. Scope of the Request

In its Appeal, the Appellant states that the Memorandum of Agreement "related directly to a settlement agreement signed October 13, 1995, by the DOE Assistant Secretary for Environmental Management and the DOE General Counsel." Appeal Letter at 2. The Appellant continues "the [DOE] possesses records subject to FOIA related to the [Agreement]." *Id.* It appears to us that the Appellant is attempting to broaden the scope of its request on Appeal to include documents supporting the 1995 agreement. A requester cannot broaden the request on Appeal. *Barbara Schwarz*, Case No. VFA-0641 (2001), *citing F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991).[1/] Accordingly, if the Appellant seeks documents supporting the 1995 agreement, the Appellant should file a request for those documents.

B. Adequacy of the Search/Agency Records

As mentioned above, DOE-ID discretionarily released records responsive to the request, *i.e.*, the seven documents mentioned above. DOE-ID concluded that any other documents responsive to the request are owned by its contractor, BEA. According to DOE-ID, those documents are contractor records, not "agency records" and, therefore, not subject to the FOIA.

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

(1) The intent of the document's creator to retain or relinquish control over the document;

(2) The ability of the agency to use and dispose of the record as it sees fit;

(3) The extent to which agency personnel have read or relied upon the record; and

(4) The degree to which the record was integrated into the agency's record system or

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

files.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010). Applying the first factor of the four-factor test, the documents were retained by BEA in a file regarding the Memorandum of Agreement. E-mail dated March 28, 2011, from Clayton Ogilvie, FOIA Officer, DOE-ID, to Janet Fishman, Attorney-Examiner, OHA. Applying the second factor, in order to respond to this FOIA request, DOE-ID contacted BEA and determined what documents BEA had which may have been responsive to the request. DOE-ID had no ability to use or dispose of the documents without contacting BEA. *Id.* In applying the third factor, DOE-ID personnel did not rely on the documents in question, to take any action regarding the Memorandum of Agreement, with the possible exception of the seven documents released to the Appellant. *Id.* Finally, in applying the fourth factor, the documents were completely separate from the agency's record keeping system or files, as the documents were retained solely by BEA. *Id.*

According to DOE-ID, all records relating to the Memorandum of Agreement, including the seven documents already produced, were in the possession and control of BEA at the time of the request. E-mail dated March 28, 2011, from Clayton Ogilvie, FOIA Officer, DOE-ID, to Janet Fishman, Attorney-Examiner, OHA. DOE-ID explained that the Memorandum of Agreement was a contractor initiative that did not involve DOE, other than its signature. *Id.* BEA reviewed the records it possessed and provided only those documents to DOE-ID that were used by DOE-ID to render a decision on the Agreement. *Id.* These documents were discretionarily released to the requestor. The remainder of the documents are not agency records, as explained above.

However, a finding that certain documents are not "agency records" does not end our inquiry. The DOE's FOIA regulations state:

> When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e). Section I.15(b)(2) and (b)(4) of the contract between DOE-ID and BEA, DOE Contract No. DE-AC07-05ID14517 (DEAR § 970.5204-3, "Access To And Ownership of Records"), identify "correspondence between the contractor and other segments of the contractor located away from the DOE facility" and "legal opinions, litigation files, and documents covered by attorney-client and attorney work product privileges" as contractor and not agency records. *See* http://www.id.doe.gov/doeid/INLContract/INL-Contract.htm.

DOE-ID maintains that the responsive documents that were not discretionarily released to the Appellant are drafts of the Agreement that were reviewed by the contractor's attorneys. Memorandum of Telephone Conversation between Clayton Ogilvie, FOIA Officer, DOE-ID, and Janet Fishman, OHA, April 12, 2011. Applying the above-quoted provisions in § I.15(b)(2) and (b)(4) of the contract between the DOE-ID and BEA to the case at hand, it is clear that these documents are the property of BEA, not the DOE. Accordingly, these documents are not subject to disclosure under the FOIA.

Therefore, for the reasons given above, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Snake River Alliance, Case No. TFA-0468, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:

April 14, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Smith & Associates

Date of Filing: March 25, 2011

Case Number: TFA-0469

On March 25, 2011, Smith & Associates (the Appellant) filed an Appeal from a March 8, 201 final determination issued by the Department of Energy's National Energy Technology Laboratory (NETL). NETL responded to a November 11, 2010, Request for Information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. On February 25, 2011, NETL released a number of responsive documents. This Appeal, if granted, would require NETL to conduct an additional search for responsive material.

I. BACKGROUND

The Appellant is a law firm representing a client that had a grant terminated by the State of Florida's Energy Program (FEP). The grant had utilized funds provided by NETL under the American Recovery and Reinvestment Act (ARRA). The FEP terminated the grant following NETL's determination that it was not an allowable use of ARRA funds. On November 11, 2010, the Appellant filed a request seeking any information concerning NETL's determination that the grant was not an allowable use of ARRA funds.

On February 25, 2011, NETL issued a determination letter (the Determination Letter) releasing a number of documents, in response to the Appellant's request. Specifically, the Determination Letter released copies of seventeen responsive documents to the Appellant. The Determination Letter also indicated that additional relevant documents might be maintained by the FEP. The Determination Letter further indicated that documents held by the FEP, however, are not agency records and therefore are not subject to the FOIA.

On March 25, 2011, the Appellant filed the present appeal contending, in essence, that NETL continues to withhold responsive information. Appeal at 2.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v.Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).

In reviewing this Appeal, we contacted NETL to ascertain the scope of its search for responsive documents. NETL informed us that the search for responsive records was conducted by contacting those within the agency who are most familiar with the subject matter of the request, and the locations where responsive documents would most likely be found. Specifically, NETL's FOIA Officer contacted the program manager, the contracting specialist, and the contracting officer requesting any responsive records. Email from Ann Dunlap to Steven L. Fine, OHA (April 5, 2011). All of these documents located in response to the request were released to the Appellant in their entirety.[1]

Because the Appellant had asserted that NETL had withheld responsive documents, we asked if it had any specific reason to believe that NETL has any additional response documents. Email from Steven L. Fine, OHA to Appellant (April 6, 2011). The Appellant responded by indicating that it had received documents from other sources that should have appeared in DOE's files as well. Email from Appellant to Steven L. Fine, OHA (April 6, 2011). The Applicant provided us with several samples of documents that it contends should have been located and identified if NETL's search had been adequate. Email from Appellant to Steven L. Fine, OHA (April 7, 2011). We have reviewed these documents and agree with the Appellant's contentions.

Based on this information, we find that NETL has not performed a search reasonably calculated to reveal records responsive to the Appellant's FOIA request. Therefore, the search was not adequate. Accordingly, the instant Appeal should be granted and remanded to NETL. On remand, a new search for responsive documents should be conducted by NETL and a new determination letter should be issued.

It Is Therefore Ordered That:

(1) The Appeal filed by Smith & Associates, TFA-0469, is hereby granted and remanded to the National Energy Technology Laboratory for processing in accordance with the instructions set forth above.

[1] NETL's FOIA Officer provided us with copies of each document it provided to the Appellant.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 14, 2011

April 19, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: tw telecom inc.

Filing Date: March 25, 2011

Case Number: TFA-0470

This Decision concerns the Appeal that tw telecom inc.[1] (TW) filed from a determination that the Department of Energy's (DOE) Strategic Petroleum Reserve Project Management Office (SPRO) issued to it on February 18, 2011. In that determination, the SPRO responded to TW's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The SPRO found that the documents are not agency records subject to release under the FOIA. This Appeal, if granted, would require the SPRO to review the requested documents as agency records and either release them or justify their withholding under the FOIA.

I. Background

DM Petroleum Operations Company (DM Petroleum) is the management and operations (M&O) contractor for the SPRO. In February 2011, DM Petroleum awarded a subcontract to Integrated Data Systems. Request Letter. Also in February 2011, TW filed a FOIA request with DM Petroleum for the "entire proposal submission and the award document(s)" for the awarded subcontract. *Id*.

The SPRO responded to TW's request and denied it. Determination Letter. The SPRO explained that the requested documents relate to a "procurement action" and that they "are not agency records" because procurement documents remain "the property of the contractor." Therefore, the SPRO explained, the requested documents are not subject to release under the FOIA. *Id*.

On appeal, TW provides two reasons why the requested documents are agency records. First, DM Petroleum performs its activities for the benefit of the DOE, which provides oversight. Appeal Letter. Second, under DOE regulations, when the M&O contract expires, contractors and subcontractors must deliver contract records to the DOE. *Id*.

[1] tw telecom inc. spells its name in lower case.

II. Analysis

A. Whether the Documents at Issue are Agency Records Subject to the FOIA

Our threshold inquiry is whether the documents at issue are agency records and thus subject to the FOIA. The FOIA does not define "agency records," but merely lists examples of the types of information that agencies must make available to the public. *See* 5 U.S.C. § 552(a). To determine whether documents are agency records subject to the FOIA, we ask (1) whether the organization is an "agency" for purposes of the FOIA; and, if not, (2) whether the requested documents are nonetheless "agency records." *See, e.g.*, *Faye Vlieger*, Case No. TFA-0250 (2008); *Eugenie Reich*, Case No. TFA-0213 (2007).[2]

1. Whether DM Petroleum is an "Agency" for Purposes of the FOIA

Under the FOIA, agency includes any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . ., or any independent regulatory agency." 5 U.S.C. § 552(f)(1). A private entity is not an agency for purposes of the FOIA "absent extensive, detailed, and virtually day-to-day supervision" by the federal government. *Forsham v. Harris*, 445 U.S. 169, 180 (1980).

We have found that an M&O contractor of a DOE-owned facility is not an agency for purposes of the FOIA. *Moore Brower Hennessy & Freeman, P.C.*, Case No. VFA-0393 (1998) (citation omitted). Recently, a federal district court reached the same conclusion. *Reich v. U.S. Dep't of Energy*, No. 09-10883-NMG, 2011 WL 977602 (D. Mass. Mar. 17, 2011).

TW requested documents in the possession of DM Petroleum, the M&O contractor for the SPRO. The SPRO does not supervise DM Petroleum's day-to-day operations. Therefore, it is not an "agency" for FOIA purposes.

2. Whether the Requested Documents are Nonetheless "Agency Records"

Although DM Petroleum is not an agency for FOIA purposes, the requested documents could nonetheless be considered "agency records" if (1) an agency created or obtained them; and (2) an agency controlled them at the time of the FOIA request. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

The SPRO did not create the requested subcontract and subcontract-related documents, and it has not obtained them. *See* Memorandum of Telephone Conversation with Deanna Harvey, Records Manager, Strategic Petroleum Reserve Project Management Office, Mar. 31, 2011. Therefore, we find that they are not agency records subject to the FOIA.

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

B. Whether the Documents are Subject to Release Under the FOIA Regulations of the DOE

A finding that certain documents are not "agency records" does not end our inquiry. When a contract with the DOE provides that contractor-generated records shall be the property of the government, the DOE will make the records available to the public unless they are exempt from disclosure under the FOIA. 10 C.F.R. § 1004.3(e)(1).

The documents that TW requested relate to procurement. Under the the M&O contract, records relating to procurement are owned by DM Petroleum – not the DOE.[3] Therefore, the requested documents are not subject to release under the FOIA regulations of the DOE.

For the reasons set forth above, we find that the requested subcontract and its related documents are neither agency records subject to the FOIA nor subject to release under the FOIA regulations of the DOE. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by tw telecom inc., OHA Case No. TFA-0470, on March 25, 2011, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 19, 2011

[3] By reference, Clause I.91 of the contract between the DOE and DM Petroleum incorporates the Department of Energy Acquisition Regulation governing the ownership of contractor records. Memorandum of Telephone Conversation with Deanna Harvey, Records Manager, Strategic Petroleum Reserve Project Management Office, Apr. 14, 2011. That regulation states that the M&O contractor, DM Petroleum, owns "[r]ecords relating to any procurement action by the Contractor. . . ." 48 C.F.R. § 970.5204-3(b)(3). The contract is available at http://www.spr.doe.gov/. The most recent version of the contract is "Mod 112." Memorandum of Telephone Conversation with Deanna Harvey, Records Manager, Strategic Petroleum Reserve Project Management Office, Apr. 14, 2011.

April 25, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: John Brandau

Filing Date: April 4, 2011

Case Number: TFA-0471

This Decision concerns the Appeal that John Brandau filed from a determination that the Oak Ridge Office (ORO) of the Department of Energy (DOE) issued to him on March 10, 2011. In that determination, the ORO responded to his request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered records or issue a new determination justifying its withholding of records.

I. Background

Mr. Brandau filed a PA request for his records at the ORO. Request Letter. He seeks his records from the United States Enrichment Corporation-Portsmouth Gaseous Diffusion Plant (Portsmouth) for the period 1978-1980. Particularly, he seeks records showing that as a truck driver for C.H. Waugh Salvage Co., he signed into Portsmouth as a visitor. In response, the ORO stated that it did not locate any records. Determination Letter. Mr. Brandau then filed the present Appeal with the Office of Hearings and Appeals (OHA), challenging the adequacy of the ORO's search. Appeal Letter.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[*] an agency must "conduct[] a search reasonably calculated to uncover all relevant documents . . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

[*] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act (PA) requires only that the agency search its systems of records. However, we require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the FOIA. *Martha J. McNeely*, Case No. TFA-0371 (2010); *Mitchell L. Rychtanek*, Case No. TFA-0256 (2008). OHA decisions regarding the FOIA and the PA issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

We contacted the ORO to gain additional information to evaluate the adequacy of its search. It stated that visitor logs at Portsmouth only date back to 1983. E-mail from Linda Chapman, Legal Assistant, FOIA/ Privacy Act Office, ORO, Apr. 18, 2011. To ensure that no other records could be found, the ORO expanded its search. It contacted Portsmouth, which searched the electronic and paper files databases that are most likely to have the information that Mr. Brandau seeks. These include the Portsmouth project sub-contractor database, the P-50 database, the classified database, and the dosimetry-related databases. It searched by Mr. Brandau's name, social security number, and the name of the company that he listed in his request, C.H. Waugh Salvage Co. The ORO concluded that if Portsmouth had any records responsive to Mr. Brandau's PA request, it would have found them with its search methodology. *Id*.

Based on the description of the ORO's search, we find that it conducted a search that was reasonably calculated to uncover all relevant records and was therefore adequate. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal that John Brandau filed on April 4, 2011, OHA Case No. TFA-0471, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 25, 2011

May 11, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Greenwire

Date of Filing: April 14, 2011

Case Number: TFA-0472

On April 14, 2011, Greenwire (Appellant) filed an Appeal from a determination issued to it on April 12, 2011, by the Loan Programs Office (LPO) of the Department of Energy (DOE). In that determination, LPO responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, LPO released one document as responsive to the Appellant's request, but withheld portions of that document under Exemption 4. The Appellant challenges LPO's withholding of information from the document. This Appeal, if granted, would require LPO to release the withheld information to the Appellant.

I. Background

On November 1, 2010, the Appellant filed a request with the DOE for "copies of all documents pertaining to any application to the Advanced Technology Vehicle Manufacturing program [(ATVMIP)]by Li-Ion Motors, [(Li-Ion)] also known as EV Innovations Inc., also known as Hybrid Technologies Inc." Request dated November 1, 2010, from Mike Soraghan, Appellant, to Alexander Morris, FOIA Officer, DOE. On April 12, 2011, LPO released one document to the Appellant.[1/] Determination Letter dated April 12, 2011, from David G. Frantz, Director, LPO, to Appellant. LPO redacted information from that one document and withheld that information under Exemption 4. *Id.*

On April 14, 2011, the Appellant appealed, contending first that the portions withheld were from a government-prepared document, not information submitted by a private company.

[1/] In the Appeal, the Appellant refers to a "file marked 'Rejection Letter.'" Appeal at 1. The Determination Letter from LPO refers to "one responsive document." Determination Letter at 1. This Decision only addresses the letter released with the Determination.

Appeal received April 14, 2011, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE at 2. Secondly, he argued that the information withheld was arguably released in a file titled, "rejection letter," thereby releasing the document's intent without releasing the actual wording. *Id.* at 2. He continues that withholding the wording is pointless as the theme of the letter is apparent from its title. *Id.* at 3.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 4 is at issue in this case.

A. The Appellant's Arguments

The Appellant makes three arguments in its Appeal. First, the Appellant claims that LPO did not adequately justify its withholding of the information under Exemption 4. The Appellant argues that the redactions made to the letter released by LPO are "unsupported and unjustified." Appeal at 2. Second, the Appellant claims that Exemption 4 was applied to the redacted information incorrectly. The Appellant argues that the FOIA "sets a high bar for demonstrating such 'substantial competitive harm.'" *Id.* To support this claim, the Appellant relies on the definition of "trade secret" adopted by the Court of Appeals, District of Columbia Circuit. *Id.* Finally, the Appellant claims that Exemption 4 only applies to information supplied to the government, and therefore, a government-prepared document cannot contain information exempted under Exemption 4. *Id.*

B. Whether the Determination Letter Contained an Adequate Justification

A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Environmental Defense Institute*, Case No. TFA-0289 (2009); *see also F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research*

Information Services, Inc., Case No. VFA-0235 (1996).[2/] Without an adequately informative determination letter, the requestor must speculate about the adequacy and appropriateness of the agency's determination. *Id.*

The Appellant argues that the redactions made to the letter released by LPO are "unsupported and unjustified." Appeal at 2. We disagree. The LPO provided a justification for its withholding under Exemption 4, stating "[d]isclosure of the information would also reveal the firm's capabilities, available resources and methods of allocating them." Appeal at 1. Moreover, the descriptions of the competitive harm that would result from the release of the withheld information were sufficient to communicate the basis for the LPO's withholdings and to permit a meaningful appeal. We find that LPO's determination letter provided adequate justification for withholding under Exemption 4.

C. Whether the Information Was Withheld as a Trade Secret

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret,"a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999) (*Lepelletier*). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g., Nadler v. FDIC,* 92 F.2d 93, 95 (2nd Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, Case No. VFA-0517 (1999). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory*

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

Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

The Appellant makes the argument that the information cannot be withheld as a trade secret under the test applied in *Public Citizen*. Our review of the determination letter concludes that DOE has not asserted that the withheld material is trade secret information. In fact, the Determination Letter states that "[p]ortions deleted from the document enclosed contain 'commercial' or 'financial' information." Determination Letter at 1. Thus, LPO made no assertion that the withheld material is trade secret information.[3/] Information submitted during the process of competing for government grants and loans is considered to have been involuntarily submitted, since the grants and loans generally would not be awarded in the absence of that information. *Bryan Cave LLP*, Case No. TFA-0464 (2011); *Alliance to Protect Nantucket Sound*, Case No. TFA-0424, (2010).

D. Whether the Information Was Supplied to the DOE

The Appellant contends that "[g]overnment-prepared documents about a person or private firm based primarily on information the government generates itself or gathers from outside sources are not exempt under this provision." Appeal at 2. We disagree. The proper focus is on the source of the withheld information not on who prepared the document. Similarly, the federal courts have looked to the identity of the party from whom the information originated to determine whether it is exempt from disclosure under Exemption 4. *See, e.g., Public Citizen*, 209 F. Supp. 2d at 44 (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., William E. Logan, Jr. & Associates*, Case No. VFA-0484 (1999); *Research Focus, L.L.C.*, Case No. TFA-0247 (2008).

[3/]The information sought is clearly "financial" in nature because it relates to a loan application from Li-Ion to the DOE.

We have reviewed an unredacted copy of the responsive document. The information on page two of the document is not DOE-generated information, but rather information that was submitted by Li-Ion to DOE and reworded by the DOE. Therefore, the fact that the letter originated with DOE does not affect our conclusion that the withheld information is exempt from disclosure pursuant to Exemption 4. *See Russell Carollo*, Case No. TFA-0430 (2010). This information concerns Li-Ion's financial resources. Release of this information would cause substantial harm to the competitive position of Li-Ion. Consequently, we believe that LPO properly applied Exemption 4 to page two of the letter.

However, our review of the responsive document does show that the information on page one of the released letter may not be exempt from disclosure under Exemption 4. It appears that some of this information is a restatement of the regulations regarding the ATVMIP, including a definition from those regulations. Further, it appears that LPO withheld a DOE opinion that does not appear to contain information obtained from Li-Ion. Therefore, we will remand the matter to LPO to reconsider whether the information on page one of the document is exempt from release under the FOIA. On remand, LPO must review the information and issue a new determination in compliance with this Decision. At that same time, LPO should also consider whether any of the information it is withholding contains factual information that should be segregated from the Exemption 4 information and released to the Appellant. 10 C.F.R. § 1004.7(b)(3).

III. Conclusion

The Determination Letter issued by LPO adequately justified its withholdings under Exemption 4. LPO properly withheld under Exemption 4 of the FOIA the redacted information on page two of the released document, which was supplied to the DOE. However, LPO must consider whether the redacted information on page one of that same document originated with the DOE or LPO or contained portions of the DOE regulations and should be released. Therefore, we will grant the Appeal in part and remand the matter to LPO for a further determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Greenwire, Case No. TFA-0472, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Loan Program Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B).

Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 11, 2011

May 2, 2011

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Barry W. Minnfee

Date of Filing: April 26, 2011

Case Number: TFA-0473

This Decision concerns a Motion for Reconsideration of a Decision and Order filed with the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) by Barry W. Minnfee. In this Motion, Mr. Minnfee requests that OHA modify the Decision and Order that we issued in response to an Appeal Mr. Minnfee filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. *See Barry W. Minnfee,* Case No. TFA-0467 (2011).*

I. Background

Mr. Minnfee filed a Privacy Act request on January 18, 2011, in which he requested DNA in an aggravated robbery case, number 49-678-D, Minnfee v. State of Texas. *Barry W. Minnfee*, Case No. TFA-0467 at 1 (2011). On February 18, 2011, DOE's Oak Ridge Operations Office (Oak Ridge) responded to the request, stating that it had no responsive documents. *Id.* Mr. Minnfee appealed, challenging the adequacy of Oak Ridge's search.

OHA denied Mr. Minnfee's Appeal. *Id.* at 2. In considering the Appeal, OHA assessed the scope of Oak Ridge's search for documents responsive to Mr. Minnfee's request. *Id.* Oak Ridge informed OHA that it conducted a computerized search using Mr. Minnfee's name for any responsive information. *Id.* Oak Ridge also confirmed that Mr. Minnfee never worked for Oak Ridge or any of its contractors. *Id.* Further, Oak Ridge established that it does not possess or maintain DNA records or any records on any criminal cases. *Id.* OHA concluded that Oak Ridge's search "was reasonably calculated to reveal the responsive information." *Id*.

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

In his Motion for Reconsideration, Mr. Minnfee asserts that "I appeal on the ground(s) that I never told Oak Ridge I was employed by Oak Ridge or one of its 'contractor organizations.'" Motion for Reconsideration received April 26, 2011, from Barry W. Minnfee to Poli A. Marmolejos, at 3. He continues, "[i]t involves a state court criminal case . . . [in] Amarillo, Texas." *Id.*

II. Analysis

The DOE Privacy Act Regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1008.11. However, in prior FOIA cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g., Citizen Action New Mexico*, Case No. TFA-0215 (2007). In reviewing such requests for reconsideration, we may look to OHA's procedural regulations regarding modification or rescission of its orders. *See* 10 C.F.R. Part 1003, Subpart E; *see also Terry M. Apodaca*, Case No. TFA-0237 (2007). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application "demonstrates that it is based on significantly changed circumstances." 10 C.F.R. § 1003.55(b)(1).

Significantly changed circumstances include "the discovery of material facts that were not known or could not have been known" at the time of the original proceeding; "the discovery of a law, rule, regulation … that was in effect" at the time of the original proceeding "and which, if such had been known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome;" or "a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between the issuance of such order and the date of the application [for modification or rescission] and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R § 1003.55(b)(2).

Applying these standards to the case at hand, we find that Mr. Minnfee's Motion does not state any basis warranting modification or rescission of our prior decision in *Barry W. Minnfee,* Case No. TFA-0467 (2011). Mr. Minnfee's argument that he never told Oak Ridge that he was employed by Oak Ridge or one of its contractors does not demonstrate "significantly changed circumstances." Specifically, Mr. Minnfee's argument is not evidence of a discovery of pertinent material facts unknown at the time of the Appeal, the discovery of an applicable law unknown at the time of the Appeal, or a substantial change in facts or circumstances. Rather, this argument is an attempt to find an error in the Decision, where none exists. As the Decision indicates, Oak Ridge made a thorough search for responsive documents. The fact that the search included a search of its list of former and present employees emphasizes, rather than detracts, from the thoroughness of the search.

III. Conclusion

In sum, Mr. Minnfee's Motion for Reconsideration is an attempt to find error where none exists, rather than a demonstration of "significantly changed circumstances" warranting modification or rescission of our decision in *Barry W. Minnfee,* Case No. TFA-0467 (2011). Consequently, the Motion should be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Barry W. Minnfee on April 26, 2011, OHA Case No. TFA-0473, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2011

Department of Energy
Washington, DC 20585
JUN - 9 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ann T. Precourt
Date of Filing:	May 4, 2011
Case Number:	TFA-0475

On May 4, 2011, Ann T. Precourt filed an Appeal from a determination issued to her by the Department of Energy's (DOE) Office of Legacy Management (OLM). In that determination, OLM responded to a request for information that Ms. Precourt filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OLM to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On March 16, 2011, Ms. Precourt submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for a copy of "the complete DOE employment file" including any available dosimeter badge information for her deceased mother, Madeline Lemieux, who worked at Metal and Controls (M&C) Corporation in Attleboro, Massachusetts, from 1946 to 1963. *See* Letter from Ann T. Precourt (March 16, 2011) (FOIA Request). DOE/FOIA forwarded the request to OLM because any document responsive to the request, if it existed, would fall under the jurisdiction of that office.

OLM conducted a search of its records but did not locate documents responsive to Ms. Precourt's request. *See* Letter from John V. Montgomery, Freedom of Information Officer, OLM, to Ann T. Precourt (April 18, 2011) (Determination Letter). On May 4, 2011, the Office of Hearings and Appeals (OHA) received Ms. Precourt's Appeal in which she requested an additional search for her mother's employment and dosimeter records. *See* Letter from Ann T. Precourt to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't*

of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).[1]

In reviewing this Appeal, we contacted OLM to ascertain the scope of its search for responsive documents. *See* E-mail from Janet R. H. Fishman, Attorney-Examiner, OHA, to John Montgomery, Freedom of Information Officer, OLM (May 9, 2011). OLM informed us that it conducted a thorough search of its electronic information systems database using Ms. Lemieux' name, social security number and the search terms "Attleboro, Metals and Controls, Metals, and Controls." *See* Email from John Montgomery, Freedom of Information Act Officer, OLM, to Avery R. Webster, Attorney-Examiner, OHA (May 19, 2011) (OLM Response to FOIA Appeal).[2] The OLM search revealed urinalysis and external dosimeter records for some M&C workers for the period of 1953-1967, but records for Ms. Lemieux were not found. *Id.* Additionally, OLM consulted with a Subject Matter Expert to aid in its processing and search activities for this request; however, its search yielded no responsive documentation. *Id.*

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that OLM performed a search reasonably calculated to reveal documents responsive to Ms. Precourt's request. Accordingly, the search was adequate under the FOIA and, therefore, Ms. Precourt's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ms. Ann T. Precourt on May 4, 2011, OHA Case No. TFA-0475, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: JUN - 9 2011

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

[2] The OLM Electronic Recordkeeping System (ERKS) is an electronic information system database containing records, finding aids, and information for all records in OLM's custody. *See* OLM Response to FOIA Appeal.

July 14, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Sierra Club
Date of Filing:	June 3, 2011
Case Number:	TFA-0476

On June 3, 2011, the Sierra Club (Appellant) filed an Appeal from an April 28, 2011 determination issued by the Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EERE). In that determination, EERE responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. EERE released documents responsive to the Appellant's request, but withheld portions of those documents under Exemption 4. The Appellant challenges EERE's withholding of information from the documents. This Appeal, if granted, would require EERE to release the withheld information.

I. Background

On August 31, 2010, the Appellant filed a request with the DOE for all energy usage certification reports and compliance statements from manufacturers and private labelers of refrigerator-freezers and room air conditioners submitted to the DOE after July 1, 2001.*/ Request Letter, dated August 31, 2010, from Robert Ukeiley, Attorney for Appellant, to Alexander Morris, FOIA Officer, DOE. Thereafter, the FOIA request was assigned to EERE, the office most likely to have responsive documents. On April 28, 2011, EERE released responsive documents to the Appellant. Determination Letter, dated April 28, 2011, from Kathleen B. Hogan, Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, EERE. EERE redacted information from those documents and withheld that information under Exemption 4. *Id.* EERE stated that the withheld information was brand names of the refrigerators, freezers, and room air conditioners. *Id.* at 2.

*/ The Appellant subsequently narrowed its request on October 18, 2010, by telephone. Appeal Letter at 1.

On June 3, 2011, the Appellant appealed, advancing two arguments in support of its Appeal. Appeal Letter received June 3, 2011, from Darin Schroeder, Counsel for Appellant, to Director, Office of Hearings and Appeals (OHA), DOE. First, the Appellant argues that the brand names do not fall within Exemption 4. Second, the Appellant argues that EERE withheld additional information but did not identify that information or explain how the exemption applies to that information. *Id.* at 1. Subsequent to our receipt of the Appeal, we contacted EERE to discuss the determination.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 4 is at issue in this case.

A. The Brand Names

In support of its position that the brand names are not withholdable under Exemption 4, the Appellant claims the brand names are within the public domain. Appeal Letter at 2-3. To support this claim, the Appellant provided a "Google" search that revealed the withheld information. *Id.* at Attachment C. As further support for the claim that the information is not withholdable under Exemption 4, the Appellant claims that there is no showing of harm from release of the information and, therefore, such information is not confidential. *Id.* at 3. As final support for this argument, the Appellant claims that release of the information does not violate the Trade Secrets Act, 18 U.S.C. § 1905.

The requested information was provided to the DOE in connection with DOE's program for certification of compliance with DOE's energy efficiency regulations. We contacted EERE concerning this Appeal, and EERE stated that it believed that the

identity of the original equipment manufacturer (OEM) for a particular product was sensitive business information and, therefore, it had a choice of releasing the name of the OEM or the brand name. In the instant case, it decided to release the OEM and withhold the brand name. EERE recognized that DOE recently issued amendments to Part 429 that would require the release of the brand name, 10 C.F.R. Part 429—Certification, Compliance, and Enforcement For Consumer Products And Commercial And Industrial Equipment, 76 Fed. Reg. 12,422 (March 7, 2011), but EERE believed that the amendments did not become effective until July 5, 2011, and, therefore, did not apply to the instant request.

The rulemaking notice provides that the effective date of the amendments is April 6, 2011, but provides later dates for certain provisions. The relevant provision here is Section 429.7, entitled "Confidentiality," which falls within the general April 6, 2011, effective date. Accordingly, we have determined that this case should be remanded to EERE to consider whether the regulation requires the release of the brand names in this case. Because we believe this newly promulgated regulation may require release of the brand names, we will not address the Appellant's arguments at this time.

B. Other Redacted Information

The Appellant also advanced the argument that EERE failed to properly justify the withholding of information by claiming that EERE withheld more than the brand names, but never identified that information. In support, the Appellant states, "DOE states that 'the proprietary information being withheld include the brand names.' . . . The use of the word 'include' may allude to the fact that information other than the brand names was withheld." Appeal Letter at 4-5.

Our review of the redacted file indicates that EERE withheld more information than it identified in its determination, but it is unclear to this office precisely what information was withheld. On remand, EERE must identify all the withheld information and justify any withholding. If entire pages of information are being withheld, EERE must identify those pages and properly justify their withholding.

III. Conclusion

On remand, EERE must consider whether the recently issued amendments to Part 429 require the release of the brand names in this case. Also on remand, EERE must review the withheld information to determine if all the information being withheld was identified and justify any withholding. Therefore, we will grant the Appeal, in part, and remand the matter to EERE for a further determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Sierra Club, Case No. TFA-0476, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Energy Efficiency and Renewable Energy of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 14, 2011

June 30, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Institute for Research: Middle Eastern Policy

Date of Filing: June 8, 2011

Case Number: TFA-0477

On June 8, 2011, the Institute for Research: Middle Eastern Policy (IRmep) filed an Appeal from a determination issued to it on May 13, 2011, by the Department of Energy's Headquarters (DOE Headquarters) Office of the Executive Secretariat (ES), in Washington, D.C., in response to a request for documents that IRmep filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. ES, in its May 13, 2011, determination letter, informed IRmep that it was unable to locate any records responsive to its request. This Appeal, if granted, would require ES to perform an additional search for responsive records and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In its February 7, 2011, FOIA request, IRmep asked for all documents relating to "classified U.S. transfers of nuclear materials to Israel from 1960-1970 possibly related to the Nuclear Materials and Equipment Corporation (NUMEC)."[1] Letter from Grant F. Smith, Director of Research, IRmep, to Alexander Morris, FOIA Officer, DOE Headquarters (February 7, 2011) (Request) at 1. In its May 13 determination letter, ES informed IRmep that it found no responsive documents pertaining to its request.[2] IRmep contends in its Appeal that ES should have located documents responsive to its Request. *Id*.

[1] IRmep enclosed in its Request a document allegedly released pursuant to a FOIA Request to the Federal Bureau of Investigation which it claims provides evidence that "classified transfers of weapons grade uranium were made from the U.S. to Israel in the 1960's." Request at 1. IRmep asserts that the document indicates that the U.S. Atomic Energy Commission (AEC) authorized the sale of 320 grams of plutonium to the Institute of Technology in Israel." Request at 1.

[2] In its Appeal, IRmep speculates that ES's determination letter might be a "Glomar" response to its FOIA Request. Appeal at 1. A "Glomar" response is an agency response to a FOIA Request, which states that the agency "can neither confirm or deny" the existence of responsive records because the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). Our review of the letter indicates that it specifically states that ES could not locate responsive documents and thus the response cannot be considered a "Glomar" response.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Aurimas Svitojus*, Case No. TFA-0349 (March 8, 2010).[3]

In reviewing this Appeal, we contacted ES to ascertain the scope of its search for responsive documents. DOE Headquarters determined that ES is the DOE organization most likely to possess responsive documents and ES was assigned the responsibility of conducting the search. The search was conducted by an ES Historian in the ES History Division. *See* E-mail from Terry Fehner, Historian, ES, to Richard Cronin, Attorney-Examiner (Hearing Officer) (June 16, 2011). The Historian reviewed the History Division's document finding aids, which include a card catalogue and a folder title index, to identify folders containing potentially responsive documents. The Historian conducted the review of the finding aids using relevant terms taken from the request, such as Israel, NUMEC, and plutonium. The Historian identified folders containing documents pertaining to Israel, NUMEC, and Materials (*i.e.*, plutonium and uranium). The Historian then physically examined the identified folders and looked for documents relevant to the request. But he found none. E-mail from Terry Fehner, Historian, ES, to Richard Cronin, Attorney-Examiner (Hearing Officer) (June 16, 2011). The Historian noted that the attachment to the Request referenced documents maintained by the Materials Branch of the AEC.[4] However, to the best of the Historian's knowledge, all such AEC documents were destroyed before DOE received IRmep's Request. Memorandum of Telephone Conversation between Richard Cronin, OHA, and Terry Fehner, ES, (June 16, 2011).

Based on the information provided to us, we find that ES performed an extensive search reasonably calculated to reveal records responsive to IRmep's Request, despite the fact that the search did not yield the records that IRmep sought. Therefore, the search was adequate. Accordingly, the instant Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on June 8, 2011, by the Institute for Research: Middle Eastern Policy, OHA Case No. TFA-0477, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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

[4] The AEC was a predecessor agency to the Department of Energy and the Nuclear Regulatory Commission. Alice L. Buck, *A History of the Atomic Energy Commission*, at 8 (Department of Energy 1983) (DOE Publication No. ES-003/1).

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 30, 2011

July 07, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: The National Security Archive

Filing Date: June 16, 2011

Case Number: TFA-0478

This Decision concerns the Appeal that The National Security Archive (NSA) filed from a determination that the Department of Energy's (DOE) Office of Information Resources (OIR) issued to it on May 25, 2011. In that determination, the OIR responded to nine requests that the NSA filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The OIR stated that no documents were found that are not publicly available. The NSA challenges the adequacy of the searches. This Appeal, if granted, would require the DOE to conduct additional searches.

I. Background

The NSA is an independent, non-governmental research institute located at the George Washington University. Appeal Letter, June 16, 2011. It collects and publishes documents obtained through the FOIA. *Id*. The NSA submitted separate FOIA requests for documents relating to U.S. participation in the following nine Climate Change Conferences (with DOE FOIA tracking numbers in parenthesis):

1) Bonn, Germany, June 1-12, 2009 (HQ-2010-02036-F)
2) Bonn, Germany, Aug. 10-14, 2009 (HQ-2010-02050-F)
3) Bangkok, Thailand, Sept. 28 – Oct. 9, 2009 (HQ-2010-02073-F)
4) Barcelona, Spain, Nov. 2-6, 2009 (HQ-2010-02094-F)
5) Berlin, Germany, Mar. 28 – Apr. 7, 1995 (HQ-2010-02126-F)
6) Geneva, Switzerland, July 8-19, 1996 (HQ-2010-02146-F)
7) Kyoto, Japan, Dec. 1-11, 1997 (HQ-2010-02149-F)
8) Buenos Aires, Argentina, Nov. 2-13, 1998 (HQ-2011-00027-F)
9) Bonn, Germany, Oct. 25 – Nov. 5, 1999 (HQ-2011-00032-F)

Determination Letter, May 25, 2011.

All nine requests were assigned to the Office of Policy and International Affairs (OPIA). Three requests (HQ-2010-02126-F, HQ-2010-02146-F, and HQ-2010-02149-F) were also assigned to the Office of the Executive Secretariat (OES). The OPIA did not locate any documents that are not already publicly available. The OES had never maintained responsive documents. *Id*.

On Appeal, the NSA stated that the DOE should search additional program offices. To assist the DOE in its search, the NSA provided the names and titles of DOE officials who attended the conferences from additional program offices. Appeal Letter, June 16, 2011. The NSA also stated that the OPIA and other program offices should search their retired files held by the Washington National Records Center. *Id*.

II. Analysis

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness . . . does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Todd J. Lemire*, Case No. VFA-0760 (2002).[*]

We contacted the OIR to determine whether it should have routed the NSA's requests to additional program offices. After consulting the Chief Information Officer, the OIR determined that two requests should be assigned to the Office of Congressional and Intergovernmental Affairs (HQ-2010-2126-F and HQ-2010-2146-F); two requests should be re-assigned to the OES, including the Office of History and Heritage Resources (HQ-2010-02149-F and HQ-2011-00027-F); and two requests should be assigned to the Office of Energy Efficiency and Renewable Energy (HQ-2011-00027-F and HQ-2011-00032-F). Memorandum of Telephone Conversation with A.C. Morris, FOIA Officer, OIR, June 29, 2011; E-mail from Joan Ogbazghi, Information Access Specialist, OIR, July 1, 2011. In light of this information, we will remand this matter to the OIR so that it can re-assign these requests.

We also contacted the OPIA to determine whether it should have searched its retired files. It stated that it has retired files only once, in 1992. E-mail from Robert Marlay, Deputy Director, Office of Climate Change Policy and U.S. Climate Change Technology Program, OPIA, June 23, 2011. Since the files were retired before the subject conferences, the retired files could not contain responsive documents. Therefore, the OPIA need not have searched its retired files to conduct an adequate search.

It Is Therefore Ordered That:

(1) The Appeal filed by The National Security Archive, OHA Case No. TFA-0478, on June 16, 2011, is hereby granted in part, as described in Paragraph (2), below, and denied in all other respects.

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

(2) The matter is remanded to the Office of Information Resources so that five of the requests submitted by The National Security Archive may be assigned to DOE program offices to search for responsive documents, as described above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 7, 2011

July 22, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alliance to Protect Nantucket Sound

Date of Filing: June 22, 2011

Case Number: TFA-0479

On June 22, 2011, the Alliance to Protect Nantucket Sound ("the Alliance") filed an appeal from determinations issued to it on May 23, 2011, and June 7, 2011, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In each determination, LGPO responded to a request for documents that the Alliance submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to the Alliance's FOIA request, LGPO identified and released a number of responsive documents, but withheld portions of the documents pursuant to FOIA Exemptions 4, 5 and 6. This appeal, if granted, would require LGPO to release the withheld information to the Alliance.

I. BACKGROUND

On February 24, 2011, the Alliance filed a FOIA request for information pertaining to the Cape Wind Project, a proposed wind-generating facility to be built off the coast of Cape Cod, Massachusetts. Specifically, the Alliance requested "all documents regarding any communications (written or oral) regarding potential grants, loans, loan guarantees, or any other federal funding assistance for the Cape Wind Project proposed by Cape Wind Associates, LLC, ["Cape Wind"]." *See* Letter from Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, to Joan Ogbazghi, Information Access Specialist, DOE Office of Information Resources, February 24, 2011 (Request Letter). Given the large scope of the FOIA request, the Alliance and LGPO agreed that LGPO would provide partial responses to the February 24, 2011, request on a rolling basis, as documents were located, reviewed, and made ready for release. Two such partial responses are the subjects of the instant Appeal.

In a May 23, 2011, partial response, LGPO released three documents, with some information withheld pursuant to Exemption 4 of the FOIA. Those documents are: (1) The Cape Wind Project Cover Application; (2) The Cape Wind Data Elements Supplemental; and (3) The Cape Wind Project Application Part I Section 1.F.1.a. *See* Letter from David G. Frantz, Director, LGPO, to Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, May 23, 2011 (May Determination). In a June 7, 2011, partial response, LGPO released correspondence responsive to the Alliance's request. Specifically, LGPO released: (1) Alistair Leslie, Environmental Protection Specialist, correspondence on Cape Wind, Sept. 30, 2010, through March 11, 2011; (2) Dan Tobin, Senior Investment Officer, correspondence on Cape Wind, Sept. 30, 2010, through March 11, 2011; (3) Mladen Nesic, Investment Analyst,

correspondence on Cape Wind, Sept. 30, 2010, through March 11, 2011; and (4) Jim McCrea, Financial Consultant, correspondence on Cape Wind, Sept. 30, 2010, through March 11, 2011. *See* Letter from David G. Frantz, Director, LGPO, to Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, June 7, 2011 (June Determination). LGPO withheld portions of those documents pursuant to FOIA Exemptions 4, 5, and 6. *Id.*

In applying Exemption 4 to the information withheld in the May and June Determinations, LGPO identified the withheld information as "sensitive commercial information that is maintained in confidence by [Cape Wind] and not available in public sources," including "financing plans, business strategies, and procurement plans." *See* May Determination at 2; June Determination at 2. LGPO withheld the information because its release would cause substantial harm to Cape Wind's competitive interests. *Id.* Specifically, disclosing financing information and strategies "would provide an unfair advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against [Cape Wind]." *Id.* Disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to [Cape Wind], in addition to allowing vendors unlicensed use of [Cape Wind's] original work product." *Id.* Finally, public disclosure of financing information "would enable potential customers to exert undue leverage with regards to purchasing [Cape Wind's] product." *Id.* The LGPO identified the information withheld under Exemption 5 as information that "relates to the Government's deliberations concerning various matters. The documents were created during Government consideration of proposed actions and other matters and were prepared in order to assist Government decision-makers in arriving at their decisions." *See* June Determination at 2. Finally, LGPO indicated that the information withheld under Exemption 6 is personal information about individuals which is protected from release because "disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 3.

On June 22, 2011, the Alliance appealed the May and June Determinations, challenging the determinations on several grounds. *See* Letter from Audra Parker, President and Executive Director, Alliance to Protect Nantucket Sound, to Poli A. Marmolejos, Director, Office of Hearings and Appeals, June 22, 2011 (Appeal). First, the Alliance makes the following procedural arguments: (1) LGPO withheld information that it has previously released and which is, therefore, already in the public domain; (2) LGPO failed to cite an exemption for each withholding; (3) LGPO failed to provide attachments to various pieces of correspondence; and (4) LGPO failed to release documents in the Nesic and Leslie correspondence packets, noting only that the agency is "waiting on consultation." *Id.* at 2-3. Second, the Alliance also argues that LGPO improperly applied Exemptions 4 and 5 to certain withheld information.[1] *Id.*

II. ANALYSIS

[1] The Alliance did not challenge LGPO's withholding of information under Exemption 6. Therefore, the Exemption 6 withholdings are not relevant to the instant proceeding and will not be considered.

In considering the instant Appeal, we have reviewed unredacted versions of each of the documents at issue in this matter, as well as the redacted documents that were released to the Alliance. We address each of the Alliance's arguments below.

A. The Alliance's Procedural Arguments

1. Whether LGPO Redacted Information Already in the Public Domain

Among the Alliance's arguments is that the LGPO "excessively redacted information" in the documents it released in the May and June Determinations. Appeal at 2, 3. The Alliance maintains that LGPO withheld information in the May Determination pursuant to Exemption 4 on page 12 of Cape Wind's loan application regarding work to be performed by a contractor, but released "similar information" in a previous determination. Appeal at 2. The Alliance further argues that LGPO improperly redacted "public information" on pages 33-34 of Cape Wind's application regarding a power purchase agreement (PPA) with an electric company and on page 36 regarding job creation estimates and other federal grants. Appeal at 2.

In reviewing the Appeal, we contacted LGPO for additional information regarding the withholdings. LGPO informed us that the information withheld on page 12 of the application is much more specific than the information previously released, because it references specific contract terms, and is therefore not information already in the public domain. Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. As to the withholdings on page 33, LGPO informed us that the information withheld in the section entitled "Market Analysis" refers to specific terms raised during the negotiation process between Cape Wind and a particular electric company and "is not public information and should remain business confidential." *Id*. The information in the sections entitled "Phase One" and "Phase Two" is financial information "not related to the PPA." *Id*. With respect to some of the withheld information on page 36, LGPO informed us that it contains specific financial terms that it withheld under Exemption 4 as business confidential. However, while responding to our inquiries concerning this Appeal, LGPO discovered that some information that it withheld on pages 34 and 36 is public information and should be released. *Id*. LGPO informed us that it will provide the Alliance with copies of pages 34 and 36 in which that information is released as part of a subsequent release. *See* Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 20, 2011.

Similarly, the Alliance argues that, in the June Determination, LGPO withheld information on pages one and two of the Tobin correspondence packet, despite releasing the same information on pages one and two of the Nesic correspondence packet. Appeal at 3. We have reviewed the pages in question and find that the information they contain is different. The information on pages one and two of the Nesic correspondence is an email from a Cape Wind representative to a DOE employee forwarding a publicly available Cape Wind press release. Nesic Correspondence at 1-2. The material withheld on pages one and two of the Tobin correspondence packet is an email chain which contains some information which LGPO withheld pursuant to Exemption 4 and other information it withheld under Exemption 5. Tobin Correspondence at 1-2.

Based on our review of the documents, with the exception of the information on pages 34 and 36 of the Cape Wind application that LGPO will release to the Alliance as part of a subsequent release, we conclude that the information in question has not been previously released. We consider below whether LGPO properly applied Exemptions 4 and 5.

2. Whether LGPO Failed to Cite an Exemption for Each Withholding

In its Appeal, the Alliance alleges that LGPO failed to cite a FOIA exemption for each instance in which it withheld information. Specifically, the Alliance alleges that LGPO redacted portions of Cape Wind's application on pages 35 and 36, but did not cite an exemption. Our review of pages 35 and 36 indicates that each page contains multiple withholdings, and that Exemption 4 is noted once in the margin of each page. LGPO confirmed that on pages of the application where it withheld information multiple times pursuant to the same exemption, it noted the exemption once in the margin of the page. Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. On review of the documents, we find no instances in which LGPO withheld information without citing any exemption.

3. Whether LGPO Failed to Provide Attachments to Email Correspondence

The Alliance states in its Appeal that, although LGPO provided requested correspondence, it did not include several attachments to released emails. Specifically, the Alliance notes that attachments are missing from Nesic correspondence packet – pages 4, 23, and 40; Tobin correspondence packet – page 5; Leslie correspondence packet – pages 8 and 18; and McCrea correspondence packet – page 6. Appeal at 2. We contacted LGPO to determine the status of the email attachments. LGPO informed us that, in light of its agreement with the Alliance to provide partial responses to the Alliance's FOIA request on a rolling basis as documents are located, reviewed and prepared for release, it has been producing the correspondence without the attachments because the correspondence can be processed more quickly. Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. LGPO stated that it is producing the documents separately. *Id*. As such, the email attachments are not part of the May or June Determinations and, therefore, do not properly fall within the scope of this Appeal.

4. Whether LGPO Improperly Failed to Release Certain Documents

The Alliance also maintains that LGPO improperly failed to release certain documents in the June Determination. Specifically, LGPO did not release the Nesic correspondence packet, pages 15 to 22, and the Leslie correspondence packet, pages 27 to 35, stating that it was "waiting on consultation." Appeal at 2. Upon review of those documents, we note that they involve correspondence between the DOE and another agency. LGPO informed us that it requested comments from the other agency regarding whether the documents should be released and has not yet received that agency's "consultation packet." Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. LGPO noted that once it receives comments from the other agency, it will complete its review of the documents and will respond to the Alliance in a separate determination. *Id*. Given the Alliance's agreement with LGPO to receive responsive documents as they become available following agency review, LGPO's partial release of the documents it had reviewed, rather than delaying providing any response to the Alliance until it

received comments from the other agency involved and completed a review of all of the relevant documents, was appropriate. We find that, because LGPO has not issued a determination with respect to these particular documents, the issue of whether they were properly withheld is not yet ripe for our consideration.

B. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, Cape Wind was required to submit the documents in question as part of its participation in the agency's loan application process. Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under Exemption 4, the first requirement is that the withheld information be "commercial or financial."[2] The information submitted by Cape Wind, *i.e.*, financing plans, business strategies, and procurement plans, *etc.*, clearly satisfies the definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000). Cape Wind, a limited liability company, satisfies that definition. Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the application process for the project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain

[2] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

similar information in the future. The question, then, turns to whether release of the information would likely result in substantial competitive harm to the submitters of the information.

LGPO determined that release of the commercial and financial information contained in Cape Wind's loan applications would likely cause the company substantial competitive harm by granting undue advantage to Cape Wind's competing power suppliers, power vendors and potential customers. Given the competitive aspect of the project and the very specific nature of the commercial and financial information contained in the loan application, we agree with LGPO's assessment that the release of the information would likely result in substantial competitive harm to Cape Wind. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents.

Turning to the Alliance's specific argument that LGPO applied Exemption 4 too broadly in withholding portions of Cape Wind's installation plan, we find the argument to be without merit. The Alliance maintains that LGPO excessively withheld information pursuant to Exemption 4 because it released some portions of Cape Wind's Installation Plan (specifically, the portions pertaining to "upland construction and transmission cable installation," "submarine transmission cables," "intra array cables," and "offshore wind turbine installation"), while withholding other portions of the Plan (portions pertaining to "ESP installation," "monopile installation," and "transition piece" installation). *See* Cape Wind Data Elements Supplemental at 15-16. The mere fact that certain steps of a process are considered non-proprietary does not render the entire process as such. In this case, Cape Wind has identified particular aspects of its installation process as confidential and proprietary business information. Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. Given that the Cape Wind project is the first of its kind, it is reasonable to conclude that portions of the installation process constitute proprietary information the release of which is likely to cause substantial harm to Cape Wind's competitive position.

C. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). In order to be shielded by this privilege, a record must be both pre-decisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.*

Pre-decisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion

among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In this case, the information withheld under Exemption 5 in the June Determination consists of written correspondence generated by DOE employees, DOE contractor employees, and consultants during the course of the agency's review of Cape Wind's application. The information contains, inter alia, opinions, recommendations and concerns raised by various parties throughout the review process. After reviewing the documents, we find that the material that LGPO withheld under Exemption 5 is pre-decisional and contains material that reflects DOE's deliberative process. Therefore, the information is exempt from disclosure under Exemption 5 of the FOIA.

The Alliance also alleges that LGPO improperly applied Exemption 5 in withholding communications that do not qualify as "inter-agency" or "intra-agency" memoranda or letters. Appeal at 2-3. Specifically, the Alliance states that on page 32 of the Nesic correspondence, LGPO withheld correspondence between a DOE employee and an outside party. *Id*. at 2. The Alliance further alleges that on page 39 of the Nesic correspondence LGPO improperly withheld correspondence between a DOE employee and a Cape Wind employee. *Id*. at 3. We contacted LGPO to ascertain the rationale for each of these withholdings. LGPO informed us that the correspondence on page 32 of the Nesic correspondence was between a DOE employee and a DOE contractor/consultant. *See* Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. As to the information on page 39, the Alliance's assertion that a recipient of the correspondence was a Cape Wind employee is incorrect. The correspondence was sent from a DOE employee to two other DOE employees and contains pre-decisional, deliberative material. *See* Email from LGPO to Diane DeMoura, Attorney-Examiner, OHA, July 19, 2011. Therefore, it was properly withheld under Exemption 5.

D. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal case law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency may withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g.*, *Tom Marks*, Case No. TFA-0379 (2010).[3] Accordingly, we may not consider whether the public interest warrants discretionary release of the information we have deemed properly withheld under Exemption 4. As to the material withheld under

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

Exemption 5, the withheld information includes the pre-decisional opinions and recommendations offered by DOE employees, DOE contractor employees, and consultants during deliberations on policy. LGPO concluded, and we agree, that "the quality of governmental decisions would be adversely affected if frank, written discussions of policy matters were inhibited by the knowledge that the content of such discussions might be made public." June Determination at 2. We find that the release of such information could have a chilling effect on the agency's ability to obtain straightforward opinions and recommendations in the future.

E. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Better Way for BPA*, Case No. TFA-0378 (2010). We find that LGPO complied with the FOIA by releasing to the Alliance all factual, non-deliberative portions of the documents.

III. Conclusion

As discussed above, we find that LGPO properly withheld information pursuant to Exemptions 4 and 5 in the documents it released to the Alliance. Moreover, LGPO complied with the requirements of the FOIA by releasing to the Alliance all non-exempt portions of the responsive documents.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Alliance to Protect Nantucket Sound, OHA Case Number TFA-0479, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 22, 2011

July 19, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Willard J. Faulkner
Date of Filing:	June 29, 2011
Case Number:	TFA-0482

On June 29, 2011, Willard J. Faulkner (Appellant) filed an Appeal from a determination issued to him on May 31, 2011, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge responded to a request for information the Appellant filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In its determination, Oak Ridge released copies of the Appellant's medical records, radiation exposure records, industrial hygiene records, and personnel records. This Appeal, if granted, would require Oak Ridge to conduct another search for responsive information.

I. Background

On April 22, 2011, the Appellant requested copies of his medical records, chest x-rays, radiation exposure records, industrial hygiene records, personnel records, personnel security file and Office of Personnel Management (OPM) Background Investigation. Request Letter dated April 22, 2011, from Appellant to Amy Rothrock, Privacy Act Officer, Oak Ridge. On May 31, 2011, Oak Ridge responded to the request, releasing the Appellant's medical records, radiation exposure records, industrial hygiene records, and personnel records. Determination Letter dated May 31, 2011, from Elizabeth Dillon, FOIA Officer, Oak Ridge, to Appellant. In its determination, Oak Ridge explained that it did not locate the Appellant's personnel security file or OPM background investigation because these records have been destroyed in accordance with the National Archives and Records Administration General Records Schedules. *Id.* On June 29, 2011, the Appellant appealed, challenging the adequacy of Oak Ridge's search and requesting a further search. Appeal Letter received June 29, 2011, from Appellant to Director, Office of Hearings and Appeals (OHA).

II. Analysis

In assessing the adequacy of a search under the Privacy Act, courts apply the "adequacy of search" analysis from the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (FOIA), precedent. *Sussman v. U.S. Dep't of Justice*, 03 Civ. 3618 DRH ETB, 2006 WL 2850608 (E.D.N.Y. Sept. 30, 2006). *See Shores v. FBI,* 185 F. Supp. 2d 77, 82 (D.D.C. 2002); *cf. Sneed v. U.S. Dep't of Labor,* 14 Fed. Appx. 343, 345 (6th Cir. 2001). Under the FOIA, courts have determined that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

In his Appeal, the Appellant first argues that the search was inadequate because it did not locate the OPM Background Investigation. When we contacted Oak Ridge concerning this request, it replied that the Appellant's employment ended in 1992 and that personnel security files are destroyed after five years in accordance with the National Archives and Records Administration (NARA) General Records Schedules. Therefore, we find no basis for ordering Oak Ridge to search for the OPM Background Investigation.[2/]

Secondly, the Appellant argues that the search was inadequate because it did not locate documents concerning visits he made to the infirmary in 1979 for vision problems. Appeal Letter. He continued, "[i]n the summer of 1979, after being contaminated I reported to the infirmary for eye rinsing on several occasions." *Id.* He maintains that those documents should exist because the Occupational Safety and Health Administration (OSHA) regulations require that an employer maintain and preserve medical records on exposed workers for 30 years after they leave employment. 29 C.F.R. § 1910.1020.[3/] *Id.* As an initial matter, we note that a provision of those

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

[2/] Oak Ridge also advised us that OPM destroys its reports of background investigations after 10 years in accordance with NARA schedules, and therefore, Oak Ridge did not believe that OPM would have the record.

[3/] The Appellant incorrectly cited the provision as 29 C.F.R. § 1910.20. That section does not

regulations states "[t]he medical record for each employee shall be preserved and maintained for at least the duration of employment plus thirty (30) years, *except that the following types of records need not be retained for any specified period* . . . first aid records . . . of one-time treatment and subsequent observation . . . which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a non-physician and if maintained separately from the employer's medical program." 29 C.F.R. § 1910.1020(d)(i)(B) (emphasis added). In any event, Oak Ridge has searched its database and located medical records responsive to the Appellant's request. For the year 1979, Oak Ridge specifically determined that the Appellant had a health evaluation and a pre-employment examination. Thus, Oak Ridge has maintained the Appellant's medical records but they do not contain a copy of the records he is requesting.

As the foregoing indicates, Oak Ridge searched the proper database for records pertaining to the Appellant. It conducted its search using appropriate keywords, *i.e.*, the Appellant's name, Social Security number, and date of birth. Based on the foregoing, we believe that Oak Ridge's search was reasonably calculated to uncover responsive information. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Willard J. Faulkner, Case No. TFA-0482, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 19, 2011

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exist. The correct citation is 29 C.F.R. § 1910.1020.

July 21, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Mary Sams
Date of Filing:	June 29, 2011
Case Number:	TFA-0483

On June 29, 2011, Tom Carpenter of Hanford Challenge filed an Appeal on behalf of Mary Sams (Mary Sams or Appellant) from a determination issued to her on June 1, 2011, by the Department of Energy's Headquarters Office of Information Resources (HQ). That determination was issued in response to a request for information that Ms. Sams' submitted under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Ms. Sams asks that HQ conduct an additional search for documents responsive to her request.

I. Background

Ms. Sams filed a request for information with the DOE's Richland Operation Office in which she sought a copy of any and all records, electronic or otherwise, relating to, generated in connection with or pertaining to Mary Sams, a former employee of the Advanced Medical Hanford, Inc., Department of Energy, Hanford Site. The Richland Operations Office forwarded part of Ms. Sams' request to the DOE HQ for a search to be conducted from the files of the Office of Health, Safety and Security (HSS). On June 1, 2011, HQ issued a determination letter which stated that HSS had completed its search and located one automated record concerning Ms. Sams. The document was released to Ms. Sams in its entirety. In its determination letter, HQ further advised that security clearance records are destroyed ten years after the employee terminates his or her access authorization. According to HQ, the last access authorization held by Ms. Sams was terminated on June 8, 1993. Therefore, HQ stated that DOE no longer maintains the types of security records sought by Ms. Sams. On June 29, 2011, Ms. Sams filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Sams challenges the reasonableness and adequacy of the search conducted by HQ. *See* Appeal Letter. She asks OHA to direct HQ to conduct a new search for responsive documents.

II. Analysis

Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The U.S. Department of Justice has issued guidance stating that an individual's access request for his own record maintained in a system of records should be processed under both the Privacy Act and the FOIA, regardless of the statute(s) cited. U.S. Department of Justice, *Privacy Act Overview,* May 2004. DOE requires a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. *See, e.g., Carla Mink*, 28 DOE ¶ 80,251 (2002). */ Accordingly, in analyzing the adequacy of the search conducted by HSS, we are guided by the principles we have applied in similar cases under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Aurimas Svitojus,* Case No. TFA-0349 (March 8, 2010). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought material." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. *Joan S. Sherwood,* Case No. TFA-0359 (March 16, 2010).

In her Appeal, Ms. Sams asserts that in 2009, HSS opened an inspection into the issue of beryllium at the Hanford site at the request of the Assistant Secretary of Energy for Environmental Management. *See* Appeal Letter at 3. According to the Appellant, in the course of this inspection, HSS team members met with Mary Sams on more than one occasion to interview her. In June 2010, HSS issued a report entitled, *Independent Oversight Inspection of the Hanford Site Chronic Beryllium Disease Prevention Program, Office of Health, Safety and Security*, June 2010. *Id.* Ms. Sams asserts that "there must have been notes of interviews, emails, and memoranda "relating to the meeting(s) with her." Consequently, Ms. Sams believes that HQ did not conduct an adequate or reasonable search in response to her request.

In reviewing the present Appeal, we contacted officials in HQ to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Sams' request might reasonably be located. Upon receiving Ms. Sams' request for information, HQ forwarded the request to HSS to search their files for responsive documents. HSS informed HQ that it sent the request to four separate offices to conduct a database search for records pertaining to Ms. Sams. It did not provide any other specificity with respect to how and exactly where the search was conducted. *See* Record of Telephone Conversation between Brenda Washington, HQ, and Kimberly Jenkins-Chapman, OHA (July 11, 2011). As stated earlier, HSS located one automated record concerning Ms. Sams. HQ officials informed us that when HSS conducted its search, the HSS report

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*/ All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.gov/foia1.asp

was not located in the search for Privacy Act records. *See* Record of Telephone Conversation between Brenda Washington, HQ, and Kimberly Jenkins-Chapman (July 14, 2011). HSS has now located the report and has informed HQ that the report is also available on the Web. *Id.*
Based on the foregoing, it is unclear whether there may exist notes of interviews, emails or other memoranda that reflect meetings with Ms. Sams. In addition, given the facts presented to us, including the lack of specificity with regard to the searches performed, we cannot find that HSS conducted an adequate search under both the Privacy Act and the FOIA which was reasonably calculated to discover documents responsive to Ms. Sams' request. In light of Ms. Sams' involvement in the HSS report issued in June 2010, we find that additional responsive information may exist pertaining to Ms. Sams. Consequently, as discussed below, we will remand this matter to HQ so that an additional search may be undertaken for responsive material.

It Is Therefore Ordered That:

(1) The Appeal filed by Tom Carpenter of Hanford Challenge on behalf of Mary Sams, OHA Case No. TFA-0483, on June 29, 2011, is hereby granted.

(2) This matter is hereby remanded to the Headquarters Office of Information Resources in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a (g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 21, 2011

August 11, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	National Association of Home Builders
Date of Filing:	July 20, 2011
Case Number:	TFA-0484

On July 20, 2011, the National Association of Home Builders (Appellant) filed an Appeal from a determination issued to it on June 10, 2011, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, Oak Ridge released three documents as responsive to the Appellant's request, but withheld portions of one document under Exemption 4. The Appellant challenges Oak Ridge's withholding of information from that document. The Appellant also challenges the adequacy of Oak Ridge's search. This Appeal, if granted, would require Oak Ridge to release the withheld information.

I. Background

On April 12, 2010, the Appellant filed a request with DOE Headquarters (DOE/HQ) essentially asking for any document that contains the formulas, equations or methodologies used by DOE to evaluate the projected energy savings to be obtained by incorporating DOE's proposals for changes to the 2012 International Energy Conservation Code (IECC).[1/] Request Letter dated April 12, 2010, from Appellant to

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1/ The International Code Council (ICC) publishes every three years an updated edition of the IECC. The IECC is a model code that local governments and other stakeholders can use in developing local building codes and standards. Appeal at 2. A federal statute mandates that DOE participate in the model national codes development process and that DOE help states adopt and implement progressive energy codes. *See* 42 U.S.C. § 6833(d) (the Energy Conservation and Production Act, as amended). DOE is also required to review whether the proposed IECC revisions would improve energy efficiency in residential buildings as compared to the previous IECC edition and publish this determination in the Federal Register. 42 U.S.C. § 6833(a)(5)(A). *See National Association of Home Builders*, Case No. TSO-0401 (August 9, 2010), *slip op*. at 1 n.2.

Alexander Morris, FOIA Officer, DOE. Included in this request were the formulas, equations and methodologies used to calculate the increase in energy efficiency that the proposed 2012 IECC edition (incorporating DOE's proposals) would produce when compared to the 2006 IECC edition and the increase of energy efficiency that the 2009 IECC edition produced versus the 2006 IECC edition. *Id.* DOE/HQ subsequently transferred the request to Oak Ridge so that a search could be made of Pacific Northwest National Laboratory (PNNL) records. PNNL had performed the calculations regarding the proposed energy savings projected for the DOE proposals. *Nat'l Ass'n of Home Builders*, Case No. TFA-0428 (November 19, 2010).

On September 15, 2010, Oak Ridge responded to the request by providing the Appellant two Excel spreadsheet files copied onto a compact disk. On October 14, 2010, the Appellant appealed to this Office, challenging the extent of the search that was made for responsive documents. This Office remanded the Appeal to Oak Ridge to determine whether information responsive to the request could be extracted from an intermediate template file that had been located. *NAHB,* at 3-4.

On remand, Oak Ridge searched the one computer file that may have contained information responsive to the Appellant's request. Determination Letter from Paul M. Golan, Acting Manager, Oak Ridge, to Appellant. Oak Ridge released three documents to the Appellant, but withheld seven pages of one of those documents. *Id.* at 1. The withheld information is EnergyGauge software source code. The Appellant is challenging the withholding of those seven pages. July 20, 2011, Appeal Letter from Appellant to Director, Office of Hearings and Appeals (OHA). In addition, the Appellant is challenging Oak Ridge's search for responsive documents. *Id.* at 5.

II. Analysis

A. Adequacy of the Search

We addressed the adequacy of Oak Ridge's search in the previous Decision, *NAHB*, Case No. TFA-0428 (November 19, 2010). Except for one intermediate template file that was to be searched on remand for responsive information, we upheld Oak Ridge's search as adequate. On remand, Oak Ridge released that file to the Appellant. We will not address the adequacy of the search a second time.

B. Exemption 4

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall

nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). Exemption 4 is at issue in this case.

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is commercial or financial, "obtained from a person" and "privileged or confidential." Oak Ridge applied this analysis to the EnergyGauge software source code it withheld. EnergyGauge is a commercial product which is licensed to end-users. Appeal Letter at 6 (acknowledging that NAHB has a license for the EnergyGauge software).

We believe the initial question that must be answered is whether the information being withheld is a "trade secret." *Public Citizen*, 704 F.2d at 1288. There is limited case law regarding "software source code,"[2/] and whether it is a trade secret under Exemption 4. For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit has adopted a "common law" definition of the term "trade secret." *Id.* at 1280, 1288. In *Public Citizen*, "trade secret" was defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or

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[2/] Courts have looked at the software's design and purpose to determine whether it is an agency record. *Compare Gilmore v. Dep't of Energy*, 4 F. Supp. 912, 920-21 (N.D. Cal 1998) (holding that video conferencing software developed by privately owned laboratory was not a record under FOIA because it was "not designed to be . . . responsive to any particular database" and "does not illuminate anything about [the agency's] structure or decision making process), *with Cleary, Gottlieb, Steen & Hamilton v. HHS*, 844 F. Supp 770, 781-82 (D.D.C. 1993) (concluding that a software program was a record because it was "uniquely suited to its underlying database" such that "the software's design and ability to manipulate the data reflect the [agency's study]," thereby "preserving information and 'perpetuating knowledge.'" (quoting *DiViaio v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978))).

processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at 1288. Trade secret protection has been recognized for product manufacturing and design information. *Appleton v. FDA*, 451 F. Supp. 2d 129, 142 & n. 7. (D.D.C. 2006). The software source code in this case properly fits under the trade secret analysis in that it is the plan or formula used for the process of running the EnergyGauge software. The process to develop software is both innovative and can require substantial effort. Therefore, we believe that the source code withheld by Oak Ridge is a trade secret within the meaning of Exemption 4. Accordingly, Oak Ridge's determination to withhold the source code under Exemption 4 was correct.

III. Conclusion

The Appellant argues that the search conducted by Oak Ridge was inadequate. We addressed this argument in its previous Appeal. We will not revisit the issue. The Appellant also argues that Exemption 4 does not apply to the information withheld. We disagree. We found that the software source code is a trade secret that should be withheld under Exemption 4. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by National Association of Home Builders, Case No. TFA-0484, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 11, 2011

August 9, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Ricky W. Ladd
Date of Filing:	July 21, 2011
Case Number:	TFA-0485

On July 21, 2011, Ricky W. Ladd (Appellant) filed an Appeal from a determination issued to him on June 14, 2011, by the Environmental Management Consolidated Business Center (EMCBC) of the Department of Energy (DOE). In that determination, EMCBC responded to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, EMCBC released documents as responsive to the Appellant's request, but withheld portions of two documents under Exemptions 5 and 6. The Appellant challenges EMCBC's withholding of information from those documents. In addition, the Appellant challenges EMCBC's search for responsive documents. This Appeal, if granted, would require EMCBC to release the information withheld under Exemptions 5 and 6 and to conduct a further search for responsive information.

I. Background

On December 6, 2010, the Appellant filed a request with DOE asking for documents related to his termination and whistleblower complaint. Request dated December 6, 2010, from Appellant to Alexander Morris, FOIA Officer, DOE. The request was subsequently forwarded to EMCBC. On May 6, 2011, EMCBC sent a preliminary response to the Appellant, informing him that some of the documents identified as responsive to his request were still being reviewed. On June 14, 2011, EMCBC issued its final determination, releasing the remaining documents but withholding information from two of those documents under Exemptions 5 and 6. Determination Letter dated June 14, 2011, from Jack R. Craig, Director, EMCBC, to Appellant.

On July 21, 2011, the Appellant appealed to this Office, challenging the Exemption 5 and 6 withholdings and the extent of the search that was made for responsive documents.

II. Analysis

A. Exemptions 5 and 6

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). EMCBC applied Exemption 5 to withhold Document "hh" and Exemption 6 to withhold two attachments to Document "v."

1. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States*, 617 F.2d at 862. Only the attorney-client privilege is at issue here.

An agency may withhold information under the attorney-client privilege if it is a "confidential communication[] between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The privilege protects only those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976). It applies to facts that a client gives to the attorney and opinions that the attorney gives to the client. *See, e.g., Jernigan v. Dep't of the Air Force*,

No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998). The privilege protects the attorney-client relationship – it encourages full disclosure to attorneys so that they can render effective legal assistance. *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988).

We find that the EMCBC properly invoked the attorney-client privilege to withhold Document "hh." The document proposes a course of action to address the Appellant's whistleblower complaint. The originator of the document was seeking legal advice from DOE attorneys. *See Southern California Edison,* Case No. VFA-0674 (June 20, 2001).[1/] This document was clearly a confidential communication between an attorney and his client made for the purpose of obtaining legal advice. Accordingly, this document is protected by the attorney-client privilege.

a. Segregability

Notwithstanding the above, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). We reviewed the withheld information and did not find any non-exempt, segregable information.

b. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. EMCBC concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to EMCBC's ongoing decision-making process. Therefore, release of the withheld information would not be in the public interest.

2. Exemption 6

EMCBC withheld two exhibits to Document "v," when it was released to the Appellant.

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

These two exhibits were withheld in their entirety and are witness statements. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees,* 879 F.2d at 874.

a. Privacy Interest

In this case, EMCBC determined that release of the two witness statements attached to Document "v" would result in the invasion of significant personal privacy interests. Specifically, EMCBC found that the witnesses had a reasonable expectation of privacy when the statements were made and the release of their identities could subject them to harassment or intimidation. *See Sandra M. Hart,* Case No. VFA-0372 (February 27, 1998). EMCBC determined that withholding only the names of the witnesses was insufficient to protect the witnesses' privacy interest because only a small group of employees observed the incident described in Document "v." Under these circumstances, the facts set forth in the statements serve to identify the witnesses. For this reason, the witness statements were withheld in their entirety. We have previously held that because a person who is revealed as having participated in an investigation may be subject to coercion, harassment, or intimidation based on the mere fact of his or her participation or on the content of his or her statements to investigators, witnesses specifically named or identified maintain a substantial privacy interest in the continued confidentiality of the withheld material. If release of the document would disclose the identities of the witnesses, then the document can be withheld. *See Robert D. Reilly*, Case No. TFA-0166

(2006). In addition, we have held in the past that the potential for harassment of individuals is sufficient justification for withholding information under Exemption 6. *Id*.

b. Public Interest

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id*.; *see also Nat'l Ass'n of Retired Employees v. Horner*, 879 F.2d at 879. In the present case, we find that the public interest in the withheld information at issue here is minimal at best. The Appellant has not established how release of the identities of the witnesses would serve any public interest. To the contrary, we find that release of the identifying information of the witnesses would reveal little, if anything, to the public about the workings of the government.

c. Balancing Test

After weighing the significant privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities and other personal information of the witnesses would constitute a clearly unwarranted invasion of personal privacy. Therefore, EMCBC properly withheld the information under Exemption 6.

B. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).

We contacted EMCBC to determine what type of search was conducted. EMCBC replied that the two employees most familiar with the requested information performed

the search for responsive information. Memorandum dated August 1, 2001, from Jack R. Craig, EMCBC, to Janet Fishman, OHA. They conducted both a computerized search and a paper search. *Id.* at 4-5. In conducting the computer search, they used the Appellant's name along with the terms "whistleblower," "OIG," "inquiry," "timeline," and "10 C.F.R. Part 708." *Id.* at 4.

As grounds for his claim that the search conducted by EMCBC was inadequate, the Appellant asserts that a number of documents are missing from the information released to him. EMCBC responded to our request for the status of the documents that the Appellant claims are missing.[2/] In light of EMCBC's response and based on EMCBC's explanation of its search, we believe that EMCBC's search was reasonably calculated to uncover responsive information.

III. Conclusion

EMCBC properly withheld information under Exemptions 5 and 6. In addition, EMCBC conducted a search reasonably calculated to uncover the requested information. Therefore, we will deny the Appeal.

[2/] As stated above, as grounds for his claim that the search EMCBC conducted was inadequate, the Appellant asked why a number of documents were not released to him. EMCBC responded to the Appellant's questions regarding the whereabouts of these specific documents. First, EMCBC indicated that Document "q," which the Appellant believes is a timeline of events, was actually a set of responses to specific questions posed by another employee. August 1 Memorandum at 3. The e-mail posing the questions was released to the Appellant as Document "p." *Id.* Second, EMCBC indicated that timeline actually referenced in Document "q" was never located. *Id.* Third, EMCBC indicated that the supporting documents for Document "i" were released as Document "k." *Id.* at 4. Fourth, EMCBC stated that one of the drafts mentioned in Document "m" was included in the responsive documents as the second page to Document "m." *Id.* at 4. However, upon receipt of a copy of this Appeal, EMCBC determined that the "original draft" of Document "m" was omitted. *Id.* at 4. EMCBC has since provided that to the Appellant. Attachment to e-mail dated August 4, 2011, from Jay Jalovec, EMCBC, to Janet Fishman, OHA. Finally, EMCBC stated that the request from Uranium Disposition Services, LLC, to the DOE regarding dismissal of the Appellant's whistleblower complaint was provided as Document "v." *Id.* at 4.

It Is Therefore Ordered That:

(1) The Appeal filed by Ricky W. Ladd, Case No. TFA-0485, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 9, 2011

AUGUST 22, 2011

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Kristopher Fair
Date of Filing:	July 26, 2011
Case Number:	TFA-0486

This Decision concerns an Appeal that Kristopher Fair filed in response to a determination issued to him by the Office of Information Resources (hereinafter referred to as "OIR") of the Department of Energy (DOE). [1] In that determination, OIR denied a request for the waiver of fees associated with its processing of Mr. Fair's request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to waive all applicable fees. In the alternative, Mr. Fair requests that he be assessed the fees charged to "educational and non-commercial scientific institution" requesters.

The FOIA generally requires that documents held by federal agencies be released to the public on request. The FOIA also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). The amount of fees assessed depends upon the category of the requester. "Commercial use requesters" are charged the full direct costs of searching for, reviewing for release, and copying the records sought. 10 C.F.R. § 1004.9(b)(1). "Educational and non-commercial scientific institution" requesters and members of the news media are charged copying costs only, excluding charges for the first 100 pages. 10 C.F.R. § 1004.9(b)(2). "All other requesters" are charged the full reasonable direct cost of searching for and copying responsive records, except that the first 100 pages of copying and the first two hours of searching are provided without cost. 10 C.F.R. § 1004.9(b)(4).

1/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

I. Background

In his request, Mr. Fair sought access to information from the years 1946 to 1960 relating to Chelyabinsk-40 and Chelyabinsk-65, two names that were given to a "secret" city in what was formerly known as the Union of Soviet Socialist Republics (U.S.S.R.), where workers in the U.S.S.R.'s nuclear industry resided. Mr. Fair also asked that all fees associated with the processing of the request be waived. In the alternative, he requested that he be categorized as an "educational and non-commercial scientific institution" requester.

In its determination letter, OIR concluded that Mr. Fair's request for a waiver of fees did not satisfy the applicable criteria for granting such requests. Specifically, OIR determined that Mr. Fair had not shown that the information requested would contribute significantly to public understanding of operations or activities of the United States government. Consequently, OIR denied Mr. Fair's fee waiver request. OIR further found that Mr. Fair, who is a student at Hood College in Frederick, Maryland, had not submitted sufficient information to warrant classification as an "educational or non-commercial scientific institution" requester. OIR pointed out that, in order to qualify for this classification,

> the request must serve a scholarly research goal of the institution, not an individual goal. Thus, a student seeking inclusion in this subcategory, who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal, and would not qualify as an educational institution requester.

June 9, 2011, OIR determination letter at 1. OIR therefore placed Mr. Fair in the "all other requesters" fee category.

In his appeal, Mr. Fair argues that the requested information about a "secret" Soviet city would contribute significantly to public understanding of operations of the United States government because it would provide insight into the information gathering activities of federal agencies. Appeal at 2. With regard to the proper classification of his request, Mr. Fair states that his research is not associated with the completion of a course, but is instead in furtherance of a "Hood College-sponsored initiative created to conduct historical research." Appeal at 1. He therefore contests his classification in the "all other requesters" category.

II. Analysis

The DOE will grant a full or partial waiver of applicable fees if a requester can demonstrate that disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii);

10 C.F.R. § 1004.9(a)(8). Both of these criteria must be satisfied before a fee waiver is granted. *Id.* Because we conclude that Mr. Fair has not demonstrated that disclosure of the information sought is likely to contribute significantly to public understanding of the government, we need not address the "commercial interest" prong of the fee waiver requirements.

The DOE regulations set forth specific guidelines that are to be used in fee waiver cases to determine whether disclosure of the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. In making such a determination, we are required to consider (i) the subject of the request: whether the requested records concern the operations or activities of the government; (ii) the informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of governmental operations or activities; (iii) the contribution to an understanding by the general public of the subject likely to result from disclosure, and (iv) the significance of the contribution to public understanding: whether disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities. 10 C.F.R. § 1004.9(a)(8)(I).

Central to these criteria, and indeed to the first prong of the fee waiver requirements itself, is that the information requested must concern the operations or activities of the United States government, and release of that information must be likely to contribute to public understanding of government operations or activities. In his appeal, Mr. Fair contends that release of the information will contribute to public understanding of the information gathering activities of the DOE's predecessor agencies. This contention fails for two reasons. First, the subject of the request is a "secret" Soviet city, which does not concern the operations of the United States government. In a number of previous cases, we have denied fee waivers where there has been no connection established between the subject matter of the request and a specific governmental activity. *See, e.g., Barbara Schwarz,* Case No. VFA-0646 (2001); *IBEW*, Case No. VFA-0250 (1997); *Tod Rockefeller,* Case No. VFA-0447 (1998). Second, Mr. Fair's argument sweeps too broadly. The collection of all of the information in the federal government's possession involved some level of governmental activity. If informing the public about the extent of information in the government's possession and how that information was gathered was sufficient to justify a waiver, it would render the first prong of the FOIA's fee waiver requirements meaningless. The OIR properly denied Mr. Fair's request for a fee waiver.

We reach a different conclusion, however, with regard to Mr. Fair's inclusion in the "all other requesters" fee category. Under the fee waiver guidelines promulgated by the Office of Management and Budget, the term "educational institution" includes institutions of higher learning that operate "a program or programs of scholarly research." 52 Fed. Reg. 10012, 10018 (1987). In order to qualify as an "educational and non-commercial scientific institution" requester, the request must serve a scholarly research goal of the institution, and not an individual goal. *Id.* We conclude that Mr. Fair's request satisfies these criteria. Mr. Fair is a Research Fellow participating as one of a team of researchers in the Summer Research Institute at Hood College, an institution of higher learning. His work directly furthers the research goals of the college, and is not for an individual course of study. Appeal at 1. The research team, which is headed by a Hood College professor, will produce

an article for publication in a scholarly journal. *Id.* Furthermore, Mr. Fair's participation on the team is not a requirement for graduation, nor will he receive any academic credits for his work. *See* memorandum of August 17, 2011 telephone conversation between Robert Palmer, OHA Staff Attorney, and Mr. Fair. Mr. Fair should therefore be assessed the fees charged to "educational and non-commercial scientific institution" requesters.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Kristopher Fair, OHA Case Number TFA-0486, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) Mr. Fair shall be classified as an "educational and non-commercial scientific institution" requester, and shall be assessed fees consistent with that classification.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 22, 2011

September 8, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gennady Ozeryansky

Date of Filing: August 17, 2011

Case Number: TFA-0487

On August 17, 2011, Gennady Ozeryansky (Appellant) perfected an Appeal from a determination issued to him on May 13, 2011, by the Department of Energy's Office of Inspector General (OIG), in Washington, D.C., in response to a request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. OIG, in its June 28, 2011, determination letter, informed the Appellant that it neither confirmed nor denied the existence of any records described in the Appellant's request. This Appeal, if granted, would require OIG to either release any discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

In his June 15, 2011, FOIA request (Request), the Appellant asked for a copy of the "Inspector General investigation of Barry Sullivan." June 28, 2011, letter from John Hartman, Assistant Inspector General for Investigations, OIG, to Gennady Ozeryansky at 1 (Determination Letter). In its June 28, 2011, Determination Letter, OIG informed the Appellant that it neither confirmed or denied the existence of any such records described in the request.[1] *Id*. The Determination Letter, citing FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C)[2] as support, went on to state that, lacking an individual's consent, an official acknowledgement of an investigation or an acknowledgment of the existence of investigatory records about an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy.

[1] An agency response to a FOIA Request, which states that the agency "can neither confirm or deny" the existence of responsive records because the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information or constitute an unwarranted invasion of personal privacy is often called a *Glomar* response. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). We will refer to OIG's response as a *Glomar* response.

[2] Exemption 7(c) of the FOIA protects records or information compiled for law enforcement purposes but only " to the extent that production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

II. Analysis

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records are kept would jeopardize the privacy interests that FOIA Exemptions are designed to protect and that a *Glomar* response neither confirming nor denying the existence of responsive records is appropriate. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983) (*Antonelli*). In reviewing the interests to be balanced to justify Exemption 7(C) protection, it is apparent that the request at issue might reveal whether an individual is the subject of an OIG law enforcement investigation.[3] The courts and OHA have consistently held that individuals have a strong privacy interest in avoiding the stigma of being associated with a law enforcement investigation. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d. 755, 767 (D.C. Cir. 1990); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *Westinghouse Savannah River Co., LLC*, Case No. VFA-0556 (March 13, 2000), *slip op.* at 3 (*Westinghouse*).[4] This strong interest is balanced against the fact that the Appellant has not referenced any specific public interest that would be furthered by the release of the requested documents. Given these interests, I find that the potential privacy interest threatened by release of any potentially responsive documents greatly outweighs any generalized, non-specific, public interest that would be furthered by release of such potential documents. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1492-94 (D.C. Cir. 1994); *Massey*, 3 F.3d at 624; *McNamera v. Dep't of Justice*, 974 F. Supp. 956, 957-60 (W.D. Tex. 1997); *Westinghouse*, *slip op.* at 3. Consequently, any potentially responsive documents would be protected by FOIA Exemption 7(C). Using this rationale, the courts and OHA have upheld the use of a *Glomar* response where a FOIA request might reveal Exemption 7(C) information disclosing the identity of individuals who are subjects of investigations or are otherwise mentioned in law enforcement records and who have not previously waived their privacy rights. *See, e.g., Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 775 (1989); *Massey*; *Antonelli*; *Westinghouse*.

We have spoken to an OIG official who was familiar with the processing of the Appellant's FOIA Request. After reviewing the subject matter of the Request, the method by which the Request was processed, and the OIG justification offered in the determination letter, we find that OIG appropriately invoked its *Glomar* response. Thus, we agree that providing any other response to the FOIA Request would potentially constitute an unwarranted invasion of personal privacy, such as that protected by Exemption 7(C). Consequently, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 17, 2011, by Gennady Ozeryansky, OHA Case No. TFA-0487, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

[3] OHA has consistently held that OIG is a law enforcement body and its investigations and reports are records compiled for law enforcement purposes within the meaning of Exemption 7(C). *See Westinghouse Savannah River Co., LLC*, Case No. VFA-0556 (March 13, 2000), *slip op.* at 2.

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

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 8, 2011

September 20, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Sierra Club
Date of Filing:	September 6, 2011
Case Number:	TFA-0488

On September 6, 2011, the Sierra Club (the Appellant) filed an Appeal from an interim determination issued by the Department of Energy's (DOE) Office of Information Resources (OIR), in response to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OIR to expedite the processing of the Appellant's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On August 8, 2011, the Appellant filed a FOIA request with OIR for records pertaining to a decision by the state government of Kansas to shift DOE supplied funds from the "Efficiency Kansas Loan Program" to "three new biofuels projects." The Appellant identified itself as a representative of the news media and requested expedited processing contending "an urgency to inform the public concerning actual or alleged Federal Government exists." Request at 3. The Appellant further contends:

> It is our understanding that an environmental review, if required of the biofuels projects, to which the efficiency Kansas funds are being diverted, must be completed by September 1, 2011. No one in the public or even stakeholders in the Efficiency Kansas Program were notified of the planned diversion of funds until July 19. Thus no one has been given an opportunity to comment on the action or on the environmental review. Thus we need the requested information immediately in order to respond in a timely fashion.

Request at 3.

On August 11, 2011, OIR issued the Interim Determination Letter in which it denied the Appellant's request for expedited processing because the Appellant had not demonstrated a "compelling need" for expedited processing. The OIR agreed that the Appellant is "primarily engaged in disseminating information." However, OIR further found that the request did not identify "an actual activity that poses any particular urgency that requires the dissemination of information in an expedited manner." Interim Determination Letter at 1.

On September 6, 2011, the Appellant submitted the present Appeal.

II. Analysis

The only issue under consideration in the present Appeal is the Appellant's request for expedited processing. The Appellant has made a number of arguments in support of its contention that it has a compelling need for expedited processing of its request. In its request, the Appellant asserted:

(1) Release of the requested information will contribute to the public's understanding of "how and why the specified diversion of funds was allowed to happen, was justified or not justified, and whether a suitable environmental review was conducted." Request at 2;
(2) It requires the requested information in order to participate in the state of Kansas' environmental review process. That process is expected to be completed by September 1, 2011. *Id.* at 3.

In its Appeal, the Appellant asserts:

> We have an urgency and a compelling need to inform the public, in particular stakeholders in the Efficiency Kansas program who expended time and resources in the program that was summarily cut off by the Kansas Corporation Commission (KCC) without advance warning, thereby putting their investments in jeopardy, and to inform the citizens of Kansas who are concerned about the proper stewardship of public funds. The stakeholders are understandably concerned about their prospects for redress because of the deadline of April 1, 2012 set by DOE for the expenditure of funds under ARAR.

Appeal at 1. The Appeal further contends that "the inability of the Sierra Club to quickly obtain the information we need to participate in the NEPA process would clearly compromise our legal right to participate on a timely basis where our comments may be of some value." *Id.* at 2.

The Appellant has not demonstrated that it has a compelling need for expedited processing of its request. Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. When an agency grants a requester expedited processing, that requester receives preference over previous requesters, by having its request moved ahead in line therefore delaying the processing of earlier requests. Accordingly, the FOIA provides that

expedited processing is to be offered when a requester is able to demonstrate "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I).

Under the FOIA, "compelling need" means:

> (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life of or physical safety of an individual; or
>
> (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to **inform the public** concerning actual or alleged **Federal Government activity**.

5 U.S.C. § 552(a)(6)(E)(v) (emphasis supplied). The relevant legislative history indicates that the "specified categories for compelling need are intended to be narrowly applied." H.R. Rep. No. 104-795 at 26 (1996).

The present case clearly does not involve information which could reasonably be expected to pose an imminent threat to the life or safety of an individual. It does involve a requester which the OIR has determined to be a "person primarily engaged in disseminating information." Determination Letter at 1. Therefore, the remaining question before us is whether the Appellant has demonstrated "urgency to inform." The legislative history states:

> The standard of "urgency to inform" requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

H.R. Rep. No. 104-795, at 26 (1996). Accordingly, the D.C. Circuit Court has ruled that in order to determine whether a requester has demonstrated an "urgency to inform" and, thus, a "compelling need," at least three factors should be considered: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). In previous cases before this office, we have applied these factors in order to determine whether a requester has demonstrated that its request is entitled to expedited processing. *See e.g. Southeastern Legal Foundation, Inc.*, Case No. TFA-0389 (2010);[1] *Center for Investigative Reporting*, Case No. TFA-0200 (2007).

Applying these factors to the present case, we find that that the interests cited by the Appellant in both its request and its Appeal apply mainly to the "stakeholders in the Efficiency Kansas program" rather than to the American public at large. Moreover, the Appellant clearly seeks the requested information in order to timely participate in a process conducted by a state entity rather

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

than a Federal government activity. These two factors strongly indicate that the appellant has not demonstrated an "urgency to inform."

Moreover, we note that the Appellant has repeatedly contended that it needs to obtain the requested information on an expedited basis in order to allow it to participate in a time-limited environmental review process. However, unless the failure to release information would pose an imminent threat to the life of or physical safety of an individual, the FOIA specifically states that "compelling needs" exist only when there exists an "urgency to **inform the public."** 5 U.S.C. § 552(a)(6)(E)(v)(2) (emphasis supplied).

For the reasons set forth above, we cannot find that the request concerns a matter of current exigency to the American public or that processing the request within the time frame of a normal FOIA request would compromise a significant recognized interest. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed on September 6, 2011, by the Sierra Club, OHA Case No. TFA-0488, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 20, 2011

September 13, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Project On Government Oversight

Date of Filing: September 1, 2011

Case Number: TFA-0489

On September 1, 2011, the Project On Government Oversight (the Appellant) filed an Appeal from a July 28, 2011, final determination issued by the Department of Energy's Oak Ridge Office (ORO). ORO responded to a Request for Information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, filed by the Appellant with DOE Headquarters on July 11, 2011. ORO's July 28, 2011, determination indicated that a search of ORO's files did not locate any responsive documents. This Appeal, if granted, would require ORO to conduct an additional search for responsive material.

I. BACKGROUND

On July 11, 2011, the Appellant filed a request with DOE Headquarters seeking a "Report by Army Corps of Engineers on the Uranium Processing Facility planned at Oak Ridge National Laboratory." Request at 1. DOE Headquarters referred the request both to the National Nuclear Security Administration (NNSA) which oversees the Y-12 facility at Oak Ridge, and to ORO, which oversees the Oak Ridge National Laboratory (ORNL).

On July 28, 2011, ORO issued a determination letter (the Determination Letter) indicating that its search for responsive documents failed to locate the information requested by the Appellant.

On September 1, 2011, the Appellant filed the present Appeal.

II. ANALYSIS

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).

The Appeal correctly states that the report the Appellant seeks was cited in an article appearing on page 2 of the July 1, 2011, edition of the Nuclear Weapons & Materials Monitor. The Appellant also cites a determination letter issued by the Army Corps of Engineers (the Corps), in which the Corps states that the report was in ORNL's possession. August 18, 2011, letter from Bill D. Woodard, District Counsel, Nashville District, Corps of Engineers to the Appellant at 1. The Appellant, not unreasonably, believes that this information establishes that the report it seeks is in fact in ORO's possession.

However, the Uranium Processing Facility program is in fact located at the NNSA's Y-12 National Security Complex operated by NNSA. July 1, 2011, edition of the Nuclear Weapons & Materials Monitor at 2; July 15, 2011, email from J.T. Howell, Nuclear Fuel Supply to Amy Rothrock, ORO FOIA Officer.

While ORO has concluded its search, NNSA's search is still ongoing. ORO's obligation to search for responsive documents applies only to its own files. The Determination Letter issued by ORO on July 28, 2011, applies only to ORO's files and does not apply to the search currently being conducted by NNSA for responsive documents that may be located in the Y-12 Site Office files. The NNSA has informed us that it will be issuing a separate Determination Letter concerning the Y-12 Site Office. Memorandum of September 1, 2011, telephone conversation between Steven Fine, OHA and Ben Jaramillo, NNSA Office of Chief Counsel at 1.

It Is Therefore Ordered That:

(1) The Appeal filed by the Project On Government Oversight, TFA-0489, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 13, 2011

September 27, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Kaiser Eagle Mountain, LLC
Date of Filing:	September 1, 2011
Case Number:	TFA-0491

On September 1, 2011, Kaiser Eagle Mountain LLC (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Golden Field Office (GFO). In that determination, GFO responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. GFO released a substantial amount of responsive information, but withheld responsive information under FOIA Exemption 4. This Appeal, if granted, would require GFO to release that information it has withheld to the Appellant.

I. BACKGROUND

The Appellant filed a request for information with GFO seeking "all applications and submittals made by or on behalf of Eagle Crest Energy Company [(ECEC)] seeking to obtain funding under DOE's Advanced Hydropower Grant program." Determination Letter at 1. On July 19, 2011, GFO issued a determination letter (the Determination Letter) releasing copies of ECEC's application and supporting documentation (the Application) to the Appellant. GFO however, withheld substantial portions of the Application under Exemption 4. Determination Letter at 1. On September 1, 2011, the Appellant filed the present appeal contending GFO had improperly withheld that information.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to

FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."[1]

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, GFO correctly concluded that the Application was involuntarily submitted. The only basis supplied by GFO for its withholding of the Application under Exemption 4 was its finding that release of the withheld information would cause substantial harm to ECEC's competitive position.

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009).[2] Accordingly, if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1);

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[1] In the present case, GFO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

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

Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Moreover, it is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, GFO merely parroted the language of the FOIA statute by stating, in conclusory fashion, that disclosure of the redacted information would result in substantial competitive harm. Determination Letter at 2. Such a statement does not provide a sufficient basis for a determination withholding information under Exemption 4. *See* e.g. *Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter for a new determination explaining how Exemption 4 applies to withheld material). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999).

Turning to the present case, we find that GFO has not met the statutory and regulatory mandate that it specifically identify the information it is withholding. The Determination Letter's identification and description of that information it has withheld under Exemption 4 are limited simply to "confidential business practice and financial information." Determination Letter at 2. While some of the information GFO has redacted from the copy of the Application it released to the Appellant is clearly identified by this description (specifically that large portion of the withheld information consisting of financial information), much of the information it has withheld is not described by the conclusory and vague description provided by the Determination Letter: i.e. "confidential business practice information." Accordingly we find that those portions of the Application and supporting documents which consist solely of ECEC's financial information were properly described and properly withheld by GFO. *See Gulf & Western Ind. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

The GFO has provided this office with both redacted and unredacted versions of the responsive document. Some information contained in the responsive document that was not adequately identified can clearly be properly withheld under Exemption 4's competitive harm standard, specifically that information which, if released, would reveal the identities of ECEC's proposed investors, employees, subcontractors or vendors.

Accordingly, we find that those portions of the Application and supporting documents which consist solely of such information were properly withheld by GFO.

GFO has withheld substantial portions of the section of the Application entitled "Project Narrative." Most of the information withheld from the Project Narrative section is not financial in nature, nor would its release reveal the identities of ECEC's proposed investors, employees, subcontractors or vendors. Accordingly, GFO has neither properly described such information nor explained how its release could result in substantial competitive harm to ECEC. Therefore, we are remanding this portion of the Appeal to GFO. On remand, GFO should either release the information it has redacted from the Project Narrative section or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in competitive harm.

We note that a substantial portion of the information GFO has withheld from the copy of the Application appears in ECEC's public submissions to the Federal Energy Regulatory Commission. It is therefore publicly available (and "customarily" disclosed to the public by the submitter). This fact rather convincingly undermines any claim that releasing such information under the FOIA would cause substantial competitive harm to its submitter. Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable. *See, e.g., Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006).

III. CONCLUSION

Our review of the information withheld by GFO under Exemption 4 has revealed that GFO failed to adequately describe some of the information it was withholding under Exemption 4 and failed to adequately justify its determination that release of the withheld information would likely result in competitive harm to its submitter. Accordingly, we are remanding this matter to GFO for further processing in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by Kaiser Eagle Mountain, LLC, Case No. TFA-0491, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Golden Field Office for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 27, 2011

September 22, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner: James R. Cromeenes

Filing Date: September 7, 2011

Case Number: TFA-0492

This Decision concerns the Appeal that James R. Cromeenes filed from a determination that the Oak Ridge Office (ORO) of the Department of Energy (DOE) issued to him on August 16, 2011. In that determination, the ORO responded to his request under the Privacy Act (PA), 5 U.S.C. § 552a, as the DOE implemented in 10 C.F.R. Part 1008. This Appeal, if granted, would require the ORO to perform an additional search and either release newly discovered records or issue a new determination justifying its withholding of records.

I. Background

Mr. Cromeenes filed a PA request with the DOE's Office of Information Resources (OIR) for any records associated with his employment at the Paducah Gaseous Diffusion Plant (Paducah). Because Paducah is administered by ORO, the OIR transferred his request to ORO. The ORO conducted a search for responsive documents and located one responsive document, a personnel security assurance card, which it released to Mr. Cromeenes. Determination Letter. Mr. Cromeenes then filed the present Appeal with the Office of Hearings and Appeals (OHA), challenging the adequacy of the ORO's search. Appeal Letter.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA),[1] an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897

[1] Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act (PA) requires only that the agency search its systems of records. However, we require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the FOIA. *Martha J. McNeely*, Case No. TFA-0371 (2010); *Mitchell L. Rychtanek*, Case No. TFA-0256 (2008). OHA decisions regarding the FOIA and the PA issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted the ORO to gain additional information to evaluate the adequacy of its search. ORO informed us that it conducted an extensive search for documents responsive to his request. This search included files in the Records Holding Area, the K-25 facility, PGDP, Oak Ridge Associated Universities, Nuclear Regulatory Commission radiation exposure records, and the ORAU Radiation Registry. As a result, ORO did not locate any personnel, medical, radiation exposure, industrial hygiene, training, payroll, visitor log sign in, Former Worker Medical Screening Program, National Supplemental Screening Program (NSSP), NIOSH dose reconstruction, or EEOICPA claim records concerning Mr. Cromeenes, other than the one record previously produced in 2009 showing he had a security clearance in 1958. E-mail from Amy Rothrock, FOIA Officer, FOIA/ Privacy Act Office, ORO, September 16, 2011.

Based on the description of the ORO's search, we find that it conducted a search that was reasonably calculated to uncover all relevant records and was therefore adequate. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal that James R. Cromeenes filed on September 7, 2011, OHA Case No. TFA-0492, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 22, 2011

September 28, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Stella L. Red
Date of Filing:	September 19, 2011
Case Number:	TFA-0493

On September 19, 2011, Stella L. Red (Appellant) filed an Appeal from a determination issued to her on August 16, 2011, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge responded to a request for information the Appellant filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In its determination, Oak Ridge released copies of the Appellant's radiation exposure records and work history report from DOE's former K-25 plant. This Appeal, if granted, would require Oak Ridge to conduct another search for responsive information.

I. Background

On June 27, 2011, the Appellant requested copies of her Personnel Security Files, Personnel Radiation Exposure Records, and Personnel Records of Former Contractor Employees. Request dated June 27, 2011, from Appellant to Amy Rothrock, Privacy Act Officer, Oak Ridge. On August 16, 2011, Oak Ridge responded to the request, releasing the Appellant's radiation exposure records and work history report. Determination Letter dated August 16, 2011, from Elizabeth Dillon, FOIA Officer, Oak Ridge, to Appellant. In its determination, Oak Ridge explained that the Appellant's Personnel Security File is located at the National Nuclear Security Administration (NNSA), which now holds jurisdiction over records from the DOE Y-12 National Security Complex. *Id.* On September 19, 2011, the Appellant appealed, challenging the adequacy of Oak Ridge's search and requesting a further search. Appeal Letter received September 19, 2011, from Appellant to Director, Office of Hearings and Appeals (OHA). In addition, the Appellant asks for additional copies of her personnel records [1/] and the source of a

[1/] In her Appeal, the Appellant asks for additional copies of personnel records as the records previously sent to her were discarded. We have determined that she submitted a request to NNSA in August 2010. In response to that request, NNSA released responsive records to her. Although this is not the proper forum to consider a request for an additional copy of records already released to her, NNSA has indicated that it will comply with the request she made in her Appeal. Memorandum of September 22, 2011, Telephone Conversation held between

request in March 2011 to the Office of Personnel Management (OPM).[2/] *Id.*

II. Analysis

In assessing the adequacy of a search under the Privacy Act, courts apply the "adequacy of search" analysis from the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (FOIA), precedent. *Sussman v. U.S. Dep't of Justice*, 03 Civ. 3618 DRH ETB, 2006 WL 2850608 (E.D.N.Y. Sept. 30, 2006). *See Shores v. FBI,* 185 F. Supp. 2d 77, 82 (D.D.C. 2002); *cf. Sneed v. U.S. Dep't of Labor,* 14 Fed. Appx. 343, 345 (6th Cir. 2001). Under the FOIA, courts have determined that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[3/]

In her Appeal, the Appellant first argues that the search was inadequate because she received her Exposure History Record but not her Personnel Report. We contacted Oak Ridge to determine what type of search was conducted. We were informed that Oak Ridge asked UCOR, the present contractor responsible for records from the former K-25 plant, to conduct a search for responsive information. E-mail dated September 20, 2011, from Linda Chapman, Oak Ridge, to Janet R. H. Fishman, Office of Hearings and Appeals (OHA), DOE. UCOR searched various computer databases for information

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Benito Jaramillo, Acting FOIA Officer, NNSA, and Janet R. H. Fishman, Office of Hearings and Appeals (OHA), DOE. Therefore, we have determined that NNSA will be sending her an additional copy of her Personnel Security File after it completes a search for her Radiation Exposure Records, which she requested from Oak Ridge.

[2/] Under the FOIA, and therefore the Privacy Act, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978). However, to simplify the process for the Appellant, we will answer the question she had regarding the source of a March 2011 letter to the OPM. The letter was generated by NNSA in response to a request she made for her personnel files in August 2010. When NNSA located responsive documents, it determined that some of those documents originated with OPM. The PA requires that the originating office, in this case OPM, make the determination regarding release of the documents. OPM received the request for review from NNSA on March 1, 2011, the date OPM referred to as the Appellant's request.

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

using the Appellant's name and Social Security Number. *Id.* Oak Ridge also asked its Access Authorization Branch to conduct a search, as it maintains the Personnel Security Files. *Id.* The Access Authorization Branch searched for information using the Appellant's Social Security Number. *Id.* The Access Authorization Branch located the Appellant's radiation exposure records. *Id.* Oak Ridge also informed us and the Appellant that any personnel records related to her employment at Y-12 would be located at the NNSA. Determination Letter; September 20, 2011, E-mail. Oak Ridge continued that it referred her request to NNSA. *Id.* NNSA is still processing that request. September 22, 2011, Telephone Memorandum.

As the foregoing indicates, Oak Ridge searched the proper database for records pertaining to the Appellant. It conducted its search using appropriate keywords, *i.e.*, the Appellant's name and Social Security number. Based on the foregoing, we believe that Oak Ridge's search was reasonably calculated to uncover responsive information. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Stella L. Red, Case No. TFA-0493, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 28, 2011

United States Department of Energy
Office of Hearings and Appeals

In the matter of Terry Constance	)	
Filing Date: September 27, 2011	)	
	)	Case No.: TFA-0494
	)	
_____	)	

Appearance:

For the Appellant: Terry Constance, Pro Se

Issued: October 17, 2011

Decision and Order

This Decision concerns the Appeal that Terry Constance (the Appellant) filed from a determination that the Department of Energy's (DOE) Bonneville Power Administration (BPA) issued to him on September 4, 2011. In that determination, BPA responded to his request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the BPA to perform an additional search and either release newly discovered records or issue a new determination justifying its withholding of records.

I. Background

The Appellant filed a request for:

> [C]opies of all emails, memos, meeting minutes, presentations delivered by all I-5 project opposition groups and hand written notes of Brian Silverstein, Larry Bekkedahl, Mark Korsness, Kathy Pierce and Luanna Grow taken before, during and after the meetings held with representatives of AnotherWayBPA on June 10, and June 28, 2011. The requested materials to include internal communications within BPA, BPA and DOE and BPA and representatives of EFSEC, whether

> acting in a private or public capacity. The date range for this request is from May 1, 2011 through the date of receipt of this request.

Determination Letter at 1.

In response to this request, BPA conducted a search for responsive documents that indentified 48 responsive documents, which it released to the Appellant. October 12, 2011, email from Cheri Benson, BPA to Steve Fine, OHA. The Appellant then filed the present Appeal with the Office of Hearings and Appeals (OHA), challenging the adequacy of the BPA's search.

II. Analysis

In responding to a request for information filed under the Freedom of Information Act (FOIA), an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted the BPA to gain additional information to evaluate the adequacy of its search. BPA informed us that it conducted an extensive search for documents responsive to the Appellant's request. To this end, BPA provided the following description of its search for responsive documents:

> The request for documents was circulated to all BPA staff that attended the meetings with AnotherWayBPA. Staff members are from Transmission, Environment, Fish and Wildlife and Public Affairs. . . . All such employees were canvassed in the course of fulfilling the request. The search was performed using e-mail, electronic databases and paper files. An e-mail was sent and conversations were held with each staff member to make sure they understood the FOIA request and how to search all electronic and paper files. If in doubt as to whether a record was responsive to the request, individuals were asked to provide the record for review and final determination by the FOIA Officer.
>
> The search terms included AnotherWayBPA, EFSEC and I-5, in addition to manually reviewing electronic and paper documents within that timeframe for possible responsiveness. All files that were reasonably expected to contain the requested records were searched and provided.

October 12, 2011, email from Cheri Benson, BPA to Steve Fine, OHA.

Based on the description of the BPA's search, we find that BPA conducted a search that was reasonably calculated to uncover all relevant records and was therefore adequate. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry Constance on September 27, 2011, OHA Case No. TFA-0494, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 17, 2011

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Russ Choma	)	
Filing Date: September 27, 2011	)	
	)	Case No.: TFA-0495
	)	
_____	)	

Appearance:

For the Appellant: Russ Choma, Pro Se

Issued: October 25, 2011

Decision and Order

On September 27, 2011, Russ Choma (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy (EE). In that determination, EE responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. EE released a substantial amount of responsive information, but withheld responsive information under FOIA Exemptions 4 and 6. This Appeal, if granted, would require EE to release that information it has withheld to the Appellant, and to conduct a new search for responsive documents.

I. BACKGROUND

The Appellant filed a request for information with DOE Headquarters EE seeking "Any and all correspondence between any member of Congress and the DOE regarding funding for renewable energy under the American Recovery and Reinvestment Act." Determination Letter at 1. DOE Headquarters referred the request to five separate Departmental elements including EE. On August 25, 2011, EE issued a determination letter (the Determination Letter) releasing 364 pages of documents to the Appellant. EE however, withheld portions of these documents under Exemptions 4 and 6.

Determination Letter at 1.[1] On September 27, 2011, the Appellant filed the present appeal contending EE had improperly withheld that information and had not conducted a reasonable search for responsive documents.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemptions 4 and 6 are at issue in the present case.

Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."[2]

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to

[1] EE's August 25, 2011, Determination letter applies only to the search for responsive documents contained in EE files.

[2] In the present case, EE does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, EE concluded that the information at issue in the present case was involuntarily submitted. The only basis supplied by EE for its withholdings under Exemption 4 was its finding that

> The information being withheld [under Exemption 4] consists of any correspondence or information which has been submitted as confidential or normally would be treated as such or any correspondence or information which would relate to the involved party's competitive position. As such, this includes information on either successful or unsuccessful applicants under DOE funding opportunities.

Determination Letter at 1.

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009).[3] Accordingly, if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Moreover, it is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Kaiser Eagle Mountain, LLC,* Case No. TFA-0491 (2011) (*Kaiser*); *Larson Associated, Inc*., Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, EE did not provide a sufficient basis for a

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

determination withholding information under Exemption 4. *See e.g. Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter for a new determination explaining how Exemption 4 applies to withheld material). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Kaiser, supra*; *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999).

Turning to the present case, we find that EE has not met the statutory and regulatory mandate that it specifically identify the information it is withholding. EE's identification and description of that information it has withheld under Exemption 4 is limited simply to "correspondence or information which has been submitted as confidential or normally would be treated as such or any correspondence or information which would relate to the involved party's competitive position." Determination Letter at 1. This description is inadequate for the purpose of justifying EE's withholdings under Exemption 4.

Therefore, we are remanding this portion of the Appeal to EE. On remand, EE should either release the information it has redacted and withheld under Exemption 4 or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in substantial competitive harm.

Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Turning to the present case, EE, invoking Exemption 6, has redacted personal information concerning members of the public such as those individual's private email addresses, personal telephone numbers, and information that would reveal those

individual's identities. It is well settled that privacy interests of members of the public can be violated when information is released that can be identified as applying to them. *Department of State v. Washington Post Co*. 102 S.Ct. 1957, 1961 (1982) (*Washington Post*). Accordingly, when disclosure of information which applies to a particular individual is sought from Government records, an agency must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. *Washington Post*, 102 S.Ct. at 1961-62. Therefore, EE correctly concluded that the individuals whose personal information appears in the responsive documents have a privacy interest which would be invaded if the information was released to the public.

It is clear that release of this information would not further the public interest by shedding light on the operations and activities of the Government. Release of the names, e-mail addresses and phone numbers of members of the public would contribute little, if any, to public understanding of any matter of public concern. Because we have found a privacy interest in the names, e-mail addresses and phone numbers of members of the public and no public interest in their disclosure, we find that release of this information would constitute a clearly unwarranted invasion of personal privacy.

Adequacy of the Search

In responding to a request for information filed under the Freedom of Information Act (FOIA), an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted EE to gain additional information to evaluate the adequacy of its search. EE informed us that it conducted an extensive search for documents responsive to the Appellant's request. This search included the written records of correspondence concerning funding of renewable energy programs between EE and Congress, and an electronic search of DOE's email database. An initial screening search located approximately 40,000 pages of documents. After further review of these documents, EE determined that 364 documents were responsive to the Appellant's request. Those documents were released to the Appellant in whole or in part. Many of the documents located during the initial screening process turned out to not be responsive because they related to energy efficiency matters and not to renewable energy.

After reviewing the search for responsive documents conducted by EE in response to the Appellant's initial request, we find that it was reasonably calculated to uncover any responsive documents and was therefore adequate.

III. CONCLUSION

Our review of the information withheld by EE under Exemption 4 has revealed that EE failed to adequately describe the information it was withholding under Exemption 4 and failed to adequately justify its determination that release of the withheld information would likely result in competitive harm to its submitter. Accordingly, we are remanding that portion of the Appeal to EE for further processing in accordance with the instructions set forth above. Because we have found that EE's withholdings under Exemption 6 were appropriate, and its search for responsive documents was sufficient, we require no further action by EE on those portions of the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Russ Choma, Case No. TFA-0495, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Energy Efficiency and Renewable Energy for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 25, 2011

March 31, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael Ravnitzky

Date of Filing: February 6, 2008

Case Number: TFC-0001

Michael Ravnitzky filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on January 22, 2008. In that determination, NNSA denied in part a request for information that Mr. Ravnitzky had submitted on March 14, 2006, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to Mr. Ravnitzky's request after it determined that two responsive documents contained information that was either classified as Restricted Data or Formerly Restricted Data or met the definition of unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release the portions of those two documents that it withheld pursuant to its January 22 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 14, 2006, Mr. Ravnitzky requested copies of 12 audit reports issued by the DOE's Office of the Inspector General (IG). Among the documents the IG identified as responsive to Mr. Ravnitzky's request were Attachment 3 to Report IG-0714 (referred to as Document 2 in the January 22 letter) and Attachment C to Report IG-0619 (referred to as Document 9 in the January 22 letter). Documents 2 and 9 were among the material that the IG referred for a declassification review, and in June 2007 the Office of Document Reviews indicated to the IG which portions of the documents could not be released to Mr. Ravnitzky because they contained classified information or UCNI. Because these two documents originated with NNSA, the IG then forwarded the two documents to NNSA, so that NNSA could consider whether other portions of the documents as well required protection from disclosure pursuant to the FOIA.

NNSA completed its review of Documents 2 and 9 and, on January 22, 2008, provided Mr. Ravnitzky with copies of the two documents from which information had been deleted. In its determination letter, NNSA explained that the deleted portions of the documents "contained information about production of special nuclear material that has been classified as [Restricted Data] and/or nuclear weapons that has been classified as [Formerly Restricted Data] and/or determined to be UCNI pursuant to" the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* NNSA further explained that, because the Atomic Energy Act exempts these categories of information from public release, such information in Documents 2 and 9 warranted protection from disclosure under Exemption 3 of the FOIA, which provides for withholding material "specifically exempted from disclosure by statute . . . ."

The present Appeal seeks the disclosure of the two documents described above in their entirety. In his Appeal, Mr. Ravnitzky contends that the deletion of material from page 10 of Document 2 is "nonsensical." Mr. Ravnitzky also challenges, on several grounds, the invocation of Exemptions 1 and 3 of the FOIA to withhold of material from pages 15 and 16 of Document 9. [*]

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord,* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed Documents 2 and 9.

[*] In its determination letter, NNSA invoked Exemption 3 alone to withheld information contained in Documents 2 and 9 from public disclosure. Mr. Ravnitzky claims in his Appeal that some information was deleted from pages 15 and 16 of Document 9 pursuant to Exemption 1. However, as noted below, appellate review of these documents has now determined that Exemption 1 is the proper basis for protecting portions of these documents from public disclosure.

The Deputy Chief reported the results of his review of Documents 2 and 9 in a memorandum dated March 3, 2009. In that review, he determined that, based on current DOE classification guidance, page 10 of Document 2 contains no classified information or UCNI. Pages 15 and 16, however, contain information that is properly classified as NSI by Executive Order 12958, as amended. The information that the Deputy Chief identified as NSI falls with section 1.4(f) of the Executive Order, which exempts from public disclosure information that reveals "United States Government programs for safeguarding nuclear materials or facilities." The Deputy Chief also determined, however, that the majority of the content on pages 15 and 16 of Document 9 is not NSI. The Deputy Chief has provided this Office with copies of those pages from which the NSI has been deleted. Beside each deletion, "DOE (b)(1)" has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 12958, as amended, requires the DOE to continue withholding portions of Document 9. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Therefore, those portions of the reviewed documents that the Deputy Chief has now determined to be properly identified as NSI must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, and at his suggestion, we have remanded these two documents to the NNSA for a new review. In that review, NNSA must consider whether it should withhold (a) any portions of page 10 of Document 2 and (b) any portions of pages 15 and 16 of Document 9 not determined to be NSI that were previously withheld from Mr. Ravnitzky. After completing its review, the NNSA should either release page 10 of Document 2 in its entirety and the currently redacted versions of pages 15 and 16 of Document 9, or issue a new determination that provides adequate justification for the withholding of any additional information from those pages that it provides to Mr. Ravnitzky. Accordingly, Mr. Ravnitzky's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael Ravnitzky on February 6, 2008, Case No. TFC-0001, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall review (a) page 10 of Attachment 3 to Report IG-0714, issued by the DOE's Office of the Inspector General, and (b) the redacted versions of pages 15 and 16 of Attachment C to Report IG-0619, also issued by the

DOE's Office of the Inspector General, which bears markings indicating where all national security information has been properly deleted. Upon completing its review, the NNSA shall either release to Michael Ravnitzky page 10 described above in its entirety and the redacted versions of pages 15 and 16 described above in their entirety, or issue a new determination that provides adequate justification for the withholding of any additional information from the copies it provides to Mr. Ravnitzky.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 31, 2009

June 1, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The National Security Archive

Date of Filing: June 13, 2008

Case Number: TFC-0002

The National Security Archive (Appellant) filed an Appeal from a determination that the Office of Information Resources (OIR) of the Department of Energy (DOE) issued on May 20, 2008. In that determination, OIR denied in part a request for information that the Appellant had submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OIR withheld portions of six documents that were responsive to the Appellant's request after it determined that those portions contained classified information, as identified by the Central Intelligence Agency (CIA) and the Department of Defense (DoD). This Appeal, if granted, would require the DOE to release the portions of those documents that it withheld pursuant to its May 20, 2008, determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

The Appellant requested copies of six specified documents contained in the journal of former Atomic Energy Commissioner Glenn Seaborg. In chronological order, the requested documents are:

1. Meeting of the National Security Council, March 15, 1969 (Document 1);
2. Meeting of NSSM 28 Steering Committee, May 14, 1969 (Document 2);
3. Meeting of NSSM 28 Steering Committee, May 28, 1969 (Document 3);
4. Meeting of the National Security Council, June 18, 1969 (Document 4;
5. Meeting of NSSM 28 Steering Committee, June 23, 1969 (Document 5); and
6. Meeting of the National Security Council, June 25, 1969 (Document 6).[*]

[*] The Appellant requested a copy of a seventh document, Meeting of the National Security Council, April 30, 1969, which was released in its entirety as an attachment to the May 20, 2008, determination letter. Consequently, this document is not the subject of the current appeal.

The DOE's Office of Classification reviewed the above six documents to determine whether they contained any classified information that could not be released to the requester. As was explained in OIR's determination letter, the Office of Classification determined that those documents, which are located in the files of the DOE's Office of History and Heritage Resources, contained no DOE classified information. Nevertheless, the CIA and the DoD identified classified information in those documents, and OIR provided copies of the requested documents with portions deleted. In the determination letter, OIR stated that the deleted portions of the documents were withheld from the requester pursuant to Exemptions 1 and 3 of the FOIA.

In its Appeal, the Appellant seeks the disclosure of the six documents described above in their entirety. The Appellant contends that the DOE has applied the grounds for withholding information in an overly stringent manner, particularly because similar information has already been made public through other sources.

On March 9, 2011, the Deputy Chief for Operations, Office of Health, Safety and Security, provided the Office of Hearings and Appeals with his appellate review of the above described six documents, together with an unredacted version of Document 1 and newly redacted versions of the remaining documents for release to the Appellant. Although the CIA and the DoD had not fully explained why they invoked Exemptions 1 and 3 in the report the Deputy Chief provided, we determined that we could nevertheless release the provided versions of the six documents to the Appellant in advance of receipt of the required information from those agencies, and did so on March 10, 2011. We recently received complete justifications from the CIA and the DoD regarding their application of Exemptions 1 and 3, and address them at this time.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord,* 10 C.F.R. § 1004.10(b)(1). Executive Order 13526 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *accord,* 10 C.F.R. § 1004.10(b)(3). The Central Intelligence Agency

Act of 1949, which protects from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA, 50 U.S.C. § 403g, has been held to meet the requirements of subpart B above. *Larson v. Dep't of State,* 565 F.3d 857, 865 n.2 (D.C. Cir. 2009).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the six documents described above. Because the original review of the documents resulted in the CIA and the DoD identifying classified information in these documents, the Deputy Chief sent the six documents to those agencies for a coordinated appellate review.

The Deputy Chief reported the results of his coordinated review of the six documents in a memorandum dated March 2, 2011. In his memorandum, he concurred with the DOE's initial determination that the six documents contain no DOE classified or sensitive information. The CIA and DoD, however, determined in their respective appellate reviews that the five of the six documents under consideration contain classified information. Neither agency found any withholdable information in Document 1, and that document will be released in its entirety.

In its response to the Deputy Chief, the CIA indicated that three of the documents it reviewed contained CIA classified information. This information has been withheld from the copies of Documents 2, 3, and 5 that will be provided to the National Security Archive. The basis for each withheld portion is marked in the margin of the document at the site of redaction as follows. "CIA (b)(1)" indicates that the information was redacted pursuant to Section 1.4(c) of Executive Order 13526, which exempts from public disclosure information that reveals "intelligence activities (including covert action), intelligence sources or methods, or cryptology." "CIA (b)(3)" indicates that the information was redacted pursuant to Section 6 of the Central Intelligence Agency Act of 1949. The denying official for these withholdings is Mr. Scott Koch, Acting Executive Secretary, Agency Release Panel, CIA.

In its appellate review, the DoD determined that three documents, Documents 4, 5, and 6, contained DoD classified information. Consequently, copies of those documents will be provided to the National Security Archive with portions deleted. Each DoD redaction is marked "DoD (b)(1)" in the margin of the document at the site of the redaction. The DoD's basis for withholding classified information is Section 3.3(b) of Executive Order 13526, which exempts from automatic declassification, under Section 3.3(a), "information the release of which would clearly and demonstrably be expected to . . . (5) reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans." The denying official

for these withholdings is Mr. Mark Patrick, Chief, Information Management Division, Joint Staff, DoD.

Based on the Deputy Chief's review, we have determined that Executive Order 13526 and Section 6 of the Central Intelligence Agency Act of 1949 require the DOE to continue withholding portions of Documents 2 through 6. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the reviewed documents that the Deputy Chief has now determined to be properly identified as classified information must continue to be withheld from disclosure. Because the CIA and the DoD have reduced the extent of the information previously withheld from the Appellant, its Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on June 13, 2008, Case No. TFC-0002, is hereby granted to the extent that certain portions of the documents withheld in the Department of Energy's May 20, 2008, Determination Letter have been released to the requester, as set forth in Paragraph 2 below, and is hereby denied in all other respects.

(2) An unredacted version of "Meeting of the National Security Council, March 15, 1969," contained in former Atomic Energy Commissioner Glenn Seaborg's journal, was provided to the National Security Archive on March 10, 2011. At the same time, newly redacted versions of the following documents contained in Commissioner Seaborg's journal, "Meeting of NSSM 28 Steering Committee, May 14, 1969," "Meeting of NSSM 28 Steering Committee, May 28, 1969," "Meeting of the National Security Council, June 18, 1969," "Meeting of NSSM 28 Steering Committee, June 23, 1969," and "Meeting of the National Security Council, June 25, 1969," were provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 1, 2011

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tri-Valley CARES	)	
	)	
Filing Date: July 19, 2010	)	
	)	Case No. TFC-0004
	)	

Issued: February 3, 2012

Decision and Order

Tri-Valley CARES filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on June 2, 2010. In that determination, NNSA denied in part a request for information that Tri-Valley CARES had submitted on September 8, 2008, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under two provisions of the FOIA. This Appeal, if granted, would require the DOE to release the portions of those documents responsive to Tri-Valley CARES's request that were withheld from disclosure due to their classified nature.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On September 8, 2008, Tri-Valley CARES requested a copy of "the Defense Programs Advisory Group's (DPAG) study of the secondary components of nuclear weapons." On June 2, 2010, NNSA issued a determination in which it released a copy of the "Secondary Lifetime Assessment Study," SAND2001-0063 (Study), from which information was redacted and withheld pursuant to Exemptions 3 and 6 of the FOIA. Tri-Valley CARES challenged those withholdings in an Appeal filed on July 19, 2010. We issued a decision regarding the information withheld from the Study pursuant to Exemption 6 on August 9,

2010 (Case No. TFA-0402).[1] In its Appeal, Tri-Valley CARES contends that the information withheld pursuant to Exemption 3 was withheld in an internally inconsistent manner, and therefore may have been improperly withheld from disclosure. It further maintains that every Significant Finding Investigation is assigned an unclassified title and number, which was improperly withheld from disclosure under Exemption 3. Because, as explained below, Exemption 3 concerns classified information, we referred the portion of the Appeal that challenged the withholdings under Exemption 3 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

II. Analysis

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive,* Case No. TFA-0115 (2006).

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the Study, focusing on the applicability of Exemption 3 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated January 20, 2012. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as properly classified concerns design and design-related information regarding the secondary stages of nuclear weapons in the United States enduring stockpile that is classified as Restricted Data (RD) and Formerly Restricted Data (FRD). RD and FRD are forms of classified information the withholding of which is

[1] Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at http://www.oha.doe.gov/search.htm.

required under the Atomic Energy Act, and are therefore exempt from disclosure under Exemption 3.

The Deputy Chief has provided this Office with a copy of the Study from which the RD and FRD have been deleted. Beside or within each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the Study pursuant to Exemption 3 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the Study that the Deputy Chief has now determined to be properly identified as RD or FRD must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, we will remand the Study to NNSA for a new review. In that review, NNSA must consider whether it should withhold, under any other authority provided in the FOIA, any portions of the document not determined to be RD or FRD that were previously withheld as such from Tri-Valley CARES.[2] After completing its review, NNSA should either release those portions or issue a new determination that provides adequate justification for the withholding of any additional information from the version of the Study that it provides to Tri-Valley CARES. Accordingly, Tri-Valley CARES's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CARES on July 19, 2010, Case No. TFC-0004, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall review the redacted version of the "Secondary Lifetime Assessment Study," SAND2001-0063, which bears markings indicating where all Restrict Data and Formerly Restricted Data have been properly deleted. Upon completing its review, the NNSA shall either release to Tri-Valley CARES the redacted version of the document described above, or issue a new determination that

[2] The copy of the Study that the Deputy Chief has provided indicates the information that NNSA withheld pursuant to Exemption 6 of the FOIA. In its Decision and Order in Case No. TFA-0402, OHA upheld the withholding of some of the information NNSA withheld under Exemption 6 and remanded the matter for further justification of its withholding of other information.

provides adequate justification for the withholding of any additional information from the version it provides to Tri-Valley CARES. It shall furthermore reach a determination, in accordance with the Decision and Order OHA issued in Case No. TFA-0402, regarding the information it previously withheld pursuant to Exemption 6, if it has not already done so, and either release all such information or provide adequate justification for withholding it in full or in part.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 3, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Eric Schlosser	)	
	)	
Filing Date: August 10, 2010	)	
	)	Case No. TFC-0005
_____	)	

Issued: March 15, 2012

Decision and Order

Eric Schlosser filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on July 7, 2010. In that determination, NNSA denied in part a request for information that Mr. Schlosser had submitted on September 24, 2008, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under two provisions of the FOIA. This Appeal, if granted, would require the DOE to release identified portions of those documents responsive to Mr. Schlosser's request that were withheld from disclosure due to their classified nature.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On September 24, 2008, Mr. Schlosser requested 12 documents from the Sandia National Laboratories archives. On July 7, 2010, NNSA issued a determination in which it released one of the requested documents in its entirety, released eight documents with portions withheld pursuant to either Exemption 3 or Exemption 6 of the FOIA, or both exemptions, and forwarded the remaining three documents to the Department of Defense for its review. Mr. Schlosser challenged certain withholdings taken pursuant to Exemption 3 in an Appeal

filed on August 10, 2010.[1] In his Appeal, Mr. Schlosser contends that specified portions of six of the documents contain information withheld pursuant to Exemption 3 that should be released to him, because they relate to nuclear weapons no longer contained in our arsenal and safety issues that no longer exist, having been corrected through advances in design and technology. Because, as explained below, Exemption 3 concerns classified information, we referred the Appeal to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

II. Analysis

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, Case No. TFA-0115 (2006).[2]

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this Appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed those pages of six documents that Mr. Schlosser identified as containing information the withholding of which he was challenging in his Appeal.

The Deputy Chief reported the results of his review in a memorandum dated March 7, 2012. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as properly classified relates to design and design-related information concerning nuclear weapons that is classified as Restricted Data (RD) and Formerly Restricted Data (FRD). RD and FRD are forms of classified information the

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[1] Mr. Schlosser clarified that he does not challenge the withholdings taken pursuant to Exemption 6. Memorandum of Telephone Conversation between Mr. Schlosser and William M. Schwartz, Attorney-Examiner, Office of Hearings and Appeals (OHA), August 10, 2010.

[2] Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at http://www.oha.doe.gov/search.htm.

withholding of which is required under the Atomic Energy Act, and are therefore exempt from disclosure under Exemption 3.

The Deputy Chief has provided this Office with copies of the pages that were reviewed, from which the RD and FRD have been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the page. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the six documents pursuant to Exemption 3 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the six documents that the Deputy Chief has now determined to be properly identified as RD or FRD must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, we will remand the reviewed portions of the six documents to NNSA. After deleting from those portions any information that it initially withheld from Mr. Schlosser pursuant to Exemption 6 of the FOIA, NNSA should release appropriately redacted versions of those portions to Mr. Schlosser. Accordingly, Mr. Schlosser's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Eric Schlosser on August 10, 2010, Case No. TFC-0005, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall release to Mr. Schlosser the newly redacted portions of six documents that were attached to a memorandum issued by the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, dated March 7, 2012, after further redacting any information initially deleted from those portions pursuant to Exemption 6 of the Freedom of Information Act.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 15, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tri-Valley CARES	)	
	)	
Filing Date: February 25, 2011	)	
	)	Case No. TFC-0008
	)	

Issued: December 13, 2011

Decision and Order

Tri-Valley CARES filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on January 14, 2011. In that determination, NNSA denied in part a request for information that Tri-Valley CARES had submitted on October 11, 2007, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under three provisions of the FOIA. This Appeal, if granted, would require the DOE to release the portions of those documents responsive to Tri-Valley CARES's request that were withheld from disclosure due to their classified nature.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On October 11, 2007, Tri-Valley CARES requested a number of documents concerning the Lawrence Livermore National Laboratory. NNSA issued its first determination in May 2008, providing some responsive documents, which are not the subject of this Appeal. On January 14, 2011, NNSA issued a second determination, in which it released a copy of the "Biological Risk and Threat Assessment for Building 368 Biological Safety Laboratory Level 3" issued by the Lawrence Livermore National Laboratory, July 14, 2005 (Risk Assessment), from which information was redacted and withheld pursuant to Exemptions 1, 2 and 6 of the FOIA. Tri-Valley CARES challenged those withholdings in an Appeal filed on February 25, 2011. We issued a decision regarding the information withheld from the

Risk Assessment pursuant to Exemptions 2 and 6 on May 25, 2011 (Case No. TFA-0463). In its Appeal, Tri-Valley CARES contends that the information withheld pursuant to Exemption 1 was withheld in an internally inconsistent manner, and therefore may have been improperly withheld from disclosure. Because, as explained below, Exemption 1 concerns classified information, we referred the portion of the Appeal that challenged the withholdings under Exemption 1 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 1 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord,* 10 C.F.R. § 1004.10(b)(1). Executive Order 13526 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the Risk Assessment, focusing on the applicability of Exemption 1 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated November 17, 2011. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified as NSI by Executive Order 13526, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as NSI falls within section 1.4(g) of the Executive Order, which exempts from public disclosure information that reveals "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." The Deputy Chief has provided this Office with a copy of the Risk Assessment from which the NSI has been deleted. Beside or within each deletion, "DOE (b)(1)" has been written in the margin of the document. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 13526 requires the DOE to continue withholding portions of the Risk Assessment pursuant to Exemption 1 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Therefore, those portions of the Risk Assessment that the Deputy Chief has now determined to be properly identified as NSI must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, we will remand the Risk Assessment to the NNSA for a new review. In that review, NNSA must consider whether it should withhold, under any other authority provided in the FOIA, any portions of the document not determined to be NSI that were previously withheld as NSI from Tri-Valley CARES. After completing its review, the NNSA should either release those portions or issue a new determination that provides adequate justification for the withholding of any additional information from the version of the Risk Assessment that it provides to Tri-Valley CARES. Accordingly, Tri-Valley CARES's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CARES on February 25, 2011, Case No. TFC-0008, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall review the redacted version of the "Biological Risk and Threat Assessment for Building 368 Biological Safety Laboratory Level 3" issued by the Lawrence Livermore National Laboratory, July 14, 2005, which bears markings indicating where all national security information has been properly deleted. Upon completing its review, the NNSA shall either release to Tri-Valley CARES the redacted version of the document described above, or issue a new determination that provides adequate justification for the withholding of any additional information from the version it provides to Tri-Valley CARES.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 13, 2011

United States Department of Energy
Office of Hearings and Appeals

In the Matter of the National Security Archive	)	
	)	
Filing Date: May 12, 2011	)	
	)	Case No. TFC-0010
	)	

Issued: July 31, 2012

Decision and Order

The National Security Archive filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on April 21, 2011. In that determination, NNSA denied in part a request for information that the National Security Archive had submitted on November 29, 2006, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under two provisions of the FOIA. This Appeal, if granted, would require the DOE to release the portions of the document responsive to the National Security Archive's request that were withheld from disclosure under Exemption 1 of the FOIA.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On November 29, 2006, the National Security Archive requested a number of documents concerning an interagency training exercise entitled "Mighty Derringer" that took place in December 1986. On April 21, 2011, NNSA issued a determination in which it released one document responsive to the request, with portions of that document withheld from disclosure pursuant to Exemptions 1 and 3 of the FOIA. The National Security Archive challenged NNSA's determination to withhold information under Exemption 1 in an Appeal filed on May 12, 2011. In its Appeal, the National Security Archive contends that because "the scenario [underlying the exercise] was entirely hypothetical, declassification of more details may be possible without harm to national security." Appeal at 1. Because, as explained below, Exemption 1 concerns classified information, we referred the portion of the Appeal

that challenged the withholdings under Exemption 1 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 1 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord* 10 C.F.R. § 1004.10(b)(1). Executive Order 13526 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the "Mighty Derringer" document, focusing on the applicability of Exemption 1 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated July 24, 2012. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified as NSI by Executive Order 13526, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as NSI falls within section 1.4(g) of the Executive Order, which exempts from public disclosure information that reveals "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." The Deputy Chief has provided this Office with a copy of the "Mighty Derringer" document from which the NSI has been deleted. Beside or within each deletion, "DOE (b)(1)" has been written in the margin of the document. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 13526 requires the DOE to continue withholding portions of the "Mighty Derringer" document pursuant to Exemption 1 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing

the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Therefore, those portions of the "Mighty Derringer" document that the Deputy Chief has now determined to be properly identified as NSI must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on May 12, 2011, Case No. TFC-0010, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the document entitled "Exercise Mighty Derringer" will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 31, 2012

Case No. VFA-0015, 24 DOE ¶ 80,162

January 23, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The National Security Archive

Date of Filing: December 21, 1994

Case Number: VFA-0015

On December 21, 1994, The National Security Archive (NSA) filed an Appeal from a determination issued to it by the Director (Authorizing Official), Office of Arms Control and Nonproliferation of the Department of Energy (Arms Control), who denied a request for information filed by NSA under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his determination, the Authorizing Official stated that no documents responsive to NSA's request could be located. In its Appeal, NSA challenges the adequacy of the search conducted by Arms Control.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

On December 23, 1989, NSA filed a request for information in which it sought records relating to the Reagan Administration's negotiations with Japan and the transfer of plutonium to Japan between 1980 and 1983. On December 5, 1994, Arms Control issued a determination which stated that it conducted a search and that no documents exist that are responsive to NSA's request. In its determination, Arms Control also informed NSA that its request was being forwarded to the Department of State's Freedom of Information Office for a response because Arms Control located relevant documents that originated in that Department. On December 21, 1994, NSA filed the present Appeal with the Office of Hearings and Appeals (OHA). NSA asks that the OHA direct the Authorizing Official to conduct a new search for responsive documents.

II. Analysis

The OHA has consistently stated that a FOIA request warrants a thorough and conscientious search for responsive documents. See W.R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have remanded cases where it is evident that the search conducted was inadequate. See, e.g., Cowles Publishing Co., 16 DOE ¶ 80,136 (1987); Hideca Petroleum Corp., 9 DOE ¶ 80, 108 (1981). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted Arms Control to ascertain whether its search was reasonably calculated to uncover the information sought by NSA. That Office explained that NSA's request was originally sent to the DOE Office of International Affairs and Energy Emergencies (IE). However, DOE failed to issue a determination at that time.

As a result of extensive internal reorganizations, NSA's request was rerouted to Arms Control in September 1994. In NSA's original request, it asked that a search be conducted in several offices including the Office of the Deputy Assistant Secretary for International Affairs and the Office of the Director of Nuclear Nonproliferation Policy. Arms Control has indicated that it has assumed the functions and has been given the custody of the files of some of these offices. Arms Control searched all of its files that might pertain to the subject of the request and indicated that it did not possess responsive documents.

While we believe that Arms Control conducted a reasonable search for responsive documents in its files, it does not appear that the scope of the search was broad enough. We are convinced that the offices originally named in NSA's request are reasonable locations to search for responsive documents. Nevertheless, not all of the files in those offices have been searched. It appears that the files of some of the offices named in the request were never transferred to Arms Control. As a result, any search performed by Arms Control that was limited to its own files could not have been adequate. Accordingly, NSA's Appeal should be granted, and this matter remanded to the FOIA Office for a search of all of the offices or their successors originally named in NSA's request. However, the files already searched by Arms Control need not be searched again.

In addition, in its Appeal, NSA requests that the search be broadened to incorporate the records of several additional offices. Although we generally do not permit appellants to expand the scope of their request at the appellate level, in light of the significant agency delay and the complexity of extensive internal reorganizations since NSA originally filed its request, we will also direct the FOIA Office to coordinate a search of the additional offices or their successors named in the Appeal. A copy of the NSA Appeal will be forwarded to that Office.

It Is Therefore Ordered That:

(1) The Appeal filed by The National Security Archive on December 21, 1994, OHA Case No. VFA-0015, is hereby granted as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is remanded to the Freedom of Information and Privacy Acts Division which shall (i) coordinate a new search for information in the following offices or their successors which were listed in The National Security Archive's original request: the Offices of the Deputy Assistant Secretary for International Affairs, Director of Nuclear Non-Proliferation Policy, Deputy Assistant Secretary for Nuclear Materials, Deputy Assistant Secretary for Intelligence and Deputy Assistant Secretary for Security Affairs and (ii) coordinate a new search of those additional offices listed in The National Security Archive's Appeal.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 23, 1995

Case No. VFA-0018, 24 DOE ¶ 80,167

February 28, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cowles Publishing Company

Date of Filing:January 17, 1995

Case Number: VFA-0018

On January 17, 1995, Cowles Publishing Company (Cowles) filed an Appeal from a determination issued to it on December 16, 1994 by the Director, Office of Communications, Department of Energy Operations Office, Richland, Washington. That determination followed the remand from this Office of a case in which Cowles had appealed a previous decision by the Richland Operations Office (Richland) denying in part a request for information submitted by Cowles pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. See Cowles Publishing Co., 24 DOE ¶ 80,102 (1994)(Cowles). If the present Appeal were granted, the DOE would be ordered to release in its entirety the information that was withheld in the December 16, 1994 determination.<1>

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Factual Background

The three withheld documents were prepared by an employee of General Electric d/b/a Hanford Atomic Products Operation (GE/Hanford) at DOE's Hanford, Washington facility.<2> The Hanford facility is a government-owned/contractor-operated (GOCO) laboratory under the jurisdiction of Richland. At the time the documents were written, GE/Hanford was the management and operating (M&O) contractor at the facility and conducted all that facility's research and development activities under contract with the DOE's predecessor, the Atomic Energy Commission. Cowles, 24 DOE at 80,504. However, in the mid-1960s, Battelle Memorial Institute (Battelle) assumed the research and development functions connected with the Hanford facility, and another contractor assumed the management and operation of that facility. Cowles, 24 DOE at 80,504. The contract between GE and DOE officially terminated on December 30, 1967, although a transition period took place several years before and after this date. See Record of Telephone Conversation between Jay Brown (outside counsel for GE), law firm of Perkins Coie, and Dawn Koren (January 25, 1995). In the course of the transition, GE turned over several thousand boxes of documents at Hanford to Battelle. Record of Telephone Conversation between Paul Davis and Dawn Koren (February 7, 1995). Each box consists of approximately 2,500 pages. Between 50 and 100 of these boxes consist of GE's human radiation experiment records, later described by Battelle as "Human Subject Committee" files. The documents at issue here were obtained by Richland from two of these "Human Subject Committee"

boxes, which apparently contained the personal working files of a scientist working under Mr. C.E. Newton, Manager, Composite Dose Studies and Records at Hanford. Id. Richland has advised us that the "Human Subject Committee" files in which the three withheld documents were found have been part of Battelle's files since the transition period at Hanford. See Record of Telephone Conversation between Paul Davis and Dawn Koren (February 1, 1995).

Each of the three documents at issue in this proceeding was prepared in 1963 by Jules Pearlman, an attorney at Hanford. It appears from the documents that Mr. Newton sought legal advice from GE/Hanford's attorneys relating to certain legal aspects of experiments involving what was then described as "voluntary and planned human exposure" to radiation. Mr. Pearlman rendered the requested legal advice to Mr. Newton in the form of three written memoranda. Mr. Newton, in turn, prepared a memorandum on December 12, 1963 for Mr. A.R. Keene, Manager of Radiation Protection at Hanford, in which he related some of the legal advice provided by Pearlman, and attached a copy of a document labeled "Procedure for Radiological Experiments" with an enclosed form and one of the three memoranda prepared by Mr. Pearlman. Messrs. Newton, Keene and Pearlman were employed by GE/Hanford at the time the subject documents were prepared and disseminated.

II. Procedural History

In a January 21, 1994 FOIA request, Cowles, publisher of the Spokesman Review, a Spokane, Washington newspaper, sought information pertaining to experiments conducted on human subjects at the Hanford facility prior to 1963. In a February 2, 1994 determination, Richland noted the prior release to Cowles of one document responsive to the request, the "Procedure for Radiological Experiments" with an enclosed form, and then withheld pursuant to FOIA Exemption 5 the three legal memoranda prepared by Mr. Pearlman. Exemption 5 protects from mandatory disclosure agency memoranda or letters which would normally be privileged in the civil discovery context. The three primary privileges incorporated into Exemption 5 are the deliberative process privilege, the attorney work product doctrine, and the attorney-client communications privilege. Richland stated that the three memoranda fell within the attorney-client privilege, and that they had retained their confidential nature over the previous 30 years. Letter from Karen K. Randolph, Director, Office of Communications, Richland, to Karen Dorn Steele, Reporter, Spokesman Review (February 2, 1994)(Original Determination Letter).

Cowles appealed, and in the Cowles Decision and Order issued on March 30, 1994, this Office found that we were unable to render a determination on the threshold issue of whether the withheld documents constituted "agency records" for purposes of the FOIA. Accordingly, we remanded the matter to Richland with instructions to investigate the facts at issue further and determine whether the memoranda are "agency records" and therefore subject to the FOIA. If it determined that the records were "agency records," Richland then was to determine whether the documents fell within the attorney-client privilege and whether that privilege had been waived during the period since the documents were prepared. Cowles, 24 DOE at 80,507.

On remand, Richland determined that the documents are not "agency records." Richland further noted that even if the documents were "agency records," they would be properly withholdable under Exemption 5, because they are protected by the attorney-client privilege and have not lost their confidential status. Letter from Karen R. Randolph, Director, Office of Communications, Richland, to Karen Dorn Steele, the Spokesman Review (December 16, 1994) (Determination Letter). Cowles is appealing the withholding of these documents. It argues that these documents are agency records, and that Exemption 5 is inapplicable because the attorney-client privilege either has never attached or has been waived. Letter from Duane M. Swinton and Kathleen D. Jensen (attorneys for Cowles), Witherspoon, Kelley, Davenport & Toole, to Director, Office of Hearings and Appeals (OHA)(January 13, 1995)(Appeal Letter) at 2-4.

III. Analysis

Our threshold inquiry in this case is whether the withheld materials are subject to the FOIA. Documents of this type can become subject to the FOIA in two different ways. First, documents can meet the criteria set out by the courts for determining "agency records." See 5 U.S.C. § 552(f). Second, they can become subject to the FOIA under a new DOE Freedom of Information Act regulation at 10 C.F.R. § 1004.3(e) concerning contractor records. See 59 Fed. Reg. 63,884 (December 12, 1994).<3> In this case, we must determine whether records which were generated by one DOE contractor, GE, and are now in the possession of another DOE contractor, Battelle, are subject to the FOIA. We conclude that the three withheld memoranda are not "agency records" and are not subject to the FOIA under the new regulation.

A. THE WITHHELD DOCUMENTS ARE NOT "AGENCY RECORDS"

The statutory language of the FOIA does not define the essential attributes of "agency records" but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, this Office has applied a two-stage analysis fashioned by courts for determining whether documents created by nonfederal organizations are subject to the FOIA. See, e.g., Cowles Publishing Co., 24 DOE ¶ 80,111 (1994) (unrelated case); Concord Oil Co., 24 DOE ¶ 80,109 (1994); International Brotherhood of Electrical Workers, 22 DOE ¶ 80,101 (1992); B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1987). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and if not, (ii) whether the requested material is nonetheless an "agency record." See Judith M. Gibbs, 16 DOE ¶ 80,133 (1987).

1. Neither GE or Battelle Can Be Considered an "Agency" for FOIA Purposes

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). A private organization will be considered a federal agency only where its organizational structure and daily operations are subject to substantial government control. See United States v. Orleans, 425 U.S. 807, 815-816 (1976); Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977); see also Forsham v. Harris, 445 U.S. 169 (1980) (Forsham).

In Cowles, we held that, with respect to the Hanford facility, Battelle is not an "agency" under the FOIA because DOE does not supervise Battelle's day-to-day operations. 24 DOE at 80,505; cf. Vista Control Systems, 24 DOE ¶ 80,104 at 80,510 (1994)(Vista)(University of California found not to be "agency" because structure and daily operations not subject to substantial federal control). However, we were unable to render a determination as to whether GE, at the time of its contract with DOE, was an "agency" under the FOIA. We noted that fact-finding in this area would be difficult because GE operated the Hanford facility over a quarter of a century ago. Nevertheless, we requested that Richland conduct an investigation on this issue. Id. On remand, Richland has been unable to discover additional relevant information. It also has not found any facts which would suggest that the relationship between DOE and GE was any different from the relationship between DOE and Battelle. Record of Telephone Conversation between Paul Davis and Dawn Koren (January 31, 1995). Accordingly, we will proceed with this FOIA Appeal on the assumption that GE was not an "agency" under the FOIA.

2. The Withheld Documents Do Not Meet the Tax Analysts Test For "Agency Records"

As for the second prong of the "agency record" analysis, we are guided by the United States Supreme Court's holding in Tax Analysts, 492 U.S. at 144-45. In that case, the Supreme Court held that "agency records" are documents which are (i) either created or obtained by an agency, and (ii) under agency control at the time of the FOIA request. For purposes of analysis, the term "obtain" means that the agency must have possession of the material at the time of the request in order for the material to qualify as an agency record. Id.

The documents at issue were not created by the DOE, but by a GE attorney employed at Hanford.

Moreover, the DOE had not obtained the subject documents prior to the time Cowles' FOIA request was made. Rather, the DOE sought access to the "Human Subject Committee" files only for the purposes of responding to Cowles' FOIA request. Cowles, 24 DOE at 80,506. Under these circumstances, the documents at issue do not meet the "agency records" test set forth in the Tax Analysts case, because the DOE did not possess or control the information at the time Cowles filed its request. See Tax Analysts, 492 U.S. at 145-46; E.O. Smelser, 24 DOE ¶ 80,143 (1994); Cowles Publishing Co., 24 DOE ¶ 80,111 (1994); see also Forsham, 445 U.S. at 185-86, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

B. THE DOCUMENTS ARE NOT SUBJECT TO THE FOIA UNDER THE NEW 10 C.F.R. § 1004.3(e) <4>

Under this Office's previous case law, see, e.g., Vista; John Lohrenz, 23 DOE ¶ 80,116 (1993); Government Accountability Project, 22 DOE ¶ 80,103 (1992), and as set forth in the new 10 C.F.R. § 1004.3(e)(1), even if a contractor-acquired or contractor-generated document fails to qualify as an "agency record," it may still be subject to the FOIA if the contract between the DOE and that contractor provides that the document in question is the property of the agency.<5> However, Subsection 1004.3(e)(2) sets forth an exception to the broad principle contained in 10 C.F.R. § 1004.3(e)(1). If DOE-owned documents are found to be validly privileged as a threshold matter, they are subject to mandatory disclosure under the regulation only if already in the possession of the Government and not otherwise exempt under the FOIA.<6>

1. The Withheld Documents Are "the Property of the Government"

Although Richland was previously unable to locate the DOE's contract with GE in effect at the time the three memoranda were prepared, it has since come to light.<7> Contract No. AT(45-1)-1350 was signed by GE and DOE's predecessor, the Atomic Energy Commission, in 1959 (the 1959 contract). Article XVI of that contract, as revised by Supplemental Agreement No. 6 (the Supplement),<8> provides in pertinent part:

1. The Contractor shall establish and maintain a separate and distinct set of accounts and records covering the work under this Contract performed at the Plant, except for accounts and records of the Contractor's general offices relating to General and Administrative Expense. The systems of accounting to be employed shall include records and books of account showing the cost to the Contractor of all items of labor, materials, equipment, supplies, and services and other reimbursable items under this Contract, and when the monetary values thereof are furnished by the [Atomic Energy] Commission, such records and books of account shall reflect all assets and property furnished by the Government which are in the custody or control of the Contractor . . . .

2(a).The Contractor and the Commission shall jointly have title to all books, records, correspondence, instructions, receipts, vouchers, and all writings of every description created by the Contractor heretofore in the course of work . . . hereafter under this Contract (apart from the drawings, designs, specifications, and other engineering, technical, scientific, and operating data referred to in Article XVII of this Contract), hereinafter referred to as "business records".

. . .

2(e).Upon the expiration of the aforesaid custody period, all business records then remaining in its custody may be removed and retained, in whole or in part, by the Contractor or at the option of the Contractor, delivered, in whole or part to the Commission . . . . In either event, the party thereafter having possession of said records will afford access thereto by the other party, . . . , at all times. In the event the removal of such business records, . . . , is . . . required for litigation or for Government investigations, the party in possession of such records shall immediately notify the other . . . . [T]he Commission shall have the right to notify the Contractor to pack and ship . . . all or any portion of such records. . . .

. . .

2(g).This Section 2 of Article XVI shall be applicable to the ownership, access, custody, storage and disposition of records created under this Contract . . . .

Article XVII further specified that "all drawings, designs, specifications, and other engineering, technical, scientific, and operating data" prepared by the Contractor under the contract were the property of the DOE.

According to Richland's interpretation of this contract, the DOE specifically reserved title to, and the right to inspect, only the financial and technical records of GE, not GE's legal records. Therefore, according to Richland, the contract expresses a "clear negative implication" that GE owns the legal documents arising from the DOE/GE contract exclusively. Determination Letter at 2. Cowles argues in response that "silence as to ownership of legal records is insufficient" to render the records those of GE. Appeal Letter at 2. In GE's opinion, Section 2(a) of Article XVI describes only the accounts and records referred to in Section 1 of that Article, as indicated by the fact that the title of the article is "Records and Accounts, Inspection and Audit." GE also notes that Section 2 is indented on that page in comparison with Section 1, thus indicating that it is a subset of Section 1. Thus, according to GE, because the withheld documents do not constitute accounting records covered by Article XVI.1 and are not covered by Article XVII, the DOE has no ownership interest in the documents. See GE Letter I at 2; GE Letter II at 1-2.

After careful examination of the revised 1959 contract between DOE and GE, we find not silence, but a clear answer as to the ownership of the three legal memoranda. We agree with Richland and GE that the withheld documents are not subject to Article XVI.1 which covers accounting and financial records or Article XVII which covers technical and scientific data. However, we find that Section 2 of Article XVI covers a much broader range of material than the documents described in Section 1, including the three withheld memoranda.

Article XVI.2(a) specifically states that GE and the DOE shall have joint title to all "records, correspondence, . . . and all writings of every description created by the Contractor heretofore in the course of work . . . under this Contract . . . hereinafter referred to as ?business records.'" Furthermore, Section 2(g) of the contract repeats the broad scope of Section 2(a) by stating that it applies to the "ownership . . . of records created under this Contract." This contract was prepared and executed by knowledgeable, experienced parties and if they had meant to restrict the definition of "business records" to records of the type described in Section 1, they could have placed that explicit limitation in either Section 2(a) or (g). The parties clearly knew how to draft limitations to Article XVI, because they did so in Article XVII (and explicitly described that limitation in Article XVI.2(a)), where they provided that DOE alone would own the scientific records.<9> Because we find that no limitation was placed on Article XVI.2, other than Article XVII, we conclude that the three memoranda are clearly encompassed by the extremely broad phrases "correspondence" and "all writings of every description." Therefore, according to the contract between DOE and GE, DOE possessed joint title to these withheld documents. Thus, by virtue of the DOE/GE contract, these records are by contract "the property of the Government" within the meaning of 10 C.F.R. § 1004.3(e)(1).

Even if GE's contract had not provided that DOE possessed a joint right of ownership over these documents, we also find that DOE owns these documents under the DOE/Battelle contract. Although it remains unclear as to how these documents found their way into Battelle's physical custody,<10> it is undisputed that Battelle acquired the records in its performance of its contract with DOE, see 10 C.F.R. 1004.3(e)(1), and therefore, the terms of its current contract with DOE must be examined.<11> Clause 8(H) of that contract states in pertinent part:

(a) Government's Records. Except as provided in (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . .

(b) Contractor's Own Records. The following records are considered the property of the Contractor and are not within the scope of Paragraph (a) above:

. . . (6)Correspondence (including privileged or confidential records, including legal files) between the Contractor's corporate offices (including governing bodies) and the Laboratory as well as records of this type related to the functions of the Contractor's corporate offices and governing bodies.

In the event of completion or termination of this contract, copies of any such contractor's own records with the exception of paragraph (b)(6), shall be, unless prohibited by law, delivered to DOE or its designees.

Under Clause 8(H)(b) set forth above, there is no question that the withheld documents, if they had been generated by or sent to Battelle's "corporate offices," would be Battelle's sole property and not owned by DOE. Consequently, they would not be subject to the FOIA. See Westinghouse Hanford Co., 23 DOE ¶ 80,165 (1993). However, since the documents appear to have been neither generated by nor sent to GE's corporate office, let alone Battelle's, we must analyze whether they are within the terms of Clause 8(H)(b)(6), i.e., whether they constitute "records of this type related to the functions of the Contractor's corporate offices and governing bodies." We find that records dealing with GE's opinion of its legal liability resulting from its own activities cannot be considered to relate to Battelle's "corporate offices and governing bodies." The purpose of Clause 8(H)(b)(6) is to afford the current contractor, Battelle, the ability to retain its purely internal, confidential records. That purpose would clearly not be served by finding GE's documents within the scope of that clause. Therefore, under Battelle's contract with the DOE, these records would fall under Clause 8(H)(a) of that contract, rendering them the property of the DOE pursuant to contract under the case law of this Office and the new 10 C.F.R. § 1004.3(e)(1).

2. The Documents are "Privileged"

We must next analyze whether the documents contain "information for which the contractor claims a privilege recognized under state and federal law." See 10 C.F.R. § 1004.3(e)(2). Although the words of the new regulation refer to the contractor merely "claiming" a recognized privilege, we believe that the regulation must be interpreted to refer to cases in which the contractor claims a privilege and the DOE finds a reasonable basis for that claim. Otherwise, any privilege claim, no matter how frivolous, would remove a DOE-owned record from the reach of Section 1004.3(e). Accordingly, we will consider the applicability of the attorney-client communications privilege and the attorney work product privilege (both of which are recognized by state and federal law) in this case.<12> After carefully reviewing the documents at issue, we conclude that each of these privileges attached to the documents when written and has not been waived.

a. The Withheld Documents Are Protected By the Attorney-Client Communications Privilege

The attorney-client privilege exists to protect confidential communications, including facts, (a) from a client to an attorney, if for the purpose of securing legal advice and (b) from an attorney to a client, if the communication is based on confidential information provided by the client. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975); In Re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1042 (11th Cir. 1990); Schefler v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); In Re Grand Jury Subpoena of Slaughter, 694 F.2d 1258, 1259-60 (11th Cir. 1982); Brinton v. Department of State, 636 F.2d 600, 603-04 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Murphy v. Department of the Army, 613 F.2d 1151, 1154 n.8 (D.C. Cir. 1979); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Not all communications between attorney and client are privileged, however. Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992)(Clarke). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Fisher v. United States, 425 U.S. 391, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. Government Accountability Project, 24 DOE ¶ 80,129 at 80,570 (1994) (GAP); C.D. Varnadore & Betty Freels, 24 DOE ¶ 80,123 at 80,556 (1994)(Varnadore). Correspondence which reveals the motive of the client in seeking legal advice,

litigation strategy or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege. Clarke, 974 F.2d at 129; see also Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977).

The three documents at issue in this Appeal were all authored by Mr. Pearlman, an attorney employed by GE/Hanford. For purposes of attorney-client privilege, in-house counsel generally are treated the same as outside attorneys. See Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968). In each of the three instances, GE/Hanford, through Mr. Newton, sought legal advice concerning a matter relating to research and development activities conducted by GE as the M&O contractor of DOE's Hanford facility.<13> The first document withheld is dated August 14, 1963 and expresses Mr. Pearlman's opinions, evaluations and legal advice concerning the subject of human exposure to radiation. The second withheld document is dated October 15, 1963 and describes proposed government regulations concerning safe levels of radiation exposure. The third document is dated November 21, 1963 and focuses on three legal aspects of experiments involving voluntary and planned human exposure. This last document contains extensive legal analysis, recommendations and advice. Based on our review of the three documents, we find that each of the three documents contains sufficient evidence of communications between Mr. Pearlman and Mr. Newton which, if released, would have a tendency to reveal confidences of a client.<14>

However, Cowles argues that the privilege never attached because the documents were not kept confidential when: (i) Mr. Newton disclosed the contents to Mr. Keene and (ii) when GE allowed these documents to find their way into Battelle's files. Appeal Letter at 3. The first contention is clearly incorrect because under the test laid out in Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981), the documents retained their confidentiality. The information was communicated for the express purpose of securing legal advice for the contractor, related to the specific duties of the communicating employee,<15> and appears to have been treated as confidential within GE/Hanford.<16> See id. at 394. With respect to the second contention, the attorney-client privilege attaches in the first instance as long as the communication is not intended to be disclosed to third persons not involved in the rendering of legal services. Rev. Uniform R. Evid. 502(a)(5) (1986 Amendment). No matter what occurred after the writing of the documents by Mr. Pearlman, they were clearly intended to remain confidential.

b.The Withheld Documents Are Protected By the Attorney Work Product Privilege

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947). This privilege is also limited. It does not extend to every written document generated by an attorney. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. See, e.g., Coastal States Gas Corp. v. United States Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980)(Coastal States). So long as there is "some articulable claim likely to lead to litigation," id., or potential litigation has become "identifiable", the work product privilege will attach. William Hyde, 17 DOE ¶ 80,130 at 80,570 (1988)(citing Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976)). Further, the term "litigation" encompasses administrative litigation. Skadden, Arps, Slate, Meagher & Flom, 22 DOE ¶ 80,155 at 80,620-21 (1992).

In this case, we find that at the time these documents were created there was cause to believe that GE/Hanford might become involved in court and administrative litigation related to radiation testing on human subjects. Although it does not appear that litigation (aside from this FOIA appeal) has yet arisen out of any human radiation experimentation conducted while GE was the M&O contractor at the Hanford facility, see Record of Telephone Conversation between Paul Davis and Dawn Koren (February 17, 1995), potential claims were outlined and fully discussed by Mr. Pearlman within the documents. The documents contain detailed litigation strategies, legal opinions, mental impressions and legal theories of Mr. Pearlman. Moreover, no discrete, easily segregable issues for which no litigation was contemplated are discussed within the documents. See Joyce E. Economus, 23 DOE ¶ 80,182 at 80,698-99 (1994).

Accordingly, all the documents consist of information protected under the attorney work product privilege, as well as the attorney-client privilege.

c. Neither Privilege Has Been Waived

In its Appeal, Cowles argues that, even if a privilege attached at the time the withheld documents were prepared, the privilege was subsequently waived when the information found its way into Battelle's files. Appeal Letter at 3. As stated in Footnote 10, we are unable to come to a conclusion as to whether these documents were deliberately turned over to Battelle or not. Assuming that GE gave these documents to Battelle under DOE's direction, we cannot find that waiver resulted merely because DOE ordered GE to turn over DOE-owned documents to a new physical custodian, Battelle. But assuming that these documents were mistakenly turned over to Battelle, we still find that waiver did not occur. Although this type of unintentional release has been occasionally found to trigger a waiver, see, e.g., Artesian Indus. v. HHS, 646 F. Supp. 1004, 1008-09 (D.D.C. 1986)(Artesian), we find that the two privileges attached to the three withheld documents were not waived because GE, DOE and Battelle share a common interest in the privileged documents. Alternatively, even if Battelle or DOE is considered not to have a common interest with GE, the requirements for a finding of waiver have not been met.

i. Battelle, DOE and GE Share a Common Legal Interest

Under the common interest doctrine, there is no waiver of attorney-client privilege by disclosure of privileged communications to third parties with a community of interest.<17> A community of interest exists where different persons or entities "have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice . . . . The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." Duplan Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974)(Duplan); see also Hundyee v. United States, 355 F.2d 183 (9th Cir. 1965)(common legal interest applied in criminal context). The content of such communication may not be disclosed without the consent of all parties sharing the privilege, although in a later controversy between the parties, any party may waive it. See Polycast Technology Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 50 (S.D.N.Y. 1989)(citing Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 385 (S.D.N.Y. 1975)).

The common interest doctrine has been extended considerably since Duplan. Because "?[t]he need to protect the free flow of information from client to attorney is so great whenever multiple clients share a common interest about a legal matter,'" United States v. Schwimmer, 892 F.2d 237, 244 (2nd Cir. 1989), cert. denied, 112 S. Ct. 55 (1991)(Schwimmer), even potential co-parties to prospective litigation, In Re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981)(LTV), and civil defendants sued in separate actions, Transmirra, 26 F.R.D. 572, can be considered to share a common legal interest. Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d at 249. Further, it is unnecessary that there be actual litigation in progress for the common interest rule to apply, or that the attorneys for each party be present when the communication is made. Schwimmer, 892 F.2d at 244. Thus, even where a non-party has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communication. United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), vacated on other grounds, 491 U.S. 554 (1989)(Zolin).

Because of the unusual nature of the DOE's GOCO facilities, we have found no case law on the common interest doctrine which directly addresses the types of facts at issue in this case. However, the considerations weighed in the cases cited above are equally applicable to the present circumstances. Under their contract, DOE was bound to indemnify GE and thus obligated to defend it in litigation. See Record of Telephone Conversation between Paul Davis and Dawn Koren (February 17, 1995). We find that this indemnification provision between DOE and GE creates an identical legal interest in the subject documents. See Cheeves v. Southern Clays, Inc., 128 F.R.D. 128, 130 (M.D.Ga. 1989). Cf. Miller, Anderson, Nash, Yerke & Weiner v. United States Department of Energy, 499 F. Supp. 767, 771 (D. Or. 1980)(potential co-party deciding whether to intervene in action had common legal interest with

contractor). In sum, the interest addressed in GE's attorney-client communication was the potential liability for injury due to experimental radiation exposure. If found liable, DOE would be the ultimately responsible party. The test set forth in Duplan has therefore been met. Similarly, because DOE is also contractually bound to indemnify Battelle, these two entities share a common legal interest in the privileged documents.

Further, we find that GE and Battelle share a common legal interest. Although we have found no cases directly on point, we believe Battelle became a successor-in-interest to GE with respect to these privileges. When corporations merge, the surviving corporation takes on the liabilities of the dissolved corporation. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).<18> While this is not exactly the case here, Battelle essentially "stepped into the shoes" of GE at the Hanford facility, to assume precisely the same research and development functions which had triggered the request for legal advice by a GE employee at Hanford. Most likely, 80% to 90% of GE employees, primarily low and middle level, continued to work at the Hanford facility under Battelle, see Record of Telephone Conversation between Paul Davis and Dawn Koren (February 17, 1995), and, of course, the physical location and "customer" remained the same. See Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 879 (Mich. 1976); Exeter Shell Service, Inc., 6 DOE ¶ 82,536 at 85,108-09 (1980)(where the site, operating assets, inventories, customers, and management continue unchanged through the transfer of ownership, the successor may be held liable for the predecessor's obligations). It also appears that Battelle and GE are potential co-parties to prospective litigation, such as was the case in LTV. Taking these circumstances into account in combination with the fact that the case law relevant to the transfer of GOCO facilities contains no precedents to the contrary, we conclude that GE and Battelle have so many interests in common that they must be considered to share a common legal interest in the withheld documents.<19> Thus, when the documents circulated from GE/Hanford to Battelle during the transition period, and then to DOE after the FOIA request, no waiver occurred.

ii.The Requirements for Waiver Have Not Been Met

Even if we were to find no common legal interest in the withheld documents exists among GE, DOE and Batelle, we would still find that the requirements for waiver have not been met. The trend in determining whether an inadvertent disclosure to a third party will be considered a waiver is to use a balancing test. Courts examine a number of different factors in making this determination, including reasonableness of precautions to prevent inadvertent disclosure, number of inadvertent disclosures, any delay taken to rectify error, the amount of documents involved in total, and the amount of documents inadvertently disclosed. See Fleet Nat. Bank v. Tonneson & Co., 150 F.R.D. 10, 16 (D. Mass. 1993)(Fleet); Martin v. Valley Nat'l Bank of Arizona, No. 89 Civ. 8361 PKL, 1992 WL 196798 (mem.)(S.D.N.Y. Aug. 6, 1992)(Martin); Eureka Financial Corp. v. Hartford Acc. And Indem. Co., 136 F.R.D. 179 (E.D. Cal. 1991); In re Consolidated Litigation Concerning Int'l Harvester's Disposition of Wisconsin Steel, 666 F. Supp. 1148, 1154-56 (N.D. Ill. 1987); Parkway Gallery v. Kittinger/Pennsylvania House Group, 116 F.R.D. 46, 50 (M.D.N.C. 1987)(Parkway); cf. Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991); Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 954 (N.D. Ill. 1982)(inadvertent disclosure by an attorney never results in waiver). But see In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied sub nom. Sea-Land Service, Inc., 444 U.S. 915 (1979); Artesian, 646 F. Supp. at 1008-09 (inadvertent disclosure results automatically in waiver). We note that it is quite difficult to waive the privilege attached to work-product material because release of this type of material would harm the vitality of the adversary system, in contrast to the attorney-client privilege, which is considered to impede the search for truth and thus construed narrowly. See, e.g., In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); United States v. American Tel. & Tel., 642 F.2d 1285, 1299 (D.C. Cir. 1980); Fleet, 150 F.R.D. at 14-15.

Although it is true that GE has allowed over twenty-five years to pass after transfer of the documents to Battelle before asserting its claim of privilege, we find the other factors in this case compel us to find in favor of non-waiver. There is no evidence that Battelle failed to treat the documents as confidential and privileged, Record of Telephone Conversation between Yvonne Sherman and Dawn Koren (February 23,

1995), and GE responded immediately after notification of Cowles' FOIA request by objecting to release of the documents and requesting return of the documents without delay. GE Letter I at 4. Most incredibly, although between 125,000 and 250,000 documents relating to human radiation experimentation were turned over to Battelle, the Pearlman memoranda appear to be the only privileged documents inadvertently turned over to Battelle.

Under these circumstances, we find that GE possesses a reasonable basis for its claim of privilege, has not waived the claim, and therefore meets the requirements of Section 1004.3(e)(2). To find otherwise, would be to draw an adverse inference from the fact that GE failed to find "a needle in a haystack" and impose an overwhelming, unfair burden on outgoing GOCO contractors. See, e.g., Transamerica Computer Co. v. International Business Machines Corp., 573 F.2d 646, 651-52 (9th Cir. 1978)(no waiver when 5,800 privileged documents produced along with 17 million non-privileged documents); Martin, 1992 WL 196798 at * 4 (no waiver where 5 protected documents produced out of 50,000); see also Richard Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605 (1986). We cannot countenance a result so unreasonable in this case.<20>

3.The DOE Does Not Have "Possession" of the Documents Within the Meaning of 10 C.F.R. § 1004.3(e)(2)

Section 1004.3(e)(2) exempts privileged documents, which are not in DOE's "possession," from the reach of the new regulation. We conclude that the term "possession" must refer to possession at the time of the request, in conformance with Tax Analysts. Otherwise, validly privileged documents which do not meet the test for "agency records" could be rendered subject to the FOIA under the new regulation simply by being identified and transmitted to DOE for its FOIA review. Instead, the DOE specifically protected these types of documents from the regulation's reach. See 59 Fed. Reg. 63,883 (1994). In this case, DOE obtained the subject documents after the FOIA request was made. Accordingly, because the three withheld documents are validly privileged and were not in the possession of the DOE at the time of the request, we find that they are not subject to the FOIA under 10 C.F.R. § 1004.3(e)(2).<21>

IV. Conclusion

For the reasons set forth above, we find that the three withheld memoranda (with the attachments to the October 15, 1963 and November 21, 1963 memos) are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under the new DOE contractor records regulation. Although we find that under the revised 1959 DOE/GE contract and under Battelle's contract with the DOE, the DOE owns the documents at issue, we conclude that they are protected by the attorney-client communications privilege and the attorney work product privilege. We also find that the documents have maintained their privileged status over the past twenty-five years, and that their transmittal to Battelle and to DOE did not trigger a waiver of the two privileges. Thus, the documents are protected from disclosure by 10 C.F.R. § 1004.3(e)(2). Accordingly, we shall deny Cowles' FOIA Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Cowles Publishing Company on January 17, 1995, Case Number VFA-0018, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 28, 1995

<1>/ After the Appeal was filed, three pages of copies of the Federal Register, which were attached to one of the withheld documents, were released to Cowles, with the permission of General Electric (GE). See Letter from Harold J. Neems, Litigation Counsel, GE, to Dawn L. Koren, OHA Staff Attorney (January 27, 1995)(GE Letter I) and Record of Telephone Conversation between Paul Davis, Office of Chief Counsel, Richland, and Dawn L. Koren (February 7, 1995).

<2>/ Two of the withheld documents were written on GE/Hanford's letterhead, which included its location of Richland, Washington.

<3>/ Even though the effective date of this regulation was January 11, 1995, after the date of the Richland determination, we will apply it in deciding this Appeal, as we consider ourselves bound by a regulation constituting a formal statement of DOE policy.

The new regulation creates a change in the terminology previously used by this Office. Relying on the wording of DOE Order 1700.1, we previously described a document contractually owned by the DOE as an "agency record" and therefore considered it subject to the FOIA. See Cowles, 24 DOE at 80,505 (citing John Lohrenz, 23 DOE ¶ 80,116 (1993); Government Accountability Project, 22 DOE ¶ 80,103 (1992)). However, the Preamble to the new regulation clarifies that although documents falling within the new regulation are indeed subject to the FOIA, they are not "agency records" within the meaning of Department of Justice v. Tax Analysts, 492 U.S. 136, 142-45 (1989)(Tax Analysts). See 59 Fed. Reg. 63,883 (1994). Accordingly, this Office will hereinafter use the terminology of the new regulation in cases involving contractor documents.

<4>/ Section 1004.3(e) provides in pertinent part:

(1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain . . . information for which the contractor claims a privilege recognized under federal or state law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. § 552(b).

<5>/ GE argues that Subsection 1004.3(e)(1) does not apply in this case because the DOE/GE contract did not use the exact wording utilized in the regulation, "any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government." Letter from Harold J. Neems, Litigation Counsel, GE, to Dawn L. Koren at 2 (February 2, 1995)(GE Letter II). We cannot accept this overly legalistic argument. It is clear from the regulatory preamble that the application of the new regulation is not tied to the use of a specific contractual formula, but instead applies to any contractual provision giving DOE ownership rights in any portion of records acquired or created by the contractor in its performance of that contract. See 59 Fed. Reg. 63,883 (1994)("DOE's management and operating contracts provide that most records . . . are the property of the government.")(emphasis added).

<6>/ However, Section 1004.3(e)(3)(i) states that the new regulation does not "affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination."

<7>/ Richland, however, was unable to locate correspondence that might have aided in interpreting the

contract's provisions. Determination Letter at 1.

<8>/ During the lengthy transition period between GE and Battelle, a series of supplements to the 1959 contract were signed. As far as can be discerned, only Supplement No. 6 was relevant to the ownership of records issue. This Supplement changed the period of custody (not ownership) of the business records described in Article XVI and stated that DOE would reimburse GE for the cost of removal of some of the records. See Record of Telephone Conversation between Jay Brown and Dawn L. Koren (January 25, 1995).

<9>/ In response to GE's indentation argument, we note that the indentation of Section 2 appears to have been done because it was composed of many subparts, unlike the other sections of Article XVI, which have no subparts and are not indented.

<10>/ Richland asserted that these memoranda, by their nature, indicate that they were clearly intended to remain confidential and the fact that these memoranda appear to be the only legal documents mixed in with a scientist's laboratory documents indicates they were misfiled. See Determination Letter at 2-3; Record of Telephone Conversation between Paul Davis and Dawn Koren (February 7, 1995). However, it is also possible that DOE directed GE to turn over these documents to a new physical custodian for the documents, Battelle. Richland advised us that when a contract terminates at a government-owned/contractor-operated (GOCO) facility, the DOE customarily requires the exiting contractor to turn over all DOE-owned records to the successor contractor. See Record of Telephone Conversation between Paul Davis and Dawn Koren (February 7, 1995). Because of the lapse in time, we find that it cannot now be determined how these documents found their way into Battelle's files.

<11>/ We requested in writing that Battelle express its views as to the applicability of the Battelle/DOE contract. It declined to do so. See Letter from Dawn L. Koren to Karen Hoewing, Manager of Legal Office, Battelle (January 24, 1995); Record of Telephone Conversation between Dawn L. Koren and Karen Hoewing (January 24, 1995).

<12>/ GE has not expressly relied on the attorney work product doctrine as a rationale for not disclosing the documents, as seems to be required under Section 1004.3(e)(2). However, because GE's analysis of the applicability of the attorney-client privilege so closely relates to a work product privilege argument, we find that it is appropriate to make a work product determination.

<13>/ In its Original Determination, Richland referred to Mr. Newton as the client of Mr. Pearlman. We believe the proper characterization of the relationship is that the client is the contractor, GE/Hanford, and that Mr. Newton was acting on behalf of the contractor and not on behalf of his personal interests. The fact that Mr. Newton relayed the legal information to another Hanford manager employed by GE, Mr. Keene, reinforces the fact that the client at issue is GE/Hanford.

<14>/ Attached to the third memo is a page containing the wording of several specific statutes, which Mr. Pearlman analyzed in response to information given him by GE/Hanford. We also find that this attachment, if revealed, would tend to reveal confidential communications between a client and its lawyer.

<15>/ Mr. Newton was the Manager of Composite Dose Studies and Records and Mr. Keene was the Manager of Radiation Protection. Their duties clearly necessitated the communication of Mr. Pearlman's legal advice.

<16>/ One of the three memos has each of its pages marked "Strictly Private." The three memos do not appear to have been widely distributed at Hanford.

<17>/ The common interest doctrine also applies to communications protected by the work product doctrine. See In Re Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990)(Grand Jury Subpoenas, 89-3 and 89-4)**(citing** Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578 (S.D.N.Y. 1960)(Transmirra)).

<18>/ Alternatively, if a corporation purchases the assets of another corporation, liabilities are assumed in those circumstances where the corporate seller dissolves and the corporate buyer is so similar to the corporate seller that it is in reality a "mere continuation" of the old corporation or where the transaction amounted to a de facto merger. See Robert Gregory, 11 DOE ¶ 82,527 at 85,114 (1983)(citing Oak Distributing Co. v. Miller Brewing Co., 370 F. Supp. 889, 903 (E.D. Mich. 1973)).

<19>/ Alternatively, Battelle could be characterized as a mere "physical custodian" of the privileged documents on behalf of DOE, rather than the holder of a common legal interest. It appears that the documents were not copied, distributed or even read while in Battelle's possession. Record of Telephone Conversation between Yvonne Sherman, FOI Officer, Office of Communications, Richland, and Dawn Koren (February 23, 1995). Thus, because GE's transfer to DOE would not be a waiver, GE's transfer to DOE's physical custodian is not a waiver.

<20>/ Cowles asserted that, because it had previously obtained the December 12, 1963 memorandum between Mr. Newton to Mr. Keene which referred to one of Mr. Pearlman's memoranda, a subject matter waiver had occurred and that the "fairness"/"selective disclosure" doctrine requires the release of all three Pearlman memoranda. Appeal Letter at 3-4. However, this doctrine presupposes a voluntary disclosure by the privilege holder. See In re Von Bulow, 828 F.2d 94, 101 (2nd Cir. 1987)(Von Bulow); In re Sealed Case, 676 F.2d at 809 n.54; Parkway, 116 F.R.D. at 52; Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986). That is not the case here. First, the December 12, 1963 memorandum was apparently not released by DOE, GE or Battelle. Record of Telephone Conversation between Yvonne Sherman and Dawn Koren (February 23, 1995). Second, these doctrines are primarily applicable when the party claiming privilege has sought to use the disclosed information in order to benefit itself, which has not occurred in this case. See Von Bulow, 828 F.2d at 103. Thus, no subject matter waiver has occurred.

<21>/ Thus, we need not address Richland's determination that the documents are exempt from disclosure under Exemption 5 and Cowles' response to that determination. Nor need we make a determination under Exemption 4, which would likely be applicable in this case if the documents were subject to the FOIA. See Varnadore and GAP (finding portions of contractors' attorney billing statements "privileged" and "confidential" and thus exempt from disclosure pursuant to Exemption 4).

Case No. VFA-0019, 24 DOE ¶ 80,163

February 1, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lloyd Makey

Date of Filing: January 18, 1995

Case Number: VFA-0019

On January 18, 1995, Mr. Lloyd Makey filed an Appeal from a determination issued to him on December 22, 1994, by the Assistant Inspector General for Investigations of the Office of Inspector General of the Department of Energy (DOE). In that determination, the Assistant Inspector General released several documents responsive to the appellant's information request under the Freedom of Information Act (FOIA).

I. Background

In a July 6, 1994 request for information, the appellant sought copies of DOE Inspector General investigation case files I93ZZ189 and I93ZZ190. In response, the Assistant Inspector General released four sets of documents in their entirety (Documents 1, 2, 3 and 5). A fifth document set (known as Document 4), an "11-page handwritten statement," was not released because it had been provided to the Inspector General's Office by Mr. Makey. In his Appeal, the appellant contends that the DOE's search was inadequate. The Appeal, if granted, would require the DOE to conduct a further search for documents responsive to his FOIA request.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). When an agency reports that no responsive documents can be found, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). In addition, in previous cases we have held that challenges to the adequacy of the agency's search must be supported by the presentation of some evidence that a requested document, unidentified by the agency in its search, does in fact exist. See Sun Co., 11 DOE ¶ 80,114 (1983); Vinson & Elkins, 4 DOE ¶ 80,127 (1979).

In order to determine whether an agency's search was adequate, its actions are examined under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the

files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In his Appeal, the appellant stated that he could supply information to show there was an inadequate search for responsive records. After we contacted Mr. Makey, he provided material concerning a security matter, but nothing that would lead us to believe that additional information exists beyond the documents identified by the Assistant Inspector General. See Record of January 25, 1995 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Lloyd Makey. In reviewing the Appeal, we contacted the DOE Inspector General's Office to ascertain the extent of the search that had been performed.<1>The FOIA representative from the DOE Inspector General's office stated that everything in investigative files I93ZZ189 and I93ZZ190 was released except for Document 4. In addition she stated that the "ZZ" designation given to these records indicates that the complaint was lodged with the Inspector General's office, but that the Inspector General's office decided not to take further action. Thus she concluded that no other records exist pertaining to these investigative files. Given these facts, we have no reason to believe that any other responsive documents exist and are convinced that the DOE Inspector General's office followed procedures which were reasonably calculated to uncover all material within the scope of the appellant's July 6, 1994 information request. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Lloyd Makey on January 18, 1995 is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district in which the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 1, 1995

<1>/ See Record of January 25, 1995 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Jane Payne, DOE Office of the Inspector General.

Case No. VFA-0020, 24 DOE ¶ 80,164

February 15, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Southwest Resource Development

Date of Filing: January 20, 1995

Case Number: VFA-0020

On January 20, 1995, Southwest Resource Development (Southwest) filed an Appeal from a determination issued to it on December 9, 1994, by the DOE's Office of Inspector General (IG). In the determination, IG partially denied Southwest's request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the information withheld in the December 9 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C § 522(b); 10 C.F.R § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, Southwest sought documents relating to an IG investigation into allegations of mischarging on a sub-contract at the DOE's Pantex facility. In its determination, IG released sixteen documents to Southwest in their entirety. Thirty-three other documents responsive to Southwest's request were released with material withheld pursuant to FOIA Exemptions 6 and 7(C). Southwest appeals the withholding of information from only one document. The appellant asserts that some portions withheld from document number 32 (a typed memorandum and written notes of an IG interview) could not fall within the scope of FOIA Exemptions 6 and 7(C). Subsequent to Southwest's January 20, 1995 appeal, IG reconsidered its determination and released additional portions of document 32. See Memo from Jane Payne, IG, to OHA (January 25, 1995). After receiving this revised determination, Southwest has stated that it still believes there is insufficient justification for withholding three of the remaining deletions from Document 32. Specifically, Southwest has requested the release of the last three deletions on the first typed page of Document

32. It believes that these three deletions contain information other than the name or identity of an individual, and argues that they cannot fall within the scope of Exemptions 6 and 7(C).

II. Analysis

Exemption 6 of the FOIA allows an agency to withhold information if its release would constitute a

"clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). By contrast, Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Because Exemption 7(C) does not require a showing of a "clearly" unwarranted invasion of privacy, the scope of Exemption 7(C) is broader than that of Exemption 6. Department of Justice v. Reporters Committee of Freedom of the Press, 489 U.S. 749 (1989).

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement for both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. Individuals involved in IG investigations, including the source of an investigation, sources of information, DOE employees, and other individuals, are entitled to privacy protection so that they will be free from harassment, intimidation and other personal intrusions.

After reviewing the withheld paragraph, we conclude that the revised determination made by IG was consistent with the principles that we have outlined above. In Document 32, IG withheld certain verbs and other words in addition to the names of the individuals. Under Exemptions 6 and 7(C), names and other information that would tend to disclose the identity of certain individuals may be withheld. These withheld words alone do not themselves constitute personal information. However, within the context of the portion of Document 32 that has been released, they might identify an individual by indicating certain functions performed by that individual. In this case, the little public interest in the identity of the individuals whose names appear in the investigative file does not outweigh these individuals' privacy interest in being free from intrusion into their professional and private lives. Consequently, the release of identifying information would constitute a clearly unwarranted invasion of privacy. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Southwest Resource Development on January 20, 1995, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 15, 1995

Case No. VFA-0021, 24 DOE ¶ 80,166

February 24, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David K. Hackett

Date of Filing: January 25, 1995

Case Number: VFA-0021

On January 25, 1995, David K. Hackett (Appellant) filed an Appeal from a determination issued to him on December 28, 1994, by the Department of Energy's Oak Ridge Operations Office (Oak Ridge), in response to a request for information submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, Oak Ridge stated that it did not possess the document requested by the Appellant. In his Appeal, the Appellant argues that since the DOE is required by contract to pay for the requested document it must possess a copy of it and should release this to him pursuant to his FOIA Request.

I. Background

On December 5, 1994, the Appellant filed an FOIA request for a copy of the transcript of the deposition taken of him in the case of Hackett v. Martin Marietta, et al., filed in the United Stated District Court for the Eastern District of Tennessee (Hackett). On December 28, 1994, Oak Ridge stated that it did not possess the requested deposition transcript but that it was available in the public domain from Gibson-Sherrod Court Reporting for $510.40. See Determination Letter from Amy L. Rothrock, Acting FOIA Officer, Oak Ridge Operations Office, to David K. Hackett (December 28, 1994). In his Appeal, the Appellant argues that since the DOE is currently paying the costs of the Hackett litigation under its contract with Martin Marietta Energy Systems (MMES), the DOE should possess the deposition transcript. The Appellant requests that this deposition transcript be furnished to him.

II. Analysis

It is well established in our cases that a FOIA determination must have reasonably specific justifications for withholding all or parts of documents responsive to a FOIA request. Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992); Davis Wright & Jones, 19 DOE ¶ 80,104 at 80,509 (1989). We enforce this rule so that the requesting party may prepare an adequate appeal, and so that this Office may make an effective review of the determination. In this case, we find that the determination letter does not permit an effective review regarding the possession and possible release of the deposition transcript.

In an effort to ascertain the status of the requested transcript, we spoke with the office responsible for preparing the determination letter. Representatives of that office stated that while DOE did not possess the document at the time of the FOIA request under the relevant contract with MMES, the DOE may own the subject document. See Memoranda of Telephone Conversations between Don Thress and Amy Rothrock,

Office of Chief Counsel, Oak Ridge, and Ariane Cerlenko, Office of Hearings and Appeals (February 9-10, 1995); see also Ownership of Records clause, Contract Number DE-AC05-84OR21400, Modification No. M066, at 45; Litigation and Claims clause, Contract Number DE-AC05-84OR21400, February 1991, at 166.<1> Since Oak Ridge did not consider whether DOE owned the deposition transcript, but merely whether it possessed the transcript, we find that Oak Ridge did not adequately justify withholding the transcript. Consequently, we will remand this matter to Oak Ridge, which should reconsider its determination with respect to the deposition transcript and either release the transcript or adequately justify the reasons, if any, for withholding the transcript.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by David K. Hackett, Case Number VFA-0021, is hereby granted in part to the extent set forth in Paragraph (2) below, and denied in all other respects.

(2) This case is remanded to the Oak Ridge Operations Office for a determination consistent with this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 24, 1995

<1>Under a new regulation, 59 Fed. Reg. 63,884 (December 12, 1994) (to be codified at 10 C.F.R. § 1004.3(e)), contractor records which are the property of the Government shall be made available to the public unless the records are exempted from the mandatory disclosure requirements of the FOIA. But see 10 C.F.R. § 1004.3(e)(2) (which exempts from this rule records not in the Government's possession that are owned by the Government under contract and contain privileged information or technical data having commercial value).

Case No. VFA-0022, 24 DOE ¶ 80,165

February 23, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:J/R/A Associates

Date of Filing:January 27, 1995

Case Number:VFA-0022

On January 27, 1995, J/R/A Associates of Mitchellville, Maryland, a regulatory information and support systems firm, filed an Appeal from a determination issued on December 15, 1994, by the Associate Deputy Secretary for Field Management of the Department of Energy (DOE). That determination denied in part J/R/A Associates' request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records which are held by a covered branch of the federal government and which have not been made public in an authorized manner generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

In this case, J/R/A Associates requested that the DOE's Office of Contractor Employee Protection (OCEP) release information on all complaints of discrimination which had been brought under the DOE program to protect contractor employee "whistleblowers." 10 C.F.R. Part 708. In particular, S/R/A Associates requested the release of the first page of each complaint or a page that contains the name of the

complaining employee and the contractor or subcontractor complained against.<1>After consulting with the requester, OCEP released portions of a list of closed cases. The cases on the closed case compilation are categorized by type and list each case name (the name of the complainant), the date the complaint was received, and the contractor involved. Of this information, OCEP released the names of all of the contractors and all dates. It also released case (complainant) names in those cases where the name already had been made public. It withheld, however, case names where the complainant's name had not already become public. In addition, OCEP withheld all of this information for fifty-one "on-going" cases. All this material was withheld under Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6), (7)(C), 10 C.F.R. § 1004.10(b)(6), (7)(iii) and under 10 C.F.R. § 1008.12, a portion of the DOE regulations implementing the Privacy Act. 5 U.S.C. § 552a.<2>In its Appeal, J/R/A Associates limits its request to the names of contractors in the fifty-one "on-going" cases.

Analysis

Exemption 6 permits an agency to make discretionary withholding of information which must otherwise

be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) applies a similar but somewhat less exacting standard allowing withholding of portions of law enforcement records which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The application of both exemptions requires an agency to balance the public interest in disclosure with the putative privacy interest involved. Department of State v. Ray, 502 U.S. 164, ___, 116 L.Ed.2d 526, 541, 112 S.Ct. 541, 548 (1991); Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); James L. Schwab, 23 DOE ¶ 80,146 at 80,615 (1993); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,639 (1991); Jerry O. Campbell, 17 DOE ¶ 80,132 at 80,576 (1988).

In this case, the only information sought is the names of the contractors listed as respondents in pending OCEP cases. These are all corporate entities. As J/R/A Associates correctly points out, such entities have no privacy interest to protect. Sims v. Central Intelligence Agency, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); Buffalo Evening News, Inc. v. Small Business Administration, 666 F. Supp. 467, 471 (W.D.N.Y. 1987); Ivanhoe Citrus Association v. Handley, 612 F. Supp. 1560, 1567 (D.D.C. 1985); Jon Berg, 23 DOE ¶ 80,129 at 80,568 (1993) (and cases cited therein); Mobil Mining & Minerals, 16 DOE ¶ 80,120 at 80,560 (1987). See also 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 5.12, at 209 (3rd ed. 1994); Annotation, When Are Government Records "personnel files" Exempt From Disclosure Under Freedom of Information Act Provision (5 U.S.C.S. § 552(b)(6)) Exempting Certain "personnel," Medical, and Similar Files, 104 A.L.R. Fed. 757, 768 (1991); 15 Fed. Proc. L.Ed. § 38:169, at 190 (1990); 15 Fed. Proc. L.Ed. § 38:213 at 229 (1990). Cf. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (privacy interests accrue to and protect individuals). The Exemption 6 and 7(C) balancing tests presuppose that there is some privacy interest to balance. William D. Lawrence, 24 DOE ¶ 80,139 at 80,600 (1994); Virginia Johnson, 23 DOE ¶ 80,168 at 80-664-65 (1993). Thus, where there is no privacy interest to balance, as in this case, whatever public interest there is in disclosure must prevail. Therefore, these corporate names cannot be withheld under either Exemption 6 or Exemption 7(C). Accordingly, we will remand this matter to the Associate Deputy Secretary for Field Management with a direction either to promptly release the corporate names requested or to issue a new determination which fully explains the reasons for the continued withholding of this information.<3>

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by J/R/A Associates of Mitchellville, Maryland, on January 27, 1995, OHA Case No. VFA-0022, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Associate Deputy Secretary for Field Management who shall either promptly release the names of the contractors involved in pending OCEP cases or issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 23, 1995

<1>/ In this Decision and Order, we use the term "contractor" to include subcontractors.

<2>/ Section 1008.12 lists exemptions from information which must be disclosed in response to a Privacy Act request. This reference was inapposite in this case. First, the request was made only under the FOIA, not under the Privacy Act. Second, by its very terms, the Privacy Act cannot be relied on as a justification for withholding information which must be released in response to a FOIA request. 5 U.S.C. § 552a(q)(2). Accordingly, we will not consider this claim any further.

<3>/ OCEP has delivered to this Office a short memorandum explaining why the material may be withholdable under Exemption 7(A) of the FOIA. Because we are remanding this matter to OCEP for its further consideration, we need not address the possible application of this additional claim of exemption.

Case No. VFA-0023, 24 DOE ¶ 80,168

March 1, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kenneth W. Warden

Date of Filing: February 1, 1995

Case Number: VFA-0023

On February 1, 1995, Kenneth W. Warden filed an Appeal from a determination issued to him on January 13, 1995, by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy. In that determination, Oak Ridge denied a request for information filed by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, the Appellant asks that we direct Oak Ridge to release the information that it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his request, the Appellant sought "a copy of any investigative file . . . in which my name appears, especially Case No. I92 OR020." Mr. Warden's request was referred to the Office of Inspector General for a determination. The Inspector General in turn referred two documents that originated at Oak Ridge to that office for a separate determination. The present Appeal concerns the determination issued by Oak Ridge. Oak Ridge found that the documents referred to it fell within the scope of Exemption 6 which shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6).

The two documents at issue in this Appeal concern an employee of Martin Marietta Energy Systems (MMES) who had been accused of misappropriating government property. Document 17 summarizes an interview conducted by two DOE employees with this MMES employee. The document concerns various activities by the employee in addition to his alleged misconduct. In this regard, it describes his relationships with, and the activities of, other individuals, including Mr. Warden. This document contains a number of references to Mr. Warden, but none of them implicate Mr. Warden in the alleged thefts. Document 23 is an internal report prepared by MMES on the alleged misconduct by the same employee. Document 23 does not refer, either directly or indirectly, to Mr. Warden.

In his Appeal, Mr. Warden asserts that these two documents may contain accusations that he has been guilty of wrongdoing. Mr. Warden contends that an effort has been made to retaliate against him for alleged whistleblowing activities. As part of this effort, Mr. Warden believes that the authors of these documents might have fabricated statements by the employee being investigated and then used these

misstatements to justify a further investigation of Mr. Warden. The appellant states that he has been unable to determine exactly what he is alleged to have done wrong, and he claims that he must see these documents to verify the reasons for the investigation of him. */

II. Analysis

The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. In making this analysis, the agency does not consider any privacy interest that the requester might have in the documents. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991) (Hopkins); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

The Supreme Court's decision in Reporters Committee has greatly narrowed the scope of the public interest in the context of the FOIA. The Court held that neither the identity of the requester nor the purpose for which the request is being made are relevant to whether information is exempt from disclosure. 489 U.S. at 771. Thus, rather than depend upon the requester's proposed use of the information, the determination "must turn on the nature of the requested document and its relationship to" the public interest. Id. at 772. The Court further distinguished between the general benefits to the public which may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. The Court found that with regard to the FOIA, the public interest in disclosure must be measured in terms of its relation to the core purpose of the Act, i.e., "public understanding of the operations and activities of the Government." Id. at 775 (quoting 5 U.S.C. § 552 (a) (4) (A) (iii)). The Court indicated that only information which contributes significantly to this understanding is within "the ambit of the public interest which the FOIA was enacted to serve." Id.

Accordingly, the amount of public interest in disclosure must be evaluated with respect to the degree to which disclosure would further the public's understanding of the workings of government. Therefore, whether disclosure in this case would assist Mr. Warden in understanding the reasons for any action taken regarding him is irrelevant to our analysis of Exemption 6. What is relevant to our analysis is the degree to which the documents will assist the public in understanding governmental operations.

The public interest in Document 17 is slight. The document describes in general terms MMES's preliminary investigation into a minor theft of property by an MMES employee. It summarizes interviews with the subject of the investigation and several witnesses. Document 17 sheds little light on government operations. There is, however, a greater public interest in the contents of Document 23, since it concerns the manner in which the government conducted certain activities. With both of these documents, however, the public's interest in them does not outweigh the very substantial privacy interests of the individuals concerned. The documents deal with criminal allegations concerning a number of people in addition to the subject of the investigation, a report by a psychologist concerning an individual, and other matters that are of a personal nature or which the individuals involved would normally wish to keep private. Under these circumstances, we find that the public interest that would be furthered by release of these two documents is outweighed by the substantial interest that the individuals mentioned in them have in maintaining their privacy.

The fact that a document contains material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979). The two documents at issue in this case contain no reasonably segregable non-exempt information.

Consequently, it is clear that disclosure of the two documents at issue here would constitute an unwarranted invasion of personal privacy, and therefore Oak Ridge properly withheld them pursuant to Exemption 6. Accordingly, the Appellant's Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Kenneth W. Warden on February 1, 1995, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 1, 1995

*/ Since Document 23 in no way pertains to Mr. Warden, this document is of no use to him in understanding the basis for the investigation of him.

Case No. VFA-0024, 24 DOE ¶ 80,169

March 16, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert S. Foote

Date of Filing: February 15, 1995

Case Number: VFA-0024

On February 15, 1995, Robert S. Foote filed an Appeal from a determination issued to him on January 18, 1995 by the Acting Associate Director for Health and Environmental Research (OHER) in the Office of Energy Research of the Department of Energy (DOE). In that determination, the OHER denied in part requests for information filed by Mr. Foote on July 26, 1994, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 26, 1994, Mr. Foote filed three separate FOIA requests in which he sought the following information relating to the review of research proposals he submitted to the DOE in 1989, 1990, and 1993: (1) names of principal reviewers; (2) names of panel members present during discussions of the proposals; (3) names and affiliations of other individuals having access to the proposals; and (4) copies of documents, memoranda, notes and other materials resulting from or related to review of the proposals. On January 18, 1995, the OHER partially denied Mr. Foote's request for the above documents. The OHER released item (3) and partially released item (4). It withheld items (1) and (2) in their entirety and partially withheld item (4) pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5).

On February 15, 1995, Mr. Foote filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Foote challenges the OHER's determination with respect to items 1 and 2 and asserts that i) the names of panel members present during the discussions of the proposals (which include the principal reviewers) are factual information that should not be withheld under Exemption 5, and ii) the refusal to disclose the names of members of the 1993 panel was an abuse of discretion in light of the fact that OHER previously disclosed names of panel members in 1989 and 1990. For these reasons, Mr. Foote requests that the OHA direct the OHER to release the withheld information.

II. Analysis

As stated above, the OHER stated in its determination that it was withholding the names of the panel

members requested by Mr. Foote pursuant to FOIA Exemption 5. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 is generally recognized as encompassing certain distinct privileges, including the attorney-client privilege, the attorney work-product privilege, and the governmental deliberative process privilege. See Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). In the present case, the OHER relied on the deliberative process element of Exemption 5.

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsive for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151 (1975). The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The information withheld by the OHER consists of a list of names of individuals who served on the 1989, 1990, and 1993 DOE Special Review Panel on the Human Genome Program. The OHER argues that the identity of these panel members is exempt from disclosure pursuant to Exemption 5 because the release of this information would have a chilling effect on the deliberative process. See Determination Letter at 2. Specifically, the OHER argues that these panel members would be less likely to serve on future panels and provide frank and candid opinions if they believed their personal views would be subject to public scrutiny. Id. Although we have in the past analyzed this kind of information under the deliberative process element of Exemption 5, see, e.g. Eugene S. Post, 17 DOE ¶ 80,142 at 80,603 (1988), for the reasons set forth below we believe it is more appropriate to apply FOIA Exemption 6 to the names of the panel members. Therefore, we will not conduct an analysis of whether the names of the panel members were properly withheld under Exemption 5. Rather, we will examine this Appeal in light of FOIA Exemption 6.

Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a substantial privacy interest would be invaded by the disclosure of the record. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d at 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990). If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Dep't of Housing and Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991) (Hopkins); FLRA v. Dep't of Treasury Fin. Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990) (FLRA). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would

constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

In sum, a determination on the application of Exemption 6 requires evaluation of the following issues: whether disclosure will result in an invasion of privacy; how serious the invasion is likely to be; the public interest to be served by the disclosure; and how the strength of the public interest in disclosure compares to the potential damage to personal privacy which would result from the release of the material. The latter determination should include an evaluation of whether that public purpose may be accomplished by alternative and less intrusive means. Church of Scientology v. Department of the Army, 611 F.2d 738, 746 (9th Cir. 1979); Douglas L. Miller, 13 DOE ¶ 80,122 at 80,573 (1985).

We have previously analyzed whether the names of reviewers or evaluators should be withheld under Exemption 6. For example, in the past we have determined that the names of DOE evaluators of contract proposals should be withheld under Exemption 6. Morgan, Lewis & Bockius, 20 DOE at 80,687. In that case we concluded that the DOE evaluators had significant privacy interests in avoiding the public disclosure of their names. In addition, we have determined that there was not a public interest in the names of individuals who conducted a Radiological Controls inspection. Knolls Action Project, 19 DOE ¶ 80,103, at 80,508 (1989). In that case we stated that, in the absence of any discernible public interest in the inspector's names, their release would constitute a "clearly unwarranted" invasion of privacy.

While the OHA may conduct a de novo review of an initial FOIA determination on appeal, we are reluctant to do so in this case because the record does not reveal the extent of privacy interests involved, whether disclosure will result in an invasion of privacy, or the public interest to be served by disclosure. Under these circumstances, we find that the best course is to remand this matter to the OHER. As the office most familiar with this information, the OHER is in the best position to make the initial determination as to whether this information should be protected under Exemption 6.

The OHER should either release this information or prepare a new determination that explains in detail the reasons which justify withholding the names of the panel members. In doing so, the OHER should carefully consider the nature and magnitude of the harm to the personal privacy which might be caused by release of the names, as well as the public interest which might be served by their release. In his Appeal, Mr. Foote asserts that the OHER abused its discretion by releasing the names of panel members who served in 1989 and 1990 and not the panel members who served in 1993. Therefore, on remand the OHER should also determine whether it has waived the protection of Exemption 6 with respect to its previous disclosures of identities of 1989 and 1990 panel members.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Robert S. Foote on February 15, 1995, Case Number VFA-0024, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Health and Environmental Research in the Office of Energy Research of the Department of Energy, which should issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 16, 1995

Case No. VFA-0025, 25 DOE ¶ 80,102

March 21, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard J. Levernier

Date of Filing: February 21, 1995

Case Number: VFA-0025

On February 21, 1995, Richard J. Levernier filed an Appeal from a determination issued by the Manager of the Department of Energy's Rocky Flats Office (DOE/RF) on January 31, 1995. The determination concerned a request submitted by Levernier under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, DOE/RF stated that it could not locate records responsive to Levernier's request. In his Appeal, Levernier challenges the adequacy of DOE/RF's search for responsive records.

I. Background

In a request dated July 1, 1994, Levernier sought "'records', including tape recordings, written transcripts or summaries, of recordings of telephone conversations" between Levernier and personnel of Wackenhut Services, Inc. (WSI), a DOE contractor. Letter from Richard J. Levernier to Mary O. Hammack, FOIA/PA Officer, DOE/RF (July 1, 1994). Levernier stated in his request that he believed these recordings had been reviewed by the Manager of DOE/RF, DOE/RF's Chief Counsel, and the Acting Director of DOE/RF's Human Resources and Internal Security Division. Id. In its January 31, 1995 determination, DOE/RF stated that neither the Office of the Manager nor the Office of Chief Counsel had records responsive to Levernier's request. Letter from Mark Silverman, Manager, DOE/RL, to Richard J. Levernier (January 31, 1995). The determination further stated that although the Acting Director, Human Resources and Internal Security Division, knew of the taped conversations that were the subject of Levernier's request, the Acting Director "did not know the whereabouts of these tapes." Id.

Levernier argues in his Appeal that DOE's search was "obviously inadequate," noting that his request was to the DOE "in its entirety," including DOE contractors and DOE offices other than DOE/RF. Levernier also submitted several documents in support of his Appeal. Among them is a document entitled "Report of Management Review of Security Concerns at Rocky Flats" and another document with the same title and the label "Appendix." This report was prepared by the Inglewood Group, Inc., under a contract with the DOE. The report was the result of an investigation by the Inglewood Group into allegations of wrongdoing leveled by WSI against DOE/RF staff. Contained in the report are lengthy verbatim excerpts from "tape recordings secretly made by the [WSI] Protective Force Director of numerous conversations he had with the [DOE/RF] Security Director [Levernier] during 1993." Levernier received a copy of this report in response to an earlier FOIA request he filed with DOE/RF. Levernier also submitted with his Appeal a copy of a letter from the Government Accountability Project to the DOE/RF Manager, which Levernier obtained from the public reading room at DOE/RF. Attached to this letter were excerpts from what appears to be a transcript of the same telephone conversations referred to in the report of the Inglewood Group.

II. Analysis

The OHA has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive records, and the Office has remanded cases where it was evident that the search conducted was inadequate. See, e.g., James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing the present Appeal, we have obtained further information from DOE/RF regarding its search for responsive records. As noted above, the FOIA/Privacy Act Officer (FOIA/PA Officer) at DOE/RF consulted the Offices of the Manager, Chief Counsel, and the Acting Director, Human Resources and Internal Security Division, in her attempt to locate the records requested by Levernier. Each office reported that it did not have records responsive to the request. The FOIA/PA Officer also forwarded the request to WSI. The company responded that it had "verbal information" indicating that one of its employees "has tapes" but that the tapes "do not belong to [WSI]." Letter from Cheryl A. Arnold, WSI, to Mary Hammack, DOE/RF (September 27, 1994).

Though the Office of Chief Counsel reported that it had no records responsive to Levernier's request, that office did state that responsive records had been given to the DOE Office of Inspector General (IG). Therefore, the FOIA/PA Officer also forwarded Levernier's request to the IG. The IG informed DOE/RF that it would respond directly to Levernier's request.

The information we have regarding the turning over of records to the IG does not rule out the possibility that additional copies of the records in question were kept at DOE/RF. However, the FOIA/PA Officer consulted each of the offices at DOE/RF that were likely to possess the records, including the offices that Levernier believed had reviewed them. While these offices may have at some point reviewed the records in question, we have no reason to believe that DOE/RF was in possession of those records at the time of Levernier's request. Further, although the determination issued to Levernier understandably gave him the impression that only offices at DOE/RF were searched, the FOIA/PA Officer also referred the request to DOE contractor WSI and to the IG. We are therefore persuaded that the FOIA/PA Officer conducted a search that was reasonably calculated to uncover the records sought by the Appellant.

We will therefore deny the present Appeal. Regarding any responsive records that are in the possession of the IG, that office is aware of the need to provide a timely response to Levernier's FOIA request. When Levernier has received a determination regarding those records, if he disagrees with that ruling he may at that time appeal it to the OHA.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard J. Levernier on February 21, 1995, Case Number VFA-0025, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 21, 1995

Case No. VFA-0026, 25 DOE ¶ 80,101

March 20, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert L. Hale

Date of Filing: February 22, 1995

Case Number: VFA-0026

On February 22, 1995, Robert L. Hale filed an Appeal from a determination issued to him by the Acting Freedom of Information Officer at the DOE's Oak Ridge Operations Office (FOI Officer). This determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the FOI Officer to conduct another search for documents responsive to Mr. Hale's request.

I. Background

On January 4, 1995, Mr. Hale requested "all employee records, and any or all medical records for William Cleo Hale." William C. Hale, the father of the appellant, was a contractor employee whom the appellant claims died at the Oak Ridge facility on August 21, 1945. In its response to Mr. Hale's request, the FOI Officer stated that the only document found to be responsive to Mr. Hale's request was William Hale's "employment card." A copy of this card was included with the FOI Officer's response.

In his Appeal, Mr. Hale contends that the search for responsive documents was inadequate, and he requests that this matter be remanded to the FOI Officer for another search. Mr. Hale cites the existence of several unanswered questions concerning his father's death as support for his claim that the search was inadequate.

II. Analysis

The FOIA generally requires that documents held by federal agencies be released to the public upon request. Accordingly, upon receiving an appropriate FOIA request, agencies are required to search their records for responsive documents. See 5 U.S.C. § 552(a)(3); Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., In Defense of Animals, 24 DOE ¶ 80,151 (1994); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981).

In considering this Appeal, we contacted the FOI Officer in order to determine the extent of the search for responsive documents. We were informed that three different records systems (personnel records of contractors, personnel medical records and personnel radiation experiment records) at each of five Oak Ridge locations were searched. Three of the five locations searched are operated by Martin Marietta Energy Systems, Inc., the DOE management and operations contractor: the K-25 Gaseous Diffusion Plant,

the Y-12 Weapons facility, and the Oak Ridge National Laboratory. The other two locations included in the search were the Oak Ridge Records Center, and the offices of the Oak Ridge Associated Universities, a contractor that conducts epidemiology studies for the DOE. See memorandum of March 10, 1995 telephone conversation between Amy L. Rothrock, FOI Officer, and Robert Palmer, OHA Staff Attorney.

Based on the information before us, we conclude that the FOI Officer's search for responsive documents was adequate. As set forth above, that search encompassed three different record systems at the five Oak Ridge facilities. Accordingly, we are not persuaded by Mr. Hale's claim that the existence of unanswered questions concerning his father's death proves that the search for responsive documents was inadequate. That the results of an FOIA request do not meet the requester's expectations is not necessarily evidence of an inadequate search. In the absence of any evidence to the contrary, we conclude that a thorough and conscientious search for responsive documents was made with respect to Mr. Hale's FOIA request.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert L. Hale on February 8, 1995 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 20, 1995

Case No. VFA-0027, 24 DOE ¶ 80,170

March 16, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Casey O. Ruud

Date of Filing: February 23, 1995

Case Number: VFA-0027

On February 23, 1995, Casey O. Ruud (hereinafter "Appellant") filed an Appeal from a determination issued to him on January 26, 1995 by the Director of the Office of Communications of the Department of Energy's Richland Operations Office (hereinafter "Authorizing Official"). In that determination, the Authorizing Official denied in part a request for information which Ruud had filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Ruud requests that the Office of Hearings and Appeals (OHA) order the release of the withheld information.

I. Background

On January 13, 1995, Ruud filed a FOIA request for a complete and unredacted copy of a letter dated November 20, 1994, addressed to the Secretary of Energy concerning Ruud's employment qualifications. He also requested a complete and unredacted copy of a similar letter written by the same author dated May 14, 1994 and addressed to Representative Jay Inslee. On January 26, 1995, the Richland Operations Office released copies of the two letters with the name and address of the author deleted. The Authorizing Official determined that the release of such personal information would result in a clearly unwarranted invasion of personal privacy and withheld it under Exemption 6 of the FOIA.

II. Analysis

The FOIA generally requires that information held by government agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post Co.).

To warrant protection under Exemption 6, information must first meet its threshold requirement. It must fall within the category of "personnel and medical files [or] similar files." 5 U.S.C § 552(b)(6). It is clear that the letters in this case are neither medical files nor personnel files. The term "similar files", however, has been interpreted broadly by the Supreme Court to include all information which "applies to a particular individual". Washington Post Co., 456 U.S. at 601. The D.C. Circuit has reinforced this interpretation by concluding that Exemption 6 is equally applicable to the "author" and the "subject" of the

file. New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990). Here, letters that disclose the author's identity qualify as similar files and, therefore, meet the threshold requirement of Exemption 6.

Next, we must undertake a three-step analysis to determine whether the author's identity may be withheld under Exemption 6. First, we must determine whether a substantial privacy interest would be invaded by the disclosure of the record. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d at 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) (Horner). Second, we must determine whether the release of the document would further the public interest by shedding light on the operations and activities of the Government. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee). Finally, if we find both privacy and public interests in the requested information, we must weigh the privacy interest against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Id. at 762-70.

A. Privacy Interest

The Supreme Court has long found a privacy interest in the names and addresses of individuals significant enough to warrant protection from disclosure under Exemption 6. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Moreover, at least seven Circuit Courts have found that an individual has a significant privacy interest in avoiding the unlimited disclosure of his or her name. See, e.g., Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991); Painting & Drywall Work Preservation Fund v. Department of Hous. & Urban Dev., 936 F.2d 1300 (D.C. Cir. 1991); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989); Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989); United States Dep't of Agric. v. Federal Labor Relations Auth., 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. United States Dep't of Agric., 737 F.2d 784, 787 (9th Cir. 1984); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir. 1984); American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983). This privacy interest has been specifically recognized with respect to authors of letters to the government. Holy Spirit Ass'n v. FBI, 683 F.2d 562, 567 (D.C. Cir. 1982) (Mackinnon, J., concurring) (Holy Spirit).

In the initial determination letter, the Authorizing Official decided to withhold the writer's identity explaining that "an individual who addresses a letter to the Secretary of Energy and/or an elected official can reasonably expect his/her name to be revealed to staff who will prepare a response to such a letter, but that individual can also reasonably expect his/her identity to go no further than the circle of those who have access to it in the normal course of their duties."

The Appellant asserts, in response, that the author of the requested letters had no "actual expectation of privacy" for two reasons. First, the Appellant argues that since the author accuses the Appellant and Secretary O'Leary of a "criminal conflict of interest," the author should expect to be "held personally accountable for such" statements by having his identity revealed. Secondly, the Appellant points out that the author sent the letters to several Congressional Representatives, the United States Attorney General Janet Reno and DOE Secretary Hazel O'Leary, thereby obviating any expectation of privacy.

The Appellant's first argument fails because the Supreme Court has held that the identity of the requesting party has no bearing on the merits of his or her FOIA request. Reporters Committee, 489 U.S. at 771. In other words, the Appellant's status as an individual accused of criminal activity is irrelevant to the analysis of whether or not the author's identity should be disclosed. Id. The Appellant's second argument, which suggests that the writer has waived any expectation of privacy, also fails. First, sending the letters to Secretary O'Leary does not constitute a waiver because of the long line of cases outlined above which protects names and addresses from disclosure. Secondly, sending the letters to a law enforcement agency such as the Justice Department (Attorney General Janet Reno), either directly or through elected representatives, does not preclude a finding that a privacy interest exists. Holy Spirit, 683 F.2d at 564. In light of the overwhelming weight of authority, we find that disclosure of the name and address of the author of these letters would result in a substantial invasion of personal privacy.

B. Public Interest

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. However, it is not enough that the information would permit speculative inferences about the conduct of an agency or a government official. Id. at 774. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Dep't of Commerce, 830 F.2d 388 (D.C. Cir. 1987).

The Appellant argues that this is a "huge case" and that there is a lot of background information that makes disclosure of the writer's identity proper. He asserts that he is a notorious whistleblower whose life has been threatened. He claims further that the writer "could be an agent of the government" and, therefore, there is a significant public interest in disclosure of the writer's identity. This argument is speculative at best and does not sufficiently demonstrate that disclosure would aid the public in understanding something directly about the workings of the government. Reporters Committee, 489 U.S. at 773.

As we have found in other cases where names and addresses have been withheld but the remainder of the document has been released, there is in the present case no discernible public interest in disclosing the author's identity. See, e.g., Morrison & Foerster, 24 DOE ¶ 80,107 at 80,518 (1994).

III. Conclusion

If no public interest exists, the requested information should be protected. Horner, 879 F.2d at 879. As the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time." Id.

In light of the privacy interest at stake and the absence of any public interest in disclosure, we conclude that the Authorizing Official correctly withheld the author's name and address under Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Casey O. Ruud on February 23, 1995 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 16, 1995

Case No. VFA-0029, 25 DOE ¶ 80,104

March 27, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mid-Missouri Nuclear Weapons Freeze, Inc.

Date of Filing: February 27, 1995

Case Number: VFA-0029

On February 27, 1995, Mid-Missouri Nuclear Weapons Freeze, Inc. (MNWF) filed an Appeal from (1) the denial of information issued to it on January 30, 1995 by the Director of the FOIA/Privacy Act Division and (2) the partial denial of information issued to it on January 31, 1995 by the FOIA Coordinator of the Office of Nuclear Energy.

The FOIA generally requires that documents held by federal agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a letter dated November 9, 1992, MNWF filed a request with the FOIA Public Information Officer seeking a copy of documents related to three projects undertaken for DOE by researchers at the Massachusetts Institute of Technology (MIT) related to the Integral Fast Reactor (IFR) and associated pyroprocessing/actinide recycle technologies. See Letter from Mark Haim, Director, MNWF to FOIA Public Information Officer (November 9, 1992). The IFR program was proposed by Argonne National Laboratory (ANL) as an improvement in the management of high level radioactive waste. In the process under study, long half-life isotopes are removed from spent nuclear fuel and returned to the reactor, where they are transmuted into safer fission by-products with shorter half-lives. On July 29, 1994, the DOE Chicago Operations Office issued a final determination stating that no responsive documents were found in that office. The IFR project was found to have been conducted under a subcontract between Martin Marietta, the management and operating contractor of the Oak Ridge National Laboratory (ORNL) in Oak Ridge, Tennessee, and MIT. On August 23, 1994, MNWF appealed that determination to the Office of Hearings and Appeals (OHA), which remanded the matter to the Freedom of Information and Privacy Acts Branch at DOE Headquarters for a search of the Oak Ridge Operations Office and the Office of Nuclear Energy. Mid-Missouri Nuclear Weapons Freeze, 24 DOE ¶ 80,142 (1994).

In a final determination dated January 30, 1995, the FOIA/Privacy Act Division stated that after a search of the Oak Ridge Operations Office, no responsive records could be found. The determination also stated that the work was done under a subcontract and pursuant to Martin Marietta's Operating Contract, subcontractor records are not agency records for purposes of the FOIA unless the Department has possession of the records. See Letter from GayLa D. Sessoms, Director, FOIA/Privacy Act Division, to

Mark Haim, Director, MNWF (January 30, 1995); see also Contract No. DE-AC05-84OR21400, §H.23(b)(8) (Contract). However, as discussed in Section II.B. of this Decision, that statement gave MNWF the erroneous impression that subcontractor (i.e., MIT) records had been found. In fact, none were located. The Office of Nuclear Energy responded in its determination letter by submitting four responsive documents and informing the requester that the project terminated in less than one year, and that individuals who worked on the program have retired or moved to other positions within DOE. See Letter from Charles W. Dougherty, FOIA Coordinator, Office of Nuclear Energy, to Mark Haim, Director, MNWF (January 31, 1995). On February 27, 1995, MNWF filed an Appeal with the Office of Hearings and Appeals (OHA). See Letter from Mark Haim, Director, MNWF, to Director, OHA (February 27, 1995) (Appeal Letter).

In this Appeal, MNWF challenges the adequacy of the search for IFR information and alleges a violation of the new DOE regulations relating to the disclosure of contractor records. MNWF maintains that DOE did not search ORNL, did not contact key individuals at Argonne National Labs (ANL), ORNL, or MIT, did not adequately search DOE headquarters, provided no verification that the project terminated in less than one year, and violated the contractor records provision of DOE's FOIA regulations.

II. Analysis

A. Adequacy of the Search

The OHA has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The OHA has remanded cases where it was evident that the search conducted was inadequate. See, e.g., In Defense of Animals, 24 DOE ¶ 80,151 (1994); James L. Schwab, 21 DOE ¶ 80,138 (1991). However, the FOIA requires that the search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted the Oak Ridge Operations Office and the Office of Nuclear Energy to ascertain whether the searches conducted were reasonably calculated to uncover the information sought by MNWF. Oak Ridge advised us that, contrary to MNWF's statement, a search was conducted at ORNL and no responsive documents were found. See Memorandum of Telephone Conversation between Amy Rothrock, FOIA Officer, Oak Ridge Operations Office, and Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 1995); see also Memorandum from Jennifer Houghton, FOIA/Privacy Act Specialist, FOIA/Privacy Act Division, to Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 1995).

We contacted an employee of the Oak Ridge Operations Office who is physically located at ORNL. He informed us that ORNL had indeed been searched and in fact was the primary search site in this case since it maintains a filing system for records and has more space than the Oak Ridge Operations Office. See Memorandum of Telephone Conversation between Gary Clifton, Oak Ridge Operations Office, and Valerie Vance Adeyeye, OHA Staff Attorney (March 17, 1995). Some responsive documents were located recently at ORNL, and are currently in transit to the FOIA Office in Oak Ridge before being sent to the FOIA/Privacy Act Division at DOE headquarters for review. Id. We find no reason to question the veracity of the Oak Ridge employees who performed the search, and therefore find that the search of the Oak Ridge National Laboratory was reasonably calculated to locate the documents requested.

The Office of Nuclear Energy (NE) released four responsive documents to MNWF after conducting a search of its offices. MNWF alleges that certain key employees of NE were never contacted. Specifically mentioned are Sol Rosen, Andy Millunzi, Frank Goldner, and Jerry Griffith. See Appeal Letter at 7. We contacted all of the individuals except Mr. Griffith (who has retired). Mr. Rosen recalls that the project

was terminated around April 1992 1/, but had no documents. He confirmed that Mr. Griffith is retired. See Memorandum of Telephone Conversation between Sol Rosen, DOE, and Valerie Vance Adeyeye (March 16, 1995). Mr. Millunzi left NE in October 1992 and did not take any papers from the project when he left. He left all files in NE. See Memorandum of Telephone Conversation between Andy Millunzi, DOE/DP, and Valerie Vance Adeyeye, OHA (March 15, 1995). Mr. Goldner said that he released all of the documents in his possession to the NE FOIA Coordinator. He said that the project ran out of money in mid-1992 and, after checking personally, he found that it never received an extension. See Memorandum of Telephone Conversation between Frank Goldner, DOE/NE, and Valerie Vance Adeyeye, OHA (March 15, 1995).

Challenges to the adequacy of an agency's search must be supported by the presentation of a reasoned argument that a requested document, unidentified by the agency in its search, does in fact exist. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992). We note that MNWF presents copies of documents referring to final reports due in April 1992. However, no one connected with the project could confirm that the project reached the stage where these reports were completed. 2/ Therefore, we conclude that the Oak Ridge Operations Office and the Office of Nuclear Energy have conducted searches reasonably calculated to find the information requested by MNWF.

B. Agency Records

The FOIA provides for disclosure of agency records. See 5 U.S.C. § 552(f). Records are "agency records" for FOIA purposes if they 1) were created or obtained by an agency; and 2) are under agency control at the time of the FOIA request. United States Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

MNWF contends that the withholding of subcontractor records violates DOE's FOIA regulations which state that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)." See 59 Fed. Reg. 63882 (December 12, 1994); 10 C.F.R. § 1004.3(e)(1). However, when they were contacted during our analysis of this Appeal, FOIA officers at DOE Headquarters and Oak Ridge Operations Office stated that no subcontractor records were withheld by their offices because none were found during the search. See Memorandum of Telephone Conversation between Jennifer Houghton, FOIA/Privacy Act Division, and Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 1995); Memorandum of Telephone Conversation between Amy Rothrock, FOIA Officer, Oak Ridge Operations Office and Valerie Vance Adeyeye (March 16, 1995).

It appears that MNWF believes that the Oak Ridge Operations Office located and subsequently withheld subcontractor records. Although the January 30, 1995 determination letter from the FOIA/Privacy Act Division states that subcontractor records are not agency records for purposes of the FOIA unless the Department has possession of the records, the letter did not mean to imply that subcontractor records had been found. See Memorandum of Telephone Conversation between Jennifer Houghton, FOIA/Privacy Act Division, and Valerie Vance Adeyeye, OHA (March 23, 1995). As discussed above, no records were located during the previous searches, and we do not need to give this argument any further consideration.

III. Conclusion

For the reasons stated above, we find that the Oak Ridge Operations Office and the Office of Nuclear Energy have performed searches reasonably calculated to find the information requested by MNWF. Nevertheless, a subsequent search of ORNL has located some responsive documents which will be the subject of a determination letter issued by the Oak Ridge Operations Office in the near future.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Mid-Missouri Nuclear Weapons Freeze, Inc., Case No. VFA-0029, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 27, 1995

1/ MNWF also alleges that no termination letter was provided. DOE/NE informed this office, in a response to the Appeal, that termination notices are not always provided when funding ceases. See Memorandum from Charles M. Dougherty, FOIA Coordinator, DOE/NE, to Valerie Vance Adeyeye, OHA Staff Attorney (March 17, 1995).

2/ In a previous appeal by MNWF, an OHA attorney contacted Dr. Yoon Chang, General Manager of the IFR Program at ANL. Dr. Chang said that he has never seen a copy of the completed study, is not sure that it was completed, and feels that he would have seen a copy of the study if it had been completed. See OHA Case File #LFA-0414, Memorandum of Telephone Conversation between Len Tao, OHA Staff Attorney, and Dr. Yoon Chang, ANL (September 21, 1994).

Case No. VFA-0030, 25 DOE ¶ 80,106

March 29, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Physicians for Social Responsibility, Inc.

Date of Filing: March 1, 1995

Case Number: VFA-0030

On March 1, 1995, Physicians for Social Responsibility, Inc. (PSR) filed an Appeal from (1) the denial of information issued to it on January 30, 1995 by the Director of the FOIA/Privacy Act Division and (2) the partial denial of information issued to it on January 31, 1995 by the FOIA Coordinator of the Office of Nuclear Energy.

The FOIA generally requires that documents held by federal agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 22, 1994, PSR filed a request with the FOI and Privacy Acts Branch of DOE Headquarters asking for a copy of documents relating to work done by the Massachusetts Institute of Technology (MIT) under contract with DOE in the area of the Integral Fast Reactor (IFR) project. The program was proposed by Argonne National Laboratory (ANL) as an improvement in waste management. In the process under study, long half-life isotopes are removed from spent fuel and returned to the reactor, simplifying waste management. The request was expanded on August 25, 1994 to include documents released under a FOIA request 1/ filed in November 1992 by the Mid-Missouri Nuclear Weapons Freeze (MNWF), Inc. See Letter from Denise Diggin, Chief, FOI and Privacy Acts Branch, DOE, to Dr. Robert Gould, PSR (August 26, 1994). The FOI and Privacy Acts Branch issued a determination stating that no responsive documents could be found. See Letter from Denise Diggin, Chief, FOI and Privacy Acts Branch, to Dr. Robert Gould (August 26, 1994). On September 30, 1994, PSR filed an appeal with the Office of Hearings and Appeals, incorporating by reference the August 23, 1994 appeal filed by MNWF. On October 7, 1994, the OHA remanded the matter to the Office of Nuclear Energy and the FOIA/Privacy Act Division for a more thorough search. Physicians for Social Responsibility, 24 DOE § 80,146 (1994). The decision was similar to that issued to MNWF the previous month. Mid-Missouri Nuclear Weapons Freeze, 24 DOE ¶ 80,142 (1994).

In a final determination dated January 30, 1995, the FOIA/Privacy Act Division stated that after a search of the Oak Ridge Operations Office, no responsive records could be found. The determination also stated that the work was done under a contract and pursuant to Martin Marietta's Operating Contract, subcontractor records are not agency records for purposes of the FOIA unless the Department has possession of the records. See Letter from GayLa D. Sessoms, Director, FOIA/Privacy Act Division, to

Dr. Robert M. Gould, PSR (January 30, 1995); see also Contract No. DE-AC05-84OR21400, §H.23(b)(8) (Contract). The Office of Nuclear Energy responded in its determination letter by submitting four responsive documents and informing the requester that the project terminated in less than one year, and that individuals who worked on the program have retired or moved to other positions within DOE. See Letter from Charles W. Dougherty, FOIA Coordinator, Office of Nuclear Energy, to Dr. Robert Gould, PSR (January 31, 1995). On March 1, 1995, PSR filed an Appeal with the Director of the OHA. See Letter from Dr. Robert Gould, PSR, to Director, OHA (March 1, 1995) (Appeal Letter).

In this Appeal 2/, PSR challenges the adequacy of the search for IFR information and alleges a violation of the new DOE regulations relating to the disclosure of contractor records. PSR maintains that DOE did not search ORNL, did not contact key individuals at ANL, ORNL, or MIT, did not adequately search DOE headquarters, provided no verification that the project terminated in less than one year, and violated the contractor records provision of DOE's FOIA regulations.

II. Analysis

A. Adequacy of the Search

The OHA has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. The OHA has remanded cases where it was evident that the search conducted was inadequate. See, e.g., In Defense of Animals, 24 DOE ¶ 80,151 (1994); James L. Schwab, 21 DOE ¶ 80,138 (1991). However, the FOIA requires that the search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted the Oak Ridge Operations Office and the Office of Nuclear Energy to ascertain whether the searches conducted were reasonably calculated to uncover the information sought by PSR. Oak Ridge advised us that, contrary to PSR's statement, a search was conducted at ORNL and no responsive documents were found. See Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge Operations Office, and Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 1995); see also Memorandum from Jennifer Houghton, FOIA/Privacy Act Specialist, FOIA/Privacy Act Division, to Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 1995).

We contacted an employee of the Oak Ridge Operations Office who is physically located at ORNL. He informed us that ORNL had indeed been searched and in fact was the primary search site in this case since it maintains a filing system for records and has more space than the Oak Ridge Operations Office. See Memorandum of Telephone Conversation between Gary Clifton, Oak Ridge Operations Office, and Valerie Vance Adeyeye, OHA Staff Attorney (March 17, 1995). Some responsive documents were located recently at ORNL, and are currently in transit to the FOIA Office in Oak Ridge before being sent to the FOIA/Privacy Division at DOE headquarters for review. Id. We find no reason to question the veracity of the Oak Ridge employees who performed the search, and therefore find that the search of the Oak Ridge National Laboratory was reasonably calculated to locate the documents requested.

The Office of Nuclear Energy (NE) released four responsive documents to PSR after conducting a search of its offices. PSR alleges that certain key employees of NE were never contacted. Specifically mentioned are Sol Rosen, Andy Millunzi, Frank Goldner, and Jerry Griffith. See Appeal Letter at 7. We contacted all of the individuals except Mr. Griffith (who has retired). Mr. Rosen recalls that the project was terminated around April 1992 3/, but had no documents. He confirmed that Mr. Griffith is retired. See Memorandum of Telephone Conversation between Sol Rosen, DOE, and Valerie Vance Adeyeye, OHA (March 16, 1995). Mr. Millunzi left NE in October 1992 and did not take any papers from the project when he left. He left all files in NE. See Memorandum of Telephone Conversation between Andy Millunzi, DOE/DP, and Valerie Vance Adeyeye, OHA (March 15, 1995). Mr. Goldner said that he released all of the

documents in his possession to the NE FOIA Coordinator. He said that the project ran out of money in mid-1992 and, after checking personally, he found that it never received an extension. See Memorandum of Telephone Conversation between Frank Goldner, DOE/NE, and Valerie Vance Adeyeye, OHA (March 15, 1995).

Challenges to the adequacy of an agency's search must be supported by the presentation of a reasoned argument that a requested document, unidentified by the agency in its search, does in fact exist. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992). We note that PSR presents copies of documents referring to final reports due in April 1992. However, no one connected with the project could confirm that the project reached the stage where these reports were completed. 4/ Therefore, we conclude that the Oak Ridge Operations Office and the Office of Nuclear Energy have conducted searches reasonably calculated to find the information requested by PSR.

B. Agency Records

The FOIA provides for disclosure of agency records. See 5 U.S.C. § 552(f). Records are "agency records" for FOIA purposes if they 1) were created or obtained by an agency; and 2) are under agency control at the time of the FOIA request. United States Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

PSR contends that the withholding of subcontractor records violates DOE's FOIA regulations which state that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)." See 59 Fed. Reg. 63882 (December 12, 1994); 10 C.F.R. § 1004.3(e)(1). However, when they were contacted during our analysis of this Appeal, FOIA officers at DOE Headquarters and Oak Ridge Operations Office stated that no subcontractor records were withheld by their offices because none were found during the search. See Memorandum of Telephone Conversation between Jennifer Houghton, FOIA/Privacy Act Division, and Valerie Vance Adeyeye, OHA (March 16, 1995); Memorandum of Telephone Conversation between Amy Rothrock, FOIA Officer, Oak Ridge Operations Office and Valerie Vance Adeyeye, OHA (March 16, 1995).

It appears that PSR believed that the Oak Ridge Operations Office located and subsequently withheld subcontractor records. Although the January 30, 1995 determination letter from the FOIA/Privacy Act Division states that subcontractor records are not agency records for purposes of the FOIA unless the Department has possession of the records, the letter did not mean to imply that subcontractor records had been found. See Memorandum of Telephone Conversation between Jennifer Houghton, FOIA/Privacy Act Division, and Valerie Vance Adeyeye, OHA (March 23, 1995). As discussed above, no records were located during the previous searches, and we do not need to give this argument any further consideration.

III. Conclusion

For the reasons stated above, we find that the Oak Ridge Operations Office and the Office of Nuclear Energy have performed searches reasonably calculated to find the information requested by PSR. Nevertheless, a subsequent search of ORNL has located some responsive documents which will be the subject of a determination letter issued by the Oak Ridge Operations Office in the near future.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Physicians for Social Responsibility, Inc., Case NO. VFA-0030, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 29, 1995

1/ Mid-Missouri Nuclear Weapons Freeze, Inc. filed a request on November 9, 1992 with the FOIA Public Information Officer seeking a copy of documents related to three projects undertaken for DOE by researchers at MIT related to the IFR and associated pyroprocessing/actinide recycle technologies. See Case File, OHA Case No. VFA-0029, Letter from Mark Haim, Director, MNWF, to FOIA Public Information Officer, DOE (November 9, 1992).

2/ In its Appeal, PSR incorporates by reference the complete appeal, including enclosures, that was submitted by MNWF and is now OHA Case No. VFA-0029. See Appeal Letter at 2. Because MNWF and PSR received equivalent determination letters, our analysis of both cases is the same.

3/ PSR also alleges that no termination letter was provided. DOE/NE informed this office, in a response to the Appeal, that termination notices are not always provided when funding ceases. See Memorandum from Charles M. Dougherty, FOIA Coordinator, DOE/NE, to Valerie Vance Adeyeye, OHA Staff Attorney (March 17, 1995).

4/ In the previous appeal by MNWF (which is incorporated by reference into PSR's Appeal now under discussion) an OHA attorney contacted Dr. Yoon Chang, General Manager of the IFR Program at ANL. Dr. Chang said that he has never seen a copy of the completed study, is not sure that it was completed, and feels that he would have seen a copy of the study if it had been completed. See OHA Case File #LFA-0414, Memorandum of Telephone Conversation between Len Tao, OHA Staff Attorney, and Dr. Yoon Chang, ANL (September 21, 1994).

Case No. VFA-0031, 25 DOE ¶ 80,105

March 27, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: J. Eileen Price

Date of Filing: March 3, 1995

Case Number: VFA-0031

On March 3, 1995, J. Eileen Price (Price) filed an Appeal from a determination issued to her on February 16, 1995 by the Assistant Administrator for Management of the Department of Energy's Western Area Power Administration (WAPA). In her Appeal, Price asserts that WAPA failed to provide her with all of the responsive documents in its possession regarding a Freedom of Information Act (FOIA) Request she submitted on February 8, 1995.

I. Background

On February 8, 1995, Price filed a FOIA Request with WAPA requesting all employee performance appraisal information in her performance appraisal file and all unofficial information not contained in her personnel file including any unofficial documents, notes and files which pertain to her or her employment in the Loveland Area Office beginning in October 1992. Additionally, Price requested that if, in the future, any information is added to any responsive files or the information in those files is changed in any way, she be provided a copy of the new or modified document. WAPA, in its February 16, 1995 Determination Letter, provided Price with copies of responsive documents in her official personnel file. WAPA also provided Price with various other documents contained in other files maintained by her supervisors.

In her Appeal, Price argues that WAPA conducted an inadequate search for responsive documents and gives examples of documents she believes exist yet were not provided to her by WAPA. Specifically, Price alleges that from October 1992 her immediate supervisor, Ms. Janet Campbell (Campbell), kept daily notes in her "Franklin Day Planner" regarding all conversations she had with Price during the period she was Price's supervisor. Price also asserts that Campbell and Ronald Steinbach (Steinbach), her new immediate supervisor, took extensive notes during the course of an August 2, 1994 meeting which she and her union representative attended to discuss matters pertaining to her performance and an EEO complaint she had filed. Further, Price asserts that at the August 2 meeting both Campbell and Steinbach stated that they were maintaining "informal personnel files" on her. Price states that none of the above described documents were provided to her. Lastly, Price asserts that WAPA failed to respond to her request for documents generated in the future. 1/

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is

evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

As an initial matter, we reject Price's apparent argument that WAPA is required under the FOIA to automatically provide to her any responsive documents it may obtain in the future. While the FOIA requires an agency to make records promptly available to any person, the courts have interpreted the FOIA as not requiring agencies to establish services automatically disseminating agency records or information. See Mandel Grunfeld & Herrick v. United States Customs Service, 709 F. 2d 41, 43 (11th Cir. 1983) (plaintiff not entitled to automatic mailing of materials as they are updated); Lybarger v. Cardwell, 577 F.2d 764 (1st Cir. 1978) (FOIA does not require that a requester be placed on agency mailing list to receive agency updated handbooks and materials). Consequently, we find Price's argument to be without merit.

In reviewing the Appeal, we contacted officials at WAPA to ascertain the extent of the search that had been performed. We were informed that officials at WAPA searched Price's official personnel file along with the files that each of Price's supervisors maintained on the employees that they supervised. See Memorandum of telephone conversation between Gloria Bogans, Director, Division of Human Resource Management, WAPA, and Richard Cronin, OHA Staff Attorney (March 8, 1995). All of the documents which were discovered in these searches were provided to Price. 2/ However, on receiving a copy of Price's FOIA Appeal, WAPA conducted another search to ascertain whether the documents described in her Appeal existed. WAPA informed us that Campbell stated that to the best of her knowledge she had destroyed all her notes regarding Price after she ceased being Price's supervisor and that she did not take substantive notes regarding Price on the pages of her day planner. See Memorandum of telephone conversation between Jim Kisselburg, WAPA, and Richard Cronin, OHA Staff Attorney (March 17, 1995). We were also informed that Steinbach had destroyed his notes regarding the August 2 meeting after having offered them to Price's union representative. Id. However, an additional search of all of Campbell's and Steinbach's files, along with the files of their supervisor, Jim Kisselburg, uncovered several potentially responsive documents. See id.; Memorandum of telephone conversation between Doug Harness, Esq., counsel for WAPA, and Richard Cronin, OHA Staff Attorney (March 22, 1995). Consequently, we will remand this matter back to WAPA. On remand, WAPA shall either release the newly discovered documents or issue a determination explaining the withholding of any material pursuant to the FOIA. 3/

It Is Therefore Ordered That:

1. The Appeal filed by J. Eileen Price on March 3, 1995 is granted in part as set forth in Paragraph (2) below, and denied in all other respects.

2. This matter is remanded to theWestern Area Power Administration who shall either release the newly discovered documents described above or issue a new determination in accordance with the instructions set forth in the above Decision.

3. This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 27, 1995

1/ Price also argues that WAPA failed to apprise her of her appeal rights as required by the FOIA. While

DOE FOIA regulations require an agency to notify a requestor of her right to appeal when a request has been denied by the agency, it is apparent that WAPA believed it had provided Price with all of the responsive documents in its possession and thus believed that no statement of appeal rights was required. See 10 C.F.R. § 1004.7 (b)(5) (provision requiring statement of right of administrative appeal for a FOIA denial).

2/ WAPA interpreted Price's request for "unofficial files" to refer to the files supervisors often keep regarding the employees they supervise. Such files might contain documents such as copies of an individual's performance appraisal. See Memorandum of telephone conversation between Gloria Bogans, Director of Human Resource Management and Richard Cronin, OHA Staff Attorney (March 8, 1995).

3/ We have been informed that one of the documents is a page from an individual's day planner. See Memorandum of telephone conversation between Jim Kisselburg, WAPA, and Richard Cronin, OHA Staff Attorney (March 17, 1995). WAPA may wish to consider whether such a document is in fact an agency record subject to the FOIA. See William D. Lawrence, 24 DOE ¶ 80,139 at 80,601 (1994) (listing factors to be considered in the determination of whether a document is an agency record for the purposes of the FOIA); OXY USA, Inc., 23 DOE ¶ 80,161 (1993) (telephone logs and appointment books held not to be agency records).

Case No. VFA-0032, 25 DOE ¶ 80,107

March 31, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David K. Hackett

Date of Filing: March 8, 1995

Case Number: VFA-0032

On March 8, 1995, David K. Hackett (Appellant) filed an Appeal from a determination issued on February 22, 1995 by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy. In its determination, Oak Ridge stated that it was providing all documents responsive to the Appellant's November 6, 1994 request under the Freedom of Information Act (FOIA) which were in the possession of Oak Ridge. This Appeal, if granted, would require Oak Ridge to conduct an additional search for responsive documents.

I. Background

On November 6, 1994, the Appellant submitted a FOIA request to DOE Headquarters (DOE HQ) seeking information relating to his complaints against Martin Marietta Energy Systems, including all documents resulting from the complaints located in the following DOE offices: Oak Ridge, the Office of Contractor Employee Protection (OCEP), the Office of Inspector General (IG), Office of Declassification, Office of the Executive Secretariat, and any other DOE office which may have become involved in the Appellant's complaints.

DOE HQ coordinated a department-wide search for documents responsive to the Appellant's Request. In a December 2, 1994 letter, DOE HQ notified the Appellant that his request had been forwarded to the three offices where responsive documents might be stored, Oak Ridge, IG and the Office of Field Management (FM), and that the three offices would respond separately. On February 22, 1995, Oak Ridge issued its determination, releasing 64 pages of responsive documents and stating that no other documents responsive to Appellant's request were found at that location. On March 8, 1995, the Appellant filed the present Appeal in which he contends that Oak Ridge's search for responsive documents was inadequate. 1/ Thus, it is only Oak Ridge's response which is at issue in this Appeal. 2/ See Telephone Conversation between Dawn L. Koren and David K. Hackett, Appellant (March 21, 1995).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981);

Charles Varon, 6 DOE ¶ 80,118 (1980).

The Appellant challenges in both general and specific terms the adequacy of the search performed for responsive documents. We contacted Oak Ridge to determine the extent of the search which had been performed. We were informed that the search was coordinated by the FOI Officer at Oak Ridge, Amy L. Rothrock. Ms. Rothrock informed us that the Equal Employment Office, Safety and Health Division and the Office of Chief Counsel were searched for responsive documents. 3/ Each of these offices certified to Ms. Rothrock that the search was done in a reasonable manner, but the only location in which responsive documents were found was the Office of Chief Counsel. See Record of Telephone Conversation between Dawn L. Koren and Amy Rothrock (March 15, 1995). However, based on discussions between the Appellant, the OHA, and Oak Ridge during the course of the present Appeal, we have determined that there may be responsive documents that were not identified in the initial search. 4/ Consequently, we will remand the Appellant's request so that a thorough and conscientious search can be made for additional responsive documents. On remand, Oak Ridge shall identify all documents responsive to the Appellant's current request and either release them or provide adequate justification for withholding any portion of them. 5/

It Is Therefore Ordered That:

(1) The Appeal filed by David P. Hackett on March 8, 1995, Case Number VFA-0032, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to Oak Ridge, which shall conduct a search for documents responsive to the Appellant's request as described in the above Decision and Order, and shall promptly issue a new determination regarding those documents.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 31, 1995

1/ Appellant also notes in his Appeal that he wishes to "hereby lodge a formal complaint for noncompliance" with his FOIA request. The Appellant's only means for "complaint" through this Office is to file an appeal under the FOIA, which he has already done.

2/ FM has been instructed by DOE HQ to coordinate its response with that of the Office of Declassification, the Office of the Executive Secretariat and OCEP. FM has not yet provided that coordinated response to the Appellant. See Record of Telephone Conversation between Dawn L. Koren, OHA Staff Attorney, and Geoffrey Gray, OCEP Staff Attorney (March 17, 1995). The IG intends to issue its response to the Appellant's Request forthwith. See Record of Telephone Conversation between Dawn L. Koren and Jane Payne, FOI Officer, IG (March 17, 1995). Further, when the Appellant filed a second FOIA request on November 23, 1994, he brought to DOE HQ's attention the fact that responsive documents may also be located in the Office of Economic Impact and Diversity (ED). ED has been instructed to provide a fourth, separate response to the Appellant. See Record of Telephone Conversation between Dawn L. Koren and Eldyne E. Bordner, FOI and Privacy Acts Division, DOE HQ (March 21, 1995). Finally, we note that the Appellant has apparently filed a third FOIA request for documents generated in connection with his complaint which are in the possession of Martin Marietta Energy

Systems. The Appellant has not yet received a response to that request. See Telephone Conversation between Dawn L. Koren and David K. Hackett (March 23, 1995). Although it is possible that those types of documents might fall within the scope of the November 6, 1994 request at issue in this Appeal, we believe the most sensible course of action is to permit Oak Ridge to respond to the issue of those documents within the context of the more specific request.

3/ The Appellant also argues that the branch of the IG located at Oak Ridge (IG-Oak Ridge) should have been searched by Oak Ridge. However, IG Headquarters is coordinating its own search with that of IG-Oak Ridge in responding to the Appellant's request. Record of Telephone Conversation between Dawn L. Koren and Jane Payne (March 17, 1995). We therefore find that Oak Ridge did not err in not searching for responsive records located at IG-Oak Ridge. Further, Appellant has stated that he made telephone calls to the Employee Concerns Hotline number, located at DOE HQ. Record of Telephone Conversation between Dawn L. Koren and David K. Hackett (March 24, 1995). Calls concerning Oak Ridge would have been directed to the Oak Ridge office responsible for the Employee Concerns program. Previously, Oak Ridge-Safety and Health Division was responsible for responding to these calls, but currently, they are in the province of Oak Ridge-EEO. Record of Telephone Conversation between Dawn L. Koren and Amy Rothrock (March 28, 1995). Both places were searched, and we are confident, in light of the record before us, that an adequate search was performed. (Any documentation of the calls to the Hotline located at HQ will be searched for in connection with the FM response. Record of Telephone Conversation between Dawn L. Koren and Eldyne E. Bordner (March 29, 1995)).

4/ For example, various correspondence between a former employee in the Office of Chief Counsel, William Stevens, and the Appellant's Representative, John Duncan, may be located in an unsearched portion of Oak Ridge. Record of Telephone Conversation between Dawn L. Koren and Amy Rothrock (March 24, 1995). Ms. Rothrock has agreed to search further for Mr. Stevens' files and telephone memoranda. Further, the Appellant has informed us that he was told within the last two years by the head of the Oak Ridge EEO office, Rufus Smith, that Mr. Smith was keeping a file on the Appellant. Record of Telephone Conversation between Dawn L. Koren and David K. Hackett (March 24, 1995). Ms. Rothrock spoke to Mr. Smith and she was informed that he has not spoken with the Appellant for at least the last three years, has never kept file on him nor told him that he was keeping a file. In view of the fact that we are remanding this case, we ask Oak Ridge to conduct a further investigation to determine the facts as to this issue.

5/ We note that Oak Ridge failed to identify one responsive document generated in connection with the Appellant's complaints against Martin Marietta Energy Systems, a transcript of a deposition. However, we will not address Oak Ridge's failure to identify this document, as that transcript has been the specific subject of a separate FOIA request (December 5, 1994) and appeal by the Appellant. See David K. Hackett, 24 DOE ¶ 80,166 (1995).

Case No. VFA-0033, 26 DOE ¶ 80,118

September 13, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: March 13, 1995

Case Number: VFA-0033

The National Security Archive filed an Appeal from a determination issued to it on February 3, 1995, by the Department of Energy's Oakland Operations Office (Oakland). In that determination, Oakland denied in part a request for information that the National Security Archive filed on April 7, 1988, and modified on April 26, 1988, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the document released to the National Security Archive in that determination was withheld after a review of the document had been performed by the predecessor of the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require Oakland to release the information that it withheld in the February 3, 1995 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On April 7, 1988, Craig Keller of the National Security Archive submitted a request under the FOIA to the Department of Defense (DOD) for "[c]opies of all records including but not limited to reports, memoranda, interviews, meeting minutes, and correspondence cited in or relating in whole or in part to the ?Nth Country Experiment,' an experiment initiated by the Lawrence Livermore National Laboratory in May 1964." The National Security Archive amended its request on April 26, 1988, and requested

only the formal report, "Summary Report of the Nth Country Experiment (UCRL-50249)" (the Report). A May 6, 1988 letter to Mr. Keller informed him that the Report contained classified information and was being forwarded to the DOE's Office of Classification (now the Office of Declassification) for review. On February 3, 1995, after the Office of Declassification completed its review, Oakland released to Mr. Keller a copy of the Report from which it withheld information it claimed to be classified as National Security Information pursuant to Executive Order 12356 and as Restricted Data pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemptions 1 and 3, respectively, of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the requested document. In its Appeal,

the National Security Archive contends that release of at least some of those portions could no longer reasonably be expected to cause damage to the national security and that there is substantial public interest in the withheld information.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. Its predecessor, Executive Order 12356, was in effect at the time the initial determination was issued. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure by Exemption 1. See Keith E. Loomis, 25 DOE ¶ 80,183 (1996); A. Victorian, 25 DOE ¶ 80,166 (1996). According to the Office of Declassification, the information withheld pursuant to Exemption 1 in this case consists of sensitive details of nuclear weapons design.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to the Office of Declassification, the portions that the DOE deleted from the requested document under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

In performing his review the Director of SA considered the two issues that the National Security Archive has raised on appeal. The National Security Archive's first contention is that the predecessor Executive Order to Executive Order 12958 (Executive Order 12356) contained language, as does the current Order, specifying that information should be classified only if its disclosure could reasonably be expected to cause damage to the national security, and that some of the withheld information no longer meets that criterion. In consideration of this contention, the Director of SA reviewed all the information that was deleted from the copy of the Report provided in the DOE's initial response. As a result of that review, the Director of SA determined that no additional portions of the Report may now be declassified, because all of the information initially withheld continues to be classified as either National Security Information or Restricted Data.

Its second contention is that, despite the public interest in the information, the DOE has withheld the Report's conclusions that appear on page 8. The Director of SA informed us that the information withheld on page 8 of the Report does not consist of conclusions; the Report's conclusions start at page 15, and the great majority of them have been released. He also informed us that those portions of the conclusions that were withheld initially continue to be properly classified as either National Security Information or Restricted Data.

Based on the review performed by the Director of SA, we have determined that Executive Order 12958 and the Atomic Energy Act require the continued withholding of those portions of the Report that were

previously identified as classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by statute or Executive Order. Therefore, those portions of the Report that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. However, on review the Director of SA was able to perform more precise deletions throughout the Report, and as a result we can now release some information that had previously been withheld. A newly redacted version of the Report will be provided to the National Security Archive under separate cover. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on May 14, 1993, Case No. VFA-0033, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the "Summary Report of the Nth Country Experiment (UCRL-50249)," in which additional information is released, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 13, 1996

Case No. VFA-0034, 25 DOE ¶ 80,109

May 18, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:International Federation of Professional and Technical Engineers

Date of Filing:April 18, 1995

Case Number: VFA-0034

On April 18, 1995, the International Federation of Professional and Technical Engineers (IFPTE), through its President, Dennis C. Morey, filed an Appeal from a determination issued to it on March 20, 1995 by the Freedom of Information Officer at the Department of Energy's (DOE) Idaho Operations Office (hereinafter "Authorizing Official" or "Idaho"). In that determination, the Authorizing Official denied a request for information which IFPTE had filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, IFPTE requests that the Office of Hearings and Appeals (OHA) order the release of the withheld information.

I. Background

On March 6, 1995, IFPTE filed a FOIA request for the following information:

1. Copy of the Contract Between DOE and Augustine Pitrolo for Consulting Support.
2. Short List of Qualified Candidates for the SES Position of Deputy in the Office of Program Execution (OPE).

On March 20, 1995, Idaho informed IFPTE that, with respect to item 1, no contract between Augustine Pitrolo and DOE exists.<1> With respect to item 2, Idaho withheld the requested information pursuant to Exemption 5. The Authorizing Official explained that the OPE Deputy selection is in a predecisional status due to the Department's Strategic Alignment Plan and has been placed on hold until the Plan is completed. Moreover, the short list consists of preliminary analyses or tentative recommendations, which are part of the deliberative process. Determination Letter from Carl R. Robertson, dated March 20, 1995. The short list is comprised of the names of the best qualified candidates, the position title and vacancy number, and the name of the selecting official.

Because IFPTE's Appeal does not challenge Idaho's determination with respect to item 1, our analysis will focus on item 2 of the request.

II. Analysis

The FOIA generally requires that information held by government agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, the Idaho Operations Office relied solely upon the deliberative process privilege of Exemption 5.

The "deliberative process" privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give and take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

The Appellant, citing NLRB v. Sears, maintains that the list does not reveal the deliberative process in any manner. He claims further that "the list is final and the selection, if allowed to proceed, must be made from the list by the selecting official without any further open and frank discussion." Appeal Letter dated April 15, 1995. We find the Appellant's arguments unpersuasive and find the requested list both predecisional and deliberative. Everyone on the short list will not be chosen for the position. There must be one final decision regarding the selection of one person for the position of Deputy Assistant Manager for Program Execution in the Idaho Operations Office. Therefore, while the list is final, it is predecisional as to the selection process. To receive Exemption 5 protection, a predecisional document must also be part of the agency's deliberative process by which decisions are made, i.e. the document must make recommendations or express opinions. Vaughn v. Rosen, 523 F.2d 1136. Here, the short list is deliberative since it represents the opinions of a group of people concerning the most qualified applicants. It also makes a recommendation to the selecting official.

The Appellant also argues that since Idaho will rely solely on the list to make the final decision, the list must be released, citing Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967 (1977). Niemeier is distinguishable from the instant case, however, because it involved a memo that was quoted and expressly adopted or incorporated by reference into a final agency document. This case involves a list of names which will not be incorporated into any final agency dispositional document.<2> Rather, a final selection of one name will be made from the list.

Even though the short list satisfies the predecisional-and-deliberative test, parts of it may be subject to mandatory release because Exemption 5 only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Since the short list form (Senior Executive Service Selection Certificate) contains factual information in addition to the list of names, a copy with the names redacted could have been properly released under the FOIA. Similarly, the name of the selecting official which appears on the

short list is not predecisional, nor deliberative. Therefore, it is not exempt from disclosure and could be properly released under Exemption 5 as well.<3> Since, however, the Appellant requested "a short list of the qualified candidates with an indication of ranking," a release of such factual information, i.e. the form without the names, would not have been responsive to the Appellant's request. See Original Request Letter dated March 6, 1995. Accordingly, we will not order the release of this factual information.

An agency must consider the public interest in releasing a document even where discretionary withholding is permitted under one of the FOIA's exemptions. When the requester's and the general public's interests are complementary, the basic purposes of the FOIA -- "to ensure an informed citizenry" and "to hold the governors accountable to the governed" -- can often be met through disclosure. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978). A standard announced by the Attorney General applies a presumption of disclosure which, in the absence of a reasonably foreseeable harm to an interest protected by an exemption, should result in a determination by the agency that the public interest lies with disclosure. See J. Reno, Memorandum to Heads of Departments and Agencies (October 4, 1993).

We must determine what harm would result from release of the withheld document. We conclude that release of the deliberative portions of the short list would have a chilling effect on the frank and independent exchange of views among those responsible for making government decisions. An employee would be unlikely to communicate his or her candid and direct opinions or beliefs about a job applicant's true qualifications if he or she knew or suspected that the communication would be released. We find that this satisfies the reasonably foreseeable harm standard recently set forth by the Attorney General and that the short list was properly withheld under Exemption 5. However, there is no foreseeable harm in releasing the name of the selecting official and the factual information contained on the short list. Nevertheless, as stated above, that information is not responsive to the Appellant's request, and therefore need not be released.

B. Exemption 6

Given the circumstances of this case, it is also appropriate to conduct an Exemption 6 analysis of whether the list of names on the short list should be withheld. Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post).

To warrant protection under Exemption 6, information must first meet its threshold requirement. It must fall within the category of "personnel and medical files [or] similar files." 5 U.S.C. § 552(b)(6). The short list qualifies as a personnel file since it was generated during the hiring process. The term "similar files" has been interpreted broadly by the Supreme Court to include all information which "applies to a particular individual." Washington Post, 456 U.S. at 602. Here, the names on the short list also qualify as similar files and, therefore, meet the threshold requirement of Exemption 6.

Next, we must undertake a three-step analysis to determine whether the names on the short list may be withheld under Exemption 6. First, we must determine whether a substantial privacy interest would be invaded by the disclosure of the names. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) (Horner). Second, we must determine whether the release of the names would further the public interest by shedding light on the operations and activities of the Government. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee). Finally, if we find both privacy and public interests in the requested information, we must weigh the privacy interest against the public interest in order to determine whether release of the list would constitute a clearly unwarranted invasion of personal privacy. Id. at 762-70.

1. Privacy Interest

The Supreme Court has long found a privacy interest in the names and addresses of individuals significant enough to warrant protection from disclosure under Exemption 6. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Moreover, at least seven Circuit Courts have found that an individual has a significant privacy interest in avoiding the unlimited disclosure of his or her name. See, e.g., Hopkins v. Department of Hous. & Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991); Painting & Drywall Work Preservation Fund v. Hous. & Urban Dev., 936 F.2d 1300 (D.C. Cir. 1991); Horner, 879 F.2d at 875; Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989); Department of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. Department of Agric., 737 F.2d 784, 787 (9th Cir. 1984); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir. 1984); American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983). In light of the overwhelming weight of authority, we find that disclosure of the names of the individuals on the short list would result in a substantial invasion of personal privacy.

2. Public Interest

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Dep't of Commerce, 830 F.2d 388 (D.C. Cir. 1987). In the absence of any such showing, we find that disclosure of the names on the short list would not aid the

public in understanding anything directly about the workings of the government. Reporters Committee, 489 U.S. at 773.

III. Conclusion

The names on the short list were properly withheld under Exemptions 5 and 6. The short list is predecisional and deliberative and, therefore, the names contained therein are protected from disclosure under Exemption 5. The individuals on the short list have a significant privacy interest in their names and there is no corresponding public interest in their disclosure. Therefore, their names are protected from mandatory disclosure under Exemption 6.

Under Exemption 5, the factual information on the short list and the name of the selecting official could have been properly released. However, we will not order the release of the factual information nor the selecting official's name because they are not responsive to the Appellant's request.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by International Federation of Professional and Technical Engineers on April 18, 1995 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 18, 1995

<1>The Authorizing Official stated in the determination letter that they have conducted a thorough search of their files for the requested contract. There is nothing in the file to suggest that they have not done so. Furthermore, IFPTE's Appeal does not challenge Idaho's determination with respect to the contract. Therefore, we will not address the issue of whether the search was adequate.

<2>In fact, no final document yet exists.

<3>Since the selecting official is a higher level government official, there is some public interest in knowing his identity. Stern v. FBI, 737 F. 2d at 94 (D.C. Cir. 1977). In this case, there would be no unwarranted invasion of privacy under Exemption 6. Id.

Case No. VFA-0035, 25 DOE ¶ 80,110

May 19, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:U.A. Plumbers and Pipefitters, Local No. 36

Date of Filing: April 21, 1995

Case Number: VFA-0035

On April 21, 1995, the U.A. Plumbers and Pipefitters, Local No. 36 (Appellant) filed an Appeal from a determination issued by the Department of Energy's (DOE) Idaho Operations Office (Idaho). The Appellant challenges Idaho's determination that certain documents sought by it are not agency records and therefore are not subject to mandatory disclosure under the Freedom of Information Act (FOIA). 5 U.S.C. § 552; 10 C.F.R. Part 1004. This Appeal, if granted, would require Idaho to consider whether the requested documents could be released under the FOIA.

I. Background

On October 4, 1993, the Appellant filed a Request for Information seeking documents relating to the West Valley Demonstration Project (the West Valley Project) which was owned by the DOE, but managed and operated by West Valley Nuclear Services (the M&O contractor). Because some of the documents requested by the Appellant contained information submitted to the M&O contractor by a subcontractor, Bell Power Corporation (the subcontractor), the DOE informed the subcontractor that it was considering releasing this information and solicited its comments, as required under the DOE's FOIA regulations. 10 C.F.R. § 1004.11. The subcontractor filed comments on October 22, 1993 and on March 11, 1994, claiming that no records responsive to the Appellant's request could be disclosed because all such records were either exempt from disclosure under the FOIA or are prohibited from disclosure by the Trade Secrets Act. On February 23, 1994 and March 31, 1994, DOE informed the subcontractor, by letter, that its claims were applied in much too broad a manner because the subcontractor had thereby excluded every record responsive to the Appellant's original request. On April 21, 1994, the subcontractor filed a "reverse FOIA" lawsuit against the DOE in the United States District Court for the Western District of New York seeking both a Temporary Restraining Order (TRO) and a Declaratory Judgement barring the release of any documents responsive to the Appellant's Request. Bell Power Corp. v. Department of Energy, Civil Action No. 94-CV-0298s(M). On April 25, 1994, the Court issued a Temporary Restraining Order preventing disclosure of the records in question

until resolution of the lawsuit. On June 20, 1994, the Appellant entered the lawsuit as an intervening party. After filing at least one other reformulation of its original request, the Appellant filed a reformulated request on January 13, 1995 seeking:

1. The contract(s) and purchase order(s) between [the subcontractor] and [the M&O contractor], including all general conditions....
2. Requests for change orders or other revisions to the contract(s)....
3. Surveillance Reports, Logs, Transmittals and Findings and Bell Responses thereto.

4. Nonconformance Reports, Logs, Transmittals and Findings and Bell Responses thereto.
5. Requests for Corrective Action ("RCA") and RCA Logs, RCA Reports, RCA Transmittals and Findings, and [subcontractor] findings thereto.
6. Corrective Action Reports, Logs, Transmittals and Findings and Bell responses thereto.
7. Technical Advisory Logs, Transmittals and Findings and Bell Responses thereto.
8. Open Items Tracking System Logs, or Deficiency Lists.
9. Stop Work Orders and Bell Responses thereto.
10. Certified Welder Inspector Training Attendance Records.
11. Financial Audit Reports or analyses Prepared by [the M&O contractor] and Bell responses thereto.

January 13, 1995 request at pages 1-2. On March 20, 1995, Idaho issued a four page determination letter containing a number of findings. Most of these findings are not yet ripe for review and therefore are not proper subjects for administrative review under the DOE's FOIA regulations. <1> See 10 C.F.R. § 1004.8(a). However, Idaho's threshold determinations that documents in the possession of the M&O contractor are not "agency records," and therefore are not subject to the FOIA, do constitute appealable determinations which we have jurisdiction to consider.

Idaho has categorized the responsive documents into four separate categories, only two of which, Categories 2 and 3, are relevant to the present Appeal. "Category 2" consists of those responsive documents located at the West Valley site that were created by the M&O contractor and are clearly owned by the DOE by virtue of the M&O Contract. Category 3 consists of responsive documents located at the West Valley Site that were created by the subcontractor and then submitted to the M&O contractor. Whether such documents are the property of DOE is one of the issues before us in the present Appeal.

Idaho determined that those documents in Category 2 are not agency records, even though they are the property of DOE, because DOE does not have physical possession of them. Idaho also determined that the Category 3 documents were not agency records, since the documents are not in DOE's physical possession. In addition, Idaho notes that the Category 3 documents were not the property of DOE under the terms of the M&O Contract, and therefore were even further removed from agency record status.

II. Analysis

Although Idaho correctly found that the Category 2 documents are not "agency records" under FOIA case law, the DOE's FOIA regulations may require Idaho to treat the Category 2 records in the same manner as agency records. The DOE's FOIA regulations specifically provide:

When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

59 Fed. Reg. 63884 (December 12, 1994), *to be codified at* 10 C.F.R. § 1004.3(e)(1). Because the category 2 documents were generated by the contractor in its performance of the contract and are the property of the Government under the terms of the contract, we are remanding that portion of this Appeal concerning Category 2 documents to Idaho for a determination of their suitability for release under DOE's FOIA regulations.

We next consider Idaho's determination that Category 3 documents are not agency records. Category 3 documents are those documents responsive to the Appellant's request that were created by the subcontractor and then submitted to the M&O contractor. The issue here is whether, under DOE's contract with the M&O contractor, Category 3 documents are the property of DOE. The contract states in pertinent part:

(a) All records *generated* by the contractor in the course of performance of this contract. . . *shall be the property of the Government* and shall be subject to inspection, copying and audit by DOE at all reasonable

times . . . .

Clause H.7(a), Ownership of Records Clause, Contract between DOE and West Valley Nuclear Services (emphasis supplied). The point of contention in the present case is whether this language confers DOE ownership upon the Category 3 documents. The Appellant contends that the term "generated" is meant to apply both to those documents actually created by the M&O contractor and to documents acquired by the M&O contractor during the course of its management and operation of the DOE facility. Idaho argues to the contrary, noting that the West Valley Nuclear Services Contract's Ownership of Records clause deviates from DOE's standard M&O contract language which usually confers DOE ownership upon documents that are "generated *or acquired* " by the M&O contractor (emphasis supplied) by omitting the term "acquired." Since the West Valley Nuclear Services M&O contract omits the term "acquired" from the ownership of records clause, Idaho argues, the contract excludes from DOE's ownership documents which are acquired, as opposed to generated, by the M&O contractor.

We agree with Idaho's interpretation of the contract. When interpreting a contract, the focus of the inquiry is to determine the intent of the parties. Subpart(c) of the ownership of records clause, which confers upon DOE the right of access to records held by the M&O Contractor, uses the term: "*generated or acquired* by [the M&O contractor]." DOE Contract with West Valley Nuclear Services, H.7(c) (emphasis supplied). This language, obviously intended to broaden the scope of DOE's access beyond its ownership rights, strongly suggests that the parties interpret the term "generated" in the manner suggested by Idaho. Accordingly, we conclude that DOE does not own the records in Category 3.

Since DOE does not own the Category 3 documents, our inquiry must turn to whether there is any other basis for concluding that the documents are subject to the FOIA. The Appellant contends that DOE has "control" of the Category 3 documents because it can order the M&O contractor to provide copies of them. This contention is without merit. The Supreme Court has expressly held that a mere right of access or ability to obtain a document does not confer agency record status upon a document. Forsham v. Harris , supra. Accordingly, we find that Idaho has correctly determined that Category 3 documents are not agency records. In addition, we find that the documents are likewise not subject to the FOIA under the regulation discussed above.

III. Conclusion

For the reasons set forth above, we have determined that the documents in Category 2 are subject to the DOE's FOIA regulations while the documents in Category 3 are not. Accordingly, we are: (1) remanding this matter to Idaho with instructions to process the Category 2 documents under the DOE's FOIA regulations (2) denying that portion of the Appeal concerning Category 3, and (3) dismissing all other aspects of the Appeal without prejudice.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by U.A. Plumbers and Pipefitters, Local 36, on April 21, 1995 (Case Number VFA-0035) is hereby granted in part, denied in part, and dismissed as to all other aspects, as set forth in Paragraphs (2) through (4).

(2) The portion of the Appeal concerning the responsive documents which are the property of the Department of Energy ("Category 2 records") is hereby granted, and remanded to the Idaho Operations Office for further processing under the DOE's Regulations.

(3) The portion of the Appeal concerning the documents that are not owned by the DOE ("Category 3 records") is hereby denied.

(4) All other aspects of the Appeal are hereby dismissed.

(5) This is a final order of the Department of Energy from which any aggrieved party may seek judicial

review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 19, 1995

<1> For example, Idaho has determined that if it were to release any of the responsive documents it would withhold certain types of information from them under exemptions 4 and 6. Because Idaho has yet to actually withhold or even sufficiently identify the information it plans to withhold, we have determined that Idaho's findings that it would withhold information under these exemptions are not yet ripe for review.

Case No. VFA-0036, 25 DOE ¶ 80,111

May 22, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:A. Victorian

Date of Filing:April 24, 1995

Case Number: VFA-0036

On April 24, 1995, Dr. A. Victorian (Appellant) filed an Appeal from a final determination issued to him on March 23, 1995 by the Albuquerque Operations Office of the Department of Energy (DOE/AL). In that determination, DOE/AL released three packets of documents responsive to Appellant's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. DOE/AL identified a fourth packet of documents as responsive to Appellant's request, but withheld them pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). See also 10 C.F.R. § 1004.10(b)(6). This Appeal, if granted, would require DOE/AL to release the withheld information.

I. Background

On November 13, 1974, Karen Silkwood died in an automobile accident while en route to talk to a reporter about possible radioactive contamination at the plutonium processing plant in Cimarron, Oklahoma, where she worked. This plant was operated by Kerr-McGee, a subcontractor for the Atomic Energy Commission (AEC), a predecessor of the DOE, through the AEC's Hanford, Washington facility. The plant manufactured plutonium fuel pellets for an experimental "breeder" reactor. Kerr-McGee closed the plant in 1975. The circumstances surrounding Silkwood's death and possible radiation contamination attracted wide-spread interest, leading to a Congressional investigation of the Cimarron plant and Kerr-McGee, a lengthy law suit, media scrutiny of both the incident and the nuclear industry generally, and speculation by the news and entertainment media about a government cover-up. On March 25, 1994, the Appellant filed a FOIA request with DOE/AL for "a copy of all documents, findings, reports compiled by LANL [Los Alamos National Laboratory] or other DOE components on the study of KAREN SILKWOOD's bones withheld in the LANL." (Emphasis in the original.)

In response to this request, a search was conducted of the LANL and four packets of documents were identified as responsive to the Appellant's request. Three of these were:

1) A letter dated February 18, 1994, and attachments from Alan C. McMillan, former leader of the LANL Human Studies Project, to Billie Silkwood, Karen Silkwood's father.

2) A letter dated March 19, 1979, from J.W. Healy, apparently of the LANL, to Robert Yoder of the Rocky Flats Area Office.

3) An undated "Karen Silkwood Case Summary."

See Letter of Gloria E. Inlow, Acting Director, Office of Intergovernmental and External Affairs,

DOE/AL (denying official), March 23, 1995 (final determination). These documents were released to the Appellant. The final determination also identified a number of responsive documents which dealt with the autopsy of Karen Silkwood and the disposal of her remains. This group of documents included: correspondence with Billie Silkwood, Karen Silkwood's father, regarding the disposal of the remains; an inventory of organs and tissue samples received by LANL; copies of the lab notebook and other records of LANL scientists who conducted tests for radioactive materials in Karen Silkwood's remains, including a description of the original autopsy results, descriptions of the processes used and immediate impressions of results; and a report, dated February 6, 1975, apparently prepared for the Nuclear Regulatory Commission, entitled "Summary Report of Evaluation of Biomedical Aspects of the Kerr-McGee Personnel Contamination Incident Reported November 7, 1974." The denying official concluded that these documents contained "sensitive, personal information to the surviving family members" and therefore withheld them under Exemption 6. Id.

Appellant argues that there is a strong public interest in the details surrounding Karen Silkwood's death. Appeal of Dr. A. Victorian, April 24, 1995 (Appeal Letter). The Appellant notes the ongoing public and media scrutiny of both the United States nuclear industry and the government's involvement in it that was sparked by Silkwood's death. Id. Therefore, the Appellant contends, the public interest in releasing this material should outweigh any privacy considerations of Karen Silkwood's next of kin. Id.

II.Analysis

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 6 is at issue here. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982); see also Morrison & Foerster, 24 DOE ¶ 80,107 (1994).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Depaptment of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Committee). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

A. Privacy Interest

The denying official found a strong privacy interest in the withheld documents, in that releasing the information would distress close associates or the next of kin of Karen Silkwood. Final determination at 1. In the past, we have found that while a right of privacy is not generally heritable, the next of kin of the deceased do have a privacy right in information pertaining to the deceased. See Morrison & Foerster, 24 DOE at 80,517; Thurm & Heller, 20 DOE ¶ 80,104 (1990). Accord, Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (holding that a family has a privacy interest in preventing disclosure of medical records). We have, however, held that this privacy interest is narrower than generally applicable under Exemption 6. "The scope of the privacy interest is narrower under these circumstances-- the test being whether release of the information would cause survivors injury, embarrassment or undue emotional distress." Thurm & Heller, 20 DOE at 80,513. See also Badwhar v. Department of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) ("some autopsy reports...would shock the sensibilities of surviving kin.")

We find that the denying official correctly identified a privacy interest under Exemption 6. In the past, we have held that documents relating to the body of the deceased have a very strong privacy interest for surviving relatives, given the special religious and emotional attachment in our society for the bodies of loved ones. Independent Documentary Group, 7 DOE ¶ 80,174 (1981) (IDG); KUTV, Inc., 4 DOE ¶ 80,150 (1979) (KUTV) (release of autopsy report and pictures of deceased "would certainly be a substantial invasion of privacy, which Congress sought to avoid by adoption of Exemption 6"). We therefore agree that a substantial privacy interest exists in the unreleased documents, which include the autopsy report and details regarding the disposal of Karen Silkwood's remains.

B. Public Interest in Disclosure

Once a privacy interest is identified, we must balance that interest against the public interest in releasing the document. Reporters Committee, 489 U.S. at 772-73. In Reporters Committee, the Supreme Court greatly narrowed the scope of public interest in the FOIA. The Court distinguished between the benefits to the public which may result from the release of information and those benefits that Congress sought to provide the public when it enacted the FOIA. The Court found that, in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Id. The Court identified the core purpose of the FOIA as "public understanding of the operations and activities of the government." Id. at 775. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of the government from the release of the document, its disclosure is not "affected with the public interest." Id. See also Morrison & Foerster, 24 DOE at 80,518.

In his Appeal, Dr. Victorian argues that there is substantial public interest in the information pertaining to Karen Silkwood. We agree. It is true that, in the past, we have found that detailed personal information of this nature has not added to the public interest. See, e.g., IDG, 7 DOE at 80,812-13; KUTV, 4 DOE at 80,809. However, even in cases of this nature, we have made no categorical determination but rather have limited ourselves to a fact-based review and balancing test. Id. <1> In the present case, several public interest groups and individuals have continued to raise questions about the manner in which the government conducted its investigation of Karen Silkwood's death.

The autopsy was performed by a team that included at least one LANL employee, under the authority of the Chief Medical Examiner for the State of Oklahoma. Subsequent testing of remains was performed at LANL by LANL personnel. Therefore, the withheld descriptions of the autopsy and subsequent tests on tissue samples, recorded at the time the tests were conducted and detailing the steps taken by the investigators, may shed significant light on the government's operations and activities. They could provide information on what was known regarding the death and possible contamination of Karen Silkwood, who knew it, and when these facts were discovered. They also may shed light on the manner in which the government conducted its investigation. In addition, the lab notebook includes handwritten notes dated 1979, 1986 and 1987. This information may provide insight into the government's conduct in this matter by indicating the extent to which the government performed additional tests on Karen Silkwood's remains long after her death.

While it is true Karen Silkwood was but one individual, we have held in the past that the manner in which the government treats even one individual can shed light on government operations and activities. See James L. Schwab, 21 DOE ¶ 80,154 (1991). Indeed, given the ongoing public concern about the government's handling of this case, the withheld documents seem to us to be the sort of information that the FOIA was meant to reveal. It may well permit the people "to know what their government is up to." Reporters Committee, 489 U.S. at 773.

C. The Balancing Test

Just as the identification of a privacy interest under Exemption 6 does not mean that a document will

automatically be withheld, the identification of a public interest in the information does not guarantee that the document will be released. Under Reporters Committee, an agency must balance any existing privacy right against the public interest in releasing the information. Id. at 772. Based on the record before us, however, we find no evidence that the denying official identified the public interest in the information or sought to balance the public interest against the properly identified privacy interest in the information. In the past, we have required the denying official to clearly state the factors considered in balancing an interest in privacy against the public interest in the information, and to articulate his motivation to strike the balance in a particular way. Center for Community Action, 20 DOE ¶ 80,120 (1990) (CCA). This requirement is important, because it provides the Appellant with the information necessary to understand the determination reached and to prepare an effective Appeal. It also provides us with the information necessary to review the determination in light of the general presumption favoring disclosure inherent in the FOIA. Id. at 80,559-60. See also Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

III.Conclusion

Since the required balancing has not been performed, we will remand this matter to the denying official with instructions to balance the properly identified privacy interest of Karen Silkwood's surviving kin with the public interest in releasing information on the government's handling of the investigation. See CCA, 20 DOE at 80,560. On remand, the denying official should consider whether elements of the withheld material can be redacted to preserve the privacy interest of surviving kin while providing sufficient insight into the manner in which the government conducted the investigation of Karen Silkwood's death.

It Is Therefore Ordered That:

(1)The Freedom of Information Act Appeal filed by A. Victorian on April 24, 1995, Case No. VFA-0036, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2)This matter is remanded to the Office of Intergovernmental and External Affairs, Albuquerque Operations Office, which shall conduct a new evaluation of the withheld material consistent with the analysis set forth in this Decision and Order.

(3)This is a final Order of the Department of Energy, from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 22, 1995

<1>Both IDG and KUTV were decided before Reporters Committee and used a broader definition of public interest, i.e. whether the information would contribute to the public understanding generally. IDG, 7 DOE at 80,812-13; KUTV, 4 DOE at 80,809. We held, however, that the pictures and autopsy report would not add any new information, and that therefore there was only a minimal interest in releasing the information. Id.

Case No. VFA-0037, 25 DOE ¶ 80,112

May 30, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:U.S. Solar Roof

Date of Filing:May 2, 1995

Case Number: VFA-0037

On May 2, 1995, U.S. Solar Roof, Inc. (Solar Roof) filed an Appeal from a determination issued to it on April 4, 1995 by the Director of the Photovoltaic Technology Division of the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE). That determination concerned a request for information submitted by Solar Roof pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EE to release the information requested by Solar Roof.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. §1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 27, 1995, Solar Roof filed a FOIA request in which it sought information relating to an unsolicited proposal submitted by Solar Roof entitled "Solar Tile Technologies: Demonstration and Validation." Solar Roof also sought information relating to another proposal it submitted entitled "Modular Integrated Solar Energy Tiles," as part of DOE's PV:BONUS Program. In its April 4, 1995 determination, EE partially denied Solar Roof's nine item request for information. EE released two specific items but withheld seven items in their entirety pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5).

On May 2, 1995, Solar Roof filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Solar Roof challenges EE's April 4, 1995 determination and asserts that EE improperly applied Exemption 5 to the withheld information. For this reason, Solar Roof requests that the OHA direct EE to release the withheld information.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts

have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States).

The deliberative process privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (Mink) (citing Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

The deliberative process privilege is inapplicable to purely factual matters. Accordingly, facts must generally be segregated from documents withheld under the deliberative process privilege and then released. There are two exceptions to this general rule. The first exception is for those circumstances where the specific factual information at issue was selected from a larger body of facts as part of the agency's deliberative process and the release of those facts would reveal that deliberative process. See Montrose v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. Wolfe v. HHS, 839 F.2d 769, 774-76 (D.C. Cir. 1988).

After reviewing most of the withheld information, we have concluded that the determination made by EE in applying Exemption 5 was correct and consistent with the principles outlined above.<1>The information contains comments and recommendations from reviewers of two proposals submitted by Solar Roof. These review comments and recommendations were used only for internal DOE purposes and thus constitute "intra-agency memoranda." In addition, the reviewers' comments and recommendations are clearly predecisional and deliberative. They were created before the DOE adopted a final position on whether to fund the proposals and they consist of personal opinions which reflect the consultative process. Furthermore, we note that the release of these comments and recommendations could inhibit reviewers from expressing their candid views if they believed that those views could become public knowledge. As such, the withheld material is precisely the sort of deliberative and "group thinking" process which Exemption 5 is designed to protect. Sears, 421 U.S. at 153 (quoting Davis, The Information Act: A Preliminary Analysis, 34 U. Chi L. Rev. 761, 797 (1967)). Accordingly, we hold that the review comments and recommendations of the above mentioned proposals meet all the requirements for withholding material under the Exemption 5 deliberative process privilege.

However, we find that EE did not adequately consider the public interest in disclosing the withheld information. On October 4, 1993, the Department of Justice (DOJ) adopted a new policy for the administration of the FOIA. The DOJ will defend the assertion of a FOIA exemption "only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not be withheld from a FOIA requester unless it need be." See Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (AG Memo). This "foreseeable harm" standard places a greater burden on an agency to provide specific references of harm to protected interests. If possible, FOIA officers are encouraged to make "discretionary disclosures." AG Memo. This DOJ policy, which DOE will follow, requires EE to be as clear as possible in providing an adequate justification for withholding under Exemption 5 and to provide specific references to a foreseeable harm. EE did not meet its burden under this policy, and there is not sufficient information in the record on appeal to consider whether the withheld material could be released without causing a foreseeable harm.

III. Conclusion

For the reasons stated above, the OHA finds that the EE properly applied the threshold requirements of Exemption 5 to the reviewers' comments and recommendations. However, we are remanding this matter to EE to issue a new determination, either releasing the withheld information or providing a more adequate consideration of the public interest in disclosure, that is, providing specific references to a foreseeable harm to protected interests. In addition, because we were unable to review item 9 due to its unavailability, EE should either release that item to Solar Roof or issue a new determination providing a complete justification for withholding this information. In the event that item 9 can no longer be located, EE should provide Solar Roof with an explanation of its unavailability as required by 10 C.F.R. 1004.4(d).

It Is Therefore Ordered That:

(1) The Appeal filed by U.S. Solar Roof on May 2, 1995, Case Number VFA-0037, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Photovoltaic Technology Division of the Office of Energy Efficiency and Renewable Energy of the Department of Energy, which should issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 30, 1995

<1>/ This Office did not review item 9 of Solar Roof's request. EE informed us that it was unable to locate this item for our review. However, EE has stated that the withheld information found in item 9 is similar to the withheld information found in items 2

through 7.

Case No. VFA-0038, 25 DOE ¶ 80,114

June 1, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: J. Eileen Price

Date of Filing: May 3, 1995

Case Number: VFA-0038

On May 3, 1995, J. Eileen Price (Price) filed an Appeal from a determination issued to her on April 21, 1995 by the Department of Energy's Western Area Power Administration (WAPA). In her Appeal, Price asserts that WAPA incorrectly withheld several responsive documents in its possession regarding a Freedom of Information Act (FOIA) Request she submitted on February 8, 1995.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 8, 1995, Price filed a FOIA Request with WAPA requesting inter alia all employee performance appraisal information in her performance appraisal file and all unofficial information not contained in her personnel file pertaining to her or her employment in the Loveland Area Office beginning in October 1992. WAPA, in a February 16, 1995 Determination Letter, provided Price with copies of various responsive documents. On March 3, 1995, Price appealed WAPA's determination arguing among other issues that WAPA had failed to conduct an adequate search. During the pendency of that Appeal, OHA was informed by WAPA that additional searching had uncovered other documents. Consequently, OHA remanded the matter to WAPA so that it could issue a determination regarding the newly discovered documents. J. Eileen Price, 25 DOE ¶ 80,105 (1995).

On April 21, 1995, WAPA issued its determination regarding the newly discovered documents. In its April 21 determination letter, WAPA identified as responsive to Price's request assorted notes on pages from the day planners (Day Planner Notes) of Ron Steinbach (Steinbach) and Jan Campbell

(Campbell), a grievance investigation document dated December 30, 1994 (Grievance Document) prepared by Jim Kesselburg (Kesselburg), and a document prepared by Steinbach containing a listing of events related to "unfair practices" prepared by Steinbach (Chronology). WAPA provided Price with a copy of the Chronology but withheld the Grievance Document. WAPA asserted that the Grievance Document was an intra-agency document which was predecisional and deliberative in nature and therefore fell within Exemption 5 of the FOIA. Additionally, WAPA stated that because the Day Planner Notes were created by employees for their personal convenience, they were not agency records for the purposes of the FOIA

and thus not subject to disclosure. In her Appeal, Price asserts that WAPA improperly failed to provide her with the Grievance Document and the Day Planner Notes. Price, however, provides no specific arguments as to why this was improper.

II. Analysis

A. The Day Planner Notes

We have considered WAPA's determination that the Day Planner Notes were not agency records and find it to be correct. Under the FOIA, an "agency record" is a document which is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and it was used for an agency purpose. Kissinger v. Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Bureau of Nat'l Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (BNA); Ben Franklin, 20 DOE ¶ 80,110 at 80,526 (1990).

In making the "agency records" determination, we look at the totality of circumstances surrounding the creation, maintenance, and use of the document(s) in question. BNA, 742 F.2d at 1492-93. We contacted officials at WAPA to inquire as to the use and nature of the Day Planner Notes. We were informed by an official at WAPA that the Day Planner Notes were pages from Steinbach's and Campbell's personal day planners and that each of these individuals had created these notes for their personal convenience in scheduling matters. At the time of Price's FOIA Request, none of these pages were maintained in any official DOE files and DOE personnel did not have official access to these documents. See Memorandum of telephone conversation between Doug Harness, Esq., Office of General Counsel, WAPA, and Richard Cronin, OHA Staff Attorney (May 17, 1995). From the facts regarding the nature of the Day Planner Notes, it is apparent that they possess none of the attributes of an agency record. The Day Planner Notes were never maintained in an agency file nor used for any official agency purpose. Consequently, we find that WAPA correctly determined that the Day Planner Notes were not agency records under the FOIA.

B. The Grievance Document

In its determination, WAPA withheld the Grievance Document pursuant to Exemption 5 of the FOIA claiming that the document was predecisional and deliberative. After reviewing the Grievance Document, we have determined that this document is predecisional and that WAPA correctly withheld portions of the document which were deliberative. However, we also find that WAPA incorrectly withheld portions of the Grievance Document containing segregable factual material.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue in this case.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. This privilege of Exemption 5 was developed primarily to promote frank and independent discussion among those responsible for making governmental decisions. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portions of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The Grievance Document is a one page document outlining Kesselburg's investigation into the facts and circumstances regarding a grievance Price had initiated against WAPA. Additionally, the document contains Kesselburg's opinion as to the causes and nature of the dispute between WAPA and Price. This document is predecisional and the analysis contained in the document has not been incorporated into an official agency decision. Further, significant portions of the Grievance Document are deliberative in nature because they reflect the opinions of Kesselburg regarding the origin and nature of Price's grievance. Consequently, we find that part of the Grievance Document was properly withheld under Exemption 5. There is, however, a significant portion of segregable factual material contained in the Grievance Document. Consequently, we will send to Price under separate cover a redacted copy of the Grievance Document. <1>

Notwithstanding our finding that Exemption 5 was properly applied to a portion of the Grievance Document, we must consider another factor. The DOE regulations state that a document should be released to a requester if disclosure is consistent with other laws, and is in the public interest. 10 C.F.R § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the material withheld consists of the opinion of an individual regarding the nature and causes of a grievance filed by Price. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion regarding employee grievances. Employees and managers would be less likely to communicate their opinions regarding an employee grievance if they knew or suspected that such opinions would be released to the individual who had filed the grievance. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the portions of the Grievance Document not being provided to Price were properly withheld.

It Is Therefore Ordered That:

(1) The Appeal filed by J. Eileen Price on May 3, 1995 is granted in part as set forth in the above Decision, and denied in all other respects.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 1, 1995

<1>A portion of the factual material, regarding Price's performance ratings, that we are releasing to Price might arguably be withheld under Exemption 6 from a third party requester. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). In applying Exemption 6, an agency must weigh the privacy interests invaded by release of the document against the public interest that would be furthered by release of the document. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S 749, 762-70 (1989). However, in the case where the only privacy interest at stake is that of the FOIA requestor, Exemption 6 cannot be used to withhold the document. See Joyce E. Economus, 23 DOE ¶ 80,182 at 80,701 n.2 (1994).

Case No. VFA-0039, 25 DOE ¶ 80,115

June 2, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Elizabeth H. Donnelly

Date of Filing: May 4, 1995

Case Number: VFA-0039

Elizabeth H. Donnelly filed an Appeal of an April 3, 1995 determination issued to her by the Nevada Operations Office of the Department of Energy (DOE). In that determination, the Acting Director of the Office of External Affairs of the Nevada Operations Office (Acting Director) denied a request for information that Ms. Donnelly filed on March 1, 1995 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

Background

In her March 1, 1995 request, Ms. Donnelly sought "a copy of the hostile work environment study conducted by Andrea Kato and Marcella Guerra, Office of Equal Employment Opportunity, in January 1995." The Acting Director informed Ms. Donnelly in his determination that he was withholding the requested document in its entirety pursuant to Exemption 5 of the FOIA. Specifically, the Acting Director stated that the requested document is so candid and personal in nature that public disclosure is likely, in the future, to stifle honest and frank communication within the agency. Furthermore, the Acting Director stated that the requested document contains opinions of co-workers who, when interviewed, were given an expressed understanding of confidentiality, and therefore these opinions are exempt from public disclosure. Finally, the Acting Director determined that since any factual information contained in the requested document is inextricably intertwined with opinions, it cannot be segregated for public release.

In her May 4, 1995 Appeal, Ms. Donnelly requested that the DOE release the requested document. Ms. Donnelly contends that Exemption 5 does not apply to the requested "study" because Exemption 5 applies only to memorandums and letters. Furthermore, Ms. Donnelly states that the "study" was not conducted in a confidential manner and that neither she nor any of the witnesses she talked to were ever told that their statements would be kept confidential.

Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil

discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue in this case.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. This privilege of Exemption 5 was developed primarily to promote frank and independent discussion among those responsible for making governmental decisions. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Ms. Donnelly bases her argument that Exemption 5 applies only to memorandums and letters, and does not apply to the requested document, on her literal reading of Exemption 5. While it is easy to see the reason for Ms. Donnelly's confusion, she clearly is unaware that the scope of Exemption 5 is broader than the literal statutory language. As stated above, the Supreme Court held in Sears that Exemption 5 applies to "those documents, and only those documents, normally privileged in the civil discovery context." Sears at 149 (footnote omitted). Thus, Exemption 5 affords protection to all documents that are part of the "deliberative process" or subject to the "predecisional privilege" and not only memorandums or letters.

We have reviewed the requested document and find that it clearly is both predecisional and deliberative pursuant to Exemption 5. There is no doubt that the requested document was prepared at the request of Robert Nelson, then Manager (since retired) of the Nevada Operations Office and Marcella Guerra, EEO Manager of the Nevada Operations Office, and served as part of an investigation before a final decision could be made. In fact, a final decision reporting the result of the investigation was sent to Ms. Donnelly on February 13, 1995 by Terry Vaeth, Acting Manager of the Nevada Operations Office. Furthermore, we have confirmed that the requested document contains opinions, recommendations and interpretations of the investigator, the disclosure of which would discourage open, frank discussions between the investigator and her superiors. Finally, the requested document contains facts, such as the summarized observations of several witnesses, that are "inextricably intertwined" with the deliberative material. Thus, we conclude that the determination made by the Acting Director was correct and consistent with the principles that we have outlined above. Accordingly, the requested document was properly withheld pursuant to Exemption 5.

The Public Interest in Disclosure

Notwithstanding our finding that Exemption 5 was properly applied to the requested document, we must consider another factor. The DOE regulations state that a document should be released to a requester if disclosure is consistent with other laws, and is in the public interest. 10 C.F.R § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally

correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested document consists of the opinion of individuals regarding the work environment of a particular office. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion regarding employee grievances. Employees and managers would be less likely to communicate their opinions regarding an employee grievance if they knew or suspected that such opinions would be released to the individual who had filed the grievance. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the requested document would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by Elizabeth Donnelly on May 4, 1995, Case No. VFA-0039, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 2, 1995

Case No. VFA-0040, 25 DOE ¶ 80,113

June 1, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Gayle M. Adams

Date of Filing:May 4, 1995

Case Number: VFA-0040

On May 4, 1995, Gayle M. Adams filed an Appeal from a determination issued to her on April 7, 1995 by the Director of the Office of External Affairs of the Department of Energy's (DOE) Richland Operations Office (hereinafter "Authorizing Official" or "Richland"). She had filed a request for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If this Appeal were granted, Richland would be ordered to conduct a further search for material responsive to Ms. Adams' request.

I. Background

On March 29, 1995, Ms. Adams filed a FOIA request for information concerning dietary studies that were conducted on school children in Richland, Washington in April 1967. Ms. Adams participated in these dietary studies and wanted a copy of her personal records including any records related to an actual whole body count.<1> Richland responded by sending her records pertaining to her enrollment in the study and some general information including the following:

1. The 11/17/94 DOE news release, entitled, "DOE Offers Historical Hanford Diet Study Results to Participants."
2. A list of published articles regarding the dietary studies at Hanford.
3. A legend for the school children dietary studies data which explains the headings used in the data ledgers.
4. Copies of five related *Tri-City Herald* newspaper articles.
5. The introduction and summary sections of the technical report on the dietary studies regarding school children.
6. A copy of a certificate of appreciation given to participants.

However, Richland was unable to locate whole body count information on Ms. Adams. On May 4, 1995, Ms. Adams filed the present Appeal challenging the adequacy of Richland's search for that information.

II. Analysis

The FOIA generally requires federal agencies to release documents to the public upon request. The Office of Hearings and Appeals (OHA) has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. In fact, the office has remanded cases where it was evident that the search conducted was inadequate. See, e.g. James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires only that the search be

reasonable, not exhaustive. "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller); accord, Weisberg v. Department of Justice, 745 F.2d at 1476, 1485 (D.C. Cir. 1984). We must determine whether Richland's search for Ms. Adams' whole body count records was reasonable.

We contacted Richland for an explanation of the steps taken to locate the requested information. We were informed that the results of the study were stored in 20 boxes and filed by school, year of participation in the study, class, number assigned and name. The whole body count records were all stored, by name and number, in one box for all of the studentswho participated in the study. Richland searched that entire box for Ms. Adams' whole body count records, but they were unable to locate them. Memorandum of telephone conversation between Kimberly Parker, OHA and Yvonne Sherman, Privacy Act Officer, Richland (May 22,1995). Ms. Sherman informed us that Judy Hays, the staff member who conducted the search, is intimately familiar with the records and the manner in which they are stored. Ms. Hays has been handling these records and these types of requests at the Richland Office for three years. Memorandum of telephone conversation between Kimberly Parker, OHA and Judy Hays, Richland (May 23, 1995). Based on this information, we find that the search for responsive material was reasonable.

Ms. Hays could have searched each of the other 19 boxes for Ms. Adams' whole body count records. However, because the actual search was reasonable, we find that a search of all 20 boxes would be unnecessarily exhaustive and is, therefore, not required. Miller, 779 F.2d 1378, 1384-85. Furthermore, we find that such a search would be unreasonable because the other 19 boxes contained consent forms and dietary information only; the whole body count records were stored in one, separate box which was thoroughly searched.

III. Conclusion

For the foregoing reasons, we find that the search performed by Richland was reasonably calculated to uncover the materials sought by the Appellant. Accordingly, we will deny this Appeal.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Gayle M. Adams on May 4, 1995 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 1, 1995

<1>/ A whole body counter is the machine used in the study that measured the amount of radioactive materials found in a person's body. A whole body count is the resulting measurement that was recorded for each student that participated in the study.

Case No. VFA-0041, 25 DOE ¶ 80,116

June 8, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard M. Ross

Date of Filing: May 10, 1995

Case Number: VFA-0041

On May 10, 1995, Richard M. Ross filed an Appeal from a determination issued to him on April 6, 1995, by the Oakland Operations Office (Oakland) of the Department of Energy. That determination denied in part a request for information submitted by Ross pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oakland to provide information responsive to the appellant's request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been disposed of or never to have existed. 10 C.F.R. § 1004.4(d). The FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In his FOIA request dated February 17, 1995, Ross sought, inter alia, copies of records and other information concerning (1) personnel actions relating to Robert Padilla (Padilla); and (2) past and present employment of nine identified DOE employees. In its April 6, 1995 determination, Oakland provided some of the information sought by the appellant, but withheld portions of some documents under Exemption 6 of the FOIA.

Ross filed this Appeal contending that Oakland (1) failed to conduct an adequate search for personnel action forms relating to Padilla and other information relating to the federal employment of certain DOE employees;<1> and (2) wrongfully withheld certain documents pertaining to the

employment history of certain DOE employees under Exemption 6 of FOIA, which protects from mandatory disclosure information in which an individual has a privacy interest.<2>

II. ANALYSIS

A. The Adequacy of the Search

We have held that an FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993).

1. The personnel action forms relating to Robert Padilla

In his FOIA request, Ross sought copies of records and other information concerning all Notifications of Personnel Actions (Standard Form 50-B) ("personnel action forms") relating to Robert Padilla. In response to this Request, Oakland produced several documents, including a personnel action form, effective August 7, 1994, and approved February 16, 1995, reflecting the appointment of Robert Padilla to the position of "Attorney-Advisor". On its face, this document indicates that it replaces a previous personnel action form. Oakland did not provide the personnel action form which was replaced by this document.

The Appellant claims that Oakland conducted an inadequate search for responsive documents because of its failure to produce the original personnel action form relating to the appointment of Padilla as an attorney. We disagree.

In reviewing the Appeal, we contacted Oakland to discuss the search for the original personnel action form. Oakland informed us that this document no longer exists. We were further informed that it is general practice to destroy an original personnel action form when it is replaced by a corrected form. Oakland informed us that it based this practice upon the Federal Personnel Management Supplement (FPM) 296-33, Subchapter 32-5, Parts (c) and (d). Memorandum of Telephone Conversation between Linda Lazarus, Staff Attorney, Office of Hearings and Appeals, and Rose Ann Pelzner, FOIA Specialist, Oakland (May 18, 1995). Because the original personnel action form appointing Padilla to the position of attorney was destroyed, it could not have been produced. Thus, the fact that it was not produced does not reflect upon the adequacy of the search. Therefore, there is no evidence in the record to support the contention that the search was inadequate.

2. Federal career information about certain DOE employees

In his original FOIA request, Ross asked for the following information concerning nine identified DOE employees:

a) present and past position titles and occupational series;

b) present and past grades;

c) present and past duty stations; and

d) date of commencement of employment with DOE.

In its determination, Oakland did not respond to this request. It neither provided documents nor indicated that such documents were being withheld pursuant to an exemption from the FOIA.

In an effort to ascertain the basis for this omission, we contacted the Oakland office. A representative of the Oakland office stated that this information was not provided because of an oversight. Id. On June 7,

1995, Oakland issued a supplemental response with respect to this issue. This portion of Ross' Appeal is therefore moot. Ross may appeal this supplemental determination.

B. Exemption 6

In his FOIA request, Ross sought certain information regarding the prior employment of nine identified DOE employees. More specifically, Ross sought the identity of each employer, position held, dates of employment, and description of job duties performed for each such employer. Oakland released this information with respect to prior federal jobs. However, for non-federal jobs, Oakland withheld this information, except for the job description where it found that the duties were related to the employee's present employment. This information was withheld pursuant to Exemption 6 of the FOIA. In his appeal, Ross contends that Oakland wrongfully withheld information under this Exemption. As detailed below, we agree.

Exemption 6 of the FOIA exempts from mandatory public disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10 (b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

The Supreme Court's decision in Reporters Committee has greatly narrowed the scope of the public interest in the context of the FOIA. The Court held that neither the identity of the requester nor the purpose for which the request is being made are relevant to whether information is exempt from disclosure. 489 U.S. at 771. Thus, rather than depend upon the requester's proposed use of the information, the determination "must turn on the nature of the requested document and its relationship to" the public interest. Id. at 772. The Court further distinguished between the general benefits to the public which may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. The Court found that with regard to the FOIA, the public interest in disclosure must be measured in terms of its relation to the core purpose of the Act, i.e., "public understanding of the operations and activities of the Government." Id. at 775 (quoting 5 U.S.C. § 552 (a) (4) (A) (iii)). The Court indicated that only information which contributes significantly to this understanding is within "the ambit of the public interest which the FOIA was enacted to serve." Id.

Here the appellant is seeking information concerning the prior employment of government employees. The privacy interest in the employment history of government employees is very small. This information was voluntarily provided by the employee when seeking government employment, under no promise of confidentiality, and the release of such information is unlikely to harm the employee. On the other hand, the public interest in this information is substantial. This information would increase public knowledge of government activities and operations by providing additional information concerning the qualifications of government employees. The public has an interest in the competence of such employees and the process by which they are selected.

After balancing the privacy interest of the Federal employees against the public interest in disclosure, we

conclude that Exemption 6 does not apply to this information. See Core v. U.S. Postal Serv., 730 F.2d 946 (4th Cir. 1984) (Freedom of Information Act required release of information concerning employment histories of successful applicants for federal employment); Washington Post Co. v. HHS, 690 F.2d 252, 261-264 (D.C. Cir. 1982) (privacy interest in information regarding non-federal employment of agency consultants is minimal); and Associated General Contractors v. United States, 488 F. Supp. 861 (D. Nev. 1980) (information regarding former employment of federal employees is not so personal that disclosure would constitute a clearly unwarranted invasion of personal privacy within FOIA).

This matter will be remanded to Oakland to provide appellant with documents which are relevant to the prior employment of nine identified DOE employees. Oakland will be required to release those portions of the documents which contain the identity of each employer, position held, dates of employment, the hours worked per week, and description of job duties performed for each such employer.<3>

III. Conclusion

For the reasons stated above, the OHA finds that the Appeal should be granted in part. The search conducted by Oakland for the personnel action forms relating to Robert Padilla was adequate. However, the search for federal career information relating to certain DOE employees was incomplete and Oakland has since issued a new determination on this matter. Oakland erred in its decision to withhold certain information regarding the private employment history of certain DOE employees. We will therefore remand this matter to Oakland with instructions to release to the Appellant the portions of the documents that contain the identity of each private employer, position held, dates of employment, number of hours worked, and description of job duties performed for each such employer.

It Is Therefore Ordered That:

(1) The Appeal filed by Richard Ross on May 10, 1995, is hereby granted as specified in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Oakland Operations Office which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 8, 1995

<1>Ross characterized the issue on appeal arising from Oakland's non-production of certain

documents relating to the federal employment of DOE employees as a failure to meet the FOIA statutory time requirements. However, after investigation, we have concluded that Oakland attempted to respond to this request for information. We will therefore decide whether the search that was originally conducted by Oakland was adequate.

<2>Ross also argued that Oakland failed to meet FOIA statutory deadlines with respect to

certain documents contained in the file of an Equal Employment Opportunity Counselor. However, on June 7, 1995, subsequent to the filing of Ross' Appeal, Oakland issued a supplemental determination on this issue. Accordingly, this portion of the Appeal is moot.

<3>It is unclear whether Ross appealed the redaction of information concerning the

employee's "reason for wanting to leave", salary information or the name and phone number of immediate supervisor. However, even if these matters were before us, we would not compel the release of such information because this material is exempt from disclosure under Exemption 6 of the FOIA. See Metropolitan Life Ins. Co. v. Usery, 426 F.Supp. 150, 167-169 (D.D.C. 1976), aff'd on other grounds sub nom. National Org. for Women v. Social Sec. Admin., 736 F.2d 727 (D.C. Cir. 1984) (reason for termination exempt from disclosure under Exemption 6); Painting & Drywall Work Preservation

Fund, Inc. v. HUD, 936 F.2d 1300, 1302-03 (D.C.Cir. 1991) (privacy interest of employees of federal contractors sufficient to redact names on disclosed payroll records under Exemption 6); and National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (privacy interest in names and addresses of individuals significant enough to warrant protection from disclosure under Exemption 6).

Case No. VFA-0043, 25 DOE ¶ 80,118

June 22, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: A. Victorian

Date of Filing: May 24, 1995

Case Number: VFA-0043

On May 24, 1995, Dr. A. Victorian filed an Appeal from a determination issued to him on May 5, 1995, by the Oakland Operations Office (Oakland) of the Department of Energy. That determination denied a request for information submitted by Victorian under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oakland to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been disposed of or never to have existed. 10 C.F.R. § 1004.4(d).

I. BACKGROUND

In his FOIA request dated April 9, 1994, Victorian sought documents containing the following information concerning "Project Woodpecker" at Lawrence Livermore National Laboratory (LLNL):

(1) the nature of the project;

(2) the starting date;

(3) the goals and functions; and

(4) the "OPR"<1>.

In its May 5, 1995 determination, Oakland stated that a search had been conducted for documents responsive to Victorian's request, but that no records were found as a result of the search. Oakland specifically stated that information relating to Project Woodpecker had been destroyed.

Victorian filed this Appeal contending that Oakland failed to conduct an adequate search for the requested documents. Victorian specifically complained that a search was conducted only at LLNL and not at any other DOE facility. <2>

II. ANALYSIS

We have held that an FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing the Appeal, we contacted the principal person involved with Project Woodpecker at LLNL to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Victorian's request might exist. He stated that Project Woodpecker was a classified project conducted on behalf of another federal agency, whose identity is also classified. At the direction of the other agency, LLNL destroyed or returned certain documents to that agency when Project Woodpecker ended in the summer of 1993. Although there are still some documents concerning Project Woodpecker at LLNL, none of these documents contains information responsive to Victorian's FOIA request. Moreover, the individual assured us that none of the requested records would be at any other DOE office. Victorian has given us no information which would lead us to question the veracity of the foregoing statements.

Based on the factors referred to above, we are convinced that the DOE followed procedures which were reasonably calculated to uncover the material sought by Victorian in his FOIA request and that no such documents are in the possession of DOE. Accordingly, Victorian's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by A. Victorian on May 24, 1995, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 22, 1995

<1>/ Victorian does not define the term "OPR" in his FOIA request. DOE understands this term to

refer to the "Office of Principal Responsibility".

<2>/ Victorian raised a number of additional matters which are not properly part of this Appeal:

First, Victorian contends that Oakland did not respond to the FOIA request in a timely manner. This Office has no jurisdiction over this issue. Section 1004.8(a) of the DOE Regulations grants OHA jurisdiction to consider FOIA appeals only in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees. . .

10 C.F.R. § 1004.8(a).

Second, Victorian requested, for the first time in his Appeal, documents relating to the destruction of Project Woodpecker documents. This request was not included within the original FOIA request, and therefore is not properly part of the Appeal. The Appellant may file a new FOIA request if he seeks to obtain documents which are related to the destruction of the Project Woodpecker documents. It is important to note that Victorian has been informed by Oakland that documents relating to Project Woodpecker had been destroyed. By informing Victorian of the destruction of these documents, Oakland fulfilled its obligation under the FOIA. See 10 C.F.R. §1004.4(d).

Third, Victorian requested answers to questions (as opposed to requesting documents) concerning the Woodpecker Project. For example, Victorian asked a question about DOE's accountability to the General Accounting Office in the event the requested documents have been destroyed. The FOIA does not require an agency to respond to such questions. It simply requires that an agency produce documents which are in existence and not exempt from disclosure. See 10 C.F.R. § 1004.4(d)(1).

Case No. VFA-0044, 25 DOE ¶ 80,119

June 28, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Wilbert L. Townsend

Date of Filing:May 30, 1995

Case Number: VFA-0044

On May 30, 1995, Wilbert L. Townsend filed an Appeal from a determination issued to him on May 23, 1995, by the Nevada Operations Office of the Department of Energy (DOE/NV). That determination denied in part a request for information filed by Townsend pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE at 10 C.F.R. Part 1004. DOE/NV identified documents responsive to Townsend's request, but withheld information under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6) (Exemption 6). See also 10 C.F.R. § 1004.10(b)(6). This Appeal, if granted, would require DOE/NV to release the withheld information.

I. Background

On May 2, 1995, Wilbert L. Townsend filed a request for information with the DOE/NV. Townsend requested information pertaining to the top three candidates for a position as an industrial hygienist with DOE/NV, all of whom filed applications in response to vacancy announcement no. DEA-95-009. Specifically, Townsend requested copies of SF-171 forms submitted by the top three candidates, and their written responses to the "ranking criteria" used in the vacancy announcement. In response to this request, DOE/NV released the SF-171 and the written responses to the ranking criteria submitted by the successful candidate, Lori Jean Arent, but deleted her social security number and other information in which DOE/NV found a privacy interest. In addition, DOE/NV released the SF-171 forms of the two unsuccessful candidates, after redacting the names and all other information except past employment history and education. From each of the SF-171 forms, DOE/NV released the place of employment and duties performed but redacted the names of previous supervisors and dates of employment. DOE/NV also released the course listings and hours of study but deleted the names of the educational institutions attended by the job applicants. DOE/NV also withheld the written responses to the ranking criteria submitted by the unsuccessful candidates. DOE/NV withheld all of this information pursuant to Exemption 6 of the FOIA, finding that: "the interest in protecting against the invasion of privacy far outweighs the public interest in such

disclosure." See Letter of Darwin J. Morgan, Acting Director, Office of External Affairs (Denying Official) to Wilbert Townsend, May 23, 1995 (Determination Letter).

In his Appeal, Townsend requests the names of the two unsuccessful candidates, the dates of employment for each candidate, and the written responses to the ranking criteria from the unsuccessful candidates. Townsend argues that "there was no legal reason to preclude DOE/NV from sending me this information in my initial request." He further maintains that, if there were privacy information in the responses to the ranking criteria, DOE/NV should have "sanitized" them and released the "sanitized" document.<1>

II. Analysis

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 6 is at issue here. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post); see also Morrison & Foerster, 24 DOE ¶ 80,107 (1994).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Committee). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

A. Privacy Interest

The Denying Official found a privacy interest in the names of the unsuccessful candidates and the social security numbers of all the candidates. See Determination Letter at 1. In the past, we have agreed that a strong privacy interest exists in one's name and social security number. See International Brotherhood of Electrical Workers, Local Union 1579, 23 DOE ¶ 80,108 (1993); United Union of Roofers, Waterproofers & Allied Workers, 21 DOE ¶ 80,137 (1991). See also Core v. United States Postal Service, 730 F.2d 946 (4th Cir. 1984) (Core). Accordingly, we agree with the initial determination of the Denying Official that a privacy interest exists in the names of the unsuccessful candidates and the social security numbers of all the candidates.<2>

We also agree that a privacy interest exists in the dates of employment and the responses to the ranking factors from the unsuccessful candidates. As the courts have noted, this information could be used to identify unsuccessful job seekers. Core, 730 F.2d at 948.<3> The unsuccessful candidates have a privacy interest in the fact that they are seeking new employment. The revelation of this information to supervisors or co-workers, not only that they are seeking new employment, but were rejected, could potentially embarrass the unselected candidates. Id. at 949; Washington Post, 456 U.S. at 599 (Congress intended to exclude from disclosure files which "might harm the individual").<4>In his Appeal, Townsend clearly seeks the withheld information because it will enable him to identify the unsuccessful candidates. Appeal at 1. Such information is precisely the kind of information in which the unsuccessful candidates have a privacy interest.

For these reasons, we agree with the determination of the Denying Official that a privacy interest exists in the withheld information. We reject Townsend's blanket assertion that no such privacy interest exists. A privacy interest exists in the information to the extent that it identifies any unsuccessful candidate. Moreover, based on our review of the responsive documents, we have determined that the withheld information could not have been "sanitized" any further, as Townsend suggests.

B. Public Interest in Disclosure

Once a privacy interest is identified, we must balance that interest against the public interest in releasing the document. Reporters Committee, 489 U.S. at 772-73. In Reporters Committee, the Supreme Court

greatly narrowed the scope of public interest in the FOIA. The Court distinguished between the benefits to the public that may result from the release of information and those benefits that Congress sought to provide the public when it enacted the FOIA. The Court found that, in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Id. The Court identified the core purpose of the FOIA as "public understanding of the operations and activities of the government." Id. at 775. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of the government from the release of the document, its disclosure is not "affected with the public interest." Id. See also Morrison & Foerster, 24 DOE at 80,518.

In his Appeal, Townsend does not identify any public interest in the disclosure of the withheld information. Generally, we have recognized a public interest in disclosing certain information regarding government employees, since it sheds light on government hiring practices and operations. See, e.g., Kenneth P. Brooks, 18 DOE ¶ 80,110 at 80,531 (1988). This does not apply, however, to unsuccessful job applicants. Id. at 80,532. As the court noted in Core:

On the other side of the scale, the public interest in learning the qualifications of people who were not selected is slight. Disclosure of the qualifications of people who were not appointed is unnecessary for the public to evaluate the competence of people who were appointed. Indeed, comparison of all applications may be misleading because the appointments were made on the basis of both applications and interviews.

Core, 730 F.2d at 949. We note that Core was decided prior to Reporters Committee and its narrowing of the "public interest' standard. However, even under the broader pre-Reporters Committee standard, the court found only a minimal public interest in the release of this information. Accordingly, we find at best a slight public interest in the release of the withheld information.

C. The Balancing Test

In the Determination Letter, the Denying Official stated that he had balanced the public interest in releasing the information against the privacy interests of the applicants and had therefore decided to withhold the requested information. In response to notification of this Appeal, DOE/NV reported that the Denying Official had sought guidance from the Office of Personnel Management. The Denying Official also relied heavily on the Core opinion cited above. See Letter of Janet Fogg, FOIA and Privacy Act Officer, DOE/NV, to Harold Feld, OHA Staff Attorney, June 1, 1995. Townsend has raised no new issues of fact or law in his Appeal, beyond his assertion that he is entitled to the information and that he does not believe that the information requested raises any privacy concerns. We find that the Denying Official correctly balanced the public interest in disclosing the information against the privacy interests of the job applicants and properly withheld the information requested in this Appeal. Accordingly, Townsend's Appeal will be denied.

It Is Therefore Ordered That:

(1)The Appeal filed by Wilbert L. Townsend on May 30, 1995, Case No. VFA-0044, is hereby denied.

(2)This is a final Order of the Department of Energy, from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George Breznay

Director

Office of Hearings and Appeals

Date: June 28, 1995

<1>Throughout his Appeal, Townsend confuses Exemption 6, the privacy exemption of the FOIA, with the Privacy Act. Exemption 6 of the FOIA concerns the privacy interest that individuals other than the requester have in the information sought. See Joyce E. Economus, 23 DOE ¶ 80,182 (1994). The Privacy Act, 5 U.S.C. § 552a, implemented by the DOE at 10 C.F.R. Part 1008, concerns the right of a requester to access to information regarding the requester himself. See Glenn T. Edwards, 21 DOE ¶ 80,124 (1991). We have interpreted Townsend's assertions in his Appeal concerning Privacy Act to mean that he believes that releasing the withheld information would not violate the privacy interests of the affected parties.

<2>There is no privacy interest in the name of the selected employee, however, since there is no privacy interest in the knowledge that the employee now works for the federal government.

<3>It does not matter that this information would identify the unsuccessful applicants only to those familiar with them or their circumstances. If the information is released to Townsend, it must be released to any other requester. Core, 730 F.2d at 949. See also Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973).

<4>No such privacy interest exists for the successful candidate, since the fact that the candidate sought another job will become clear once the candidate accepts the position. Core, 730 F.2d at 948.

Case No. VFA-0046, 25 DOE ¶ 80,120

June 30, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard W. Miller

Date of Filings: June 2, 1995

June 19, 1995

Case Numbers: VFA-0046

VFA-0049

On June 2, 1995, Richard W. Miller, on behalf of his client Foley Company, filed an Appeal from three Determinations issued to him by the Freedom of Information Officer at the Department of Energy's (DOE) Strategic Petroleum Reserve Project Management Office (SPRO). In those Determinations, the Authorizing Official released numerous documents but withheld some documents pursuant to Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Miller requests that the Office of Hearings and Appeals (OHA) order the release of all of the withheld documents.

I. Background

On November 1, 1994, Mr. Miller filed a FOIA request for all documents related to Solicitation No. DE-FB96-92P016055 dated October 10, 1991, Contract No. DE-AC96-92P016055 and the Sandia National Laboratories Contract No. DE-AC04-76 DP99189. In a series of three Determinations, SPRO identified and released hundreds of responsive documents but withheld a total of 211 specific documents listed in March 31st and June 1st Determinations and a series of diaries discussed in a May 5th Determination which were responsive to the above request.<1> In a March 31, 1995

Determination, SPRO withheld, in their entirety, 150 memoranda described as draft internal memoranda, government cost estimates, price negotiation memoranda, job diaries and drafts of specifications. SPRO stated that the subject documents were exempt under Exemption 5 because they were predecisional and recommendatory in nature and consisted of opinions which are part of the process by which governmental decisions and policies are formulated. Shortly thereafter, on May 5, 1995, SPRO issued a second Determination which withheld a series of diaries under Exemption 5 of the FOIA stating that the diaries contained opinions and thoughts which are part of the process by which governmental decisions and policies and formulated. On June 1, 1995, SPRO issued yet another Determination which withheld an additional 61 documents under Exemption 5 of the FOIA and restated the same general reasons that it had provided in the March 31st and May 5th determination letters. These 61 documents were described as internal memoranda, draft letters, and meeting and telephone notes. SPRO is reviewing an additional 66 documents for possible release which are not the subject of this Appeal.

II. Analysis

The FOIA generally requires that information held by government agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work-product privilege, and the "deliberative process" privilege. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, the SPRO relied solely upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enters., 19 DOE ¶ 80,106 (1989). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give and take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.; Joyce E. Economus, 23 DOE ¶ 80,182 at 80,699 (1994).

Even if portions of the documents at issue in this Appeal meet the criteria cited above for applying Exemption 5, that does not mean that they may be withheld in their entirety. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." See 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10; Oak Ridger, 21 DOE ¶ 80,120 at 80,564-65 (1991); Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989). In the context of the "deliberative process" privilege of Exemption 5, this means that the non-deliberative material (generally factual information) contained in otherwise deliberative documents should be released to the requestor. The only exceptions to the requirement of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id.; Nuefeld v. IRS, 646 F.2d 661, 666 (D.C. Cir. 1981).

B. Adequacy of the Justification

In each of the Determinations at issue in this Appeal (March 31, 1995, May 5, 1995 and June 1, 1995), SPRO withheld documents under Exemption 5 of the FOIA and stated categorically that all of the documents contained opinions and thoughts which are part of the process by which governmental decisions and polices are formulated. We find this generic explanation as applied to all of the documents withheld by SPRO to be insufficiently informative and legally inadequate.

It is well established that a FOIA determination must contain a reasonably specific justification for withholding material pursuant to an FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993).

A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal. Instead, SPRO has merely restated the language of Exemption 5, without explaining the reasons why SPRO concluded that the documents are predecisional and deliberative and therefore exempt from mandatory disclosure under Exemption 5. See Federal Sources, Inc., 23 DOE ¶ 80,101 (1993). Furthermore, we note that DOE regulations require the agency to consider whether otherwise exempt documents should nonetheless be released to the public if the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1; see also J. Reno, Attorney General, Memorandum to Heads of Departments and Agencies (October 4, 1993); Jane Affleck, 24 DOE ¶ 80,155 at 80,637 (1994). SPRO does not appear to have made such a determination in this case. We also find that there does not appear to have been any attempt to segregate and release possibly non-exempt information from exempt information in any of the withheld documents.

III. Conclusion

For the reasons stated above, we will remand to SPRO the three Determinations at issue in this Appeal. SPRO should either release to Mr. Miller all of the documents responsive to his request or issue a new Determination supporting the withholding of the documents. If a new determination is issued, SPRO should include a statement of the reason for denial, a brief explanation of how the exemption applies to the record withheld and a statement of why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). SPRO should further review each document for the possible segregation of non-exempt material. See 10 C.F.R. § 1004.7(b)(3). In making its determination, SPRO may group similar documents together, e.g., price negotiation memoranda, and provide one justification for that particular group of documents.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard L. Miller on June 2, 1995, Case No. VFA-0046, is hereby granted in part as set forth below in Paragraph (3) and denied in all other respects.

(2) The Freedom of Information Act Appeal filed by Richard L. Miller on June 19, 1995, Case No. VFA-0049, is hereby granted in part as set forth below in Paragraph (3) and denied in all other respects.

(3) The matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office which shall either release the documents withheld in its March 31, 1995, May 5, 1995, and June 1, 1995 Determinations or issue a new determination in accordance with the guidance in the foregoing Decision.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 30, 1995

<1>Mr. Miller's June 2, 1995 Appeal specifically challenged the withholding of certain diaries mentioned in a May 5, 1995 determination letter. His Appeal also challenged two other Determinations issued by SPRO on March 31, 1995,

and June 1, 1995. However, Mr. Miller's filing with respect to these two Determinations was incomplete. We therefore bifurcated Mr. Miller's Appeal and assigned the Appeal of the diaries case number VFA-

0146 and the Appeal of the two remaining Determinations case number VFA-0149. The filing of the Appeal for case number VFA-0149 was completed on June 19, 1995. See Letter from Richard W. Miller, Miller Law Firm to Ariane Cerlenko, OHA Staff Attorney (June 19, 1995). This Decision and Order addresses both Appeals.

Case No. VFA-0047, 25 DOE ¶ 80,121

June 30, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Sangre de Cristo Animal

Protection, Inc.

Date of Filing:June 5, 1995

Case Number: VFA-0047

On June 5, 1995, Sangre de Cristo Animal Protection, Inc. (SDCAP), through Western Environmental Law Center, filed an Appeal from a determination issued to it on April 27, 1995 by the Freedom of Information Officer at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter "Authorizing Official" or "Albuquerque"). In that determination, the Authorizing Official denied in part a request for information which SDCAP had filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, SDCAP requests that the Office of Hearings and Appeals (OHA) order the release of the withheld information. SDCAP also requests that OHA find that the search for responsive documents was inadequate.

I. Background

On December 15, 1994, SDCAP filed a FOIA request for the following records which are required by statute to be kept at the Inhalation Toxicology Research Institute (ITRI), a DOE facility located on Kirtland Air Force Base in Albuquerque and operated by the Lovelace Biomedical & Environmental Research Institute (Lovelace):

1. ITRI's Institutional Animal Care and Use Committee's (IACUC) most current report generated pursuant to 9 CFR § 2.31, chapter 1 of the Animal Welfare Act, and all previous reports for the last three years.
2. Copies of all ITRI IACUC records prepared pursuant to 9 CFR, § 2.35, chapter 1 of the Animal Welfare Act.
3. A copy of the 1992, 1993 and 1994 annual reports, which are prepared by ITRI for Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA) to show compliance with 9 CFR, § 2.36, chapter 1 of the Animal Welfare Act.
4. Copies of all photographs of ITRI animal research that may be in ITRI's possession.

On January 6, 1995, Albuquerque sent SDCAP a letter acknowledging receipt of their FOIA request. In that letter, Albuquerque also informed SDCAP that their request would be processed in turn after a number of other pending FOIA requests. On April 27, 1995, Albuquerque issued a final determination letter. In that letter, the Authorizing Official determined that the request for item 1 should be denied under 10 C.F.R. § 1004.3(e) because of the "critical self-evaluative privilege" claimed by Lovelace. With regard to items 2, 3 and 4, the Authorizing Official released redacted copies of the requested documents. The redactions were made in order to protect the identities of Lovelace employees pursuant to Exemption 6 of

the FOIA. In its Appeal, SDCAP challenges the timeliness of Albuquerque's response, Lovelace's withholding of item 1 of the request under 10 CFR § 1004.3(e), Albuquerque's redaction of the names and faces of Lovelace employees under Exemption 6 and the adequacy of Albuquerque's search for items 2 and 4 of their request.

II. Analysis

A. Timeliness of Response

When an agency receives a proper FOIA request, it is required to inform the requester of its decision to grant or deny access to the requested records within ten working days. 5 U.S.C. § 552(a)(6). However, the FOIA provides for extensions of initial time limits in certain situations. For example, the D.C. Circuit has approved the general practice of handling backlogged FOIA requests on a "first-in, first-out" basis. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C)).

SDCAP argues that Albuquerque's April 27, 1995 determination of their December 19, 1994 FOIA request violated FOIA regulations because Albuquerque failed to provide written notice of the "unusual circumstances" warranting extension of the response period beyond the statutory ten day period required under 5 U.S.C. § 552 (a)(6)(B). Appeal letter dated May 30, 1995 at 2.

SDCAP's initial FOIA request dated December 15, 1994 was received by Albuquerque on December 19, 1994. Albuquerque acknowledged receipt of that request in a letter dated January 6, 1995. In that same letter, Albuquerque explained that a number of pending requests were received before SDCAP's and theirs would be processed in turn. We find that Albuquerque's explanation for the delay appears reasonable and is sufficient under Open America and 5 U.S.C. § 552 (a)(6)(C) to warrant an extension of time beyond the statutory ten day period.

If a requester can show an "exceptional need or urgency," his or her request may be expedited and processed out of sequence. Expedited access has been granted in exceptional circumstances such as jeopardy to life or personal safety or a threatened loss of substantial due process rights. See, e.g., Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978), aff'd, 612 F. 2d 1202 (9th Cir. 1980); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976); Ferguson v. FBI, 722 F. Supp. 1137, 1141-43 (S.D.N.Y. 1989). On March 1, 1995, SDCAP wrote a letter to the Albuquerque Operations Office expressing concern for the delay in processing their request. However, SDCAP made no showing, in either the original request letter or in the March 1, 1995 letter, of exceptional need or urgency that would warrant an expedited response to their request. Therefore, we find, in the absence of such a showing, that Albuquerque responded in a manner consistent with applicable FOIA statutory and regulatory provisions.

B. 10 C.F.R. § 1004.3 (e)

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

There are certain procedural requirements that must be met before documents are subject to the FOIA. Documents must first qualify as "agency records" under the criteria set out by the courts. See 5 U.S.C. § 552(f). Documents that do not qualify as "agency records" may nevertheless be subject to the FOIA under a new DOE FOIA regulation that pertains specifically to contractor records. 10 C.F.R. § 1004.3(e).<1> We must first determine whether the documents in item 1 of SDCAP's FOIA request qualify as agency records.

The OHA has applied a two-part test established by the courts to determine whether documents generated by nonfederal organizations are subject to the FOIA. See, e.g., Cowles Publishing Co., 24 DOE ¶ 80,111 (1994); Concord Oil Co., 24 DOE ¶ 80,109 (1994); International Brotherhood of Electrical Workers, 22 DOE ¶ 80,101 (1992); B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1987). That analysis involves a determination of 1) whether the organization is an "agency" for purposes of the FOIA and if not, 2) whether the requested material is nonetheless an "agency record." See Judith M. Gibbs, 16 DOE ¶ 80,133 (1987).

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). A private organization will be considered a federal agency only where its organizational structure and daily operations are subject to substantial government control. See United States v. Orleans, 425 U.S. 807, 815-816 (1976); Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977); See also Forsham v. Harris, 445 U.S. 169 (1980) (Forsham). For example, in Cowles, we held that DOE contractor, Battelle, was not an "agency" under the FOIA because DOE did not supervise its day-to-day operations. Cowles Publishing Co., 24 DOE at 80,505 (1994).

ITRI is a government-owned/contractor-operated (GOCO) facility located in Albuquerque and managed by Lovelace, a DOE contractor. The DOE does not supervise the day to day operations of Lovelace. Memorandum of Telephone Conversation between Kimberly Parker, OHA and Ron O'Dowd, Albuquerque (June 16, 1995). Therefore, we conclude that Lovelace is not an agency for purposes of the FOIA. Id.

Since we have determined that Lovelace is not an agency for purposes of the FOIA, we must now turn to the second part of the test and determine whether the requested material is nonetheless an "agency record." Judith M. Gibbs, 16 DOE ¶ 80,133 (1987). The Supreme Court has held that "agency records" are documents which are (i) either created or obtained by an agency, and (ii) under agency control at the time of the FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 142-45 (1989) (Tax Analysts). For purposes of analysis, the term "obtain" means that the agency must have had possession of the material at the time of the request in order for the material to qualify as an agency record. Id. Here, the documents requested in item 1 were not created by the DOE, but by ITRI employees. Moreover, the DOE had not obtained those documents prior to the time of SDCAP's FOIA request. Rather, the DOE sought access to the documents only for the purposes of responding to SDCAP's FOIA request. Therefore, because DOE did not create, obtain, control or possess the documents at the time SDCAP filed its request, the documents are not agency records under the test set forth in Tax Analysts.

However, if a contractor-generated document fails to qualify as an "agency record," it may still be subject to the FOIA under this Office's previous case law and under a new DOE FOIA regulation which pertains specifically to contractor records. See, e.g. John Lorenz, 23 DOE ¶ 80,116 (1993); Government Accountability Project, 22 DOE ¶ 80,103 (1992); 10 C.F.R. § 1004.3(e)(1).<2> In general, if the contract between the DOE and the contractor provides that the contractor records are property of the agency, then the contractor records are subject to the FOIA. 10 C.F.R. § 1004.3(e)(1).

Our first inquiry under 10 C.F.R. § 1004.3(e)(1), then, is whether the contractor records are "property of the Government." To answer this question, we must examine the contract between the DOE and Lovelace. Clause 42 of Contract No. DE-AC04-76EV01013/Mod M1 entitled, "Ownership of Records Relating to the Contract" reads in pertinent part, ". . . all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . ." This clause satisfies the requirement of 10 C.F.R. § 1004.3(e)(1). Therefore, we find that, according to the terms of the DOE/Lovelace contract , these records are "the property of the Government" within the meaning of 10 C.F.R. § 1004.3(e)(1).

However, our analysis does not end there. Subsection 1004.3(e)(2) sets forth an exception to the broad principle contained in 10 C.F.R. § 1004.3(e)(1). Subsection 1004.3(e)(2) provides that if the contractor

claims a privilege found to be recognized under federal or state law, then DOE-owned documents will be subject to mandatory disclosure only if already in the possession of the Government and not otherwise exempt under the FOIA. Therefore, we must analyze whether the documents contain "information for which the contractor claims a privilege recognized under Federal or State law." See 10 C.F.R. § 1004.3(e)(2). Although the words of the new regulation refer to the contractor merely "claiming" a recognized privilege, we believe that the regulation must be interpreted to refer to situations in which the contractor claims a privilege and the DOE finds a reasonable basis for that claim. Otherwise, any privilege claim, no matter how frivolous, would remove a DOE-owned record from the reach of the FOIA. Cowles Publishing Co., 24 DOE at 80,663 (1995). Accordingly, we will consider the applicability of the "critical self-evaluative privilege" and whether that privilege is judicially recognized under state or federal law.

The D.C. Circuit has recognized the "critical self-evaluative privilege" in a civil discovery context. Bredice v. Doctors Hosp., Inc., 479 F.2d 920 (D.C. Cir. 1973) (Bredice); see also, Laws v. Georgetown University Hospital, 656 F.Supp. 824, 826 (D.D.C. 1987); Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). The "critical self-evaluative" privilege exists to promote critical self-analysis and improve practices and procedures. Bredice, 479 F.2d at 250-51. For example, in Bredice, the court held that medical staff documents were not subject to discovery and were entitled to a qualified privilege because there is an overwhelming public interest in promoting the self-evaluative process. To allow parties to obtain these types of reports would have an undue chilling effect on an organization's ability to evaluate its performance and the actions of its employees where such evaluation is in the public interest. Id. Although the privilege was applied under different factual circumstances in the Bredice and Washington Post cases, the same policy considerations that were present in those cases are present in this case. Therefore, we find that the "critical self-evaluative privilege" is a judicially recognized privilege that was properly invoked by Lovelace in this case.

We have determined that 1) the documents requested in item 1 are the property of the government and that 2) the contractor has reasonably claimed a judicially recognized privilege. We must finally determine whether the government is in possession of the requested documents. 10 C.F.R. § 1004.3(e)(2) exempts privileged documents, which are not in the DOE's possession, from mandatory disclosure. We conclude that the term "possession" must refer to possession at the time of the request, in conformance with Tax Analysts. Otherwise, validly privileged documents which do not meet the test for "agency records" could be rendered subject to the FOIA under the new regulation simply by being identified and transmitted to the DOE for its FOIA review. Instead, the DOE specifically protected these types of documents from the regulation's reach. See 59 Fed. Reg. 63,883 (1994). In this case, the DOE obtained the requested documents only after the FOIA request was made. Therefore, we conclude that while the documents are property of the government, they are validly privileged and were not in possession of the DOE at the time of the FOIA request. Accordingly, we find that the documents requested in item 1 are not subject to the FOIA under 10 C.F.R. § 1004.3(e)(2).

SDCAP argues that even if the documents requested in item 1 are privileged and therefore exempt from mandatory disclosure, redacted copies should be released under the FOIA which expressly provides that "any reasonably segregable portion of a report shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. §552(b); U.S. Department of Justice v. Julian, 486 U.S. 1, 9 (1988). In other words, SDCAP argues, the "non-self-evaluative" material should be released. We need not address this argument. As we determined above, these documents are neither agency records as defined by case law nor subject to the FOIA by operation of the DOE's FOIA regulations. As a result, they are not subject to the disclosure provisions of the FOIA.

C. Exemption 6

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 CFR §

1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). SDCAP challenges ITRI's redaction of the names of Lovelace employees from records responsive to items 2, 3 and 4.<3> SDCAP also challenges the redaction of the faces of Lovelace employees from photographs responsive to item 4. We find that faces are akin to other personal identifiers such as names, social security numbers and addresses that are exempt from mandatory disclosure under Exemption 6 where such disclosure would constitute an unwarranted invasion of personal privacy. Accordingly, the following analysis with respect to the names of Lovelace employees applies to the faces of those employees as well.

To warrant protection under Exemption 6, information must first meet its threshold requirement. It must fall within the category of "personnel and medical files [or] similar files." 5 U.S.C. § 552(b)(6). The term "similar files" has been interpreted broadly by the Supreme Court to include all information which "applies to a particular individual." Washington Post, 456 U.S. at 602. We find that the names of Lovelace employees contained in reports prepared under 9 C.F.R. §§ 2.31, 2.35 and 2.36 and the faces of Lovelace employees depicted in pictures qualify as similar files. Id.

Next, we must undertake a three-step analysis to determine whether the names and faces of Lovelace employees were properly withheld from the IACUC reports under Exemption 6. First, we must determine whether a substantial privacy interest would be invaded by the disclosure of the names and faces. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) (Horner). Second, we must determine whether the release of the names and faces would further the public interest by shedding light on the operations and activities of the Government. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee). Finally, if we find both privacy and public interests in the requested information, we must weigh the privacy interest against the public interest in order to determine whether release of the names and faces would constitute a clearly unwarranted invasion of personal privacy. Id. at 762-70.

1. Privacy Interest

It is widely held that federal employees have no expectation of privacy regarding their names, titles, grades, salaries and duty stations. See 5 C.F.R. § 293.311 (1994); National W. Life Ins. Co. v. United States, 512 F. Supp. at 461; Core v. United States Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984). Therefore, the disclosure of such information about federal employees would involve little or no invasion of privacy. ITRI employees, however, are not federal employees. Rather, they are private individuals. The Supreme Court has long found a privacy interest in the names and addresses of private individuals significant enough to warrant protection from disclosure under Exemption 6. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Moreover, at least seven Circuit Courts have found that an individual has a significant privacy interest in avoiding the unlimited disclosure of his or her name. See, e.g., Hopkins v. Department of Hous. & Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991); Painting & Drywall Work Preservation Fund v. Hous. & Urban Dev. 936 F.2d 1300 (D.C. Cir. 1991); Horner, 879 F.2d at 875; Halloran v. Veterans Admin., 874 F.2d 315, 323 (5th Cir. 1989); Department of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. Department of Agric., 737 F.2d 784, 787 (9th Cir. 1984); Heights Community Congress v. Veterans Admin. 732 F.2d 526, 529 (6th Cir. 1984); American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983).

For example, the Court of Appeals for the District of Columbia Circuit has held that the release of names and addresses of contractor employees would constitute a substantial invasion of privacy which would not be outweighed by the public interest in disclosure. Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300 (D.C. Cir. 1991) (Painting & Drywall). In Painting & Drywall, the Fund sought to compel HUD to divulge names and addresses of contractor employees which had been redacted pursuant to Exemption 6 of the FOIA. The court reasoned that the dissemination of this sort of information about private citizens is not what the framers of the FOIA had in mind. Id. at 1303 (citing Reporters Committee, 489 U.S. at 765). Similarly, in this case SDCAP challenges the redaction of the identities of Lovelace

employees from records released to them in response to their FOIA request. We find a significant privacy interest in the names and faces of Lovelace employees working at ITRI.<4>

2. Public Interest

Next, we must determine whether release of the names and faces would further the public interest. SDCAP argues that, in making its determination, Albuquerque did not explain the public interests it considered in performing the balancing test under Exemption 6. Appeal letter dated May 30, 1995 at 12. However, the burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Dep't of Commerce, 830 F.2d 388 (D.C. Cir. 1987). We note that SDCAP did not argue in its original request that there is a public interest in the disclosure of the requested information. Albuquerque is not required to consider a public interest argument that has not been advanced by the requester. Id. Since SDCAP has argued on appeal that there is a public interest in disclosure, we will determine whether that public interest would be served by disclosure. Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991).

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. SDCAP argues, on appeal, that there is a public interest in knowing whether the government is complying with federal law at animal research facilities. Appeal letter dated May 30, 1995 at 12. While this is a legitimate concern of the public, we find that disclosure of the names and faces of Lovelace employees does not in itself shed light on DOE's compliance or non-compliance with federal law. Painting & Drywall, 936 F.2d at 1303 (citing Reporter's Committee, 489 U.S. at 774-775).

Furthermore, SDCAP argues, a review of the names of Lovelace employees gives the public an opportunity to identify persons uniquely unqualified to receive federal funds for animal research, such as persons convicted of animal cruelty or disciplined for medical or scientific fraud or malpractice. Appeal letter dated May 30, 1995 at 12. We recognize that the names and faces could provide leads to someone seeking to determine whether persons convicted of animal cruelty, etc. are working at government owned animal research facilities. Such information is of interest to the public and could shed light on government activity. Painting & Drywall, 936 F.2d at 1303. However, this public interest, though tenuous, must be weighed against the significant privacy interest that we have identified.

3. Balancing

If an asserted public interest is found to qualify under the Reporters Committee standard, it must be accorded some measure of value so that it can be weighed against the threat to privacy. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1981). Since we have found that Lovelace employees have a significant privacy interest in their names and faces and since we have found that there is a recognizable public interest where disclosure of those names could lead to relevant information about the activities of the government, we must accord some weight to each and balance them. Id.

In Painting & Drywall, the requester sought the names of contractor employees listed on payroll records. The court recognized that disclosure of the names could lead to other relevant information about government activity, but held that this attenuated public interest in disclosure does not outweigh the employees' significant privacy interest in their names. Id. at 1303. We reach the same result in this case. We conclude that the public interest cited by SDCAP is so attenuated that it does not outweigh the significant privacy interest Lovelace employees have in their names and faces. Id. Therefore, in keeping with the D.C. Circuit's holding and in light of the overwhelming weight of authority, we find that disclosure of the names and faces of Lovelace employees would constitute a clearly unwarranted invasion of personal privacy. Id.

D. Adequacy of Search

The Office of Hearings and Appeals has stated on numerous occasions that a FOIA request deserves a

thorough and conscientious search for responsive documents. In fact, the office has remanded cases where it was evident that the search conducted was inadequate. See, e.g. James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires only that the search be reasonable, not exhaustive. "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller); accord, Weisberg v. Department of Justice, 745 F.2d at 1476, 1485 (D.C. Cir. 1984).

SDCAP requested copies of all ITRI IACUC reports required under 9 C.F.R. § 2.35 (item 2) and copies of all photos of ITRI animal research (item 4). FOIA Request Letter dated December 15, 1995. In response to item 2, Albuquerque provided a list of all dogs at ITRI between January 1, 1992 and January 27, 1995 and a compilation of shipping documents for dogs entering or leaving the facility during that time. They explained that there were no such records for other species mentioned in the Animal Welfare Act (9 C.F.R. § 2.30 et. seq.); for example, such records are not required for rodents. In response to item 4 of the request, Albuquerque provided copies of file photographs, proof sheets and reprints of publications depicting dogs, ponies, mice and rats in research situations. Appeal letter dated May 30, 1995 at 11.

In its Appeal, SDCAP argues that Albuquerque did not conduct an adequate search for documents responsive to items 2 and 4 because 1) with respect to item 2, USDA regulations require the IACUC to maintain other forms of records besides lists of dogs<5> and 2) with respect to item 4, the ITRI annual reports for 1991-1993 reflect that other species besides dogs, ponies, mice and rats were used for research.<6> Therefore, SDCAP argues, because they were not given what was required to be included in the reports requested under item 2 and because they were not given photos of animals that ITRI indicated were used in research, the search was not reasonably calculated to uncover all relevant documents. We must determine whether Lovelace's search for items 2 and 4 of SDCAP's FOIA request was reasonable.

We contacted Albuquerque for an explanation of the steps taken to locate the requested information. We spoke with Dr. Joseph Mauderly, the Director of ITRI, because the search for responsive documents was conducted under his direction. With respect to item 2 of the request, we were informed that ITRI stores all of its reports required under 9 C.F.R. § 2.35 in file drawers that were thoroughly searched in an effort to respond to the request. Everything that was found was released. Memorandum of Telephone Conversation between Kimberly Parker, OHA and Joseph Mauderly, D.V.M., ITRI (June 16, 1995). Based on this information, we find that the search for documents responsive to item 2 of the request was reasonable.

With respect to item 4 of the request, we were informed that ITRI sent all of the responsive pictures that they had. We have been informed that ITRI does not take a lot of pictures; pictures are only taken at ITRI for publications, to put on bulletin boards and for use at meetings. They are kept in two places: 1) in the Illustration Department/Technical Communications Office in a central file of photographs and 2) in the Pathology files.<7> Memorandum of Telephone Conversation between Kimberly Parker, OHA and Joseph Mauderly, D.V.M., ITRI (June 16, 1995). Dr. Mauderly explained that the first step in their search was to determine what was meant by "pictures of animals in research situations," because it was not clear from the original FOIA request letter. He explained, for example, that they may take pictures of a piece of lung tissue or a tumor from an animal and this could be considered responsive to the request. They determined that only photographs of whole animals were responsive. Dr. Mauderly then stated that he and a team of about 12 other people on his staff spent several days searching for responsive pictures in file drawers in the areas described above. As a result, over 100 pictures were released. Based on this information, we find that the search for documents responsive to item 4 of the request was reasonable.

III. Conclusion

For the reasons set forth above, we find that Albuquerque responded to SDCAP's FOIA request in a manner consistent with applicable FOIA statutory and regulatory provisions. We also find that the reports requested in item 1 are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under the DOE contractor records regulation and were therefore properly withheld. We find that the names

and faces of Lovelace employees were properly withheld from items 2, 3 and 4 pursuant to Exemption 6. Finally, we conclude that the search for documents responsive to items 2 and 4 of the request was reasonable.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Sangre de Cristo Animal Protection, Inc. on June 5, 1995 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 30, 1995

<1>This new regulation creates a change in the terminology previously used by this Office. We previously referred to a document contractually owned by the DOE as an "agency record" and therefore considered it subject to the FOIA. See Cowles Publishing Co., 24 DOE at 80,505 (citing John Lorenz, 23 DOE ¶ 80,116 (1993); Government Accountability Project, 22 DOE ¶ 80,103 (1992)). However, the Preamble to the new regulation clarifies that although documents falling within the new regulation are indeed subject to the FOIA, they are not "agency records" within the meaning of Department of Justice v. Tax Analysts, 492 U.S. 136, 142-45 (1989) (Tax Analysts). See 59 Fed. Reg. 492 63,883 (1994). Accordingly, this Office will hereinafter use the terminology of the new regulation in cases involving contractor records.

<2>10 C.F.R. § 1004.3(e) provides in pertinent part:

(1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

(2) Notwithstanding paragraph (e) (1) of this section, records owned by the Government under contract that contain . . . information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. § 552 (b).

<3>We note that while these are contractor records under 10 C.F.R. § 1004.3(e), they are not being withheld. Lovelace has claimed no privilege with regard to these particular records as it has done with regard to item 1 of the request.

<4>We note, in addition, that the names and faces of Lovelace employees are not responsive to SDCAP's initial FOIA request. It is only on Appeal that this information has been requested.

<5>For example, § 2.35(a) requires that ITRI maintain the minutes of meetings, including records of attendance, activities and deliberations, records of proposed activities and proposed significant changes in activities involving animals, records of IACUC approval or disapproval of those activities or changes in activities, and semiannual reports.

9 C.F.R. § 2.35(a).

<6>For example, the annual reports indicated that guinea pigs, hamsters, rabbits, monkeys and sheep were used in research.

<7>Pictures kept in the Pathology files depict tumors or lesions and few of them show the whole animal. Memorandum of telephone conversation between Kimberly Parker, OHA and Dr. Mauderly, ITRI (June 16, 1995).

Case No. VFA-0050, 25 DOE ¶ 80,123

July 11, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Murray, Jacobs & Abel

Date of Filing:June 15, 1995

Case Number: VFA-0050

On June 15, 1995, Murray, Jacobs & Abel (hereinafter "MJA") filed an Appeal from a determination issued to them on May 18, 1995 by the Assistant Inspector General for Investigations at the Department of Energy's Office of Inspector General (hereinafter "OIG"). In that determination, the Authorizing Official denied a request for information which MJA had filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, MJA requests that the Office of Hearings and Appeals (OHA) order the release of the withheld information.

I. Background

On May 3, 1995, MJA filed a FOIA request for the following information from the Office of Inspector General:

1. Any and all statements, memoranda or other documentation which refer to allegations that Technology Management Services, Inc. (TMS) or any of its employees has charged back to the DOE inappropriate charges on any contract being performed for the DOE.
2. Any and all statements, memoranda or other documentation which refer to Roger Legassis or any other employee of TMS in connection with the TMS contract with DOE.
3. Any and all statements, memoranda or other documentation which refer to a DOE employee named Barbara McKee in connection with the items referred to in paragraphs one or two above.
4. Any and all statements, memoranda or other documentation which refer to SoBran, Inc. of 3138 Valentino Court, Oakton, VA 22124 or Amos Otis, President of TMS in connection with the items referred to in paragraphs one or two above.
5. Any and all internal guidelines or procedures promulgated by the Inspector General to verify that charges of impropriety are not brought for improper or self serving motives.
6. Any and all statements, memoranda or other documentation regarding the OIG verifi-cation of whether any alleged charges of impropriety were made in good faith.

Request letter dated May 3, 1995 at 1.

On May 18, 1995, the OIG denied MJA's request in its entirety pursuant to Exemption 7(A) of the FOIA. The Inspector General explained that the office has not reached a final resolution of this investigation. Therefore, release of the withheld material could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. The Inspector General also determined that it is not in the public interest to release investigative information when, as in this case, release could tend to prematurely disclose investigative efforts, which might provide individuals involved in the investigation an opportunity to

fabricate defenses, destroy evidence, intimidate witnesses, or otherwise impede an investigation. See determination letter at 1. The withheld documents include a case processing form and the complainant's letter to the Inspector General.

MJA maintains that its request was improperly denied. In its Appeal, MJA claims that the case processing form and the complainant's letter can be redacted so as not to reveal sensitive investigative material. MJA also argues on appeal that items 5 and 6 of their request have no relation to Exemption 7(A).

II. Analysis

The FOIA generally requires that information held by government agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 7(A) of the FOIA allows agencies to withhold at their discretion "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(I). Clearly, the documents responsive to items 1 through 4 and 6 of the request satisfy the threshold test for application of Exemption 7. They have been compiled for a law enforcement purpose by the Inspector General who is charged with investigating and correcting waste, fraud or abuse in programs and operations administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1) - (2), 4(a) (1), (3) - (4), (d), 6(a) (1) - (4), 7(a), 9(a) (1) (E).

Our cases state that the Authorizing Official must take one of two avenues to determine whether release could reasonably be expected to cause some articulable harm. See Albuquerque Journal, 22 DOE ¶ 80,148 (1992) (Albuquerque). Under the ordinary approach, a responding office must construct a list of relevant documents with a reason for applying each exemption, then segregate and release non-exempt material. Id. The second approach permits the Authorizing Official to categorize similar information according to function. There must be a rational link between the nature of the document and the alleged likely interference in the law enforcement proceedings. Id. If the agency chooses this approach, our cases state that it must define its categories functionally, conduct a document-by-document review in order to assign documents to the proper category and then explain how release of documents in each category would interfere with its enforcement proceedings. See Firearm Training Systems, Inc., 21 DOE ¶ 80,119 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990). It appears that OIG has chosen the latter approach. We find, however, that the determination letter's explanation of the reason for withholding the requested documents falls short of the necessary specificity.

In Albuquerque, we stressed the need for the agency to describe "with some specificity" the likely connection between the harm it anticipates and release of the requested documents. In this case, the OIG has cited several potential harms which may result from release of the case processing form, allegations, intra-agency memoranda, confidential source information and other documentary evidence sought by MJA. The Inspector General's chief concerns are that premature revelation could result in the destruction of evidence, fabrication of defenses, intimidation of witnesses or other interference with its investigation. We stated in Albuquerque that similar concerns were valid but, without more, they did not constitute a complete justification for the Inspector General's withholding under Exemption 7(A). These statements could be said about virtually every scrap of paper in virtually every ongoing Inspector General investigation file. Allowing this level of generality would transmute Exemption 7(A) into the type of blanket exemption the courts have consistently stated that it is not. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236; North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989); Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987); Campbell v. Department of Health & Human Servs., 682 F.2d

256, 262 (D.C. Cir. 1982). Rather, the agency should describe "with some specificity" how the harm it claims may connect with release of the requested documents. For example, in this case, the Inspector General could support his fear of evidence destruction by explaining that the target of the investigation has previously eradicated evidentiary or potential evidentiary documents in the target's control. Another explanation might be that the Inspector General has reason to believe that he does not have all relevant documents or that he has only asked for a sample of documents. In these situations, there may be reasons to believe that the target, aware of the direction of the agency investigation, might alter or destroy relevant documents which are not in the possession of the Inspector General.

Although we have found that the Inspector General's determination is insufficient, we will address the arguments that the requester has made on appeal. MJA argues that the withheld documents can be redacted so as not to reveal sensitive investigative material. We agree with MJA that the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (1982). Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 259-62 (D.C. Cir. 1977); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of the non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate it. The Inspector General must consider, in its determination, whether any of the documents in the investigatory file contain significant non-exempt material which can be released. There is no evidence in the determination letter that the Inspector General considered whether the file contained non-exempt material which could be released. We were informed, however, that the case processing form and the complainant's letter to the Inspector General were not reasonably segregable because any non-exempt material contained in the documents is so "inextricably intertwined" with the exempt material that release of the non-exempt material would compromise the withheld material and could interfere with the investigation. Memorandum of Telephone Conversation between Kimberly Parker, OHA and Jane Payne, OIG (July 3, 1995). If MJA appeals OIG's final determination, we will review the documents to determine whether the OIG determination that the documents cannot be redacted is reasonable.<1>

MJA also argues that items 5 and 6 of their request have no relation to Exemption 7(A). We agree with MJA and find that there is no basis for withholding item 5 under Exemption 7(A). Item 5 requests "[a]ny and all internal guidelines or procedures promulgated by the Inspector General to verify that charges of impropriety are factually based and not alleged for improper or self serving motives." As long as documents are created, collected or assembled for a law enforcement purpose, Exemption 7(A) may be properly invoked. John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 155 (1989). There is no evidence in the record to suggest that these internal guidelines were created in connection with the TMS investigation or that they are even a part of the investigatory file. Therefore, we do not believe that they were created, collected or assembled for a law enforcement purpose. Accordingly, we find that item 5 does not meet this threshold test and cannot be properly withheld under Exemption 7(A).<2> Item 6 requests "[a]ny and all statements, memoranda or other documentation regarding the OIG verification of whether any alleged charges of impropriety were made in good faith." We find that this is the type of investigatory information that could be withheld under Exemption 7(A). It is created for a law enforcement purpose and if released could interfere with an ongoing investigation. However, as discussed above, OIG has not stated with specificity how the harm it claims connects with the release of the requested documents.

III. Conclusion

For the foregoing reasons, we find that the Inspector General's determination needs to specify the relationship between the withheld documents and the asserted harm. In the absence of specific reasons, based on particular facts as to why the identified harms may occur, the Inspector General must release the requested information. Accordingly, we will remand this case to the Inspector General to either release the documents or issue a new determination in accordance with the guidance in this Decision and Order.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Murray, Jacobs & Abel on June 15, 1995, is hereby granted in part as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Inspector General who shall issue a new determination consistent with this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 11, 1995

<1>Since we have found that the OIG's determination is insufficient with regard to its explanation for withholding documents under Exemption 7(A), we emphasize that we are addressing MJA's arguments solely to provide guidance for OIG's consideration on remand and for future determinations.

<2>In addition, OIG admitted that item 5 was inadvertently withheld under Exemption 7(A) and informed us that the request for that item would be reconsidered. They did not state which exemption or if any exemption would be invoked with regard to item 5. Memorandum of Telephone Conversation between Kimberly Parker, OHA and Jane Payne, OIG (June 3, 1995).

Case No. VFA-0051, 25 DOE ¶ 80,182

March 21, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Esther Samra

Date of Filing: June 16, 1995

Case Number: VFA-0051

On June 16, 1995, Esther Samra filed an Appeal from a determination issued on May 2, 1995 by the Department of Energy's Albuquerque Operations Office (DOE/AL). The determination concerned a request submitted by Ms. Samra under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Ms. Samra requests that the Office of Hearings and Appeals (OHA) order the release of the information withheld by DOE/AL.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). Department of Energy (DOE) regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a November 9, 1994 FOIA request to DOE/AL, Ms. Samra requested a copy of a particular photograph, negative No. 2048, of the "Fat Man" atomic bomb. <1> In its May 2, 1995 determination letter, DOE/AL stated that it possessed a copy of the photograph but that the photograph was classified and was being withheld pursuant to Exemption 3 of the FOIA. DOE/AL stated that the photograph contained information regarding nuclear weapon design which was classified as restricted data pursuant to an Exemption 3 statute, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq. Thus, DOE/AL noted that release of the photograph could jeopardize the common defense and security of the United States or have a significant adverse effect on the health and safety of the public.

In her Appeal, Ms. Samra argues that the photograph was inappropriately classified. Ms. Samra has submitted copies of other publicly released photographs of the internal structure of different versions of the "Fat Man" atomic bomb and claims that these photographs are nearly identical to the withheld photograph. <2> Consequently, Ms. Samra asserts that the withheld photograph should be released to her. Additionally, Ms. Samra argues that DOE/AL's claim that release of the photograph would cause harm to the defense and security of the United States is belied by the fact that DOE has publicly released similar photographs, such as the ones submitted with her Appeal.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The photograph was withheld under Exemption 3 on the grounds that it contains information classified as Confidential/Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of Security Affairs (Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA Appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.1 (December 20, 1991). In his review of this Appeal, the Director instructed the Office of Declassification (OD) to reexamine the photograph at issue. OD reexamined the withheld photograph under the current classification guidelines including those guidelines released at the Secretary of Energy's June 27, 1995 news conference. After OD's reexamination of the withheld photograph, the Director determined that the photograph was properly classified as containing nuclear weapons design information and that it should be withheld.

With regard to Ms. Samra's arguments regarding the publication of photographs similar to the withheld photograph and the lack of harm to the national defense, the Director notes that the publicly available photographs submitted by Ms. Samra are superficially similar to the withheld photograph. However, the Director notes that the withheld photograph contains a clear and accurate view of currently classified nuclear weapons design features not revealed in the publicly available photographs. Consequently, Ms. Samra's arguments regarding the prior release of information contained in the withheld photograph or the lack of potential harm to the national defense are inapposite.

In conclusion, the Director, upon review by OD, found that DOE/AL properly classified and withheld the photograph pursuant to Exemption 3 of the FOIA. Consequently, Ms. Samra's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Esther Samra on June 16, 1995, Case Number VFA-0051, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 21, 1996

<1>"Fat Man" was the name given to the United States' first implosion triggered atomic bomb.

<2>The photographs are from two books, City of Fire, by James Kunetka and The Making of the Atomic Bomb, by Richard Rhodes.

Case No. VFA-0052, 25 DOE ¶ 80,124

July 25, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Blumberg, Seng, Ikeda & Albers

Date of Filing:June 26, 1995

Case Number:VFA-0052

On June 26, 1995, Michael J. Seng of the law firm of Blumberg, Seng, Ikeda & Albers (Seng) completed its filing of an Appeal from a determination issued on May 17, 1995 by the Office of the Inspector General of the Department of Energy (OIG). The OIG determination was issued in response to a request for documents submitted by Seng under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, the OIG denied Seng's request in part. The OIG redacted the names of subjects, sources, witnesses and investigators, as well as personal identifiers and other indicia, pursuant to Exemptions 6 and 7(C) before releasing the information to Seng. In his Appeal, Seng asks that the DOE provide full disclosure of the names of these individuals.

The FOIA requires that agency records held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents which may be exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On April 18, 1995, Seng requested from the OIG "the entire file" of documents related to or generated in connection with the OIG's investigation of the death of a particular individual at the Naval Petroleum Reserves in Elk Hills, California. The OIG's investigation focused on the connection, if any, between the death and alleged violations of the Clean Water Act, 33 U.S.C. § 1251, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601. On May 17, 1995, the OIG released a redacted copy of the requested records from which the names of subjects, sources, witnesses and investigators, as well as personal identifiers and other indicia, were deleted pursuant to Exemptions 6 and 7(C) of the FOIA.

The OIG states that it invoked Exemptions 6 and 7(C) to protect the names of Federal employees, subjects, sources and witnesses. In addition to the names, gender-linked pronouns referring to individuals whose identities the OIG sought to protect and other information which could possibly be used to glean the identity of individuals in the above-named categories were withheld. The OIG justified withholding the names under the Exemptions cited on the grounds that release would violate the privacy of employees and tend to disclose the identity of the personnel who are entitled to be free from harassment, intimidation and other personal intrusions. See OIG May 17, 1995 Determination at 1. In addition, the OIG determined that there was no public interest served by release of this information.

In the present Appeal, Seng contends that the disclosure of the redacted identifying information "would be in the public interest, would not cause any additional intrusion into the individuals' privacy interests and could diminish otherwise necessary intrusions." Letter from Michael J. Seng, Esq. to William H. Garvie, Assistant Inspector General for Investigations at 1 (June 15, 1995).

II. Analysis

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases we would analyze the withholding only under Exemption 7(C), the broader of the two Exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992); James L. Schwab, 21 DOE ¶ 80,117 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990); Jerry O. Campbell, 17 DOE ¶ 80,132 (1988). Exemption 6 allows an agency to withhold information if its release would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). By contrast, Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes, if its release could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). It is only necessary to address the application of Exemption 7(C) to these documents since all of the documents were compiled for law enforcement purposes and any document which satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Similarly, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The Exemption 7 "law enforcement" exception to the requirement of mandatory release of information under the FOIA encompasses compliance with both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). The OIG is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). In the present case, the OIG investigated alleged violations of environmental laws at the Naval Petroleum Reserves in Elk Hills, California. There is little doubt that the OIG documents generated in conjunction with the investigation were compiled for law enforcement purposes.

In determining whether the release of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, the courts have used a balancing test which weighs the privacy interests that would be infringed against the public's interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989). We have previously determined that OIG investigators have a "significant interest in retaining the capability to perform their tasks effectively by avoiding untoward annoyance or harassment that might result from the release of their names." Lloyd R. Makey, 20 DOE ¶ 80,109 (1990), quoting New England Apple Council v. Donovan, 725 F.2d 139, 143 (1st Cir. 1984). Because exposure of their identities would compromise their privacy interests while at the same time diminish their effectiveness as investigators, we have determined in those cases that investigators' names are exempt from disclosure pursuant to Exemption 7(C).

Similarly, we have found that subjects, sources and witnesses mentioned in OIG files have a strong privacy interest in remaining anonymous. James L. Schwab, 21 DOE ¶ 80,117 (1991). Exemption 7(C) affords broad privacy rights to suspects and witnesses. Moreover, the public interest in this context favors protection of identities rather than disclosure, in order to ensure that witnesses continue to provide information voluntarily for law enforcement investigations. Releasing the names and other personal identifiers of those who are interviewed by the OIG may chill future witnesses and thus hamper future investigations. K.D. Moseley, 22 DOE at 80,551. We therefore also find that the OIG properly withheld the names of subjects, sources and witnesses. Accordingly, we will deny Seng's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Blumberg, Seng, Ikeda & Albers on June 15, 1995, Case Number VFA-0052, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 25, 1995

Case No. VFA-0055, 25 DOE ¶ 80,126

August 4 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Richard W. Miller

Date of Filing: July 7, 1995

Case Number: VFA-0055

On July 7, 1995, Richard W. Miller, on behalf of his client Foley Company, filed an Appeal from a Determination issued to him by the Freedom of Information Officer at the Department of Energy's (DOE) Strategic Petroleum Reserve Project Management Office (SPRO). In that Determination, the Authorizing Official released some documents but withheld 64 documents pursuant to Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Miller requests that the Office of Hearings and Appeals (OHA) order the release of all of the withheld documents.

I. Background

On November 1, 1994, Mr. Miller filed a FOIA request for all documents related to Solicitation No. DE-FB96-92P016055 dated October 10, 1991, Contract No. DE-AC96-92P016055, and the Sandia National Laboratories Contract No. DE-AC04-76 DP99189. In a series of determinations, SPRO identified and released hundreds of responsive documents but withheld numerous other documents under Exemption 5. In considering two prior appeals filed by Mr. Miller regarding SPRO's responses to his request, we determined that SPRO had inadequately justified its withholding under Exemption 5 and failed to segregate possibly factual material from the withheld documents and remanded the matter to SPRO. See Richard W. Miller, 25 DOE ¶ ____ (1995) (Miller). However, on June 23, 1995, prior to the issuance of our Decision and Order SPRO issued yet another determination, which is the subject of this Appeal. In that Determination SPRO withheld 64 documents under Exemption 5 and provided the same type of justification as it had in its previous determinations. Mr. Miller challenges the withholding of those 64 documents.

II. Analysis

The FOIA generally requires that information held by government agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In the Determination at issue in this Appeal, SPRO withheld 64 documents under Exemption 5 of the FOIA and provided Mr. Miller with the same categoric explanations as it did in its prior determinations. We have contacted SPRO and inquired as to the status of the withheld documents. In light of our earlier Decision and Order, SPRO has agreed to review all documents at issue in this Appeal and issue a more detailed determination. See Memorandum of Telephone Conversation between Tammy James, FOIA

Officer and Ariane Cerlenko, OHA Staff Attorney (July 21, 1995). We will therefore remand this Appeal to SPRO for a new determination consistent with our prior decision. See Miller. Specifically, SPRO should either release to Mr. Miller all of the documents responsive to his request or issue a new determination supporting the withholding of the documents. For each document withheld in full or in part, SPRO should include a statement of the reason for denial, a brief explanation of how the exemption applies to the record withheld, and a statement of why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). SPRO should further review each document for the possible segregation of non-exempt material. See 10 C.F.R. § 1004.7(b)(3). In making its determination, SPRO may group similar documents together, e.g., price negotiation memoranda, and provide one justification for that particular group of documents.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard L. Miller on July 7, 1995, Case No. VFA-0055, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) The matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office which shall either release the documents withheld in its Determination or issue a new determination in accordance with the guidance in the foregoing Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 4, 1995

Case No. VFA-0056, 25 DOE ¶ 80,125

August 3, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Esther Lyons

Date of Filing: July 11, 1995

Case Number: VFA-0056

On July 11, 1995, Esther Lyons (Lyons) filed an Appeal from a determination issued to her on June 6, 1995 by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy. In her Appeal, Lyons asserts that Oak Ridge failed to perform an adequate search for responsive documents in its possession regarding a Freedom of Information Act (FOIA) Request she submitted on January 21, 1995.

I. Background

On January 21, 1995, Lyons filed a FOIA Request with the Albuquerque Operations Office (Albuquerque) of the Department of Energy requesting copies of all documents containing information pertaining to her father, Michael D. Lyons. Albuquerque, as part of its search for responsive documents, subsequently forwarded her Request to Oak Ridge. Oak Ridge, in its June 6, 1995 Determination Letter, stated that it could not find any documents which were responsive to her Request.

In her Appeal, Lyons argues that Oak Ridge conducted an inadequate search for responsive documents. Lyons states that her father operated a mine which supplied beryllium ore to the Atomic Energy Commission (AEC), a DOE predecessor, and operated two companies, Beryl Ores Co. and Radio Communication Co., which did business with the AEC. Given this factual background, Lyons argues that responsive documents must exist regarding her father. <1>

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for

responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

In reviewing the Appeal, we contacted officials at Oak Ridge to ascertain the extent of the search that had been performed. Oak Ridge informed us that Lyons' Request provided only her father's name and no other information. Consequently, Oak Ridge, looking for references to Lyons' father's name, made a search of its files at the facilities most likely to contain responsive records. Oak Ridge conducted searches of its files at the K-25 site, Y-12 site, Oak Ridge Associated Universities, Oak Ridge National Laboratories and a records holding center in Georgia. At none of these facilities were responsive documents found. See

Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, Oak Ridge, and Richard Cronin, OHA Staff Attorney (July 24, 1995). Given the information available to Oak Ridge, we find that it conducted an adequate search in response to Lyons' FOIA Request. However, on receiving a copy of the Appeal and further information from Lyons regarding her father's business operations with the AEC, Oak Ridge has agreed to conduct another search using this additional information. Consequently, we will remand this matter to Oak Ridge so that it may conduct a further search for responsive documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Esther Lyons on July 11, 1995 is granted in part as set forth in the above Decision and is denied in all other respects.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 3, 1995

<1>None of the additional factual information provided in Lyons' Appeal was included in her Request. See Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, Oak Ridge, and Richard Cronin, OHA Staff Attorney (July 24, 1995).

Case No. VFA-0058, 25 DOE ¶ 80,127

August 8, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert S. Foote

Date of Filing: July 10, 1995

Case Number: VFA-0058

On July 10, 1995, Robert S. Foote filed an Appeal from a Determination issued to him on June 8, 1995, by the Office of Health and Environmental Research (OHER) in the Office of Energy Research of the Department of Energy (DOE). In that determination, the OHER denied a request for information filed by Mr. Foote under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 26, 1994, Mr. Foote filed three separate FOIA requests in which he sought certain information relating to the review of research proposals he submitted to the DOE in 1989, 1990, and 1993. The present Appeal concerns his request for the names of panel members reviewing research proposals. On January 18, 1995, the OHER denied Mr. Foote's request for this information.<1> On March 16, 1995, after considering an Appeal filed by Mr. Foote from the January 18 Determination, we remanded the matter to the OHER for a new Determination that would explain in greater detail the reasons for withholding the panelists' names. See Robert S. Foote, 24 DOE ¶ 80,169 at 80,673 (1995).

On June 16, 1995, the OHER issued a new Determination which withheld the panelists' names under Exemption 6 of the FOIA. Mr. Foote then filed the present Appeal. Mr. Foote contends that (1) there is no cognizable privacy interest within the meaning of Exemption 6, and (2) there is a strong public interest in disclosure of the panelists' names in order to ensure that the government makes unbiased decisions. For these reasons, Mr. Foote requests that the OHA direct the OHER to release the withheld information.

II. Analysis

The only issue before us is whether OHER properly withheld the panelists' names requested by Mr. Foote under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."

Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a substantial privacy interest would be invaded by the disclosure of the record. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d at 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990). If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of Housing and Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991) (Hopkins); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990) (FLRA). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70. Determination of the third issue should include an evaluation of whether that public purpose may be accomplished by alternative and less intrusive means. Church of Scientology v. Department of the Army, 611 F.2d 738, 746 (9th Cir. 1979); Douglas L. Miller, 13 DOE ¶ 80,122 at 80,573 (1985).

A. Privacy Interest

OHER found a strong privacy interest in the panelists' names and stated that releasing the information could expose the individuals to "persecution."<2>

In the past we have considered this issue and determined that the names of DOE evaluators of contract proposals should be withheld under Exemption 6. ML&B, 20 DOE at 80,687. In that case we concluded that the DOE evaluators had significant privacy interests in avoiding the public disclosure of their names, disclosure of which would subject them to unwanted public inquiries. Id.; see Knolls Action Project, 19 DOE ¶ 80,103 (1989) (Knolls) (withholding the names of radiation inspectors who due to the nature of their work would likely be contacted by the public should they be identified); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Thus, we find that the denying official correctly identified a significant privacy interest under Exemption 6.

B. Public Interest in Disclosure

Once a privacy interest is identified, we must balance that interest against the public interest in releasing the document. Reporters Committee, 489 U.S. at 772-73. In Reporters Committee, the Supreme Court greatly narrowed the scope of public interest in the FOIA. The Court distinguished between the benefits to the public which may result from the release of information and those benefits that Congress sought to provide the public when it enacted the FOIA. The Court found that, in the FOIA context, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Id. The Court identified the core purpose of the FOIA as "public understanding of the operations and activities of the government." Id. at 775. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of the government from the release of the document, its disclosure is not "affected with the public interest." Id.

In his Appeal, Mr. Foote argues that there is a substantial public interest in the public confirming that the functions of government remain unbiased. Although there may be a public interest in determining whether panelists who review grant proposals possess conflicts of interest, the Appellant's assertion that release of their names would advance this interest is mere speculation. Before panelists review a grant proposal, they are required to complete conflict of interest statements. These statements, together with lists of affiliations or interests which might be construed as creating a conflict of interest, are reviewed by the DOE to confirm that no such conflict exists. Thus, we find that disclosure of the panelists' names is not necessary

to serve this purpose.

The burden of establishing that disclosure would serve the public interest is on the requester . Carter v. United States Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987). In the past we have found that the names of source evaluation board members and radiation inspectors would not shed light on the operations or activities of the government. See ML&B, 20 DOE at 80,687; Knolls, 19 DOE at 80,508. Without a public interest rising above a mere speculation, we find that there is no public interest in disclosure of the panelists' names.

III. Conclusion

The panelists' names were properly withheld under Exemption 6. The panelists have a significant privacy interest in their names and any public interest in their disclosure is minimal. Balancing the significant privacy interest against the minimal public interest, we conclude that the names should not be released. Therefore, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Robert S. Foote on July 10, 1995, Case Number VFA-0058, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 8, 1995

<1>OHER released some documents that were responsive to other portions of the Appellant's request.

<2>Further, OHER noted that the clear expectation of the panelists was that their names would not be released and that they would be reluctant to serve on panels if their identities were made public. Moreover, panelists would be less likely to provide their frank and candid technical opinions. OHER concluded that the release of the panelists' names would diminish the quality of the agency's decision-making process. For these reasons, we previously determined that the identities of similar panelists fall within the scope of Exemption 6. See Morgan, Lewis & Bockius, 20 DOE ¶80,165 (1991) (ML&B).

Case No. VFA-0059, 25 DOE ¶ 80,128

August 10, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jay M. Baylon

Date of Filing: July 13, 1995

Case Number: VFA-0059

On July 13, 1995, Mr. Jay M. Baylon filed an Appeal from determinations issued to him by the Freedom of Information and Privacy Act Division of the Office of Administration Services (FOI Office) of the Department of Energy (DOE) and by the DOE's Office of Arms Control and Nonproliferation (Arms Control). Those determinations granted in part the request for information that Mr. Baylon submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to conduct an additional search for information responsive to the appellant's request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

In his FOIA request dated March 20, 1995, Mr. Baylon sought all agency documents pertaining to Westinghouse Electric Corporation's (Westinghouse) transfer of nuclear-related technology to the People's Republic of China (China). Particularly, Mr. Baylon asked for copies of the following documents:

(1) Any application since 1980 filed by Westinghouse pursuant to 10 C.F.R. Part 810 for the transfer of nuclear-related technology to the China.

(2) Any authorizations for transfer of nuclear-related technology issued by the DOE since 1980 (not limited to Westinghouse).

(3) Any clarifications, interpretations, explanations or supporting information concerning the scope, legality, or effectiveness of the above listed items.

(4) Any correspondence from China in 1994 and 1995 relating to any of the above.

In its determination letter of May 24, 1995, Arms Control stated that certain documents responsive to items (1), (2) and (3) of Mr. Baylon's request were either enclosed or currently available in the Freedom of Information Reading Room at DOE headquarters. The office further explained that the remainder of materials pertaining to items (1) and (2) either had originated in another executive branch agency, which will issue a separate Determination on Mr. Baylon's FOIA request, or were classified and are now

undergoing a declassification review, the results of which will be provided to Mr. Baylon at the review's completion.<1> Regarding Mr. Baylon's fourth request, the office indicated that it had no documents. In a letter dated June 28, 1995, the FOI Office reiterated the response made earlier by Arms Control and explained Mr. Baylon's right to appeal the adequacy of DOE's search.

In his Appeal, Mr. Baylon contests the adequacy of the DOE's search for responsive information. In support of his assertion that additional responsive documents exist, Mr. Baylon cites a newspaper article and a DOE report: "China Trip Ends with Signing of Energy Deals," New York Times (Feb. 25, 1995), and "Presidential Mission on Sustainable Energy and Trade to China Led by Secretary of Energy Hazel O'Leary," DOE Trip Report (Feb. 15-24, 1995). This Appeal, if granted, would require DOE to conduct a further search for responsive documents.<2>

II. Analysis

The OHA has consistently stated that an FOIA request warrants a thorough and conscientious search for responsive documents. See W.R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have remanded cases where it was evident that the search conducted was inadequate. See, e.g., Cowles Publishing Co., 16 DOE ¶ 80,136 (1987); Hideca Petroleum Corp., 9 DOE ¶ 80, 108 (1981). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing this Appeal, we contacted the FOI Office at DOE headquarters as well as Arms Control, the office to which the request was originally referred, to ascertain the extent of the search that had been performed.<3> After receiving the request, Arms Control investigated its in-house and archived records for responsive documents. Zander Hollander of Arms Control, who conducted the search, remarked that in the past year a flood of interest in China and 10 C.F.R. Part 810 had prompted him to segregate materials relevant to that issue. In the process of compilation, he had examined all his folders and files and was confident that the resulting collection was comprehensive. This effort greatly facilitated his search for the items identified in Mr. Baylon's FOIA request.<4> From these conversations with Mr. Hollander as well as with Doug Downen of Arms Control who stressed Mr. Hollander's experience in directing FOIA-related searches, it appears that Arms Control conducted an adequate search of its records.

However, there is ample evidence to suggest that the FOI Office should have directed Mr. Baylon's FOIA request to other DOE Offices involved in nuclear-related transfers. Jennifer Houghton, the FOI officer responsible for processing the request, stated that subsequent to DOE's initial determinations at least two other DOE Offices, the Office of General Counsel (GC) and the Office of Nuclear Energy (NE), became aware of the FOIA request and have initiated searches for responsive documents. According to representatives of NE and GC, those offices have either already identified responsive documents or believe they may uncover relevant materials after further searches. See Memoranda of Telephone Conversations between Allison Varzally, OHA, and Chuck Dougherty, NE (July 24, 1995), between Allison Varzally and Jennifer Houghton, FOI Office (July 27, 1995) and between Allison Varzally, and Joe Mahaley, GC (July 25, 1995).

In the present case, discussions between Mr. Baylon and the DOE have identified possibly responsive documents which were not discovered in the original search.<5> Consequently, we will remand Mr. Baylon's request so that a thorough and conscientious search can be made for responsive documents.

Accordingly, the Appeal filed by Jay M. Baylon shall be granted. The matter will be remanded to the FOI Office for an additional search for responsive documents that shall include, but not necessarily be limited to, the Office of Nuclear Energy and the Office of General Counsel. The FOI Office shall identify all documents relevant to Mr. Baylon' request and either release them or provide adequate justification for

withholding any portion of them.

It Is Therefore Ordered That:

(1) The Appeal filed by Jay M. Baylon on July 13, 1995, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is remanded to the FOI Office which shall, in accordance with the foregoing Decision, coordinate an additional search for responsive documents.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 10, 1995

<1>/ The review determines whether such documents should remain classified and be withheld under an FOIA exemption or should be released to the requestor. In light of this procedure, the FOI office has followed those provisions set forth in 10 C.F.R. § 1004.6(b)(c) and has referred records marked as classified to the Director of Classification (now Director of Declassification) who will "advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section."

<2>/ Mr. Baylon raised several matters which are not central to his charge that DOE conducted an inadequate search. First, Mr. Baylon argues that DOE must cite the specific Executive Order under which it is undertaking its declassification review and should explain the general nature of the review. Second, for those documents referred to other agencies for a determination, Baylon claims DOE must indicate "(1) which Executive Branch agencies are conducting such reviews; (2) the appropriate individuals at such Executive Branch agencies responsible for such reviews and available for discussion; (3) whether the reviews are being conducted in accordance with either 10 C.F.R. § 1004.4(f) or 1004.6(e); and (4) when the reviews will be completed." Third, Mr. Baylon claims that the DOE failed to render a complete determination regarding classified documents within the FOIA statutory deadlines. See 10 C.F.R. § 1004.5(d)(1). These issues lie outside the scope of this Office's jurisdiction. Section 1004.8(a) of the DOE Regulations states that the Office of Hearings and Appeals (OHA) has jurisdiction to consider Freedom of Information Act Appeals in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request

...or when the Freedom of Information Officer has denied a request for waiver of fees.

10 C.F.R. § 1004.8(a), 53 Fed. Reg. 14660 (May 3, 1988).

Moreover, we find nothing either in the FOIA or in DOE regulations to support the Appellant's claim that the DOE must explain the basis or nature of its declassification review. The Appellant is correct that DOE must identify the other agencies to which it has referred the FOIA request, if their identity is not classified, but it need not provide the other information claimed by the appellant. See 10 C.F.R. § 1004.4(f). Although the circumstances for an administrative appeal do not exist with respect to those portions of his

request to which the DOE has not yet responded, Mr. Baylon has the right to file a complaint with the appropriate federal district court on this issue. See 5 U.S.C. § 552(a)(4)(B), (6)(C).

<3>/ See Memoranda of Telephone Conversations between Allison Varzally, Office of Hearings and Appeals (OHA) Analyst, and Jennifer Houghton, FOI Office (July 24 and 27, 1995) between Allison Varzally and Doug Downen, Arms Control (July 24, 1995), and between Allison Varzally and Zander Hollander, Arms Control (July 24, 1995).

<4>/ John Kyte, a representative of Mr. Baylon's attorney, claims that he visited the FOI Reading Room on two separate occasions and was unable to locate responsive documents dated after 1992. Ms. Houghton explained that she provided all responsive documents supplied by

Arms Control to a representative of Mr. Baylon's attorney, presumably Mr. Kyte. Responsive documents for years after 1992 were undergoing a declassification review or had not yet been discovered by the DOE and were therefore not provided to him.

<5>/ Some of the documents identified by the appellant may be among those undergoing declassification review. It would aid requesters in determining whether a search was adequate if the documents undergoing review were identified or described to the requester, provided that could be done without compromising the reasons for their being classified.

Case No. VFA-0060, 25 DOE ¶ 80,129

August 15, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Greg Long

Date of Filing:July 14, 1995

Case Number: VFA-0060

On July 14, 1995, Greg Long of Philomath, Oregon filed an Appeal from a determination issued on June 29, 1995 by the Albuquerque Operations Office (Albuquerque Operations) of the Department of Energy (DOE). That determination denied in part Mr. Long's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records which are held by federal agencies, and which have not been made public in an authorized fashion by a covered branch of the federal government, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 5552(b)(1)-(b)(9). See also 10 C.F.R. § 1004. 10(b)(1)-(b)(9). The DOE regulations further provide that documents which may be exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a letter dated March 23, 1995, Mr. Long filed a FOIA request with Albuquerque Operations seeking two related categories of information. The first category concerns the investigation of a mysterious and unexplained "hum" reported by many people in and around Taos, New Mexico. In particular, Mr. Long noted that Sandia National Laboratory had been involved in exploring this phenomenon starting in

1991. The second category asks for documents in which Sandia personnel explored similar "hums" elsewhere in New Mexico.

Albuquerque Operations reported to Mr. Long on June 29, 1995 that Sandia National Laboratory had provided one responsive record for each category. The first, the "Electromagnetic Test Report, Electromagnetic Investigation of the Taos Hum, Test Report, dated September 27, 1994," was released in its entirety. The second document, a draft report on "other possible sources of the Taos 'Hum.'" was withheld in its entirety. Albuquerque Operations explained that the report was never finalized because funding for the project had been terminated. Accordingly, Albuquerque Operations withheld the document under the deliberative process privilege of Exemption 5 of the FOIA on the grounds that the document contained preliminary opinions and findings which were never finalized. 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Albuquerque Operations did provide Mr. Long with findings done by a team at the University of New Mexico who were working in conjunction with the Sandia National Laboratory team.

Mr. Long has appealed the withholding of the draft report.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this section exempts "those documents, and only those documents, normally privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Among these privileges is the "executive" or "deliberative process" privilege. This is the privilege that Albuquerque Operations relied upon in withholding information in this case under Exemption 5.

The "executive" privilege shields from mandatory disclosure documents, advisory in nature, which are created during agency consideration of proposed action, and which are part of the decision-making process. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Thus, application of the privilege "under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin., 610 F.2d 70, 80 (2d Cir. 1979) (Lead Industries).

As a result, to withhold an intra- or inter-agency document under the "executive" privilege of Exemption 5, it must be both predecisional, i.e., "antecedent to the adoption of agency policy," and deliberative, i.e., "it must actually be related to the process by which policies are formulated." Jordan v. Department of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978). See also Assembly of California v. Department of Commerce, 968 F.2d 916, 920-21 (9th Cir. 1992); Formaldehyde Inst. v. Department of Health and Human Services, 889 F.2d 1118, 1122 (D.C. Cir. 1989). That is to say, a document must not only be prepared as part of agency consideration of some matter, it must also "bear on the formulation or exercise of policy-oriented judgment." Ethyl Corp. v. Environmental Protection Agency, 25 F.3d 1241, 1248 (4th Cir. 1994); Petroleum Info. Corp. v. Department of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992); Playboy Enterprises v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982). While the Albuquerque Operations determination in this case explains the first prong of this test, it does not address the second. Therefore, the determination does not adequately explain its basis for withholding and, we will remand this matter to Albuquerque Operations for a new, more detailed determination.

In making a further determination in this case, Albuquerque Operations should also consider the fact that even if a document meets the criteria set forth above, the document may not be simply withheld in its entirety. The FOIA, as implemented by 10 C.F.R. § 1004.10, requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See The Oak Ridger, 21 DOE ¶ 80,120 at 80,564-65 (1991) (and cases cited therein); Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989) (and cases cited therein). In the context of the "executive" privilege of Exemption 5, this means that non-deliberative material ordinarily should be released to the requester. Environmental Protection Agency v. Mink, 410 U.S. 73, 87-91 (1972). The only exceptions to the command of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries, 610 F.2d at 85, or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id. <1>In this case, it appears that no attempt was made to segregate and release non-exempt material. In addition, we note that the withheld document contains factual statements and graphs that do not appear to be deliberative. This non-exempt material should be released to Mr. Long.

On remand, Albuquerque Operations should also consider whether Exemption 5 can be applied to this draft in a manner which is consistent with the guidance contained in the Memorandum from Janet Reno, Attorney General of the United States, to Heads of Departments and Agencies (October 4, 1993) (Reno Memorandum). See also Memorandum from William Jefferson Clinton, President of the United States, to Heads of Departments and Agencies, 29 Weekly Comp. Pres. Doc. (No. 40) 1999, 2000 (Oct. 11, 1993)

(noting the importance of FOIA and its centrality to the Reinventing Government initiative). That memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. See Reno Memorandum, at 1, 2 (Oct. 4, 1993). As the Attorney General stated, an agency should withhold information "only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not be withheld from a FOIA requester unless it need be." Id. See also Mapother v. Department of Justice, 3 F.3d 1533, 1537-38 (D.C. Cir. 1993) (before agency attempts to withhold factual material under deliberative process privilege, withholding must be examined in light of goals and policies of privilege); Wolfe v. Department of Health and Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc) (same). Thus, the Attorney General's standard applies a presumption in favor of disclosure unless an agency articulates a reasonably foreseeable specific harm to a specific interest protected by an exemption. Albuquerque Operations should take account of the Attorney General's memorandum on remand. See U.S. Solar Roof, 25 DOE ¶ 80,112 at 80,530 (1995); William D. Lawrence, 24 DOE ¶ 80,139 at 80,599 (1994).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Greg Long of Philomath, Oregon, Case No. VFA-0060, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Director of the Office of Public Affairs of the Albuquerque Operations Office, who shall either release information or issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 15, 1995

<1>In addition, information which has been made available to the public ordinarily may not be withheld under Exemption 5 because the authorized release of such information generally constitutes a waiver of the application of the exemption. See United States v. Metropolitan St. Louis Sewer District, 952 F.2d 1040, 1045 (8th Cir. 1992); Lawyers Alliance for Nuclear Arms Control - Philadelphia Chapter v. Department of Energy, 766 F. Supp. 318, 322-23 (E.D. Pa. 1991); Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992).

Case No. VFA-0061, 25 DOE ¶ 80,130

August 22, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Case: Murray, Jacobs & Abel

Date of Filing: July 17, 1995

Case Number: VFA-0061

This Decision and Order reconsiders a Decision and Order issued by the DOE's Office of Hearings and Appeals (OHA) to Murray, Jacobs & Abel (MJ&A) on July 11, 1995. Murray, Jacobs & Abel, 25 DOE ¶ _____, Case No. VFA-0050 (July 11, 1995). The July 11, 1995 Decision and Order concerned an appeal by MJ&A from a determination issued by the DOE's Assistant Inspector General for Investigations (Assistant IG) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, the Assistant IG withheld responsive material pursuant to Exemption 7(A) of the FOIA, which protects "records or information compiled for law enforcement purposes ... to the extent that [their] production ... (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(I). The July 11, 1995 Decision and Order granted the appeal in part and remanded the matter to the Assistant IG for a further determination.

On July 17, 1995, the Office of the Inspector General (OIG) requested that the OHA reconsider the July 11, 1995 Decision and Order. In response to the request, the OHA contacted MJ&A to determine if it wished to submit comments on the OIG's requested reconsideration. MJ&A advised the OHA that it wished to submit comments and would do so by August 10, 1995. The OHA received MJ&A's comments on that date.

I. Background

A. The FOIA and Exemption 7(A)

The FOIA generally requires that information held by government agencies be released to the public upon request. Congress has provided nine exemptions, pursuant to which information may be withheld. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 7(A) of the FOIA allows agencies to withhold at their discretion "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(I).

B. MJ&A's FOIA Request

MJ&A's FOIA request stated that it concerned "an investigation being conducted by the ... OIG involving Technology & Management Services, Inc. (TMS) D.O.E. Contract No. DE-AC01-95FE63433 and Subcontract No. S-SB#-000-001." MJA requested the following six categories of documents:

1. Any and all statements, memoranda or other documentation which refer to allegations that TMS or any of its employees has charged back to the DOE inappropriate charges on any contract being performed for the D.O.E.
2. Any and all statements, memoranda or other documentation which refer to Roger Legassie or any other employee of TMS in connection with the above-referenced contract or subcontract.
3. Any and all statements, memoranda or other documentation which refer to a D.O.E. employee named Barbara McKee in connection with the allegations referred to in paragraph one or two above.
4. Any and all statements, memoranda or other documentation which refer to SoBran, Inc. of 3138 Valentino Court, Oakton, VA 22124 or Amos Otis, President of said company in connection with the allegations referred to in paragraphs one, two or three above.
5. Any and all internal guidelines or procedures promulgated by the Inspector General to verify that charges of impropriety are factually based and not alleged for improper or self serving motives.
6. Any and all statements, memoranda or other documentation regarding the OIG verification of whether any alleged charges of impropriety were made in good faith.

C. The Assistant IG's Determination

In his determination, the Assistant IG stated that documents responsive to the request were being withheld pursuant to Exemption

7(A). The Assistant IG stated that responsive documents included a case processing form and the complainant's letter to the OIG.

The Assistant IG stated that "release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding." More specifically, the Assistant IG stated that release of the withheld material was not in the public interest because it could prematurely disclose investigative efforts, provide individuals involved in the investigation an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede an appropriate resolution of the investigation.

D. The MJ&A Appeal

MJ&A appealed the determination on two grounds. First, MJ&A argued that the IG was required to provide a redacted form of the case processing form and the complainant's letter. Second, MJ&A argued that Exemption 7(A) did not apply to Items 5 and 6 of the request.

E. The OHA July 11, 1995 Decision and Order

In the July 11, 1995 Decision and Order, the OHA held that the Assistant IG had not adequately supported his determination to withhold material pursuant to Exemption 7(A). The OHA held that the determination had not adequately described the documents or explained how their release would interfere with the instant investigation. July 11, 1995 Decision and Order, slip op. at 4, citing Albuquerque Journal, 22 DOE ¶ 80,148 (1992) (Albuquerque). The OHA also noted that the Assistant IG was in the process of making a new determination with respect to Item 5 of the request. Accordingly, the OHA determined that the request should be remanded to the Assistant IG for a new determination with respect to all six items of the request.

F. The OIG Reconsideration Request

The OIG requests that the OHA reconsider the July 11, 1995 Decision and Order based on the OIG objections to Albuquerque, which are set forth in a 1993 OIG letter from the OIG to the Albuquerque

Journal.<1>The 1993 letter sets forth the OIG's opinion that federal court cases do not require the type of showing specified in Albuquerque. The OIG's position is that (i) under federal court cases, the OIG need only show that the release of specified categories of information could as a general matter interfere with enforcement proceedings and (ii) the OIG made that showing with respect to the information requested by MJ&A.

G. The MJ&A Comments

The MJ&A comments make three arguments in opposition to the OIG's reconsideration request. First, MJ&A notes that the OIG request for reconsideration refers to a telephone conversation between the OIG and the OHA, and MJ&A contends that the conversation constituted an impermissible ex parte contact. Second, MJ&A contends that the reconsideration request does not address specific documents. Third, MJ&A contends that the OIG has not justified its application of Exemption 7(A) to Items 5 and 6.

II. Analysis

A. MJ&A's Contention that an Impermissible Ex Parte Contact Occurred

As an initial matter, we address MJ&A's comment that an impermissible ex parte contact occurred. The OIG reconsideration request refers to a telephone conversation in which the OIG objected to Albuquerque and cited its July 1993 letter.

MJ&A's position that an impermissible ex parte contact occurred is without merit. Neither the FOIA nor the implementing DOE regulations prohibit ex parte contacts between an authorizing official and the reviewing authority. Thus, although OHA provided MJ&A with a copy of both the memorandum referring to the conversation and the 1993 letter, the OHA was not required to do so.

B. The Merits of the OIG's Reconsideration Request

As explained below, we have concluded that the OIG is correct in its assertion that Albuquerque is inconsistent with federal court decisions and should be reversed. In addition, we have concluded that the OIG has sufficiently justified the application of Exemption 7(A) to the sought material, except as to Item 5. As mentioned above, the Assistant IG is in the processing of issuing a new determination with respect to Item 5. Accordingly, we have concluded that the July 11, 1995 Decision and Order should be modified to limit the remand to Item 5.

1. The Standard for Assessing the Sufficiency of an Exemption 7(A) Justification for Withholding

In the July 11, 1995 Decision and Order, we found, in keeping with Albuquerque, that the OIG's determination was insufficient because it did not explain how the facts of this particular enforcement proceeding warranted a conclusion that the release of the material at issue was likely to interfere with the proceeding. The OIG stated that release of the withheld material could result in the destruction of evidence, fabrication of defenses, intimidation of witnesses or other interference with its investigation. We stated that these concerns were valid but did not constitute a complete justification for withholding the material. We stated that the OIG should describe, based on the particular facts of the case, how the harm it claimed would flow from the release of the requested documents. July 11, 1995 Decision and Order, slip op. at 4, citing Albuquerque. We suggested that the OIG might support its fear of evidence destruction by explaining, for example, that the target of the investigation had previously eradicated evidentiary documents in the target's control. Id.

Upon reconsideration, we find that the OIG is not required to make a particularized, case by case showing of interference with its investigation. Rather, a generic determination of likely interference is sufficient. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 224 (1978); Crancer v. United States Dep't of Justice, 999 F.2d 1302, 1306 (8th Cir. 1993). The Supreme Court has held that Congress did not intend to prevent federal courts from determining that, with respect to particular kinds of enforcement proceedings,

disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings." NLRB v. Robbins, 437 U.S. at 236. In its discussion concerning the plain meaning of Exemption 7(A), the Supreme Court stated that although Congress could easily have required in so many words that the government in each case show a particularized risk to the enforcement proceeding at issue, Congress did not do so. NLRB v. Robbins, 437 U.S. at 234. By contrast, the Court explained, since 7(A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made. Id. at 224. As a result, the Court upheld a generic determination that the release of witness statements would interfere with enforcement proceedings within the meaning of Exemption 7(A).<2>

In Bevis v. Department of State, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986) (Bevis), the United States Court of Appeals for the District of Columbia discussed how the government could make generic determinations pursuant to Exemption 7(A). Bevis provided for a three-step process. First, the government must define its categories functionally. Second, it must conduct a document by document review in order to assign documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings. Id. An explanation is sufficient if there is "a rational link" between the nature of the document and the alleged likely interference in enforcement proceedings. Id., quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C. Cir. 1986). As indicated above, in light of the Supreme Court's decision in NLRB v. Robbins, if the category of records is of the type that could reasonably be expected to interfere with enforcement proceedings generally, the government need not make any particularized, case specific showing. Again, to the extent that our decision in Albuquerque requires a higher standard, it is reversed.

In making the foregoing determination, we have considered the MJ&A comments concerning the OIG's burden. The MJ&A comments, however, do not discuss the Exemption 7 cases cited by the OIG. Instead, the MJ&A comments cite general language in cases involving the application of other exemptions to the FOIA, principally Exemption 5. As the above cases hold, Exemption 7(A) determinations do not require the same level of specificity. Because the MJ&A comments do not address the standards for Exemption 7(A) determinations, the comments were not helpful in our analysis.

Having made the foregoing determinations concerning the applicable standard for Exemption 7(A) justifications for withholding, we now turn to whether the OIG has met that standard.

2. Whether the Exemption 7(A) Justification for Withholding was Adequate

As an initial matter, we observe that the Assistant IG's determination was not entirely clear as to the categories of documents upon which he made his Exemption 7(A) determinations of interference. Thus, it was unclear whether the Assistant IG had made the type of category by category determination required by Bevis.

The arguments made in the OIG's reconsideration request indicate that the Assistant IG viewed the MJ&A's requested categories of documents as functional categories that warranted determinations of likely interference. Because the categories defined the scope of the FOIA request, documents outside the categories were not responsive to the request. Thus, it was unnecessary for the Assistant IG to review the entire investigatory file to determine if there were documents that fell within other categories.

We have concluded that the Assistant IG made a sufficient determination that documents falling within those categories were withholdable pursuant to Exemption 7(A). All of the five categories at issue, i.e., Items 1 through 4 and Item 6, request "statements, memoranda or other documentation" related to specified allegations of impropriety. Thus, all five categories of documents consist of evidence or analysis compiled by the OIG in connection with the allegations that are the subject of the investigation. The Assistant IG determined that the release of the material would prematurely reveal evidence, disclose investigative techniques and provide individuals with the opportunity to fabricate witnesses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede appropriate resolution of the

investigation. Thus, the categories are sufficient to "trace a rational link to the alleged likely interference." Bevis, 801 F.2d at 1390 (generic determinations of interference concerning "identities of possible witnesses and informants" and "reports on the location and viability of potential evidence").<3>

Having concluded that the Assistant IG made sufficient generic determinations of interference under Bevis, we turn to the issue of segregability. In its Appeal, MJ&A argued that the Assistant IG was required to release redacted versions of the two specifically identified documents, i.e., the case processing form and the complainant's letter. Our remand included a review of those documents for segregability.

Upon reconsideration, we have concluded that a remand on the issue of segregability is unwarranted. As an initial matter, we observe that the MJ&A argument concerning redaction is inconsistent with the category by category determination permitted by Bevis, because the MJ&A argument, if accepted, would require a line by line review of each document. Accordingly, in cases in which we uphold a determination that the release of a category of documents would interfere with an enforcement proceeding, no review of portions of individual documents for segregability is necessary. In any event, an OIG staff member has advised us that the two documents mentioned do not contain segregable material, and the nature of the documents themselves indicates that they would not contain segregable material. Accordingly, a formal remand to the Assistant IG on this issue is not warranted and, therefore, we will so modify our July 11, 1995 Decision and Order.

Having made the foregoing determinations, we emphasize that an authorizing official must clearly specify the categories of documents upon which he is making his determinations of interference. In instances such as this, where the request is limited to certain categories of documents and the authorizing official is making determinations with respect to those categories, the determination should so specify. On the other hand, if the authorizing official is making determinations with respect to a different categorization of the documents, he is required to identify the categories in his determination.

III. Conclusion

As the foregoing decision indicates, we have concluded that the OIG has provided a sufficient Exemption 7(A) determination with respect to Items 1 through 4 and Item 6 of the request. Accordingly, the remand provided for in our July 11, 1995 Decision and Order should be limited to Item 5 of the request.

It is Therefore Ordered That:

(1) The July 17, 1995 request by the DOE's Office of the Inspector General that the OHA reconsider its July 11, 1995 Decision and Order issued to Murray, Jacobs & Abel, Case No. VFA-0050, is hereby granted as set forth in paragraph 2 below.

(2) The remand provided for in Ordering Paragraph 2 of the July 11, 1995 Decision and Order is limited to Item 5 of the May 3, 1995 FOIA request submitted by Murray, Jacobs & Abel.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 22, 1995

<1>See Memorandum dated July 14, 1995 from Sanford J. Parnes, Counsel to the IG, to Thomas L. Wieker, Deputy Director, OHA, attaching Letter dated May 17, 1993 from John C. Layton, IG, to John Fleck, Albuquerque Journal.

<2>In two subsequent decisions, the Court held that generic determinations could also be made in connection with Exemptions 7(C) and 7(D) of the FOIA. Dep't of Justice v. Landano, 113 S. Ct. 2014, 2023 (categorical determination that paid informants and witnesses to gangland slayings were "confidential sources" within the meaning of Exemption 7(D)); Dep't of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468, 1484-85 (1989) (categorical determination that "rap sheets," i.e. records of law enforcement violations by individuals, constituted information whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of Exemption 7(C)).

<3>See also Curran v. Dep't of Justice, 813 F.2d 473, 476 (1st Cir. 1987) (generic determinations of interference concerning "details regarding initial allegations giving rise to the investigation, interviews with witnesses and subjects, investigative reports furnished to the prosecuting attorneys, contacts with prosecutive attorneys regarding allegations, subsequent progress of the investigations, and prosecutive opinions; and, other sundry items of information [of the same general kind, quality, and character]"); Cucci v. Drug Enforcement Agency, 871 F. Supp. 508, 510-12 (D.D.C. 1994) (generic determinations of interference concerning "administrative instructions," "routine reporting communications," "inter-agency correspondence," "witness statements," "information exchanged between agencies," "physical evidence," "evidence obtained pursuant to search warrants," and "documents relating to the case's documentary and physical evidence").

Case No. VFA-0063, 25 DOE ¶ 80,139

October 4, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Ikoi Kawata

Date of Filing:September 6, 1995

Case Number: VFA-0063

Ikoi Kawata filed an Appeal of a July 12, 1995 determination issued to her by the FOIA/Privacy Act Division, Office of the Executive Secretariat, of the U.S. Department of Energy (DOE). In that determination, the Director of the FOIA/Privacy Act Division denied a request for information that Ms. Kawata filed on May 1, 1995 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been disposed of or never to have existed. 10 C.F.R. § 1004.4(d).

Background

Ikoi Kawata of Nagano, Japan requested access to documents containing:

1. The legal basis which makes it possible to deal or to trade the reactor's waste or the junk of radioactive contamination.
2. All cases of violation of the act.
3. All records of dealing and trading, including the data of the radioactivity of isotopes.

Letter from Ikoi Kawata to U.S. Commerce Department (May 19, 1995) ("Request Letter"). The Commerce Department routed the letter to DOE, since the request concerned an issue under DOE's purview. On July 12, 1995, the Director of the FOIA/Privacy Act Division issued a final response to Ms. Kawata's request, and informed her that no responsive documents were found. See Letter from Director, FOIA/Privacy Act Division, to Ikoi Kawata (July 12, 1995) ("Determination Letter").

Ms. Kawata then wrote to the Director of OHA, appealing the final determination. See Letter from Ikoi Kawata to Director, OHA (August 8, 1995). Along with this letter, she also submitted three

pages from a Review Paper in *Health Physics*, but did not include the Determination Letter. Id. The Review Paper was entitled Radioactive Materials in Recycled Metals. Joel O. Lubenau & James G. Yusko, Radioactive Materials in Recycled Metals, *Health Physics*, Volume 68, Number 4, at 440 (April 1993) ("Lubenau Paper"). Ms. Kawata also included a one-page statement of the purpose of her search, written in Japanese.<1> We then requested that Ms. Kawata provide us with the Determination Letter, which she did on September 6, 1995. See Letter from Ikoi Kawata to Deputy Director, OHA (September 6, 1995)

("Appeal Letter").

Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. , Eugene Maples, 23 DOE ¶ 80,106 (1993); David K. Hackett, 25 DOE ¶ 80,107. However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing the Appeal, we first contacted the FOIA/Privacy Act Division of the Office of the Executive Secretariat, the office which issued the final determination letter. We were informed that the FOIA/Privacy Act Division had distributed the request to the following offices within the DOE: General Counsel (OGC), Arms Control and Nonproliferation (NN), Environment, Safety and Health (EH), Nuclear Energy (NE), Civilian Radioactive Waste Management (RW), Environmental Management (EM), and Defense Programs (DP). None of the offices responded with any documents. See Memorandum of Telephone Conversation Between Jennifer Houghton, FOIA/Privacy Act Division, and Valerie Vance Adeyeye, OHA Staff Attorney (September 11, 1995).

The general consensus of the employees who conducted the searches was that the request was not specific and was difficult to understand-- the requester needed to describe more reasonably the type of information desired. Id. For example, in Request 1, Ms. Kawata refers to the "legal basis" for trading reactor waste and "junk of radioactive contamination." See Request Letter. Employees in Nuclear Energy were unable to determine where they should search for material concerning either of these items, and indeed, did not know what meaning to attach to "junk of radioactive contamination." See Memorandum of Telephone Conversation Between C. Dougherty and S. Ashbaum, NE, and Valerie Vance Adeyeye, OHA (September 28, 1995). Ms. Kawata's letter mentioned an "act," but none of the employees were able to determine an act, law or statute that would be appropriate in this context. Id.; Memorandum of Telephone Conversation Between Harold Goldsmith, OGC, and Valerie Vance Adeyeye, OHA (September 28, 1995). Although DOE manufactures isotopes and sells them to hospitals, it is not clear that this could be classified as dealing and trading in isotopes, nor could anyone determine what information she needed on the radioactivity of isotopes. See Memorandum of Telephone Conversation Between C. Dougherty and S. Ashbaum, NE, and Valerie Vance Adeyeye, OHA (September 28, 1995).

We considered the excerpt from Radioactive Materials in Recycled Metals in order to see if it could conceivably provide insight into the type of information that Ms. Kawata wants to receive.<2> The article discusses the occurrence of "inadvertent radioactive contamination," especially the occurrence of radioactive material in metal scrap. See Lubenau Paper at 440. The paper states that "[r]adioactive material appearing in metal scrap includes sources subject to licensing under the *Atomic Energy Act* and also naturally occurring radioactive material." Id. (emphasis added). In the event she wishes to pursue this matter, Ms. Kawata should describe what in the Lubenau Paper she finds relevant, and this may provide a starting point for any future search. However, many of the bibliographical references in the article are documents published by the Nuclear Regulatory Commission (NRC). It is possible that this agency may have documents which are responsive to a future inquiry.

Conclusion

After conversations with agency employees responsible for the search, we conclude that an adequate search was performed in light of the unclear and overly broad nature of the request. Accordingly, this Appeal should be denied.<3>

It Is Therefore Ordered That:

(1)The Freedom of Information Act Appeal filed by Ikoi Kawata on September 6, 1995, Case No. VFA-0063, is hereby denied.

(2)This is a final Order of the Department of Energy, from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 4, 1995

<1>We have not yet been able to secure a translator for this document within DOE. However, it is the request itself which is the focus of any Appeal under these regulations. We need not

know the purpose of the request to properly process an Appeal.

<2>Due to the apparent difficulty at DOE in understanding the written request, we asked Ms. Kawata to provide this office with a telephone number in order to speak with her personally

to determine the parameters of her request. See Letter from Deputy Director, OHA, to Ikoi Kawata (August 14, 1995). Unfortunately, she does not have access to a private telephone. See Appeal Letter.

<3>DOE employees have expressed their willingness to cooperate with Ms. Kawata and provide her more information *if she can revise her request to be more specific*. If the requester has

difficulty expressing her request in English, which is understandable considering the technical subject matter, she should attempt to find someone to assist her in formulating a new request.

Case No. VFA-0064, 25 DOE ¶ 80,131

September 6, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James Minter

Date of Filing: August 8, 1995

Case Number: VFA-0064

On August 8, 1995, James Minter (Appellant) filed an Appeal from a determination issued on July 12, 1995 by the Department of Energy's Albuquerque Operations Office (DOE/AL). In its determination, DOE/AL stated that it was unable to find any statements or reports responsive to a particular category listed by the Appellant in his April 13, 1995 request under the Freedom of Information Act (FOIA). This Appeal, if granted, would require DOE/AL to conduct an additional search for responsive documents.

I. Background

On April 13, 1995, the Appellant, an employee at the DOE's Oak Ridge Operations Office (DOE/OR), submitted a FOIA request to DOE/AL seeking various documents relating to an alleged assault and battery on January 26, 1994 by the Appellant upon Frank Oakes, another DOE/OR employee, which Mr. Oakes claims to have occurred while both employees were traveling on DOE business.<1>DOE/AL conducted a search for documents responsive to the Appellant's Request. On July 12, 1995, DOE/AL issued its determination, releasing responsive documents but further stating that the Transportation Safety Division (TSD) could not find any responsive statements or reports by Ray Parrett, Chief of the TSD at DOE/OR. On August 8, 1995, the Appellant filed the present Appeal in which he contends that DOE/AL's search for statements or reports by Mr. Parrett was inadequate.<2>In the course of this Appeal, the

Appellant stated that he believes Mr. Parrett took handwritten notes during a meeting the Appellant had with Mr. Parrett soon after the incident. See Memorandum of Telephone Conversation between Dawn Koren, OHA Staff Attorney, and the Appellant (August 29, 1995).<3>

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

We contacted DOE/AL to determine the extent of the search which had been performed. Eva Brownlow,

Chief of Standards and Policy Application of the TSD at DOE/AL, coordinated the search. Ms. Brownlow informed us that as a result of the alleged assault and battery, DOE/AL took a disciplinary action against the Appellant. The entire contents of the file relating to the disciplinary action were turned over to the Appellant in the original determination. See Memorandum of Telephone Conversation between Dawn Koren and Eva Brownlow (August 17, 1995). No handwritten notes by Mr. Parrett were found in the disciplinary file. In response to discussions DOE/AL had with the Appellant after this Appeal was filed, DOE/AL examined a trip report file which was compiled after the incident and located separately from the disciplinary action file, but similarly found no handwritten notes of Mr. Parrett. See Memorandum of Telephone Conversation between Dawn Koren and Christina Lujan-Bonds, Standards and Policy Application, TSD, DOE/AL (August 29, 1995).

Although we find that, overall, DOE/AL had conducted a reasonable search calculated to find relevant documents, it appeared that DOE/AL had not yet attempted to ask Mr. Parrett if he remembered taking any such notes, and if so, where these notes would be located. Id. Ms. Lujan-Bonds then spoke with Mr. Parrett, and upon discovering that he had taken notes during the meeting in question, realized that the notes could be located in a certain, though as yet unsearched, place. See Memorandum of Telephone Conversation between Dawn Koren and Christina Lujan-Bonds (August 31, 1995). Consequently, in light of the fact that DOE/AL is currently in the process of continuing to search for responsive documents, we shall remand this case to DOE/AL. On remand, DOE/AL shall identify all documents responsive to the Appellant's request for statements and reports of Mr. Parrett, and either release them or provide adequate justification for withholding any portion of them.

It Is Therefore Ordered That:

(1) The Appeal filed by James Minter on August 8, 1995, Case Number VFA-0064, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to Albuquerque Operations Office, which shall conduct a search for additional documents responsive to the Appellant's request as described in the above Decision and Order, and shall promptly issue a new determination regarding those documents.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 6, 1995

<1>Mr. Oakes has now brought a personal injury suit against the Appellant in a Tennessee state court.

<2>Appellant notes in his Appeal that he needs this information

to support his defense in Mr. Oakes' lawsuit. However, a FOIA requester's basic right of access is "neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). Thus, the Appellant's "need" for this document has no bearing under the FOIA on the primary issue in this case, whether DOE/AL conducted a reasonable search for the requested documents.

<3>In that conversation, the Appellant requested access to a joint statement of himself and Mr. Oakes that

he believes should have been included with the trip report filed after the incident, as well as any handwritten notes taken by a Mr. Marshall Cross during a meeting between Mr. Cross and the Appellant. See Memorandum of Telephone Conversation between Dawn Koren and the Appellant (August 29, 1995). We find that because each of these requests is outside of the scope of either the initial FOIA request or the present Appeal, the OHA will not consider them. Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992). The Appellant did not ask for Mr. Cross' notes in his original request and appealed only the adequacy of the search for Mr. Parrett's notes. If the Appellant now wishes to obtain information of a broader nature than that which he originally requested, he should file a new request for information.

Case No. VFA-0065, 25 DOE ¶ 80,132

September 8, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Klickitat Energy Partners

Date of filing: August 10, 1995

Case Number: VFA-0065

On August 10, 1995, Klickitat Energy Partners (KEP), through Richard Oehler, Esq. at Perkins Coie Law Firm, filed an Appeal from a determination issued to it on July 10, 1995 by the Freedom of Information Act Officer at the DOE Bonneville Power Administration (BPA). In that determination, BPA partially denied a request for information which KEP had filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, KEP requests that the Office of Hearings and Appeals (OHA) order the release of the withheld information.

I. Background

On June 7, 1995, KEP filed a FOIA request for the following information:

1. Any and all documents within BPA's possession and control that concern, refer, mention or relate to Contract No. DE-MS79-93BP93940 between KEP and BPA.
2. Any and all documents within BPA's possession and control that concern, refer, mention or relate to BPA's execution of a consent for the lender on the Tenaska Contract No. DE-MS79-94BP94492 project and, in addition, a copy of the contract (including modifications) between BPA and Tenaska.

In its July 10, 1995 determination, BPA identified 22 responsive documents. Of these documents, 15 were withheld in their entirety and 7 were partially released pursuant to Exemption 5 of the FOIA. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which

would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). BPA also determined that, given the nature of the withheld material, disclosure would not be in the public interest. Determination letter at 5. In its Appeal, KEP argues that (1) BPA's search for responsive documents was inadequate, and (2) BPA has failed to adequately justify its use of Exemption 5.

II. Adequacy of the Search

The Office of Hearings and Appeals has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. In fact, the office has remanded cases where it was evident that the search conducted was inadequate. See, e.g. James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires only that the search be reasonable, not exhaustive. "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985)

(Miller); accord, Weisberg v. Department of Justice, 745 F.2d at 1476, 1485 (D.C. Cir. 1984).

KEP argues that BPA's search for responsive documents was inadequate because BPA neither produced nor identified large quantities of contracting documents that should exist. For example, KEP notes that there should be documents relating to the Request for Proposals which resulted in the award of the BPA contract to KEP as well as documents discussing the rationale for award of the contract to KEP. KEP argues that these documents have not been provided, nor have they been listed as withheld. Appeal letter at 5. We contacted BPA for an explanation of the steps taken to locate the requested information. We were informed that BPA retains its contracts in its files, but predecisional documents such as comments are not retained and are kept only by their authors. We were informed that KEP's request for "documents that concern or relate to the BPA/KEP contract" was taken literally. Memorandum of Telephone Conversation between Roxanne Freeman, BPA and Kimberly Parker, OHA (August 22, 1995). BPA indicated it conducted a search for documents related to the contract negotiation process by contacting the lead negotiator and others who worked on that contract. Id. Based on this information and the number of documents identified as relevant, we find that BPA's search for responsive documents was reasonable. Oglesby v. United States Dep't of the Army, 920 F. 2d at 67 n.13 (D.C. Cir. 1990).

III. Adequacy of the Determination

KEP argues that the descriptions of some of the items in the index are not sufficient to determine whether the claimed exemption applies. For example, KEP argues that items 5 and 11 which were withheld under the attorney-client privilege, do not identify the attorney or the client. We have consistently held that the FOIA requires the authorizing official to give reasonably informative descriptions of the documents or portions of documents being withheld that are sufficient to allow the requester to understand the determination and if appropriate to formulate a meaningful appeal. See, e.g. , Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984); Exxon Co., USA, 5 DOE ¶ 80,178 at 80,813 (1980); Cities Service Co., 5 DOE ¶ 80,101 at 80,502 (1980). Descriptions are generally adequate if each document is identified by a brief description of the subject matter it discusses and "if available, the date each document was produced [and] its authors and recipients. . . ." Petroleum Delivery Service, 5 DOE ¶ 80,152 (1980). We have indicated that the "brief description" requirement is generally satisfied if sufficiently informative titles of the withheld documents are provided and that the index need not contain factual information which would compromise the privileged nature of the documents. P.A. Barnes, 5 DOE ¶ 80,112 at 80,538 (1980); Akin Gump, Hauer & Feld, 3 DOE ¶ 80,155 at 90,765 (1979).<1>

BPA provided a list of 22 items that were determined to be responsive to KEP's request. The list was divided into two parts: 1) 15 items withheld in their entirety and 2) 7 items withheld in part. BPA gave a brief description of each item and stated the asserted Exemption 5 privilege in parentheses at the end of each description. At the end of the list, BPA gave a generalized explanation for withholding items 1-3, 9, 12-16 and 19-22 under either the attorney-client privilege or the attorney work-product privilege. The same was done for those items withheld under the deliberative process privilege. We find that in general this is an acceptable method for justifying the withholding of documents as long as the documents are adequately described.

After examining the description of each withheld document in the index, we find that BPA did not adequately describe the 22 documents. None of the 22 items contained a brief description of the referenced document or a sufficiently descriptive title of that document. For example, most of the 15 documents withheld in their entirety were electronic mail messages. The descriptions indicate their date and the fact that they are electronic mail messages, but do not indicate the subject matter discussed in the messages.<2> This prevents the requester from determining whether the claimed exemption reasonably applies. See, e.g. James L. Schwab, 22 DOE ¶ 80,164 (1992). Therefore, we shall remand this determination to BPA for more informative descriptions of the withheld documents. Colorado River Commission of Nevada, 23 DOE ¶ 80,138 at 80,592 (1993).

KEP also argues that BPA has provided inadequate justification for withholding the documents under the

claimed exemptions. Appeal letter at 2. We find that given a new determination with more informative descriptions consistent with this Decision, BPA's rationale for withholding certain documents will become apparent under their current method of justification. We have held that a determination must adequately justify the withholding of documents. This justification must make clear why the authorizing official has determined that a particular exemption applies. Arnold & Porter, 12 DOE ¶ 80,108 at 80,529 (1984). For example, for the application of the deliberative process privilege, the determination must identify the deliberative process at issue and show that a particular withheld document is predecisional and deliberative. BPA should also explain how release of the material might interfere with the deliberative process. Similarly, for the application of the attorney work-product privilege, the determination must indicate that a document was prepared by an attorney in contemplation of litigation. For the application of the attorney client privilege, the determination must indicate that a particular withheld document reflects confidential communications between an attorney and a client relating to a legal matter for which the client sought professional advice.

IV. Segregability

Even if documents meet these criteria, however, that does not mean that they may be withheld in their entirety. The FOIA, as implemented by 10 C.F.R. § 1004.10(c), requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See The Oak Ridger, 21 DOE ¶ 80,120 at 80,564-65 (1991) (and cases cited therein); Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989) (and cases cited therein). In the context of the "predecisional" privilege of Exemption 5, this means that non-deliberative material ordinarily should be released to the requester. Environmental Protection Agency v. Mink, 410 U.S. 73, 87-91 (1972). The only exceptions are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin., 610 F.2d 70, 85 (2d Cir. 1979). For example, documents that are solely factual or contain passages of factual material that are easily segregable from policy discussion or legal recommendations are generally not covered by Exemption 5. Bracewell & Patterson, 9 DOE ¶ 80,111 (1981). However, factual material contained in a predecisional, deliberative document may be withheld if its disclosure would expose the agency's deliberative process. Mead Data, 566 F. 2d at 256.

There is some indication in this case that BPA considered whether the withheld documents contained non-exempt, segregable material. BPA states in the Appendix to its determination that none of the withheld documents simply recite facts and items 1-15 do not contain any reasonably segregable, non-exempt material. Determination letter at 3. Our review of the documents reveals, however, that some withheld documents contain factual information that may in fact be segregable. For example, item 4, "generation supply gap analysis document entitled 'Termination Net Costs'" appears to be a chart that contains raw data or other, simply factual information. Unless BPA can explain why these numbers are deliberative and not merely factual, the factual portion of that document should be released. The electronic mail messages may also be segregable since they contain factual information such as the date and time of the message, the subject matter discussed and phrases such as, "Your buddy called today." This is factual information that does not appear to be deliberative or subject to any of the other Exemption 5 privileges. Therefore, we find that this information should be released unless BPA can explain how it may compromise any exempt material or pose an inordinate burden to separate it from the exempt material. Since this matter is being remanded for a new determination, BPA should review those documents again to insure that they do not contain any segregable, non-exempt information.

V. Conclusion

As discussed above, we have concluded that 1) BPA's search for responsive documents was reasonable, 2) BPA failed to provide an adequate description of the documents withheld, and 3) the justifications provided by BPA for withholding information pursuant to Exemption 5 are generally inadequate.

Accordingly, we shall remand the determination to BPA and order them to either release the withheld documents or issue a new determination that sufficiently describes each responsive document, correlates each portion of the material withheld with a specific exemption and adequately explains the reasons which justify withholding the material. See SHAD Alliance, 9 DOE ¶ 80,169 (1982).

It Is Therefore Ordered That:

(1) The Appeal filed by Klickitat Energy Partners, Inc. on August 10, 1995 is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is remanded to the Bonneville Power Administration who shall review the 22 documents withheld either in their entirety or in part and either release all portions of the documents withheld under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), or provide an adequate explanation of the reasons which justify withholding the material.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district in which the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 8, 1995

<1>For example, if the title of a document withheld pursuant to Exemption 5 was "The Advisability of Suing Company XYZ for Breach of its Contract," and the agency believed that release of the fact that it was considering legal action could interfere with the deliberative process, the title could be withheld and the document described as "An evaluation of XYZ's default." Similarly, the name of a document's author might be withheld if release would constitute an unwarranted invasion of personal privacy under Exemption 6.

<2>For example, the following items are not sufficiently descriptive because they do not refer to the deliberative process at issue or the subject matter of the message:

6. 9/13/94 E-mail to Judi Johansen from Paula Fowler and reply to Fowler from Johansen (deliberative).

7. 8/1/94 E-mail to Judi Johansen from Roxane Freeman and reply to Freeman from Johansen (deliberative).

Case No. VFA-0066, 25 DOE ¶ 80,135

September 15, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of Michigan

Date of Filing: August 17, 1995

Case Number: VFA-0066

On August 17, 1995, James F. Flug on behalf of his client the State of Michigan filed an Appeal from a Determination issued to the State of Michigan on July 10, 1995, by the FOIA and Privacy Act Division (FOIA Division) of the Department of Energy (DOE). In that Determination the FOIA Division provided the State of Michigan with two documents responsive to its request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the FOIA Division to conduct an additional search for responsive documents.

I. Background

On March 4, 1994, the State of Michigan filed a request for (1) the identities of those who worked on DOE matters in the course of the 1992-93 Presidential transition process (Transition), (2) documents relating to contacts between the Transition members and Cities Service Oil and Gas Corporation (Cities), and (3) documents concerning the Cities enforcement action that were either prepared for or provided to the Transition members. The FOIA Division coordinated a department-wide search for documents responsive to the Appellant's request. On July 10, 1995, the FOIA Division issued its Determination which released two documents responsive to the Appellant's search. On August 17, 1995, the Appellant filed the present Appeal in which it contends that the FOIA Division's search for responsive documents was inadequate.<1>

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require an absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Barton Kaplan, 22 DOE ¶ 80,125 (1992); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). However, in previous cases we have held that challenges to the adequacy of the agency's search must be supported by the presentation of some reasoned argument that a requested document, unidentified by the agency in its search, does in fact exist. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992) (Boggs); Sun Co. Inc., 11 DOE ¶ 80,114 (1983); Vinson & Elkins, 4 DOE ¶ 80,127 (1979).

In reviewing the Appeal, we contacted Joan Ogbazghi, FOIA Officer, FOIA Division, to ascertain the

extent of the search that had been performed and to determine whether any more documents responsive to the Appellant's request might exist. Ms. Ogbazghi informed us that searches had been conducted of the files of the Offices of the Executive Secretariat, Personnel, Administrative Services, General Counsel (including the Economic Regulatory Administration), and the Chief Financial Officer and that all of the responsive information found had been released to the Appellant. In addition to coordinating the search of the offices named above, Ms. Ogbazghi contacted certain DOE employees, identified by the Appellant, who appeared to have worked with the Transition. None of these individuals could provide responsive information. Further, in response to our inquiries regarding the Determination, Ms. Ogbazghi contacted the Office of Security Affairs and the Office of Administrative Services to inquire whether any responsive information existed concerning the identity of any Transition members or the Cities enforcement action. Ms. Ogbazghi was unable to locate any responsive records in either of these offices.

Based on the information before us, we conclude that the FOIA Division's search for responsive documents was adequate and was reasonably calculated to uncover the documents sought by the Appellant. See Miller, 779 F.2d at 1384-1385; Richard J. Levernier, 25 DOE ¶ 80,102 (1995). As set forth above, that search encompassed seven offices. The Appellant's only argument that more documents exist is that the Transition members ought to have produced some written work product and that work product must exist within the DOE. As stated above, mere inference is insufficient to warrant our directing a new search. We need a reasoned argument that additional documents exist. See Boggs, 22 DOE at 80,504. We are thus unpersuaded by the Appellant's speculative argument. Accordingly this Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Michigan on August 17, 1995, Case No. VFA-0066, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 15, 1995

<1>In addition to appealing the adequacy of the search for responsive documents, the Appellant requests OHA to provide the Appellant with a copy of all communications concerning the FOIA Division's July 10 FOIA Determination and to provide the Appellant with information which would show that although responsive documents exist, they were either relinquished by DOE to some other entity or retained by some other entity in privity with the DOE. It is well established that OHA does not permit FOIA appellants to broaden their requests for information in an appeal. See Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992); Bernard Hanft, 21 DOE ¶ 80,134 at 80,610 (1991). Since the Appellant now seeks to obtain information of a broader nature than that which it initially requested, the Appellant should

file a new request for that information.

Case No. VFA-0067, 25 DOE ¶ 80,136

September 18, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James W. Simpkin

Date of Filing: August 18, 1995

Case Numbers: VFA-0067

VFA-0068

On August 18, 1995, James W. Simpkin (Simpkin) filed a joint Appeal from two determinations issued to him on July 20, 1995, by the Albuquerque Operations Office (AL) of the Department of Energy (DOE). The determinations were issued in response to requests for information submitted by Simpkin under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In those determinations, AL indicated that it had released all documents in its possession that were responsive to the requests for information filed by Simpkin on February 4, 1995 and February 11, 1995. The Appeal, if granted, would require AL to conduct additional searches for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

On February 4, 1995, Simpkin filed a request in which he sought "any and all videotapes and audiotape recordings . . . of the January 27, 1995 meeting . . . on the subject of the Personnel Assurance Program." He also sought documents developed in preparation for that meeting. On July 20, 1995, AL issued a determination enclosing a videotape that was made of the January 27, 1995 meeting. However, with respect to the second portion of Simpkin's request, AL stated that no responsive documents exist.

On February 11, 1995, Simpkin filed a second request in which he sought the following documents: 1) documents developed by Mason & Hanger-Silas Mason Co., Inc., or the DOE and related to FOIA requests made by Simpkin and 2) "documents developed in preparation for . . . a meeting held to discuss the response to FOIA requests made by James W. Simpkin." On July 20, 1995, AL issued a second determination in which it stated that it was providing documents responsive to item

1. However, in response to item 2, AL stated that no documents exist that are responsive to Simpkin's request.

On August 18, 1995, Simpkin filed two separate Appeals with the Office of Hearings and Appeals. In his first Appeal, relating to his February 4 request, Simpkin states that the videotape provided to him was defective. He asks that he receive a clean copy of this videotape. In his second Appeal, relating to his

February 11 request, Simpkin states that he received an anonymous letter transferring a copy of an E-mail message relating to Simpkin's request. In addition, he states that an anonymous person called him and reported that there were numerous E-mail messages dealing with his request. On that basis, Simpkin asks that the OHA direct AL to conduct a new search for responsive documents.

II. Analysis

The OHA has consistently stated that a FOIA request warrants a thorough and conscientious search for responsive documents. See W.R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have remanded cases where it is evident that the search conducted was inadequate. See, e.g., Cowles Publishing Co., 16 DOE ¶ 80,136 (1987); Hideca Petroleum Corp., 9 DOE ¶ 80, 108 (1981). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing this joint Appeal, we first contacted AL to ascertain the extent of the searches that had been performed in response to Simpkin's requests. With respect to Simpkin's February 4 request, that Office informed us that it contacted the Amarillo Area Office of the DOE which agreed to obtain a clean copy of the videotape requested by Simpkin. The Office further indicated that it would provide a new copy of the videotape directly to the requester. Because AL has agreed to send Simpkin a new copy, there is no need to consider this issue on Appeal.

With respect to Simpkin's Appeal of his February 11 request, we find that the search conducted at the direction of AL was inadequate. AL has informed us that it directed the Amarillo Area Office of the DOE to conduct a search for responsive documents. The Amarillo Area Office in turn directed the M&O contractor of the Pantex Plant, Mason & Hanger-Silas Mason Company, to search its records for responsive documents. This search was performed by the legal department at Pantex, which coordinated a plant-wide search for responsive documents. However, the Pantex legal department did not locate the E-mail message discovered by Simpkin when the final response was prepared. As a result of this Appeal, the Pantex legal department has conducted a new search and has located the E-mail message Simpkin referred to in his appeal. Since Pantex's first search did not locate all documents responsive to Simpkin's request, we believe a new, more thorough search should be conducted at Pantex.

In addition, it is unclear whether a thorough search was conducted within DOE for documents responsive to item 1 of Simpkin's February 11 request. It is also possible that new searches at DOE and at Pantex may now locate documents responsive to item 2 of Simpkin's February 11 request. Accordingly, Simpkin's Appeal should be granted and this matter remanded to AL to coordinate a new search for documents responsive to both portions of Simpkin's February 11 request. Of course, this search should encompass E-mail files as well as paper files.

It Is Therefore Ordered That:

(1) The Appeal filed by James W. Simpkin on August 18, 1995, OHA Case No. VFA-0067, is

hereby dismissed.

(2) The Appeal filed by James W. Simpkin on August 18, 1995, OHA Case No. VFA-0068, is hereby granted as set forth in Paragraph (3) below.

(3) This matter is remanded to the Albuquerque Operations Office of the Department of Energy which shall coordinate a new search for responsive documents.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 18, 1995

Case No. VFA-0069, 25 DOE ¶ 80,134

September 15, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Jeffrey R. Leist

Date of Filing:August 18, 1995

Case Number:VFA-0069

On August 18, 1995, Jeffrey R. Leist filed an Appeal from a determination issued to him on July 27, 1995, by the Manager of the Ohio Field Office (OFO) of the Department of Energy (DOE). In that determination, the Manager partially denied a request for information filed by Mr. Leist on May 24, 1995, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA will nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. Leist sought copies of several documents concerning Fernald Environmental Restoration Management Company (FERMCO) employees who were granted or who applied for Voluntary Reduction in Force (VRIF) benefits in 1995. On July 11, 1995 the Manager of the OFO provided Mr. Leist copies of several documents as a partial response to Mr. Leist's request. In the July 27, 1995 determination letter, the Manager provided a complete response to Mr. Leist's May 24, 1995 request. Specifically, the Manager enclosed with his letter documents responsive to Mr. Leist's request, but he redacted all personal identifying information in accordance with Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6).

In his Appeal, Mr. Leist requests a copy of the employees' names that were redacted in the Manager's July 27, 1995 response. Mr. Leist argues that he has "the right to at least know the names of those involved" and "that this information should be considered public knowledge." Finally, Mr. Leist states that he has the "right" to see his name on a list to confirm that FERMCO has included him as one who was formally denied the VRIF.

II. Analysis

Initially, we note that a representative of the OFO has informed us that Mr. Leist's name was accidentally redacted from a document he received in the Manager's July 27, 1995 response.<1> Accordingly, we will direct the OFO to send to Mr. Leist a corrected copy without a redaction of his name in the April 6, 1995

document entitled "Employees Volunteering for VRIF." However, we must still consider the releasability of all of the remaining redacted names.

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Pursuant to the established legal precedent, there is no doubt that the names of individuals redacted in this case qualify as "similar files" under Exemption 6.

In order to determine whether a record may be withheld pursuant to Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C.Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Comm.). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

A. Privacy Interest

The Supreme Court has long found a privacy interest in the names and addresses of individuals significant enough to warrant protection from disclosure pursuant to Exemption 6. Department of the Air Force v. Rose, 425 U.S. 352, 375 (1976). Moreover, at least seven Circuit Courts have found that an individual has a significant privacy interest in avoiding the unlimited disclosure of his or her name. See, e.g., Hopkins v. Department of Hous. and Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991); Painting and Drywall Work Preservation Fund v. Department of Hous. and Urban Dev., 936 F.2d 1300, 1303 (D.C.Cir. 1991); Halloran v. Veterans Admin., 874 F.2d 315, 324 (5th Cir. 1989); Department of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. Department of Agric. 737 F.2d 784, 787 (9th Cir. 1984); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir. 1984); American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983). In light of the overwhelming weight of authority, we find that disclosure of the names of the individuals who were granted or who applied for VRIF benefits in 1995 would result in a substantial invasion of personal privacy.

B. Public Interest in Disclosure

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Comm., 489 U.S. at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987). While Mr. Leist argues that he has "rights" which dictate that the DOE provide the names of others to him, we do not agree. Mr. Leist has simply not demonstrated and we do not find any public interest in the disclosure of the requested information. We fail to see how release of the names would aid the public in understanding anything about the workings of the government. In view of the fact that there is no apparent public interest to balance against the significant potential invasion of personal privacy, we find that the Manager properly withheld the names of employees other than Mr. Leist from disclosure. Accordingly, we must deny Mr. Leist's Appeal with respect to the other redacted names.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey R. Leist on August 18, 1995, Case Number VFA-0069, is hereby granted

as set forth in paragraph (2) below, and is denied in all other respects.

(2) The Manager of the Ohio Field Office is directed to send to Mr. Jeffrey Leist a corrected copy, without a redaction of his name, of the April 6, 1995 document entitled "Employees Volunteering for VRIF".

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 15, 1995

<1>See September 12, 1995 Record of Telephone Conversation between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and Jane Greenwalt, OFO.

Case No. VFA-0071, 25 DOE ¶ 80,133

September 12, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Jeffrey R. Leist

Date of Filing: August 24, 1995

Case Number: VFA-0071

On August 24, 1995, Jeffrey R. Leist filed an Appeal from a determination issued to him on August 9, 1995, by the Manager of the Ohio Field Office (OFO) of the Department of Energy (DOE). In that determination, the Manager partially denied a request for information filed by Mr. Leist on July 10, 1995, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA will nonetheless be released to the public, unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

In his request for information, Mr. Leist sought copies of several documents. In his determination, the Manager released copies of some of these documents, but could not locate various letters including a copy of a letter Mr. Leist alleges was sent to him during the first week of March 1995 from the Fernald Environmental Restoration Management Company (FERMCO) HR Department, which acknowledged FERMCO's receipt of Mr. Leist's Voluntary Reduction in Force application. In his Appeal, Mr. Leist requests a copy of this FERMCO letter.

We have confirmed the existence of the letter requested by Mr. Leist in his Appeal. Specifically, a representative of the OFO informed us that after a more thorough search of Mr. Leist's records, the OFO found the letter responsive to Mr. Leist's request. See memorandum of September 6, 1995 telephone conversation between Leonard M. Tao, Office of Hearings and Appeals, and Jane Greenwalt, OFO FOIA representative. We will therefore remand the case to OFO for a determination regarding the releasability of this letter.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey R. Leist on August 24, 1995 is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Manager of the Ohio Field Office of the Department of Energy who will promptly either release a copy of the letter sent to Jeffrey R. Leist from the Fernald Environmental Restoration Management Company HR Department during the first week of March 1995

acknowledging Mr. Leist's Voluntary Reduction in Force application, or provide a detailed explanation as to why the information is exempt from public disclosure under the Freedom of Information Act.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 12, 1995

Case No. VFA-0073, 25 DOE ¶ 80,137

October 2, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Cohen & Cotton, P.C.

Date of Filing:September 1, 1995

Case Number: VFA-0073

Cohen & Cotton, P.C. ("C&C") filed an Appeal of a July 28, 1995 determination issued to it by the Western Area Power Administration ("WAPA") of the Department of Energy ("DOE"). In that determination, the Administrator of WAPA provided C&C a redacted copy of an internal memorandum which C&C had asked for in a request for information filed on October 21, 1994 pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. §1004.10(b).

Background

C&C represents Nevada Pacific Mining Company, Inc. ("Nevada Pacific") which owns a mining claim (the "P&LM claim") allegedly encroached upon by the Mead-Phoenix 500 kV Transmission Line ("Mead-Phoenix Line")<1> . See Memorandum of Telephone Conversation Between Valerie Vance Adeyeye, OHA Staff Attorney, and FOIA Information Officer, WAPA (September 20, 1995). However, the encroachment claim appears unfounded. The Bureau of Land Management ("BLM")

of the U.S. Department of the Interior conducted its own survey<2> of the area in dispute and determined that the subject claim lies north of the Mead-Phoenix Line construction. See Letter from Area Manager, BLM, to WAPA (November 3, 1994). BLM thereupon gave WAPA permission to proceed with construction of the line. Id.

C&C requested access to ten categories of public records concerning the circumstances surrounding the creation and operation of the Mead-Phoenix Line. See Letter from C&C to FOIA Officer, WAPA (October 21, 1994). C&C also requested information on any responsive documents that had been destroyed, and the circumstances of their destruction. Id. WAPA advised C&C that, due to the large volume of records involved, substantial time was required to perform a thorough search. On January 13, 1995, WAPA released an index of records located in its Western Headquarters, and it was still reviewing an index of records located at its Phoenix office. See Letter from Assistant Administrator for Management, WAPA, to C&C (January 13, 1995).

On May 31, 1995, WAPA released several documents to C&C. It withheld, under Exemption 5 of the FOIA, a WAPA internal memorandum entitled "Mead-Phoenix 500-kV Project and Mining Claim Potential Conflicts" dated June 24, 1994. See Letter from Administrator, WAPA, to C&C (May 31, 1995).

C&C requested that WAPA provide additional information regarding its withholding of the memorandum, pursuant to 10 C.F.R. § 1004.7. See Letter from C&C to Freedom of Information Act Officer, WAPA (July 13, 1995). WAPA then explained that the memo "contains opinions of its author and was, and still is, being used in the agency evaluation process." See Letter from Administrator, WAPA, to C&C (July 28, 1995). According to WAPA, release of the redacted material would inhibit employees from making open and honest recommendations in the future. Id. However, information concerning the location of some claims was determined to be factual and was released. Id. On September 1, 1995, C&C filed this Appeal which requests release of the entire memo. See Letter from C&C to Director, OHA (September 1, 1995) ("Appeal Letter").

Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States).

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. This privilege of Exemption 5 was developed primarily to promote frank and independent discussion among those responsible for making governmental decisions. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 15.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The Memorandum of June 24, 1994

In an internal memorandum entitled "Mead-Phoenix 500kV Project and Mining Claim Potential Conflicts," a WAPA employee in the Division of Land documented his activities during a "mining claim location"<3> in Arizona. The purpose of the "location" was to determine the status of the Nevada Pacific mining claims (the Lee claims and the P&LM claim) allegedly located in the area of the Mead-Phoenix Line. See Memorandum from Michael Thompson to Director, Division of Land, WAPA (June 24, 1994) ("WAPA Memorandum"). WAPA used mining claim notices to locate the mining claims, and noted that the P&LM claim notice was not as specific as the Lee notice in its location description. Id. The P&LM claim was located based on a lath<4> in the ground that BLM later declared inappropriately located. See Memorandum of Telephone Conversation Between Michael Thompson, WAPA, and Valerie Vance Adeyeye, OHA (September 27, 1995); Letter from Area Manager, BLM, to C&C (September 14, 1995.) After the WAPA Memorandum was written, a map filed in 1979 by a previous P&LM claimant was discovered, and labelled "essentially correct" by BLM. See Letter from Area Manager, BLM, to C&C (November 3, 1994). Therefore, the location of the P&LM claim in the WAPA memorandum, determined

without the assistance of the 1979 map, is inaccurate. In response to C&C's request, WAPA released much of this memorandum, including a description of the location of the Lee claims, but withheld from disclosure two portions of the memorandum--the description of the location of the P&LM claim and a section entitled "Options."

The Foreseeable Harm Standard Applied to the Deliberative Process Privilege

WAPA provided this office with an unredacted copy of the WAPA Memorandum, an intra-agency advisory document being used by WAPA to evaluate the potential conflicts between Nevada Pacific's mining claims and the Mead-Phoenix Line. After a review of the entire, unredacted document, we conclude that the "Options" portion of the memorandum contains opinions and recommendations of an agency employee which, if released to the public, would inhibit the frank and independent discussion which defines the deliberative process. See U.S. Solar Roof, 25 DOE ¶ 80,112 (1995). This deliberative information was properly withheld.

However, the portion of the memorandum concerning the P&LM claim location which was withheld consists of factual information which is not protected from disclosure by Exemption 5 of the FOIA. Even though WAPA considered the material deliberative and protected by Exemption 5, under the new foreseeable harm standard imposed by the Attorney General, in order to withhold the material a FOIA officer must determine that disclosure of the information in question would foreseeably harm the basic institutional interests that underlie the deliberative process privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993).

In reaching the conclusion that the material is not protected by Exemption 5, we have carefully considered WAPA's decision to disclose the Lee claim location information. That information was released because it is factual. The P&LM claim location material in the memorandum is similar to the Lee material--it is factual, albeit inaccurate, and it should also be released. The correct location of the P&LM claim, based on the best currently available information, is established by BLM in its September 1995 survey, and is available to the public. We find that inaccuracy of the P&LM information does not make it deliberative in nature or exempt it from disclosure under Exemption 5.<5> Accordingly, WAPA should release this information or issue a new determination that adequately supports withholding this information under a different rationale.

It Is Therefore Ordered That:

(1) The Appeal filed by Cohen & Cotton, P.C. on September 1, 1995, Case No. VFA-0073, is granted in part as specified in Paragraph (2). The remainder of the Appeal is denied.

(2) This matter is hereby remanded to WAPA, which shall either release the following portions of the WAPA Memorandum dated June 24, 1994:

(a) Paragraph 1 of Page 2; and

(b) Sentence 2 of Paragraph 2 on page 2,

or issue a new determination adequately justifying continued non-disclosure of this information..

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. Section 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 2, 1995

<1>The Mead-Phoenix 500kV Transmission Line is a transmission access line that connects the Southwest and Southern California. Hydropower is generated in the Southwest and marketed

to entities with "preferred status" (e.g., utilities, electricity cooperatives) that purchase the electricity and sell it to the end user. The line enables power to be directed to the geographic location that needs it the most at any particular time. The Mead-Phoenix Line was scheduled to open on January 1, 1996, but is not yet completed. Memorandum of Telephone Conversation between Ron Klinefelter, WAPA, and Valerie Vance Adeyeye, OHA Staff Attorney (September 22, 1995).

<2>Inconsistencies in the maps submitted by Nevada Pacific to BLM in conjunction with a required mining plan of operations caused BLM to review existing claim location documents

and conduct its own field investigation. See Letter from Area Manager, BLM, to C&C (December 1, 1994). Thus, BLM has advised that until Nevada Pacific files a mineral survey specifying a more precise location of the mining claim, the BLM survey completed in September 1995 is the most accurate representation of the location of the claim. See Letter from Area Manager, BLM, to C&C (September 14, 1995).

<3>A "mining claim location" is not as accurate or extensive as a mining claim survey. See Memorandum of Telephone Conversation Between Michael Thompson, WAPA, and Valerie

Vance Adeyeye, OHA Staff Attorney (September 27, 1995).

<4>A lath is a small piece of wood placed in the ground to mark a specific location.

<5>In addition, we find that the sentence on page 2 of the WAPA Memorandum beginning with "Occupancy..." should also be released. This information is also factual.

Case No. VFA-0075, 25 DOE ¶ 80,144

October 24, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Kenneth H. Besecker

Date of Filing:September 7, 1995

Case Number: VFA-0075

On September 7, 1995, Kenneth H. Besecker of Martinez, Georgia filed an Appeal from a determination issued on August 4, 1995, by the Director of the Office of Economic Impact and Diversity (Director) of the Department of Energy (DOE). That determination denied in part Mr. Besecker's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records which are held by federal agencies, and which have not been made public in an authorized fashion by a covered branch of the federal government, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9). See also 10 C.F.R. § 1004. 10(b)(1)-(b)(9). The DOE regulations further provide that documents which may be exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.<1>

I. Background

In his FOIA request, Mr. Besecker asked for "information concerning complaints of discrimination filed by Mr. Larry Brown, Sr., Ms. Rita Freeman, and Mr. Morris James." The Director responded on August 4, 1995. In her determination letter, she identified nine groups of documents responsive to Mr. Besecker's request. A considerable amount of material was released to Mr. Besecker. However, several documents were withheld in part pursuant to Exemptions 5 and 6 of the FOIA. Mr. Besecker appeals two items. First, he claims he has not received the groups of documents denominated Enclosures 7, 8, and 9. Second, he appeals the withholding of certain handwritten information from Document 53 of Enclosure 4. Enclosure 4 is the Complaint File in Case No. 92(18)SR. Document 53 is an Investigative Review Form consisting of three pages. The first page is a checklist of procedural and substantive matters. The last two pages contain handwritten evaluations of an investigator's report written by another investigator for use by his supervisor. Each of these pages contains one paragraph of investigator evaluation. This handwritten material was withheld under Exemption 5 and is the subject of this Decision and Order.<2>

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "[i]nter-agency or

intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this section exempts "those documents, and only those documents, normally privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Among these privileges is the "executive" or "deliberative process" privilege. This is the privilege that the Director relied upon in withholding information in this case under Exemption 5.

The "executive" privilege shields from mandatory disclosure documents, advisory in nature, which are created during agency consideration of proposed action, and which are part of the decision-making process. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Thus, application of the privilege "under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin., 610 F.2d 70, 80 (2d Cir. 1979) (Lead Industries).

As a result, to withhold an intra- or inter-agency document under the "executive" privilege of Exemption 5, it must be both predecisional, i.e., "antecedent to the adoption of agency policy," and deliberative, i.e., "it must actually be related to the process by which policies are formulated." Jordan v. Department of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978). See also Assembly of California v. Department of Commerce, 968 F.2d 916, 920-21 (9th Cir. 1992); Formaldehyde Inst. v. Department of Health and Human Services, 889 F.2d 1118, 1122 (D.C. Cir. 1989). That is to say, a document must not only be prepared as part of agency consideration of some matter, it must also "bear on the formulation or exercise of policy-oriented judgment." Ethyl Corp. v. Environmental Protection Agency, 25 F.3d 1241, 1248 (4th Cir. 1994). See also Petroleum Info. Corp. v. Department of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992); Playboy Enterprises v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982).

In this case, the withheld portions of the document consist of two paragraphs of handwritten notes by a DOE investigator. The notes evaluate another investigator's report and assess the suitability of the report for further action. These opinions and recommendations were prepared for and transmitted to the reviewing investigator's supervisor for her use. Under these circumstances, it is clear that the handwritten material was properly withheld by the Director under Exemption 5.

We have previously held that material prepared by investigators evaluating processes and reports in EEO files may be properly withheld under the deliberative process privilege of Exemption 5. See William D. Lawrence, 24 DOE ¶ 80,139 at 80,599 n.3 (1994); Kenneth H. Besecker, 23 DOE ¶ 80,158 at 80,641 (1993). Such evaluations written by an investigator for the use of his supervisor in making a decision are clearly predecisional. Further, we find that this material is "deliberative" within the meaning of the "executive" privilege. The handwritten material only reflects the individual investigator's opinion and does not constitute the reason for any action that was or was not taken. Cf. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 12-14 (D.D.C. 1995) (appeal pend'g) (a decision whether to proceed with a course of action is a valid determination for the purposes of the "executive" privilege of Exemption 5). As the cases cited above indicate, information in EEO files can be properly withheld in this situation under Exemption 5.

We also find that release of this material could cause a reasonably foreseeable harm as set forth in Attorney General Janet Reno's Memorandum to All Department Heads on the application of the FOIA (October 4, 1993). The decision on the sufficiency of information and whether to proceed with an EEO or civil rights investigation can involve important policy and legal judgments. In addition, release of this type of information could have a chilling effect on future evaluations. If investigators believe that their recommendations would be subject to second-guessing they might become reticent to make the hard analysis so necessary in this sensitive area. Thus, withholding these types of evaluatory comments promotes the full, free and frank exchange of ideas, opinions and options which the "executive" privilege of Exemption 5 is designed to protect.

Even if a document meets the criteria set forth above, the document may not be simply withheld in its entirety. The FOIA, as implemented by 10 C.F.R. § 1004.10, requires that "[a]ny reasonably segregable

portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See The Oak Ridger, 21 DOE ¶ 80,120 at 80,564-65 (1991) (and cases cited therein); Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989) (and cases cited therein). In the context of the "executive" privilege of Exemption 5, this means that non-deliberative material ordinarily should be released to the requester. Environmental Protection Agency v. Mink, 410 U.S. 73, 87-91 (1972). The only exceptions to the command of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries, 610 F.2d at 85, or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id. In this case, we have reviewed the withheld material and find that both withheld paragraphs contain exempt material and that no portion of it is reasonably segregable. Accordingly, we find that the Director properly withheld the material under the deliberative process privilege of Exemption 5.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Kenneth H. Besecker of Martinez, Georgia, Case No. VFA-0075, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 24, 1995

<1>This Decision and Order was originally scheduled to be issued by October 10, 1995. However, because of our difficulty in obtaining the withheld information as well as information regarding the background and context of the withheld information, it was not possible to resolve this Appeal by that date. On October 6, 1995, Mr. Besecker agreed to extend the time for the issuance of this Decision and Order.

<2>At our request, the Director has sent another copy of the material listed in Enclosures 7, 8, and 9 to Mr. Besecker.

Case No. VFA-0076, 25 DOE ¶ 80,140

October 10, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: September 12, 1995

Case Number: VFA-0076

On September 12, 1995,<1> William H. Payne filed an Appeal from a Determination issued to him on August 21, 1995, by the Department of Energy (DOE) Albuquerque Operations Office (DOE-AL). In that Determination DOE-AL stated that it was unable to locate any documents responsive to a request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE-AL to conduct a further search for responsive documents.

I. Background

On July 29, 1995, Mr. Payne filed a request for copies of documents showing the employment dates and names of all retired military personnel who were hired by Sandia National Laboratories (SNL) between the dates of October 1, 1979 and July 28, 1995. See Determination Letter from Elva Barfield, FOIA Officer, Office of Public Affairs, DOE-AL (August 21, 1995) (Determination Letter). In response to the FOIA request, DOE-AL contacted the SNL which informed DOE-AL that there were no documents which identified retired military personnel working at SNL. In his Appeal, Mr. Payne argues that since SNL maintains records which list previous employment and in some instances that previous employment is military employment, some records must exist which indicate whether a person has retired from the military. See Appeal Letter from William H. Payne, to Hazel O'Leary, Secretary of Energy (September 6, 1995).

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Barton Kaplan, 22 DOE ¶ 80,125 (1992); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). However, in previous cases we have held that challenges to the adequacy of the agency's search must be supported by a reasoned argument that a requested document, unidentified by the agency in its search, does in fact exist. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992); Sun Co. Inc., 11 DOE ¶ 80,114 (1983); Vinson & Elkins, 4 DOE ¶ 80,127 (1979).

In reviewing the Appeal, we contacted Elva Barfield, FOIA Officer, DOE-AL, to ascertain the extent of the search that had been performed and to determine whether any documents responsive to the Mr. Payne's

request might exist. According to Ms. Barfield, SNL searched an employee database it maintains and was unable to locate any responsive documents. The SNL database identifies whether an employee has a military background but does not identify an employee's military status, i.e. whether an employee is retired from the military. From subsequent conversations with Ms. Barfield, we have learned that despite the fact that the database does not contain responsive documents, SNL does possess individual personnel files which identify whether a particular employee is retired from military service.

Under these circumstances, we find that this FOIA request may not have been subjected to a search sufficiently thorough and conscientious to meet the established standards of reasonableness. It appears that documentary information responsive to Mr. Payne's request does in fact exist.<2> See David Hackett, 24 DOE ¶ 80,166 (1995); Robert Heitman, 24 DOE ¶ 80,152 (1995). Accordingly, this Appeal will be remanded to DOE-AL to perform a new search for responsive documents consistent with this Opinion.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne, Case No. VFA-0076, on September 12, 1995, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Albuquerque Operations Office which shall conduct a new search for responsive documents in accordance with the guidance in the foregoing Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 10, 1995

<1>Mr. Payne's correspondence to the Secretary of Energy was forwarded to this Office on September 6, 1995. In reviewing the correspondence we determined that Mr. Payne was appealing a Freedom of Information Act (FOIA) Determination. However, the correspondence did not include a copy of the Determination required by this Office before it can begin processing a FOIA Appeal. See 10 C.F.R. § 1004.8(b). We received a copy of the Determination on September 12, 1995. Thus the Appeal was considered to be filed as of that date.

<2>Even though responsive information may in fact exist, at this time we express no opinion whether the document(s) are in fact agency records under the FOIA. See Sangre de Cristo Animal Protection, 25 DOE ¶ 80,121 (1995).

Case No. VFA-0078, 25 DOE ¶ 80,138

October 2, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Quanterra Environmental Services

Date of Filing: September 8, 1995

Case Number: VFA-0078

On September 8, 1995, Quanterra Environmental Services (Quanterra) filed an Appeal from a determination issued to it on August 14, 1995, by the Richland Operations Office (Richland) of the Department of Energy (DOE). That determination concerned a request for information submitted by Quanterra pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Richland would be required to conduct a further search for responsive material.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been discarded or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

In its request, Quanterra sought documents concerning:

1. The total number of samples taken for the Environmental Program and Waste Management Program at the Hanford Site from January 1, 1994, to June 23, 1995, and
2. A list of all environmental laboratory service contracts or subcontracts awarded by [Richland] or its contractors for analysis of samples taken at the Hanford Site since August 1, 1993, including those awarded prior to August 1, 1995, where the period of performance continued after January 1, 1994.

In response, Richland issued a determination in which it provided a listing titled, "Pacific Northwest Laboratory (PNL) Analytical Service Contracts for Samples Taken on Hanford Reservation." Richland also included information designed to assist Quanterra in narrowing its request. In its Appeal, Quanterra states that Richland did not indicate that responsive documents in the possession and/or control of Westinghouse Hanford Company (WHC) were reviewed in response to the FOIA request.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably

calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The request "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." H. Rep. No. 93-876, 93d Cong. 2d Sess. 6 (1974), as cited in Mills v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988). However, the FOIA does not require an agency to create new documents in response to an FOIA request, but merely requires the agency provide documents already in its possession.

In reviewing the present Appeal, we contacted Dorothy Riehle, who handled the FOIA request at Richland, and Yvonne Sherman, the FOIA Officer at Richland, to ascertain the extent of the search that had been performed and to determine whether any additional documents responsive to Quanterra's request might exist. Ms Riehle informed us that she had contacted both WHC and PNL. Memorandum of Telephone Conversation between Janet R. H. Fishman, Staff Attorney, OHA, and Dorothy Riehle and Yvonne Sherman, Richland (September 11, 1995) (Memorandum of September 11, 1995 Telephone Conversation). According to the information we received, Richland provided all relevant documents which exist to Quanterra. For example, no "lists" of the type Quanterra seeks previously existed. Ms Riehle stated that PNL created the document provided to Quanterra in response to the appellant's request. PNL could easily create the document because of the small number of samples taken under PNL's direction. This was a customer-friendly action. In contrast, because WHC has thousands of contracts, with about 90 percent of them dealing with samples, it would be difficult to create a document such as PNL created.<1> Ms Riehle also checked with DOE personnel and Bechtel-Hanford, a prime contractor. She determined that WHC does all the sampling for DOE, and Bechtel-Hanford does not do any sampling.

Ms Riehle explained that she spoke with Mr. Whiting of Quanterra on numerous occasions while researching the FOIA request. In regard to the first part of Quanterra's request, for the total number of samples taken at Hanford between January 1, 1994, and June 23, 1995, Ms Riehle asked if Quanterra could indicate what types of samples it was interested in so that she might be better able to formulate a response. Mr. Whiting was unable to narrow the request further. With respect to the second part of the request, for a list of all environmental laboratory service contracts or subcontracts, she asked Mr. Whiting if a copy of the contracts or the cover page of the contracts would be satisfactory. He indicated that it would not, apparently desiring only a list of the contracts.

We are convinced that Richland followed procedures which were reasonably calculated to uncover the material sought by Quanterra. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). It is apparent that despite Quanterra's allegation, Ms Riehle did contact WHC to determine if it had any documents responsive to Quanterra's request, i.e., a document listing the total number of samples and a list of all environmental laboratory service contracts. It had none. Quanterra has not provided any evidence that any additional responsive listings exist in Richland's files. The fact that the search did not uncover the lists sought by Quanterra does not mean that the search was inadequate. While Richland has an abundance of information that might have satisfied Quanterra, the information is not in the list form desired by the firm. For example, had Quanterra been willing to accept copies of the contracts instead of a "list" of the contracts, it would have received additional material in response to its request. Federal agencies are not required to create new documents, such as the requested list, in response to FOIA requests. We also note that Richland initiated a dialogue with Mr. Whiting in order to attempt to narrow and clarify Quanterra's request, but this attempt was not successful. See 10 C.F.R. § 1004.4(c)(2).

Under the circumstances of this case, we find that Richland's search for responsive documents was adequate and that no additional documents responsive to Quanterra's request exist in the possession of the DOE. Accordingly, Quanterra's Appeal should be denied.

It Is Therefore Ordered That:

(1)The Appeal filed on September 8, 1995, by Quanterra Environmental Services, Case No. VFA-0078, is

hereby denied.

(2)This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 2, 1995

<1>/ The environmental samples are examined too measure the presence of radiation, ambient air

particulates, soil, surface water, sediment, biota, and effluent releases. Memorandum of September 11, 1995 Telephone Conversation.

Case No. VFA-0079, 25 DOE ¶ 80,141

October 11, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Henry, Lowerre, Johnson, Hess & Frederick

Date of Filing: September 12, 1995

Case Number: VFA-0079

On September 12, 1995, David Frederick of the law firm of Henry, Lowerre, Johnson, Hess & Frederick (Frederick) filed an Appeal from a Determination issued on August 14, 1995, by the Department of Energy (DOE) Albuquerque Operations Office (DOE-AL). The DOE-AL Determination was issued in response to a request for documents submitted by Frederick under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that Determination DOE-AL released seven responsive documents and stated that no other responsive documents existed.

I. Background

On February 22, 1995, Frederick filed a request for copies of documents related to the Falls City, Texas, Uranium Mill Tailings Remedial Action (UMTRA) site. In response to the FOIA request, DOE-AL released seven responsive documents in their entirety, stated that DOE-AL could not locate certain other documents that had been requested by the Appellant, and referred Frederick to a publicly available document. DOE-AL stated that it was unable to locate as requested (1) either the results of legal research performed by the law firm of Davidson & Troilo or any documents reflecting the distribution of the results of the legal research; (2) a document entitled "UMTRA-Falls City-Proposed Scope Change-Engineering Support for Water Quality Issues-July and August 1993; (3) attachments A-F to a document entitled "UMTRA Project-Task Change Work Sheet for Changes in Scope-Falls City Scope Change #15-M.K. Ferguson Document No. 3885-FCT-R-01-01960-00 and (4) documents concerning soils to be excluded from the disposal cell site. Finally DOE-AL noted that since one of the documents requested, a Falls City Remedial Action Selection Report, was already publicly available, DOE-AL would not provide Frederick with a copy of the report under the FOIA. See Determination Letter from Elva Barfield, FOIA Officer, DOE-AL to David Frederick (August 10, 1995).

In its Appeal, Frederick challenges the adequacy of the search for the above-mentioned documents and the withholding of the publicly available document. To support its challenge to the adequacy of the search, Frederick notes that memoranda already in his possession refer to the existence of the

requested documents and that since the documents have not been produced, the search was inadequate. With regard to the document that was publicly available, Frederick notes that under the Supreme Court's analysis in Department of Justice v. Tax Analysts, 492 U.S. 136, 153 (1988) (Tax Analysts), DOE-AL must release the document. See Appeal Letter from David Frederick to Director, Office of Hearings and Appeals (September 12, 1995).

II. Analysis

A. Adequacy of the Search

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Barton Kaplan, 22 DOE ¶ 80,125 (1992); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). However, in previous cases we have held that challenges to the adequacy of the agency's search must be supported by a reasoned argument that a requested document, unidentified by the agency in its search, does in fact exist. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992); Sun Co. Inc., 11 DOE ¶ 80,114 (1983); Vinson & Elkins, 4 DOE ¶ 80,127 (1979).

In reviewing the Appeal, we contacted Terry Apodaca, FOIA Officer, DOE-AL, to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to the request exist. According to Ms. Apodaca, there are two contractors who are responsible for the work at the UMTRA site and who might possess responsive documents: M.K. Ferguson Company (MK-F) and Jacobs Engineering Company (Jacobs Engineering). Although the UMTRA office appears to have searched the files of Jacobs Engineering, it did not search the files of MK-F for responsive information. Moreover, the search did not include the Office of Chief Counsel where one of the requested documents, the Davidson & Troilo research results, is most likely to be found.

Under these circumstances, we find that this FOIA request has not been subjected to a search sufficiently thorough and conscientious to meet the established standards of reasonableness. See David Hackett, 24 DOE ¶ 80,166 (1995); Robert Heitman, 24 DOE ¶ 80,152 (1995). Since DOE-AL failed to search all of the offices likely to contain responsive documents, we cannot at this time find that the search has been adequate and that no additional responsive documents exist. Accordingly, this Appeal will be remanded to DOE-AL to perform a new search consistent with the guidance provided in this Decision.

B. Documents Already Made Publicly Available

In its Determination, DOE-AL informed Frederick that one responsive document was publicly available from the National Technical Information Service (NTIS). Frederick argues in his Appeal, that under the Tax Analysts decision, DOE/AL must provide him with the requested document, regardless of whether it is publicly available from NTIS.

It is generally true that an agency may not withhold documents in its possession solely because the requestor can obtain the document from a source outside that agency. However, an agency need not provide to a requestor documents that "have been previously published or made available by the agency itself." Tax Analysts, 492 U.S. at 152. Since the DOE has chosen to make the document in question publicly available through NTIS, DOE/AL is not required by the FOIA to provide this document to Frederick directly, and may instead refer him to the location where the document is available. See Daniel Grossman, 22 DOE ¶ 80,117 at 80,537 (1992). Accordingly, this portion of Frederick's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Henry, Lowerre, Johnson, Hess & Frederick, Case No. VFA-0079, on September 12, 1995, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Albuquerque Operations Office which

shall conduct a new search for responsive documents in accordance with the guidance in the foregoing Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 11, 1995

Case No. VFA-0082, 25 DOE ¶ 80,142

October 18, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Cohen & Cotton, P.C.

Date of Filing:September 21, 1995

Case Number: VFA-0082

Cohen & Cotton, P.C. ("C&C") filed an Appeal of an August 16, 1995 determination issued to it by the Western Area Power Administration ("WAPA") of the Department of Energy ("DOE"). In that determination, the Administrator of WAPA informed C&C that one of the documents that the firm had asked for in a request for information filed on October 21, 1994 pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, did not exist. This Appeal, if granted, would require WAPA to conduct a further search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. §1004.10(b).

Background

C&C, a law firm located in Phoenix, Arizona, represents Nevada Pacific Mining Co. ("Nevada Pacific"), a company which owns mining claims allegedly encroached upon by the Mead-Phoenix 500kV Transmission Line, a transmission access line connecting the Southwest and Southern California. See Cohen & Cotton, 25 DOE ¶ (October 1995). The line is owned and operated by WAPA. On August 3, 1995, C&C filed a request with WAPA for access to two categories of documents: (1) an executed Land Rights Agreement related to the Mead Phoenix Transmission Line; and (2) a Preliminary Real Estate Plan. See Letter from C&C to FOIA Officer, WAPA (August 3, 1995). Preliminary Real Estate Plans (PREP) are referenced in a DOE Real Property Management memorandum. See DOE Order 4300.1C, "Real Property Management," page I-3 (June 28, 1992) ("Order"). The Order states that a PREP is prepared whenever there is a requirement to acquire additional realty interest by: (1) fee purchase; (2) lease, exceeding $500,000 per year; (3) contract, where the estimated project cost exceeds $5 million; and (4) transfer of

Government property from another agency to DOE, or withdrawal of land from the public domain. Id.

DOE released the Land Rights Agreement to C&C on August 16, 1995, but informed the requester that no PREP exists because a DOE memorandum exempts WAPA from preparing PREPs in accordance with Paragraph 2a of the Order. See Memorandum from Director of Administration, DOE, to Administrator, WAPA, "Real Estate Authority" (January 7, 1988). That memorandum, released to C&C along with WAPA's determination, authorizes the Administrator of WAPA to take three categories of real estate actions without the prior approval of the DOE Director of Administration. Id. The Administrator of WAPA stated that DOE and WAPA have "interpreted the memorandum to accomplish the goals of the

PREP as [WAPA] conducts a planning process within the environmental process impact statement." See Letter from Administrator, WAPA, to C&C (August 16, 1995) ("Determination Letter"). C&C filed this Appeal on September 21, 1995. See Letter from C&C to Director, OHA (September 21, 1995).

Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. David K. Hackett, 25 DOE ¶ 80,107 (1995); J. Eileen Price, 25 DOE ¶ 80,105 (1995); National Security Archive, 24 DOE ¶ 80,162 (1995). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Wiesberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing the Appeal, we contacted the WAPA FOIA Officer to discuss the statement in the Determination Letter that no PREP exists. The FOIA Officer informed us that upon receiving the request, she met with the Director of the Division of Lands. See Memorandum of Telephone Conversation Between FOIA Officer, WAPA, and Valerie Vance Adeyeye, OHA Staff Attorney (October 2, 1995). In that meeting, the Director told her that because the real estate action in question fell within one of the three categories of delegated authority, *i.e.* , the acquisition of fee and permanent easements where the total cost does not exceed $500,000, no PREP was prepared. Id. This interpretation was confirmed by a Lands Attorney at WAPA. See Memorandum of Telephone Conversation Between Lands Attorney, WAPA, and Valerie Vance Adeyeye, OHA (October 4, 1995).

Although the Order was published four years later than the 1988 memorandum, there is no indication in the Order that the 1988 Memorandum was rescinded. In fact, in a section of the Order entitled "Cancellation," only the previous Order (DOE 4300.1B) is cancelled. See Order at 1.

Based on the information provided to us by WAPA, and after careful review of the DOE Order and the 1988 Memorandum, we conclude that no responsive document exists. It has been WAPA's consistent interpretation of the 1988 memorandum that a PREP is not required in the acquisition of easements where the cost is not estimated to exceed $500,000. Accordingly, C&C's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Cohen & Cotton, P.C. on September 21, 1995, Case No. VFA-0082, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. Section 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 18, 1995

Case No. VFA-0084, 25 DOE ¶ 80,143

October 20, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Portland General Electric Company

Date of Filing: September 22, 1995

Case Number: VFA-0084

On September 22, 1995, Portland General Electric Company (PGE) filed an Appeal from a determination issued to it on September 11, 1995, by the Bonneville Power Administration (BPA). In that determination, BPA released one document in response to a request for information made by PGE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, PGE requests that we direct BPA to conduct an additional search for responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been discarded or never to have existed. 10 C.F.R. § 1004.4(d).

In its request, PGE sought documents pertaining to proposed contracts between BPA and its direct service industrial customers (DSIs) regarding the sale of electrical power. Specifically, PGE sought:

1. Any and all drafts . . . of proposed power sales contracts between BPA and its direct service industrial customers.
2. Any documents reflecting, evidencing or relating to a decision of Bonneville to offer or enter into the contracts referenced in (1) above.

In its determination, BPA identified and released one document in response to item 1 of PGE's request. With respect to item (2), BPA stated:

Last year BPA conducted joint customer negotiations on its proposals to offer new power sales contracts to all customers, including the . . . DSIs. PGE participated in those negotiations and received all BPA papers regarding a proposed DSI contract offer and terms. Apart from that, BPA has not yet made any decisions to offer or enter into new

contracts, therefore no records exist regarding a decision to offer or enter into the contracts.

Because it believed that PGE had already received all responsive documents, no additional documents were provided pursuant to Item 2 of the request.

PGE appeals the determination with respect to Item 2.<1> The firm states that it does not seek duplicate copies of documents that it already has, but it contends that responsive documents do exist which were not provided to it. In support of its position, PGE has identified several documents in BPA's possession that

should have been provided to it pursuant to its request. It also states that it has not received copies of any correspondence between BPA and the DSIs.

We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

In reviewing this Appeal, we contacted both the person at PGE who drafted the FOIA Request and one of the individuals at BPA who was involved in responding to the request. Memorandum of Telephone Conversation between R. Lessner, PGE, and B. MacPherson, Office of Hearings and Appeals (October 17, 1995); Memorandum of Telephone Conversation between T. Miller, BPA, and B. MacPherson, Office of Hearings and Appeals (October 16, 1995). Based upon these conversations, it is apparent that BPA misconstrued the scope of PGE's request. Because no decision had yet been made on whether to enter into contracts with the DSIs, BPA concluded that it had no documents "reflecting, evidencing or relating to a decision . . . to offer or enter into" such contracts. However, PGE intended its request to include, inter alia, documents that would be relevant to BPA's future decision on such contracts.

While BPA's construction of PGE's request is not unreasonable, the request was ambiguous. BPA should therefore have sought clarification of what information PGE desired. See 10 C.F.R. § 1004.4(c)(2). Accordingly, the present Appeal shall be granted, and the matter shall be remanded to BPA. BPA shall consult with PGE to clarify the scope of the request, and it shall conduct a new search and issue a new determination following the consultation.

It Is Therefore Ordered That:

(1) The Appeal filed by Portland General Electric Company on September 22, 1995, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is remanded to the Bonneville Power Administration which shall promptly issue a new determination after consulting with the requester to clarify the scope of its request.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 20, 1995

<1>PGE originally also appealed the determination with respect to Item 1. The firm

contended that the search must have been inadequate because only one draft contract was provided, while draft contracts with a number of firms appeared to exist. In the course of processing this Appeal, PGE was informed that although there were a number of draft contracts, the contracts were identical except for the name and other information identifying the customer. PGE indicated that if this had been explained in the determination, it would not have appealed Item 1, and it withdrew its Appeal with respect to this Item. Memorandum of Telephone Conversation between R. Lessner, PGE, and B. MacPherson, Office of Hearings and Appeals (October 17, 1995).

Case No. VFA-0087, 27 DOE ¶ 80,199

April 16, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Stanley Goldberg

Date of Filing: September 27, 1995

Case Numbers: VFA-0087

VFA-0088

Stanley Goldberg filed Appeals from determinations issued to him on August 28, 1995, by the National Archives and Records Administration (NARA). In those determinations, NARA denied in part a request for information that Dr. Goldberg filed on June 16, 1989 (Case No. VFA-0087), and denied in full a request for information that he filed on March 16, 1990 (Case No. VFA-0088), pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the document released to Dr. Goldberg in the June 16 determination, as well as the entirety of the remaining requested documents, were withheld after a review of the document had been performed by the Department of Energy (DOE). This Appeal, if granted, would require the DOE to release the information that it instructed NARA to withhold in the August 28, 1995 determinations.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 16, 1989, Dr. Goldberg submitted a request under the FOIA to NARA for a number of documents authored by Samuel Goudsmit. In April 1993, NARA requested that the DOE review those documents for classification purposes. An August 1995 letter from NARA informed Dr. Goldberg that the DOE had determined that one document could be released in part and the remaining documents were classified and must be withheld in full.

On March 16, 1990, Dr. Goldberg submitted a similar request to NARA, for all materials in Box 3, Folder 12 of a collection of papers authored by Dr. Goudsmit. NARA requested

classification review by the DOE and, in a second August 1995 letter, informed Dr. Goldberg that the DOE had determined that all the requested documents were classified and must be withheld in full. In both of the above instances, NARA stated that the material that was responsive to Dr. Goldberg's requests but not released to him was withheld under Exemption 1 of the FOIA. NARA provided no basis for its

application of that exemption to withhold information from Dr. Goldberg.

The present Appeals seek the disclosure of all the material withheld from Dr. Goldberg in both determinations. In his Appeals, Dr. Goldberg stated that the denials were so general that he was unable to formulate specific arguments, but nonetheless contended that the materials should be released because they are at least 40 years old and therefore unlikely still to affect the national security. Moreover, Dr. Goldberg contended that some of the documents have already been made public.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. See National Security Archive, 26 DOE ¶ 80,118 (1996); Keith E. Loomis, 25 DOE ¶ 80,183 (1996); A. Victorian, 25 DOE ¶ 80,166 (1996). According to the Office of Declassification, the national security information withheld in this case relates to intelligence sources, methods, and activities, which is protected by Section 1.5(c) of the Executive Order and is therefore exempt from mandatory disclosure under Exemption 1 of the FOIA.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed all materials for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

In performing his review the Director of SA considered the two issues that Dr. Goldberg raised on appeal. Despite Dr. Goldberg's assertions that the withheld materials are more than 40 years old and that some of them have been released to the public, the Director of SA has determined that no additional portions of requested documents may now be released under the FOIA, because all of the information initially withheld continues to be properly classified as national security information under Section 1.5(c) of Executive Order 12958.

Based on the review performed by the Director of SA, we have determined that Executive Order 12958 requires the continued withholding of the materials responsive to Dr. Goldberg's requests that were previously identified as classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by Executive Order. Therefore, those portions of the responsive documents that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. Accordingly, Dr. Goldberg's Appeals will be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by Stanley Goldberg on September 27, 1995, Case Nos. VFA-0087 and VFA-0088, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 16, 1999

Case No. VFA-0089, 25 DOE ¶ 80,145

October 31, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William M. Arkin

Date of Filing: September 29, 1995

Case Number: VFA-0089

On September 29, 1995, William M. Arkin (Arkin) filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Albuquerque Operations Office (Albuquerque). In that determination, Albuquerque denied a request for information filed by Arkin under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Albuquerque to release the information requested by Arkin.

I. BACKGROUND

On April 11, 1995, Arkin filed a request for information seeking copies of:

Descriptions of Los Alamos laboratories current R&D activities regarding Blinding, Dazzling, or Stunning Laser-related counter electro-optics weapons on the battlefield or for special missions including, but not limited to Perseus. Records sought include briefings, histories, or fact sheets.

April 11, 1995 Request for Information. On August 16, 1995, Albuquerque issued a determination letter in response to Arkin's request stating that:

A search of administrative files at the Los Alamos National Laboratory (LANL) produced negative results. This office has also been advised that LANL is not aware of any current research or development activities at LANL regarding blinding, dazzling or stunning using laser technology.

August 16, 1995, Determination Letter. <1> On September 29, 1995, Arkin filed the present Appeal, contending that the search for responsive documents conducted by Albuquerque was inadequate and that Albuquerque's response was "evasive."

II. ANALYSIS

The FOIA generally requires that documents held by federal agencies be released to the public upon request. If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981).

Arkin's Appeal is based upon his contention that LANL's "search and reply was inadequate and evasive."

In support of his contentions, Arkin notes that LANL's involvement in the invention and development of "Battlefield Optical Munitions" (BOM) has been the subject of a number of articles in both the popular and technical press. As examples, Arkin specifically cites articles in the September 1994 edition of "Laser Focus World," the January 1995 edition of "Technology Review" and the March 1995 edition of "GQ" Magazine.

These articles contradict the determination letter's contention that LANL does not conduct BOM research and development. In order to investigate this apparent contradiction, we have contacted Albuquerque which reports that it has attempted unsuccessfully to obtain an explanation from LANL.

Since Albuquerque has neither challenged the accuracy of Arkin's assertion nor otherwise explained the apparent contradiction between its determination and the media reports referring to LANL's involvement in BOM research and development, it is reasonable to assume that LANL might possess documents which are responsive to Arkin's request that were not located by LANL's initial search. Therefore, we are instructing Albuquerque to conduct a new, more comprehensive search at LANL for documents responsive to Arkin's request.

It Is Therefore Ordered That:

(1) The Appeal filed by William M. Arkin, Case No. VFA-0089, on September 29, 1995, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 31, 1995

<1>/ The Albuquerque Operations Office's Office of Public Affairs supervised LANL's search for responsive documents and issued the determination letter to Arkin.

Case No. VFA-0091, 25 DOE ¶ 80,147

November 8, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: October 17, 1995

Case Number: VFA-0091

On October 17, 1995, William H. Payne filed an Appeal from a determination issued to him on September 29, 1995, by the Department of Energy's Albuquerque Field Office (DOE/AL), in response to a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On September 12, 1995, Payne filed a request under the FOIA in which he sought the "[n]ames and dates of employment of all retired military personnel who were hired by Los Alamos National Laboratory [LANL] between the date of October 1, 1979 and September 12, 1995." Letter from William H. Payne to Hazel R. O'Leary, Secretary of Energy (October 6, 1995). LANL is a DOE site currently operated under a contract between the DOE and the University of California. DOE/AL issued a determination on September 29, 1995, in which it stated that the information sought by Payne is contained in "personnel files in the possession and control of [LANL.]" Letter from Elva Ann Barfield, Freedom of Information Officer, DOE/AL, to Bill Payne (September 29, 1995). According to DOE/AL, these files are "not 'agency records' subject to the provisions of the FOIA" and "are not subject to release under DOE policy as well." Id.

In his Appeal, Payne does not dispute that the information he is seeking is contained in LANL personnel files. He does state, without elaborating, that "others disagree with" DOE/AL's determination that these files are not subject to release under the FOIA. Letter from William H. Payne to Hazel R. O'Leary, Secretary of Energy (October 6, 1995). He further contends that the information he seeks is of national and international concern. Id.

II. Analysis

Our threshold inquiry in this case is whether personnel files generated by and in the possession of a DOE contractor are subject to the FOIA. First, we must determine whether such records are "agency records,"

and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). We conclude that the records in question are not "agency records" and are not subject to the FOIA under DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as the University of California, are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, the University of California is the prime contractor responsible for maintaining and operating LANL. While the DOE obtained the University's services and exercises general control over the contract work, it does not supervise the University's day-to-day operations. We therefore conclude that University of California is not an "agency" subject to the FOIA.

Although the University of California is not an agency for the purposes of the FOIA, its records relevant to the Payne request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the appellant's request. Thus, the records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and the University of California to determine the status of these records. That contract states:

Except for those records owned by the University pursuant to paragraph (b) below, all records acquired or generated by the University's employees at the Laboratory or at the University's Laboratory Administrative Management Oversight Unit in the performance of this Contract shall be property of the Government, and shall be delivered to the Government or otherwise disposed of by the University in accordance with the terms of this contract or as directed by the Contracting Officer during the term of this contract or upon its termination or expiration.

Contract W-7405-ENG-36, Modification No. M359, Article VI, Cl. 10(a) (emphasis added). Paragraph (b) of this clause states that the category of "University-owned Records" includes "Personnel and medical . . . records and files maintained on individual employees, applicants and former employees[.]" Id. at Cl. 10(b). Thus, because personnel records are not among the records which are "property of the Government" under the DOE's contract with the University of California,

these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under DOE regulations. Accordingly, we shall deny the present FOIA Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on October 17, 1995, Case Number VFA-0091, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 8, 1995

Case No. VFA-0092, 25 DOE ¶ 80,158

January 16, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dennis McQuade

Date of Filing: December 8, 1995

Case Number: VFA-0092

On December 8, 1995, Dennis McQuade (McQuade) completed the filing of an Appeal from a series of determinations that denied in part a request for information filed under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), as implemented by the DOE in 10 C.F.R. Part 1004. McQuade appeals from (1) an August 25, 1995 determination issued by the Oak Ridge Operations Office (Oak Ridge); (2) a May 2, 1995 determination issued by the FOIA/Privacy Act Division at DOE Headquarters (Headquarters' FOIA Office); (3) an October 31, 1995 determination issued by the Office of Economic Impact and Diversity at DOE Headquarters (Headquarters' Office of Economic Impact and Diversity); and (4) a December 1, 1995 determination by the Savannah River Operations Office (Savannah River).<1> This Appeal, if granted, would require the DOE to (1) release the information that was withheld; and (2) conduct a further search for documents responsive to McQuade's request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from

disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I . Background

The Appellant in this case was an employee of the Personnel Clearance and Assurance Branch of the Personnel Division of Oak Ridge. This Branch is responsible for determining an individual's eligibility for a security clearance. The Appellant filed a FOIA request for documents relating to complaints of employment discrimination, Privacy Act violations, discrimination in the issuance and revocation of security clearances, and other problems in the workplace.<2>

In its determination, Oak Ridge found, inter alia, that there were no documents at Oak Ridge responsive to Request Items 1, 2, 3, 4, and 6. Oak Ridge further indicated that it had located documents which were responsive to Request Item 5. However, Oak Ridge withheld certain of these documents in their entirety under Exemptions 6 and 7 of the FOIA. Other documents were provided, with certain information redacted pursuant to Exemption 6 of the FOIA.

The Headquarters' FOIA Office indicated in its determination that a search for records responsive to McQuade's request had been conducted by the Office of Inspector General and the Office of Safeguards

and Security and that no responsive records had been located. In their determinations, the Headquarters' Office of Economic Impact and Diversity and Savannah River stated that no responsive documents had been found.

McQuade appealed the adequacy of the search for documents and the withholding of information under Exemptions 6 and 7 of the FOIA.

II. Analysis

A. The Documents Withheld Under Exemptions 6 and 7

In its determination, Oak Ridge withheld six documents in their entirety based upon Exemptions 6 and 7 of the FOIA. Five of the six withheld documents were created as a result of a personnel inquiry designed to maximize performance at the Personnel Clearance and Assurance Branch. These documents include summaries of interviews, witness statements and memoranda. The sixth document is a memorandum to the file setting forth the author's perceptions of many of the relationships and problems (including allegations of discrimination) within the Personnel Clearance and Assurance Branch. These documents contain information on many subjects. For example, the statements and interviews contain candid comments about other employees and critical remarks concerning the manner in which security clearances are being processed and the management of the office. These documents also contain information about the duties of employees and a description of the workplace.

Oak Ridge also provided McQuade with four responsive documents in which small amounts of information were redacted pursuant to Exemption 6 of the FOIA. The redacted information in three of the documents consists of the name of an employee. In two instances in which the name was redacted, the documents contain negative information about the individual. In the third document in which a name was redacted, the document indicates that the employee had filed a complaint against management. In the fourth document, two sentences consisting of potentially negative information about a named employee were redacted.

B. Exemption 7

The investigatory information at issue here was withheld pursuant to Exemptions 7(C) and 7(D).<3> The threshold test for withholding information under Exemption 7 is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement for both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). An investigation of an agency's own employees is for "law enforcement purposes" only if it focuses on distinct acts of illegality by specific employees. Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984).

In an effort to determine whether the records at issue were compiled for law enforcement purposes, we contacted James Ware, the former Chief, Inspections and Technical Assessments Branch, Safeguards and Security Division at Oak Ridge. Mr. Ware conducted the investigation that gave rise to five of the six documents withheld under Exemption 7. He informed us that the documents at issue were generated during an investigation commenced after an allegation that a person who worked as a contractor at Oak Ridge received threatening phone calls. The investigation began as a criminal investigation. However, the criminal investigation was subsequently discontinued and the investigation was transformed into an inquiry into personnel issues designed to obtain information to maximize performance at the Personnel Clearance and Assurance Branch. The documents at issue in this Appeal were generated after the criminal investigation was discontinued and were part of an attempt to investigate and rectify a personnel matter. Memorandum of Telephone Conversations between Linda Lazarus, Staff Attorney, Office of Hearings and Appeals, and James Ware, Deputy Assistant Manager for Defense Programs (January 2, 1996). As such,

the documents at issue were not generated during a civil or criminal agency law enforcement proceeding. Accordingly, Exemption 7 was improperly applied to these documents. <4>

C. Exemption 6

1. In General

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

The fact that a document contains material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

2. The Privacy Interest

The documents withheld in their entirety pursuant to Exemption 6 contain some information in which individuals have a significant privacy interest; however, they also contain some information in which there is little or no privacy interest. There is a privacy interest in the candid opinions of the witnesses concerning their co-workers and supervisors. Their release could harm working and personal relationships among co-workers and supervisors, and might prompt reprisals. Moreover, other employees may have privacy interests with respect to certain statements in the documents made about them. The degree of their privacy interest will depend upon the sensitivity of the subject matter of the comments. Joyce E. Economus, 23 DOE ¶ 80,182 (1994). However, there is no privacy interest in some portions of the documents. For example, the first two sentences of Document 1 ("Letter dated July 13, 1990, Subject: Personnel Issues, Personnel Clearance and Assurance Branch (PCAB), Oak Ridge Operations") simply indicate that a memorandum is being transmitted concerning work place problems. Moreover, the witness statements contain descriptions of an employee's duties or of the workplace which are common knowledge.

In contrast, the material redacted pursuant to Exemption 6 from the four documents that were released in part clearly constitutes information in which individuals have a privacy interest. The Supreme Court has

long found a privacy interest in the names of individuals sufficient enough to warrant protection from disclosure under Exemption 6. Department of Air Force v. Rose, 425 U.S. 352, 375 (1976). Moreover, the individuals referred to here have an even greater interest in maintaining privacy. The individuals whose names are deleted are referred to in a negative context in two of the three documents. In the third document, there is an indication that the person whose name has been deleted has filed a complaint. In the fourth document, there is arguably negative information about a named individual. Thus, the withholding of each individual's name and possibly negative information about the employee is consistent with the core purpose of Exemption 6, i.e. to protect individuals from embarrassment resulting from disclosure of personal information. Washington Post, 456 U.S. at 599.

3. The Public Interest in Disclosure

The strength of the privacy interests at issue here must then be weighed against the public's interest in disclosure. In Reporters Committee, the Supreme Court held that neither the identity of the requester nor the purpose for which the request is being made is relevant to whether information is exempt from disclosure. 489 U.S. at 771. Thus, the determination "must turn on the nature of the requested document and its relationship to" the public interest, id. at 772, rather than upon the requester's proposed use for the information. The Court further found that with regard to the FOIA, the public interest in disclosure must be measured in terms of its relation to the core purpose of the Act, i.e., "public understanding of the operations and activities of the Government." Id. at 775. The Court indicated that only information which contributes significantly to this understanding is within "the ambit of the public interest which the FOIA was enacted to serve." Id. Accordingly, the measure of public interest in disclosure depends on the degree to which disclosure would further the public's understanding of the workings of government.

We find that there is a significant public interest in disclosure of at least portions of the material contained in the six documents withheld in their entirety. These documents concern not only internal management problems within the Personal Clearance and Assurance Branch but also involve material that is relevant to the issue of the fairness of the issuance of security clearances and the proper operation of government. The public's understanding of the Branch's operations and activities would likely be enhanced significantly by release of portions of these documents.

In contrast, there is very little public interest in disclosure of the information redacted from the four documents. In three instances, these redactions involve the names of individuals. In the fourth, the redaction involves potentially negative information about an employee. The Appellant has been given the remainder of the documents. We do not see how the public's understanding of the government's activities would be enhanced by the disclosure of this information. As we have found in prior cases where names have been withheld but the remainder of the document has been released to a requester, there is seldom a public interest in disclosing the identities of the individuals. See Morrison & Foerster, 24 DOE ¶ 80,107 (1994). The same is true for the potentially negative information concerning the named employee.

4. The Balancing Test

In order to determine whether release of the documents is appropriate, the agency must weigh the privacy interest it has identified against the public interest in the release of the documents. We find that the privacy interest in the redacted portions of the four documents withheld in part clearly outweighs the public interest in disclosure of the redactions . The redacted material therefore falls within the scope of Exemption 6.

Individuals also have a privacy interest with respect to some, but not all, of the information contained in the six documents withheld in their entirety. Moreover, there is a significant public interest in release of some of the material contained in these documents. The balancing test with respect to these six documents can best be performed by Oak Ridge. We shall therefore remand this portion of the determination to Oak Ridge. On remand, Oak Ridge must issue a new determination either releasing the material that the

Appellant seeks or specifically justifying why the material is being withheld. Oak Ridge should segregate and release all material in which there is no privacy interest or the public interest in disclosure outweighs the privacy interest.

D. The Adequacy of the Search for Documents

The Appellant has claimed that DOE failed to search adequately for documentation responsive to Items 1, 2, 3, 4, and 6 of his FOIA request. Certain of the DOE offices performed an adequate search. However, as detailed below, the searches conducted by Oak Ridge and the Headquarters' FOIA Office were inadequate, and this matter should be remanded to those offices for a further search for responsive documents.

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness which we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

1. The Search Conducted by Oak Ridge

We contacted Amy Rothrock, Freedom of Information Act/Privacy Act Officer at Oak Ridge, to discuss that Office's search for documents responsive to Appellant's FOIA request.

Ms. Rothrock has requested that Request Items 1 and 4 be remanded for an additional search. Memorandum of Telephone Conversation Between Amy Rothrock and Linda Lazarus (January 4, 1996). Accordingly, Request Item 1 will be remanded so that a further search for responsive documents may be conducted in the Office of the Manager of Oak Ridge. Request Item 4 will be remanded so that a further search for responsive documents may be conducted by the Hearings Coordinator in the Personnel Clearance and Assurance Branch.

Ms. Rothrock provided the following information concerning the search for documents at Oak Ridge with respect to the other items of the request : **Request Item 2.** Request Item 2 sought information concerning investigation reports issued by Donald Thress, Assistant Chief Counsel for Litigation and Programs, and other information regarding a possible violation of the Privacy Act by the Appellant. In an effort to obtain these documents, Ms. Rothrock contacted many people, including Mr. Thress. Mr. Thress indicated that he had no documents regarding this matter. Mr. Thress recalls that the subject came up briefly in the context of a legal question and no opinion was issued, no investigation launched and no written record created. No other individuals contacted knew of any responsive documents.

Request Item 3. Request Item 3 sought information concerning discrimination complaints filed by Patricia Howse-Smith or Rufus Smith from 1983 to the present. In an effort to locate documents responsive to this Item, Ms. Rothrock obtained information from many people, including Rufus Smith and Patricia Howse-Smith. Rufus Smith and Patricia Howse-Smith indicated that they had no copies of any complaints or related information in their files. No other office at Oak Ridge produced any documents relating to claims of discrimination filed by either Rufus Smith or Patricia Howse-Smith.

Request Item 6. Request Item 6 involved documents furnished by outside facilitators concerning workplace issues at the Personnel Clearance and Assurance Branch. In an effort to ascertain whether there were documents responsive to this request, Ms. Rothrock contacted Margo Weil, Organizational Development Specialist, who manages the Facilitator Program, and Susan Cange, Special Assistant to the Manager. Any facilitator activities would have been coordinated by these two people. Neither of these people had any documents which would be responsive to the Request.

Based on this information, we are convinced that Oak Ridge followed procedures which were reasonably calculated to uncover the materials sought by the Appellant in FOIA Items 2, 3, and 6. Moreover, it appears that Oak Ridge contacted the persons who would have knowledge of whether relevant documents exist. As such, the search for these Request Items was adequate. However, for the reasons set forth above, Request Items 1 and 4 will be remanded to Oak Ridge for an additional search for responsive documents.

2. The Search Conducted by Savannah River

On December 1, 1995, the Savannah River Operations Office issued a determination concerning Request Item 1, the request for all reports issued by Carlos Collazo, an Equal Employment Opportunity Counselor at Savannah River who investigated a complaint of discrimination at Oak Ridge. Savannah River indicated that no responsive documents were found. The determination also indicated that, before issuing this response, Savannah River consulted Mr. Collazo and the Equal Employment Opportunity Office. Mr. Collazo stated that, upon completion of the investigation, he provided a report to Joe La Grone, then the Oak Ridge manager. Mr. Collazo also provided a copy of the report to the Savannah River EEO Manager; however, that copy has been destroyed. Mr. Collazo did not retain a copy of the report. As noted above, this portion of the search will be remanded to Oak Ridge for fuller investigation.

Based on this information, we are convinced that Savannah River followed procedures which were reasonably calculated to uncover the materials sought by the Appellant in his FOIA request and that no such documents are in the possession of that Office.

3. The Headquarters Search

Appellant's FOIA request was processed by Edward McGinnis, a Freedom of Information Act/Privacy Analyst at the Headquarters' FOIA/Privacy Act Office. Mr. McGinnis contacted the Headquarters' Office of Economic Impact and Diversity, the Office of Inspector General and the Office of Safeguards and Security in an effort to obtain responsive documents. Memorandum from Edward McGinnis to Linda Lazarus (December 27, 1995).<5> As detailed below, the search conducted for Request Items 1, 2, and 3 by the various offices in Headquarters was reasonably calculated to uncover the materials sought by Appellant in his FOIA request. However, there is no indication that any office was searched for documents responsive to Request Item 4, which seeks Oak Ridge's response to Secretary O'Leary's request for a listing which identifies persons subject to security clearance hearings by race and sex. As such, Request Item 4 will be remanded to the Headquarters' FOIA office for an additional search.<6>

a. The Search for Documents in the Office of Inspector General

Jane A. Payne, a Freedom of Information Act Officer, processed Appellant's request on behalf of the Office of Inspector General. She informed us that Appellant's request pertained to various EEO complaints and investigations, discrimination complaints relating to the issuance of security clearances, and internal Oak Ridge Operations investigations. She further informed us that none of these matters was within the purview of the Office of Inspector General. She reported that there were no responsive documents in that Office. Memorandum from Jane Payne to Linda Lazarus (December 8, 1995).

b. The Search for Documents in the Office of Safeguards and Security

The search for responsive documents in the Office of Safeguards and Security was conducted by Victor Hawkins, a Personnel Security Specialist. Mr. Hawkins informed us that when he received Appellant's request, he checked the Personnel Security Clearance Index to determine whether or not Mr. McQuade had an active access authorization. This Index indicated that Mr. McQuade had an active access authorization at Oak Ridge, and that his security file was also located at Oak Ridge. According to Mr.

Hawkins, this indicated that the only responsive documents that the Headquarters' Office of Safeguards and Security would possess with respect to Mr. McQuade would be in the Information Management Center (IMC). IMC searched its records but found no responsive documents concerning Mr. McQuade. Memorandum from Victor Hawkins to Linda Lazarus (December 19, 1995).

c. The Search for Documents in the Headquarters' Office of Economic Impact and Diversity

We contacted John Thornton, the Freedom of Information Act Officer for the Headquarters' Office of Economic Impact and Diversity, to ascertain the adequacy of the search for responsive documents by that Office. Mr. Thornton indicated that he searched for documents concerning Civil Rights complaints (Requests Items 1 and 3) by asking Melvin Daniels of the Complaint Investigation Division whether any such documents existed. It is Mr. Daniels' responsibility to be familiar with complaints of discrimination filed at Headquarters. Mr. Daniels responded that there were no complaints responsive to these Requests other than the complaint mentioned in the FOIA request.<7>

Mr. Thornton further indicated that he searched for documents responsive to Request Item 2 by reading the case file of the complaint discussed in Appellant's FOIA request. He indicated that no documents were found that were responsive to Request Item 2 in this file. Mr. Thornton also indicated that the Headquarters' Office of Economic Impact and Diversity would not generally maintain any records which would be responsive to Request Item 2.

4. Summary Regarding the Adequacy of the Search

The offices in Headquarters conducted searches which were reasonably calculated to uncover the material sought by Request Items 1, 2, and 3. However, this is not the case for the Headquarters response to Request Item 4. Request Item 4 sought documents relating to Oak Ridge's response to Secretary O'Leary's request for a listing of all security clearance review hearings which identifies persons subject to clearance hearings by race and sex. It is reasonable to assume that such documents would be at Headquarters. However, there is no indication that a search was made for such documents before the determination was issued. As such, Request Item 4 shall be remanded to the Headquarters' FOIA Office so that an additional search may be conducted.

III. Conclusion

In view of the foregoing, we shall grant the present Appeal in part. This matter will be remanded to Oak Ridge with directions to issue a new determination. Before issuing this determination, Oak Ridge shall review the six documents withheld in their entirety and balance the private interest of individuals against the public interest in disclosure to ascertain the information that should be withheld pursuant to Exemption 6. Oak Ridge shall then release any segregable non-exempt information. Oak Ridge shall also search for additional documents that are responsive to Request Items 1 and 4. This matter will also be remanded to the Headquarters' FOIA Office to search for additional documents that are responsive to Request Item 4.

It is Therefore Ordered That:

(1) The Appeal filed by Dennis McQuade on December 8, 1995, is hereby granted as set forth in Paragraphs (2) and (3) below, and is in all other respects denied.

(2) This matter is remanded to Oak Ridge, which shall promptly issue a revised determination concerning the six documents withheld in their entirety. In this revised determination, Oak Ridge shall release any segregable non-exempt information. Additionally, Oak Ridge shall search for documents responsive to the Request Items 1 and 4 and release segregable non-exempt information.

(3) This matter is remanded to Headquarters' FOIA Office to conduct a further search for documents

responsive to Request Item 1 and release segregable, non-exempt information.

(4) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 16, 1996

<1>McQuade filed a deficient Appeal on October 10, 1995. Subsequently, McQuade modified this Appeal to include the adequacy of the search at the Headquarters' FOIA Office, the Headquarters' Office of Economic Impact and Diversity, and Savannah River. Memoranda of Telephone Conversations between Linda Lazarus, Staff Attorney, Office of Hearings and Appeals, and Dennis McQuade (November 22, 1995 and December 8, 1995).

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<2>In relevant part, the Appellant specifically requested the following:

1. Information concerning a complaint of discrimination filed in early 1992 and investigated by Carlos Collazo in which the Appellant was named in some capacity;

2. Investigation reports issued by Don Thress and other information regarding a possible violation of the Privacy Act by the Appellant;

3. Information concerning any discrimination complaints filed by Patricia Howse-Smith or Rufus Smith from 1983 to the present;

4. Oak Ridge's response to Secretary O'Leary's request for a listing of all security clearance administrative review hearings conducted, which identifies persons subjected to clearance hearings by race and sex, for the time period 1990-1994;

5. Information pertaining to Appellant in the personal possession of Patricia Howse-Smith, Rufus Smith, Daniel Wilken, or Joe La Grone, or in the minutes of any Senior Management Board meetings from 1987 to the present;

6. All written reports, recommendations, findings, and supporting documents furnished by certain outside facilitators concerning workplace issues at the Personnel Clearance and Assurance Branch.

<3>Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Section 7(D) protects from mandatory disclosure records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source who furnished information on a confidential basis. 5 U.S.C. § 552(b)(7)(D); 10 C.F.R. § 1004.10(b)(7)(iv).

<4>The above discussion does not necessarily apply to Document 5 (Memorandum for the File dated June 23, 1994, Subject: Patricia Howse-Smith). The reason this document was created is unclear. On remand,

if Oak Ridge maintains that Document 5 is protected under Exemption 7, it should provide information on the circumstances under which this document was created.

<5>There is no reason to believe that any office in Headquarters would have information responsive to Request Items 5 and 6.

<6>At the present time, Mr, McGinnis has requested that the Office of the Secretary and the Office of Compliance and Audit Liaison search for documents which are responsive to this Request.

<7>Mr. McQuade is not seeking any documents relating to that complaint. Memorandum of Telephone Conversation between Linda Lazarus and Dennis McQuade (January 4, 1996).

Case No. VFA-0093, 25 DOE ¶ 80,148

November 13, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Knolls Action Project

Date of Filing: October 13, 1995

Case Number: VFA-0093

On October 13, 1995, the Knolls Action Project (KAP) filed an Appeal from a determination issued to it by the Department of Energy's Office of Naval Reactors (NR) on September 14, 1995. In that determination, NR denied a request for a waiver of fees in connection with four FOIA requests filed by KAP under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, KAP asks that we reverse NR's determination, and grant it a fee waiver.

I. Background

In submissions dated July 11, 12, 13 and 14, 1995, KAP filed four Requests under the Freedom of Information Act requesting various documents from NR pertaining to the shipment and management of spent nuclear fuels from U.S. naval vessels. In its FOIA Requests, KAP requested a fee waiver for the costs associated with processing the FOIA Requests. KAP stated that it was going to use the information obtained by its four July FOIA Requests to help prepare a report under a contract with a non-profit educational organization. In its September 14, 1995 response, NR denied KAP's fee waiver request and advised it that the cost of processing its request would be approximately $250. NR stated that information KAP had provided to it in requesting a fee waiver was insufficient for NR to conclude that a fee waiver should be granted. Additionally, NR stated that the much of the releasable portions of the material requested would not contribute significantly to the public understanding of the operations and activities of the Department of Energy. However, NR suggested that if KAP could provide additional details regarding the nature of the report it is preparing, the identity of the group it was being prepared for and the intended use and distribution of the report, NR would reconsider whether a fee waiver should be granted.

In its present Appeal, KAP asks that we reverse that determination and grant it a waiver of fees in connection with its four July 1995 FOIA Requests. KAP argues that Congress established a liberal standard for public interest fee waivers under the FOIA and that this implies that requesters should not be required to provide detailed information, such as the identity of the group for which the report is being prepared or the nature of the report it seeks to create, in order to justify a fee waiver. Thus,

KAP asserts that NR inappropriately solicited detailed information in order to evaluate KAP's fee waiver request. Further, KAP argues that release of the requested information would significantly contribute to the understanding of U.S. government operations by shedding light on the U.S. Navy's and DOE's program for shipping and managing spent nuclear fuel. KAP states that it has a documented history of providing information obtained by its FOIA requests to the news media which have used the information in various published articles. In support of its assertion, KAP supplied a reference to one article. Additionally, KAP

submitted a chart summarizing information regarding spent naval fuel shipments (Exhibit 4) which it claims it has widely distributed. Further, KAP states that the information sought by its current FOIA requests will be used in preparing a report for the Snake River Alliance in managing and shipping of spent nuclear fuel. It states that the Snake River Alliance plans to disseminate the report to the media and interested citizens. Additionally, KAP asserts that it intends to release any information obtained from its FOIA Requests through press releases and public fact sheets. Finally, KAP argues that it has met all the statutory requirements for a fee waiver under the FOIA.

In its reply to KAP's present FOIA Appeal, NR states that the release of the requested material would not significantly contribute to the public's understanding of the operations of the government because most of the material is already in the public domain. NR points out that DOE and the Navy have released a 5,200 page Environmental Impact Statement (EIS) of which some 1000 pages detail DOE and Navy spent fuel shipments and how they are conducted. Additionally, NR states that additional information on spent naval nuclear fuel is available in public records regarding litigation between the State of Idaho and the DOE as well as in the vast body of information provided by extensive media coverage of the issue of spent nuclear fuels. NR also states that responsive information not already in the public domain is either non-existent, otherwise withholdable under the FOIA, or has little significance in contributing to the public's understanding of a governmental activity. NR also argues that KAP has a commercial interest in the requested information and that it consequently should not be eligible for a fee waiver. Finally, NR contends that KAP lacks the ability to widely disseminate any information it obtains to the public.

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests.

5 U.S.C. § 552(a)(4)(A)(I); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test remains on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (Larson). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(I). If the DOE finds that a request satisfies these four factors, it must also consider the following two factors in order to determine whether disclosure of the information is primarily

in the commercial interest of the requester:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

10 C.F.R. § 1004.9(a)(8)(ii).

As an initial matter, we need not decide whether the inquiries NR made of KAP to consider whether KAP should receive a fee waiver were overly broad or inappropriate. In its Appeal, KAP has provided us with enough information so that we may apply the regulatory standards for granting a fee waiver ourselves. We do note however that the burden is on the requester to establish that the fee waiver standard has been met. Larson, 842 F.2d at 1483. Further, in order for an agency to have sufficient information to make a determination, it may request information from a requester who seeks a fee waiver. See McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 at 1286-87 (9th Cir. 1987) (23 questions found not burdensome).

We have performed a de novo review of the merits of KAP's fee waiver request. For the purposes of our analysis we have analyzed each of KAP's FOIA Requests separately. As discussed below, we find that KAP is eligible for a fee waiver for some materials which may be located pursuant to its July 11, 1995 FOIA Request. However, we find that the material requested in the remaining three FOIA Requests would not significantly contribute to the public's understanding of governmental activities and operations since the information is already in the public domain or is trivial in nature. Thus, for the material located pursuant to those three requests, NR properly denied a fee waiver.

A. July 11 FOIA Request

KAP's July 11 FOIA Request asks for documents regarding the railroad cars and casks used to transport spent nuclear fuels by the U.S. Navy's and the DOE's naval nuclear reactor program. Specifically, KAP requests that it be provided documents which list each railroad car's serial number, location of the railroad car as of the date of the request, the type of cask mounted on each car, configuration of each cask, loading status of cars and casks, maintenance and repair status information regarding the railroad cars and casks. Additionally, KAP requests information which indicates which cars are used for transporting spent nuclear fuels on the Pearl Harbor Naval Shipyard-Bremerton-Idaho National Engineering Laboratory (INEL) route.

Factor A

First, a fee waiver is only appropriate where the subject matter of the requested records specifically concerns identifiable "operations or activities of the government." See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772-75 (1989). In the present case, the requested documents are agency records that pertain to the identity, nature and status of nuclear fuel transport casks used by the DOE and the U.S. Navy. It is clear that the requested information concerns identifiable "operations and activities of the government."

Factor B

Second, the DOE must determine whether disclosure of information is "likely to contribute" to the public's understanding of the government operations and activities. The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general

population. If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver would not be appropriate. NR states that the EIS has already disclosed the number of casks at each naval shipyard. NR further asserts that information regarding railroad car serial numbers, cask configuration, location and the current maintenance status of the railroad cars and casks is not of general interest to the public especially since information regarding the location, casks configuration and maintenance and repair conditions of each car changes very quickly and is constantly outdated.

We disagree with NR's assertion about the extent of the public interest in the current maintenance and repair status of the railroad cars and casks. While the maintenance conditions change for the railroad cars and casks, the requested information could contribute to the public's understanding of potential risks, if any, associated with mechanical problems with the railroad cars and casks used to transport spent nuclear fuels. Moreover, NR has not asserted that information regarding the maintenance and repair status of the railroad cars and casks is in the public domain. Consequently, those documents relating to the maintenance and repair status of the railroad cars and casks meet the requirements of Factor B. However, KAP has not provided us with any specific information on how the other information requested in its July 11 FOIA request would contribute to the public's understanding of governmental operations. Further, it is not apparent to us how such information would significantly contribute to the public's understanding of government operations. Finally, we note that any material found pursuant to KAP's July 11 request that is already in the public domain need not be considered for fee waiver.

Factor C

Third, the requested disclosure must contribute to the understanding of the general public. To meet this test, the requester must have the ability and intention to disseminate this information to the public. James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992). We were unable to obtain a copy of the article KAP cited in its Appeal. Consequently, pursuant to our request KAP has supplied us with NEXIS copies of five recent published articles where a KAP spokesman has been quoted. In one article KAP provided factual information regarding spent naval fuel containers. In three other articles, KAP representatives provided opinions regarding spent naval nuclear fuels. The fifth article contains a reference to KAP activities in spotting a transhipment of spent naval nuclear reactor fuels by rail.

In support of its assertion that KAP does not have the ability to disseminate information to the public, NR states that KAP's contributions to the media usually consist of inaccurate, incomplete or outdated information regarding events which were previously covered by the news media and that KAP has not shown a history of uncovering useful information. NR also asserts that KAP operates by contacting a local reporter regarding an issue and that the reporter then contacts the program office directly for further information. Thus, NR asserts that KAP does not itself disclose information to the public.

While this is a close case, we find that KAP has shown it has the ability to disseminate information it may obtain through in its FOIA Request. With the additional information which was provided to us on appeal, but not to NR in response to its determination letter, KAP has demonstrated a history of success in having facts and opinions published by the press regarding the ongoing controversy regarding spent nuclear fuels and their transport. Additionally, KAP has stated it has a contract with an educational public interest group, the Snake River Alliance, to publish a report based in part on any materials it may gather. As discussed above, NR has acknowledged that KAP has a history of being able to interest the media about the issues involving spent nuclear fuels. Consequently, we find that KAP has shown an ability to disseminate information to the public.

Factor D

Fourth, the requested disclosure must contribute significantly to public understanding of government operations or activities. The Department of Justice has suggested the following test for this factor:

To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.

1995 Justice Department Guide to the Freedom of Information Act 381 (1995).

In the present case, KAP submits that disclosure of the requested information will contribute significantly to the public's understanding of government operations and activities relating to spent naval nuclear fuels. The requested information relates, in part, to the disclosure of possible maintenance problems with railroad cars used in the transport of spent naval reactor fuels. There is no doubt that the public's understanding of this aspect of the DOE's and the U.S. Navy's nuclear reactor program would likely be enhanced to a significant extent by the disclosure of this information. See Natural Resources Defense Council, 14 DOE ¶ 80,118 at 80,547 (1986) (NRDC).

In view of the foregoing considerations, we find that with regard to the July 11 FOIA request, KAP has satisfied the four factors which must be weighed by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e. that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities. We must next determine whether KAP has a commercial interest that would be furthered by the requested disclosure.

Commercial Interest

A "commercial interest" has been defined as "one that furthers a commercial, trade or profit interest as those are commonly understood." See 1995 Justice Department Guide to the Freedom of Information Act 382 (1995). KAP has stated that it has no commercial interest in the requested material and it intends to distribute the information it discovers through the press and public fact sheets. However, in its Appeal, it has also stated that it has a contract to produce a report for the Snake River Alliance and that it is seeking to use the information requested in its FOIA Requests to prepare that report. NR argues that this fact indicates that KAP has a commercial interest in material requested in its four FOIA requests.

A requester does not become ineligible for a fee waiver merely because it intends to sell a publication rather than disseminating the information gained through a FOIA Request for free. See NRDC. Given the current factual situation, we believe KAP's commercial interest in preparing a report for the Snake River Alliance is minor and in any case is not sufficient to warrant a denial of its fee waiver request with regard to the July 11 FOIA request concerning maintenance and repair information about railroad cars and casks. KAP is a nonprofit, public policy organization which has stated that it intends to distribute the information it obtains to the press and via public fact sheets. We have no evidence before us that indicates that the contract KAP has with the Snake River Alliance is a significant commercial interest especially given the fact that KAP has a history of more than 15 years of public advocacy regarding spent nuclear fuel issues. Consequently, we find that the public interest with regard to the release of material concerning maintenance and repair status of railroad cars and casks is significantly greater in magnitude than KAP's commercial interest. KAP should therefore be granted a fee waiver with regard to material concerning the maintenance and repair status of the railroad cars and casks.

B. July 12 FOIA Request

KAP's July 12 FOIA Request asks for copies of Bills of Lading for all shipments of spent naval reactor fuel made by the U.S. Navy and DOE's naval nuclear reactor program between 1954 and 1995.

After examining KAP's July 12 FOIA Request and NR's response, we must conclude that NR is not eligible for a fee waiver because the requested information would not significantly contribute to the public's understanding of governmental activities or operations. Specifically, we find that the information

contained in the Bills of Lading would not be likely to contribute to the public's understanding about the shipment of spent nuclear fuels. NR has informed us that information contained in the Bills of Lading, such as point of origin of the shipment, core and container type, date of shipment and ship from which the fuel has been removed, has already been disclosed to the public in the EIS and is in the public domain. <1> Consequently, NR need not consider for a fee waiver any document found pursuant to KAP's July 12 FOIA Request.

C. July 13 FOIA Request

KAP's July 13, 1995 FOIA Request seeks documents requesting various information relating to U.S. Navy nuclear powered ships commissioned after February 10, 1994 (the date of a prior KAP FOIA Request). Specifically, it requests information relating to the hull number, date and location of commissioning, location of refuelling servicing, start and finish dates of refueling overhauls, the date the nuclear fuel was removed from these ships, nuclear core type removed from and installed in each ship, date of shipment to Idaho for each spent fuel assembly and the number and type of rail transport casks required for each shipment. The Request also asks for similar information regarding all decommissioned nuclear powered vessels. NR has informed us that most of the information requested by KAP pursuant to this Request, such as the hull number and date of commissioning and decommissioning of the ships, number and type of rail transport casks, and date of shipment of spent nuclear fuel, has already been provided to the public in the EIS or other publicly available documents. With regard to ships commissioned after February 10, 1994, such ships have not yet been refueled and thus no information exists regarding refueling operations. <2> From the information provided to us by NR it appears that most of the information sought by this request is already in the public domain and thus would not contribute to the public's understanding regarding the DOE and U.S. Navy's handling of spent nuclear fuel. Regarding the information not identified as in the public domain by NR, namely, the dates of the removal of nuclear fuel for commissioned and decommissioned ships, KAP has not provided any specific information indicating how this type of data would significantly contribute to the public's understanding of government activities or operations. Further, this information does not appear to us to be type of information that would significantly contribute to the public's understanding regarding the handling of spent nuclear fuel. Consequently, NR need not consider for a fee waiver any document retrieved pursuant to KAP's July 13, 1995 FOIA Request.

D. July 14 FOIA Request

In its July 14, 1995 FOIA Request, KAP requested a copy of a July 7, 1995 memorandum written by D.I. Curtis of NR requesting the DOE's Bettis Atomic Power Laboratory to begin detailed planning to develop new facilities for spent nuclear fuel management and storage (Curtis Memorandum). KAP also stated in its request that the memorandum had been released by the public relations staff at the Idaho National Engineering Laboratory and that the memorandum had requested an "initial scoping report" within one week of the date of the memorandum. KAP also requested a copy of the initial scoping report and any documentation relating to further review and analysis of any alternative site planning for the handling of spent nuclear fuel.

In its response, NR has informed us that the documents that would be responsive to KAP's July 14 FOIA Request consist of internal predecisional recommendations that were performed by NR with regard to other sites for the handling of spent nuclear fuels. NR has informed us that since it has resolved a dispute it had with the State of Idaho regarding the disposition of spent nuclear fuels, no decision was made regarding the recommendations contained in these documents. Because these documents were internal deliberative, predecisional documents, NR states that most of the information contained in these documents would be protected from disclosure by Exemption 5 of the FOIA. The releasable portions of these documents would, in its opinion, not significantly contribute to the public's understanding regarding the DOE and U.S. Navy's handling of spent nuclear fuel. Given the factual background presented to us, we agree with NR. The documents described by the July 14 FOIA Request would most likely be of a type consisting of mostly predecisional, deliberative material. Further, since the NR dispute with the State of

Idaho has been

resolved regarding the issue of spent nuclear fuels, it is apparent that no final decision was made regarding the proposals set forth in the documents. <3> With regard to the requested Curtis Memorandum, KAP has stated that the memorandum has been publicly released. Providing it to KAP thus would not significantly contribute to the public's understanding of government operations and activities. Consequently, we find that NR need not consider for a fee waiver any document it locates pursuant to the July 14, 1995 FOIA request for a fee waiver.

It Is Therefore Ordered That:

(1) The Appeal filed by the Knolls Action Project on October 13, 1995, is hereby granted in part as set forth in Paragraph (2) below and is denied in all other respects.

(2) The fees assessed for complying with the July 11, 1995 Knolls Action Project FOIA Request with regard to documents concerning the maintenance and repair status of railroad cars and casks shall be waived.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 13, 1995

<1>In its response, NR states that the information requested in the July 12, 1995 FOIA request can be found in Exhibit 4 submitted with KAP's Appeal.

<2>NR states that the EIS it prepared and released to the public does contain information regarding the 575 container shipments of spent nuclear fuel which are expected to be made from 1995 through 2035.

<3>In making our conclusion about the likely application of Exemption 5 to documents which may be found under this exemption, we do not express an opinion regarding the correctness of any future application of Exemption 5 to any specific document which may be found pursuant to this request. We merely find that, after likely redactions, the releasable portions of the responsive documents would not be likely to contribute significantly to the public's understanding of government operations.

Case No. VFA-0094, 25 DOE ¶ 80,149

November 28, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burlin McKinney

Date of Filing: October 27, 1995

Case Number: VFA-0094

On October 27, 1995, Burlin McKinney filed an Appeal from a determination issued to him by the Assistant Inspector General for Investigations, Office of the Inspector General (the OIG). This determination was issued on October 16, 1995 in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OIG to release information that it deleted from a document that it provided to Mr. McKinney.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from mandatory disclosure under the FOIA shall nonetheless be released to the public upon request, unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

I. Background

On May 23, 1995, Mr. McKinney requested "any records, documents, etc. that are related to the Beryllium program at the Y-12 Plant." The DOE's Oak Ridge Operations Office conducted a search for such documents, and a memorandum from the OIG to the Manager of the Oak Ridge Operations Office was identified as responsive to Mr. McKinney's request. Because the memorandum was generated by the OIG, the memorandum was referred to that Office for review.

The memorandum describes an interview that the OIG conducted with an individual concerning alleged safety violations at the Y-12 weapons facility in Oak Ridge, Tennessee. According to the memorandum, the individual also discussed allegations of misconduct on the part of the DOE contractor that operates the Y-12 facility and the contractor's supervisory personnel. A copy of the memorandum, with any portions tending to identify the individual deleted, was released to Mr. McKinney. In its determination, the OIG cites Exemptions 6 and 7(C) of the FOIA as justification for withholding the identity of the individual. Exemption 6 protects from mandatory disclosure "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy...." Exemption 7(C) provides that "records or information compiled for law enforcement purposes" may be withheld from disclosure, but only to the extent that the production of such documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy...." In reaching its determination, the OIG stated that individuals involved in Office of Inspector General investigations are entitled to privacy protections so that they will

be free from harassment, intimidation and other personal intrusions. The OIG further determined that release of the individual's identity was not in the public interest.

In his Appeal, Mr. McKinney acknowledges the general validity of the OIG's policy of withholding the identity of individuals who take part in OIG investigations. However, Mr. McKinney does not believe that policy is applicable in this case. In support of his belief, he cites a statement made by the author of the memorandum that the individual "... has expressed no desire for confidentiality." Therefore, Mr. McKinney believes that the individual's identity should be released.

II. Analysis

We have previously considered cases in which both Exemption 6 and 7(C) were invoked and we stated that in such cases we would analyze the withholding only under Exemption 7(C), the broader of the two Exemptions. See, e.g., Valley Times, 23 DOE ¶ 80,154 (1993) (Valley Times). Exemption 6 allows an agency to withhold information if its release would constitute a "clearly" unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). By contrast, Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes, if its release could constitute a "reasonably" unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). In such cases, it is only necessary to address the application of Exemption 7(C) to the withheld material since the memorandum was compiled for law enforcement purposes and any material which satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Similarly, information not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that the release of the information constitutes a "clearly" unwarranted invasion of personal privacy.

The threshold test under Exemption 7(C) is whether the withheld information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The Exemption 7 "law enforcement" exception to mandatory release of information under the FOIA encompasses compliance with both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). The OIG is charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). The memorandum provided to Mr. McKinney in redacted form was generated in the course of an OIG investigation into allegations of safety violations and management misconduct at the Oak Ridge facility. The memorandum was therefore compiled for law enforcement purposes within the meaning of Exemption 7(C).

In determining whether the release of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, the courts have used a balancing test which weighs the privacy interests that would be infringed against the public's interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989). In this case, Mr. McKinney contends that the individual's privacy interests are minimal, given the statement in the memorandum that the individual has expressed no desire for confidentiality.

We disagree. The statement referred to by Mr. McKinney was made not by the individual, but by the author of the memorandum. It is the author's interpretation of the results of an IG investigator's interview with the individual, an interview in which the author may or may not have taken part. There is no indication in the record before us that the individual has ever expressly stated that he does not desire confidentiality.

Furthermore, even if the statement relied upon by Mr. McKinney accurately reflects the individual's position, it does not appear to apply to all of the allegations set forth in the memorandum. We have reviewed the memorandum as a whole, including the withheld information, and we conclude that the statement that the individual "... has expressed no desire for confidentiality" refers only to the individual's allegations of safety violations at the Y-12 weapons facility. There is no indication in the memorandum

that the individual would want his identity as a participant in an OIG investigation or a source of information concerning alleged management misconduct to be revealed to the public.

We therefore believe that the individual retains a substantial interest in remaining anonymous. Revealing the individual's identity could subject the individual to harassment, retaliation, or invasions of privacy. See, e.g., Valley Times, 23 DOE at 80,632; James L. Schwab, 21 DOE ¶ 80,117 (1991). The public's interest in disclosure, on the other hand, does not warrant disclosure of the individual's identity since it would not add to the public's understanding of government operations. Indeed, the public interest is best served by protecting the identity of OIG's sources, in order to ensure that witnesses continue to voluntarily provide information in OIG investigations. Accordingly, we conclude that the OIG properly withheld information concerning the individual's identity.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Burlin McKinney on October 27, 1995 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 28, 1995

Case No. VFA-0095, 25 DOE ¶ 80,151

November 30, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The National Security Archive

Date of Filing: October 31, 1995

Case Number: VFA-0095

On October 31, 1995, the National Security Archive (NSA) filed an Appeal from a Determination issued to it by the Office of Resource Management, Office of Policy (Policy) of the Department of Energy (DOE). In that Determination, Policy stated that it was unable to locate any documents responsive to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NSA challenges the adequacy of the search conducted by Policy.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

On July 27, 1995, NSA filed a request for information in which it sought records relating to certain meetings surrounding U.S.-Mexico oil negotiations during 1977 and 1978. The request for information was forwarded by the Freedom of Information and Privacy Acts Division (FOIA Division) to Policy for a reply. On October 18, 1995, Policy issued a Determination which stated that it conducted a search for responsive documents and that no responsive documents had been found. On October 31, 1995, NSA filed the present Appeal with the Office of Hearings and Appeals (OHA). NSA asks that a new search for responsive documents be conducted. In its Appeal, NSA attached an extract from a 1979 report produced by the Senate Committee on Energy and Natural Resources entitled,"Mexico: The Promise and Problems of Petroleum" (Mexico extract).

II. Analysis

The OHA has consistently stated that a FOIA request warrants a thorough and conscientious search for responsive documents. See W.R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have remanded cases where it is evident that the search conducted was inadequate. See, e.g., Cowles Publishing Co., 16 DOE ¶ 80,136 (1987); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice,

745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted both the FOIA Division and Policy to ascertain whether their search was reasonably calculated to uncover the information sought by NSA. The FOIA Division informed us that in addition to the search performed by Policy, a search had been performed of the Office of the Executive Secretariat (Executive Secretariat) and that no responsive documents had been found in either office. Executive Secretariat informed us that it had searched the databases that it maintains using string searches (searches using key words of names, places and dates as listed in the FOIA request) and found no responsive documents. However, in response to our inquiry, Executive Secretariat, using additional information included in the FOIA request and the Mexico extract provided by NSA on appeal, again searched the databases that it maintains. Through this second search, Executive Secretariat's History Division discovered nine classified documents which may be responsive to NSA's request.

Policy informed us that utilizing the information provided by NSA, it had searched all of its files that might pertain to the subject of the request and determined that it did not possess responsive documents. However, in response to our inquiry concerning the scope of the request, Policy contacted another office within the DOE which it believed might possess responsive information: the Economic Regulatory Administration (ERA) of the Office of General Counsel. Policy informs us that ERA is currently searching its files for responsive documents.

While we believe that Policy conducted a reasonable search for responsive documents in its files, it does not appear that the scope of the search was broad enough. We now know that Executive Secretariat possesses potentially responsive documents and that another office within the DOE may possess responsive information. In addition, the file concerning the FOIA Request filed by Alan Riding in 1983 should also be examined, as that request included some of the information sought here. See Alan

Riding, 11 DOE ¶ 80,126 (1983). Accordingly, NSA's Appeal should be granted, and this matter remanded to the FOIA Division to (1) coordinate a search of ERA files for responsive documents, and (2) issue a new determination with regard to the newly discovered Executive Secretariat documents and the search of ERA files.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on October 31, 1995, Case No. VFA-0095, is hereby granted as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is remanded to the Freedom of Information and Privacy Acts Division which shall coordinate a new search for information and cause a new Determination to be issued in accordance with the guidelines set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 30, 1995

Case No. VFA-0096, 25 DOE ¶ 80,150

November 30, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Paul W. Fox

Date of Filing: November 1, 1995

Case Number: VFA-0096

On November 1, 1995, Paul W. Fox filed an Appeal from two determinations issued to him on September 29, 1995, and October 17, 1995, by the Bonneville Power Administration (BPA). The determinations denied in part a request for information filed by him under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Fox requests that we order the BPA to release the documents that were withheld in the determinations.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public upon request whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

The documents requested in this case pertain to the 1961 Columbia River Treaty between the United States and Canada. Pursuant to that treaty, Canada built three storage reservoirs in British Columbia on the Columbia River. In return, Canada is entitled to 50 percent of the increased power generated at U.S. hydroelectric facilities on the Columbia River as a result of this increased storage capacity (the Canadian entitlement). Canada sold its power entitlement to a group of U.S. utilities for 30-year terms, which expire between 1998 and 2003. If Canada decides to take its share of the power, under the Treaty, BPA may have to construct power lines to deliver it to the Canadian border. A tentative agreement between the U.S. and Canada provided for the U.S. government to purchase part of the Canadian power entitlement for $180 million. When the market value of electric power declined significantly after reaching the tentative agreement, the U.S. elected not to finalize the agreement. The documents at issue in this case primarily concern the development within BPA of the negotiating position it should take with Canada regarding how the Canadian entitlement will be delivered.

In its determinations, the BPA released a substantial number of documents. However it withheld 278 documents in whole or in part pursuant to Exemption 5 of the FOIA, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

In his Appeal, Mr. Fox challenges the BPA's determinations. The Appellant argues that (1) the description of the withheld documents is inadequate, (2) the documents would not be exempt from discovery in litigation, (3) some of the requested documents are not inter- or intra-agency documents because they

were created by or for parties outside of the government, (4) to the extent that the documents would otherwise satisfy the requirements of Exemption 5, BPA has waived any Exemption 5 privileges by disclosing the documents to third parties, and (5) BPA incorrectly declined to exercise its discretionary authority to release the documents in the public interest.

II. Adequacy of the Determination

The Appellant argues that the determinations do not establish that the requested documents are exempt from disclosure. He contends that BPA did not include a Vaughn index that provides a particularized and specific justification sufficient to demonstrate that each document is exempt from disclosure. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir 1973); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 861 (D.C. Cir. 1980).

We do not necessarily agree that BPA's determinations fail to meet the criteria for a Vaughn index. Nonetheless, we need not reach this issue. Vaughn indexes are not required at the administrative review level. They are designed to aid a court in determining whether documents were properly withheld without the necessity of performing an in camera document-by-document review. At the administrative level, the DOE conducts document-by-document reviews whenever appropriate, and the degree of specificity of a Vaughn index is not required. See, e.g., Rockwell Int'l, 21 DOE ¶ 80,105 at 80,527 (1991).

We have also held that a requester should not be forced to hazard a guess as to the nature of the withheld material. Thus, a requester must be given a description of the withheld documents that is sufficient to allow the requester (1) to ascertain whether the claimed exemptions under which the documents were withheld reasonably apply to the documents, and (2) to formulate a meaningful appeal. See, e.g., James L. Schwab, 22 DOE ¶ 80,164 (1992); Harold Fine, 17 DOE ¶ 80,136 at 80,588 (1988); Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients.<1> The index need not, however, contain information that would compromise the privileged nature of the documents. Id. at 80,527. A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. Id.

BPA's determinations in this case reasonably described the documents and explained why BPA believes they are exempt from mandatory disclosure. The determinations make clear that BPA gave serious thought to the reasons why the documents should be withheld. BPA therefore adequately described the documents and its reasons for withholding them.

III. Exemption 5

Exemption 5 is generally recognized as encompassing certain distinct privileges, primarily the attorney-client privilege, the attorney work-product privilege, and the governmental deliberative process privilege. See, e.g., Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980). All of the documents withheld by the BPA in this case were withheld pursuant to the deliberative process privilege. With respect to 14 of the documents, BPA also relied upon the attorney-client or work-product privileges as additional grounds for withholding. In this section, we discuss the considerations guiding our application of Exemption 5.

A. Deliberative Process Privilege

The deliberative process privilege shields from disclosure documents which were created as part of the agency's decision-making process. Darci L. Rock, 13 DOE ¶ 80,102 (1985); Texaco Inc., 1 DOE ¶ 80,242 (1978). The courts have identified three main purposes for this privilege. One of these is the need to avoid misleading the public by the release of documents that are only the opinion of the author and do not reflect the actual rationale for the agency's action. Another is to protect against premature release of policies and

decisions before formal adoption. The paramount rationale is to insure open, uninhibited, and robust debate of various options so that the final decisionmaker has the benefit of thoroughly evaluated options by eliminating the fear of disclosure of preliminary viewpoints. Coastal States, 617 F.2d at 866; Jordan v. United States Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978). By shielding developing governmental deliberations from public scrutiny, the quality of final governmental decisions is enhanced. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149-51 (1975).

The privilege protects from disclosure materials which contain opinions, analyses or recommendations concerning possible actions that reflect personal opinions of the writer rather than the policy of the agency. Coastal States, 617 F.2d at 866. The factors that should be weighed to determine whether a document deliberative in nature and therefore protected by the privilege include: (i) whether the document reflects the give-and-take of the consultative process; (ii) whether the document is "predecisional" (i.e., whether it was generated before the adoption of an agency policy); (iii) whether the document is so candid or personal in nature that public disclosure would stifle honest and frank communication in the future; and (iv) whether the document is recommendatory in nature. Id. See also Industrial Sprinkler Co., 12 DOE ¶ 80,111 (1984); Texaco, 1 DOE at 81,259. Accordingly, not all inter- or intra-agency memoranda come within the scope of the privilege. Rather, only documents that are part of the agency's deliberative process are protected by the privilege.<2>

B. Qualified Privilege for Commercial Information

Although not relied upon by BPA in its determinations, it is evident that many of the documents at issue here fall within the scope of the qualified privilege for commercial information. BPA is little different from any other business with respect to its dealings with Canada. Courts recognize a limited privilege with respect to commercial government information. The privilege is similar in scope to Exemption 4 which applies to commercial information submitted by parties outside the government. See Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340 (1979); Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp 352 (D.D.C. 984), aff'd, 762 F.2d 138 (D.C. Cir. 1985). In the present case, if Canadian negotiators had access to the studies, estimates, and position papers involved in this request, it could seriously undermine BPA's negotiating posture. Also, public access to this information might undermine BPA's position when negotiating with utilities and other purchasers of power. As one court explained, "Requiring the agency to tip its hand by compelling disclosure of its cost estimates could destroy all incentive a firm would have to propose a lower price." Hack v. Department of Energy, 538 F. Supp. 1098, 1104 (D.D.C. 1982). This privilege is limited. Once the reason for finding documents privileged is over (e.g., the negotiations are complete), the documents may no longer be withheld.

C. Segregation & Release of Non-Exempt Information

The presence in a document of some material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

IV. Application of the Exemption

The documents at issue here were created (1) as part of BPA's development of policy concerning how the United States should comply with its obligations under the Columbia River Treaty and (2) for use in

developing BPA's negotiating strategy with Canada over these obligations. We have carefully examined these documents, and with certain exceptions set forth below, we find that BPA correctly found that these documents fall within the scope of Exemption 5. Release of the deliberative material in these documents could interfere with the frank exchange of written views within BPA in the future. This is precisely the type of information that the deliberative process privilege was intended to shield from public scrutiny. Release of material upon which BPA is basing its negotiating posture with Canada over the Columbia River Treaty could undermine its position.

A. Whether Certain Documents are Intra-Agency Memoranda

The threshold requirement for applying Exemption 5 is that the documents must be inter- or intra-agency documents. The Exemption does not ordinarily apply to documents prepared by or for persons outside of the government. However, government contractors, outside attorneys, consultants, and similar agents are considered part of the agency when applying Exemption 5. A number of documents at issue in this proceeding were created by the Mid-Columbia Participants or their attorneys or consultants (MCPs), or were given to the MCPs. The MCPs are a coalition of private power companies that have a contractual relationship with BPA and generate about 30 percent of the power resulting from the Columbia River Treaty. The MCPs are responsible to BPA for returning their share of the Canadian entitlement. Any agreement between BPA and Canada over return of the Canadian entitlement may require the cooperation and agreement of the MCPs. For example, if Canada agrees to sell part of its entitlement, it may be to the MCPs, who would be responsible for financing and paying the purchase price. BPA gave copies of certain documents pertaining its negotiations with Canada to the MCPs. This sharing of information occurred because BPA and the MCPs have some common interests with respect to the Canadian power entitlement. The Appellant argues in this case that the MCPs should not be considered part of the government and that documents prepared by them or for them cannot be inter- or intra-agency documents. He maintains that in other matters, the MCPs have interests adverse to BPA. He also contends that BPA waived any privilege it might have had with respect to otherwise internal memoranda if it provided copies of those memoranda to the MCPs.<3>

We reject the Appellant's contention that no document that was given to, or originated with, the MCPs can be an intra-agency document. While some documents produced by the MCPs qualify as agency records, based upon the record before us, we are unable to conclude that all such documents so qualify. It is clear that the MCPs have a vital interest in the negotiations over the Canadian entitlement. However, the existence of an interest in common with BPA does not necessarily make them always part of the agency for purposes of the FOIA. Conversely, the fact that the MCPs might have interests adverse to BPA with respect to other matters does not imply that they cannot be considered government consultants with respect to the Canadian entitlement negotiations. We shall therefore remand this matter to BPA for a new determination with respect to each withheld document that passed between BPA and the MCPs. That determination must explain, as a threshold matter, why the document should be treated as an intra-agency memorandum. One important factor that BPA should consider in determining whether a particular document is an intra-agency record is the purpose for which it was created. Documents prepared by the MCPs primarily at the request of BPA in order to assist it in developing its position may be deemed intra-agency since the MCPs under such circumstances would be acting as government consultants. Documents prepared by the MCPs' primarily for their own purposes are less likely to be intra-agency documents. For example, a number of documents are memoranda of meetings between the MCPs and Canadian authorities. Unless the MCPs were acting on behalf of BPA in these meetings, it is unlikely that these memoranda are intra-agency documents. We must emphasize, however, that a determination that a document submitted by the MCPs is not an intra-agency record does not necessarily mean that it must be released to the Appellant. BPA should also consider whether such records should be withheld pursuant to FOIA Exemption 4 which protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). See generally Critical Mass Energy Proj. v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

We also find that BPA did not waive its privilege with respect to otherwise exempt documents by

providing copies of them to the MCPs. Limited disclosure to parties outside of the government in furtherance of a legitimate governmental purpose does not waive an agency's right to withhold those documents from the general public. See generally, Cooper v. Department of the Navy, 558 F.2d 274, 278, (5th Cir. 1977), modified, 594 F.2d 484 (5th Cir. 1979); Badhwar v. Department of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986), remanded on other grounds, 829 F.2d 182 (D.C. Cir. 1987). BPA has a legitimate interest in obtaining the views of the MCPs concerning the Canadian entitlement. In developing its negotiating stance, BPA must consider whether the MCPs are willing, and under what conditions and for what price, to purchase part of that entitlement. It would be difficult, if not impossible, for BPA to decide on its negotiating position without considering the views of the MCPs, and it would be difficult for the MCPs to develop their position if BPA did not share reports, estimates, and other confidential information.

B. Estimates of Costs & Capacity

Approximately one-third of the documents at issue in this proceeding include estimates of items such as the value of Canada's power entitlement and the cost, under various scenarios, of delivering that entitlement to Canada. The Appellant contends that the fact that BPA conducted studies or made estimates does not necessarily mean that they were deliberative, particularly if they are based upon publicly available figures, rates, or assumptions.

The Appellant's contention in this regard is not convincing. These estimates and projections are not routine computations over which the agency has little discretion and which would for that reason fall outside the scope of Exemption 5. These estimates were made to aid BPA in determining the best way to fulfill its obligations under the Columbia River Treaty. It is irrelevant whether the estimates are based upon publicly available figures. In the circumstances presented, release of either the assumptions upon which they are based or the scenarios under consideration by BPA would reveal, and could interfere with, the deliberative process. See Quarles v. Department of the Navy, 893 F.2d 390 (D.C. Cir. 1990). Moreover, if these estimates became available to Canadian authorities, it could undermine BPA's negotiating posture. This group of documents is protected by both the deliberative process privilege and the qualified privilege for commercial information and was therefore properly withheld under Exemption 5.

C. Summaries of Meetings & Telephone Conversations

The deliberative process privilege does not shield from disclosure purely factual information. As a rule, facts fall within the privilege only if the selection of certain facts vis-a-vis other facts would reveal the deliberative process or where the facts are inextricably intertwined with exempt material. The Appellant notes that 27 of the documents in this case are described as notes of meetings or telephone conversations. He contends that factual summaries of what transpired during these meetings and conversations are not withholdable under Exemption 5.

Several of these documents report meetings or conversations with solely governmental personnel, and record the opinions and views of those present.<4> These are clearly deliberative in character and fall within the scope of Exemption 5. The remainder of these documents, however, involve meetings and conversations with Canadian authorities. The input of outside parties cannot be part of the governmental deliberative process. To the extent, however, that these reports reflect a subjective selection of facts, they may be withheld. Nevertheless, we note in this regard that "A report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected . . . ." Playboy Enters. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir 1982). Consequently, purely factual descriptions of what transpired during these meetings and conversations which occurred cannot be withheld pursuant to the deliberative process privilege.<5> Many of the reports are peppered with subjective observations and evaluations about what occurred, and such subjective comments may properly fall within the Exemption. These documents

will therefore be remanded to BPA for release of those non-deliberative portions unless BPA finds that they may be withheld pursuant to another Exemption.

D. Drafts

Document 11 cited in the September 29 determination was withheld solely because it was a draft. It appears that other documents may also have been withheld for this reason, but the determinations are unclear about this. We previously determined that drafts are by their very nature deliberative and could be withheld. James L. Schwab, 23 DOE ¶ 80,144 at 80,609 (1993). However, we recently reevaluated this position in view of the guidance contained in the Memorandum from Janet Reno, Attorney General of the United States, to Heads of Departments and Agencies (October 4, 1993) (Reno Memorandum). See also Memorandum from William Jefferson Clinton, President of the United States, to Heads of Departments and Agencies, 29 Weekly Comp. Pres. Doc. (No. 40) 1999, 2000 (Oct. 11, 1993) (noting the importance of FOIA and its centrality to the Reinventing Government initiative). That Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. See Reno Memorandum, at 1, 2 (Oct. 4, 1993). As the Attorney General stated, an agency should withhold information "only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not be withheld from a FOIA requester unless it need be." Id. See also Mapother v. Department of Justice, 3 F.3d 1533, 1537-38 (D.C. Cir. 1993). Consequently, we have held that drafts should be released unless the agency can articulate a reasonably foreseeable specific harm to a specific interest protected by an exemption. William D. Lawrence, 24 DOE ¶ 80,139 at 80,599 (1994). Accordingly, we shall remand this matter to BPA to consider whether, in light of the Reno

Memorandum, Document 11 or any other documents or portions of documents withheld because they were drafts should continue to be withheld.

E. Non-Exempt Material & Release in the Public Interest

As noted above, the FOIA requires that any reasonably segregable non-exempt portion of a document be released. In addition, the fact that portions of the Report fall within a statutory exemption does not necessarily preclude release of the material. DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall be released, regardless of their exempt status, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. In considering whether documents should be released in the public interest, due regard should be paid to the Reno Memorandum discussed above, which holds that an FOIA exemption should be asserted only where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.

Our review of the documents at issue in this proceeding reveals that some of them contain information primarily of a factual character that appears not to fall within an exemption, or if it is exempt, would harm no significant interest if released. For example, Documents 2, 18 and 20 contain portions that appear only to describe the Columbia River Treaty or the current status of the negotiations. Documents 127 and 128 were released except for handwritten comments in their margins. These comments appear to be minor editorial suggestions and it is doubtful that their release would harm the deliberative process. Similarly, Document 91 is an E-mail message that concerns the setting up of a technical team, which does not appear to contain anything of substance. Upon remand, BPA shall review the documents withheld to determine whether they contain additional non-exempt information or should be released in the public interest.

Accordingly, we shall grant the present Appeal in part. This matter will be remanded to BPA to issue a new determination in accordance with the foregoing Decision.

It Is Therefore Ordered That:

(1)The Appeal filed by the Paul W. Fox on November 1, 1995 is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2)This matter is remanded to the Bonneville Power Administration which shall promptly issue a revised determination in accordance with the foregoing Decision.

(3)This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: NOvember 30, 1995

<1>The Appellant complains that the descriptions of some of the documents do not give a date or identify

the authors. In these instances this information was not available because the documents are undated or their authors are unknown. An agency does not forfeit its ability to withhold exempt documents merely because some facts normally given in a description are unknown.

<2>The Appellant contends that BPA has not demonstrated that the documents at issue are deliberative in

nature because BPA failed to specify, as allegedly required by law, what decisions were being considered when the documents were generated. This argument is both factually and legally incorrect. BPA clearly indicates in its determinations that the documents relate to the U.S. decision to terminate the "Memorandum of Negotiators Agreement," and to what position the U.S. should take with respect to disposition of the Canadian entitlement. Moreover, agencies need not point to a particular decision for which a document is prepared. As part of an agency's continuing process of examining its policies, deliberative documents may be generated concerning matters that will not necessarily ripen into agency decisions. City of Virginia Beach v. Department of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. at 151—52 nn. 18—19). The development

of BPA's negotiating position is an ongoing process that will not be completed until the negotiations are complete.

<3>Document 256 was produced by the Northwest Power Planning Council, and the Appellant argues that

it too cannot be an intra-agency document. The Council, however, was created by a federal statute that provides that the rules governing disclosure of documents applicable to BPA shall be applicable to the Council. 16 U.S.C. § 839b(a)(4). Under these circumstances, we find that the document is an intra-agency document to which Exemption 5 may be applied.

<4>From the present record, it is not possible for us to identify the affiliation of all the individuals present at

these meetings. Consequently, we cannot determine in all cases which documents report on meetings of only government employees.

<5>Exemption 4, however, might apply to some of this material. Exemption 4 could protect any interest

that

the government of Canada might have in keeping the substance of the negotiations confidential. Moreover, Exemption 4 could also apply to the extent that the MCPs submitted information when not acting as part of the agency.

Case No. VFA-0097, 25 DOE ¶ 80,160

January 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: VECTRA Government Services, Inc.

Date of Filing: December 12, 1995

Case Number: VFA-0097

On December 12, 1995, VECTRA Government Services, Inc., completed its filing of an Appeal from a determination issued to the company by the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE). In that determination, the Authorizing Official partially denied a request for information filed by VECTRA on February 9, 1994, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to (1) release the information that was withheld in its determination; and (2) conduct a further search for documents responsive to VECTRA's request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

This FOIA Appeal arises from a procurement action designed to award a contract for Technical and Management Support Services at Rocky Flats. The review process included an evaluation of the bidders'

technical and cost proposals by a Source Evaluation Board (SEB). During the review process, bidders were invited to submit Best and Final Offers (BAFOs). Following the submission of the BAFOs, there was a reranking of the bidders. A contract was awarded to the Science Applications International Corporation (SAIC). The Appellant (formerly ABB-Government Services, Inc.) was among the unsuccessful bidders. The Appellant contends that the SEB determined that the contract should have been awarded to it, but that the decision was overridden.

On February 9, 1994, VECTRA submitted a FOIA request to Rocky Flats asking for information concerning the procurement process. In its October 16, 1995 determination, Rocky Flats granted certain portions of the request. However, it denied the request for certain documents generated by the SEB under Exemption 5 of the FOIA.<1>Rocky Flats further indicated that there were no documents responsive to the request for documents containing any "findings/decision to override SEB selection."

VECTRA's appeal claimed that the evaluative portions of the SEB Report were wrongfully withheld and that Rocky Flats failed to perform an adequate search for documents regarding what VECTRA claims was

a decision to override the SEB selection.<2>As detailed below, we found that VECTRA's arguments are without merit.

II. Analysis

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, only the "deliberative process" privilege is at issue.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to properly withhold information under the deliberative process privilege, the information in question must be both predecisional and deliberative. Vaughn v. Rosen, 523 F. 2d 1136, 1143-44 (D.C. Cir. 1975).

In the instant case, VECTRA is seeking only the evaluative portions of the SEB report including all findings and rankings. We have consistently found that the evaluative portions of SEB reports meet the Exemption 5 criteria and therefore may be withheld.<3>This information reflects the SEB opinions on the relative merits of the proposals. This information is deliberative and is exempt from mandatory disclosure under Exemption 5. See, e.g., Morgan, Lewis & Bockius, 20 DOE ¶ 80,165 at 80,685-86 (1991); Metrix Int'l, Inc., 20 DOE ¶ 80,117 at 80,546-47 (1990); Holmes & Naver, Inc., 9 DOE ¶ 80,140 (1982); Exxon Nuclear Co., 5 DOE ¶ 80,151 (1980).

Nevertheless, the Appellant contends that if the names of the government deliberators were withheld, then the disclosure of the evaluative portions of the SEB report would not interfere with the deliberative process. Appellant's argument is without merit. The purpose of the deliberative process privilege is to protect the free flow of information within the government. This free flow of information can be inhibited not only by fear of personal revelations, but also by concerns such as publicizing preliminary ideas which are never adopted and misleading the public. These concerns would not be mitigated by merely withholding the names of the government employees involved in the decision-making process.

Moreover, the release of this information would not be in the public interest because the ability and willingness of the evaluators to make honest and open recommendations could be compromised if they knew that this information would be released. 10 C.F.R. § 1004.1. If employees were to become inhibited in their recommendations, the agency would be deprived of the benefit of their open and candid opinions. Consequently, Rocky Flats properly withheld the evaluative portions of the SEB Report.

B. The Adequacy of the Search for Responsive Documents

The Appellant claims that Rocky Flats failed to search adequately for documentation to support its allegation that the SEB selection was overridden. As detailed below, we are not persuaded by the

Appellant's contention.

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive: "[t]he standard of reasonableness which we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the Appeal, we contacted Mary Hammack, FOIA/Privacy Act Officer at Rocky Flats, to discuss the search for documents concerning whether the SEB selection was overridden. Ms. Hammack informed us that if such documents existed, they would be located in the Rocky Flats Contracts Division. She further stated that she and Ralph Riccio, contracts specialist and custodian of the records relating to the contract at issue, performed an extensive search of the administrative records of the Contracts Division and no records responsive to this portion of the request were found.<4>Memorandum of Telephone Conversation between Linda Lazarus, Staff Attorney, Office of Hearings and Appeals, and Mary Hammack, FOIA and Privacy Act Officer, Rocky Flats (December 19, 1995).

Based on these statements, we are convinced that Rocky Flats followed procedures which were reasonably calculated to uncover the materials sought by the Appellant in this portion of its FOIA request and that no such documents are in the possession of DOE. Furthermore, as noted above, the evaluative portions of the SEB Report were properly withheld under Exemption 5 of the FOIA. Accordingly, VECTRA's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal completed by VECTRA on December 12, 1995, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 18, 1996

<1>/ Rocky Flats also denied this information based upon Exemption 3 of the FOIA. However, as the decision to withhold these documents can be fully justified based upon Exemption 5, we need not reach the issue of whether the documents were properly withheld under Exemption 3.

<2>/ The scope of VECTRA's appeal was clarified during three telephone conversations between Linda Lazarus, OHA Staff Attorney, and George Klein, Contracts Manager of VECTRA, (December 1, 11, and 12, 1995). During these conversations, Mr. Klein indicated that VECTRA wished to challenge only those portions of the October 16, 1995 determination which (1) withheld the evaluative material contained in the SEB report; or (2) indicated that no documents had been found regarding any findings or decision to override the SEB selection.

<3>/ Source evaluation board reports typically contain at least some information that is not properly

withheld under the deliberative process privilege. For example, material such as the table of contents and the section descriptions which serve only to orient the reader are neither predecisional nor deliberative. Moreover, descriptive passages which merely set forth factual and historical information are not withholdable under Exemption 5. Additionally, the evaluation criteria themselves are not deliberative, since they are not recommendations. See Morgan, Lewis & Bockius, 20 DOE ¶ 80,165 at 80,685-86. However, in the instant case the Appellant does not seek this material. Memorandum of Telephone Conversation between Linda Lazarus, OHA Staff Attorney, and George Klein, Contracts Manager of VECTRA (December 12, 1995). Therefore, Rocky Flats is not required to segregate this material and provide it to the Appellant.

<4>VECTRA has not submitted any evidence that documents exist to support its claim that the SEB had initially determined that the contract should have been awarded to it, but that this decision was overridden. Nonetheless, we note that a firm's ranking might have been changed by the SEB during the evaluation process after receipt of the BAFOs. Information concerning such a reranking would be included in the deliberative portion of the SEB report that we have found falls within the scope of Exemption 5.

Case No. VFA-0098, 25 DOE ¶ 80,152

December 13, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Butler, Vines and Babb, P.L.L.C.

Date of Filing: November 14, 1995

Case Number: VFA-0098

On November 14, 1995, Butler, Vines and Babb, P.L.L.C., filed an Appeal from a determination issued to it on November 2, 1995, by the FOIA Officer of the Oak Ridge Operations Office (FOIA Officer) of the Department of Energy (DOE). In that determination, the FOIA Officer determined that no documents could be found responsive to the appellant's October 3, 1995 request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

In its request for information, Butler, Vines and Babb, P.L.L.C. sought a copy of any documents pertaining to Armstrong Contracting and Supply's (a.k.a. ACandS, Inc) sale of any asbestos-containing material for use at the Oak Ridge Reservation and documents pertaining to contracts governing performance by Armstrong Contracting and Supply at Oak Ridge from 1958 through 1975. In her determination, the FOIA Officer stated that a thorough search of the files at the Oak Ridge Operations Office was unsuccessful in locating any records responsive to the appellant's request. In its Appeal, the appellant contends that the DOE's search was inadequate. The Appeal, if granted, would require the DOE to conduct a further search for documents responsive to the October 3, 1995 FOIA request.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). When an agency reports that no responsive documents can be found, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). In addition, in previous cases we have held that challenges to the adequacy of the agency's search must be supported by the presentation of some evidence that a requested document, unidentified by the agency in its search, does in fact exist. See Sun Co., 11 DOE ¶ 80,114 (1983); Vinson & Elkins, 4 DOE ¶ 80,127 (1979).

In order to determine whether an agency's search was adequate, its actions are examined under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on

rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In its Appeal, the appellant contends that responsive documents must exist in the federal repository in Atlanta. Specifically, the appellant states that it has been told by contractors who worked at Oak Ridge that responsive records were delivered to the DOE and stored in Atlanta.

In reviewing the Appeal, we contacted the FOIA Officer at the Oak Ridge Operations Office to ascertain the extent of the search that had been performed.<1>From these conversations it is clear that an adequate search for responsive documents was performed at the Oak Ridge Operations Office. Nonetheless, the search was limited to the Oak Ridge Office. Since the FOIA Officer confirmed that there is a reasonable possibility that responsive documents may exist at the repository in Atlanta, we will remand the case to the Oak Ridge Operations Office for a search of the Atlanta repository.

It Is Therefore Ordered That:

(1) The Appeal filed by Butler, Vines and Babb, P.L.L.C.. on November 14, 1995 is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Oak Ridge Operations Office of the Department of Energy for a search of the repository in Atlanta for any documents responsive to the Freedom of Information Act request filed by Butler, Vines and Babb, P.L.L.C. on October 3, 1995. Any documents found to be responsive to this request shall be released or a detailed explanation as to why the information is exempt from public disclosure under the Freedom of Information Act shall be provided.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district in which the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 13, 1995

<1>/ See memoranda of telephone conversations between Leonard M. Tao, OHA Staff Attorney, and Amy Rothrock, Oak Ridge Operations Office.

Case No. VFA-0099, 25 DOE ¶ 80,153

December 13, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: U.S. Ecology, Inc.

Date of Filing: November 14, 1995

Case Number: VFA-0099

On November 14, 1995, U.S. Ecology, Inc. (USE) filed an Appeal from a determination issued to it on October 30, 1995, by the Office of External Affairs (OEA), a unit of the Richland Operations Office of the U. S. Department of Energy (DOE/RL). In that determination, the OEA denied partially USE's request for information filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the requested information.

The FOIA generally requires that documents held by federal agencies be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On September 29, 1995, USE filed a request for information in which it sought "all documents and communications pertaining to the receipt, discussion or evaluation by DOE or Westinghouse Hanford personnel of the February 1994 and/or July 31, 1995 unsolicited proposals submitted by USE." See Letter from Barry Bede, Vice President, USE, to FOIA Officer and Unsolicited Proposal Coordinator, DOE (September 29, 1995). This request was forwarded to the OEA. On October 30, 1995, the OEA responded to USE's request by sending responsive documents it deemed releasable and information on obtaining one responsive document that is available to the public. See Letter from Director, OEA, DOE/RL to Barry C. Bede, USE (October 30, 1995) ("determination letter"). The determination letter also stated that some responsive documents which had originated at DOE headquarters in Washington, D.C. were sent to that office for review.<1> Finally, the determination

letter stated that although OEA had located an issue paper regarding "a proposed contract at DOE/RL," this paper was being withheld pursuant to Exemption 3 of the FOIA and the Procurement Integrity Act ("PIA"), 41 U.S.C. § 423. See Determination Letter at 1. The OEA considered this document to be "source selection information"<2> which is required by the PIA to be withheld from the public during a federal procurement. Id. USE contends that this decision should be reconsidered, and filed this Appeal to request the release of the issue paper.

II. Analysis

Exemption 3 of the FOIA allows the withholding of information prohibited from disclosure by another federal statute only if that statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C.A. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the exemption's coverage if it satisfies either of Exemption 3's tests. See Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984). The D.C. Circuit has stated that the Exemption 3 analysis under the FOIA is not dependent on the factual content of the documents at issue; instead "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (Fitzgibbon) (quoting Association of Retired Railroad Workers v. U.S. Railroad Retirement Board, 830 F.2d 331, 336 (D.C. Cir. 1987)).

The Supreme Court has established a two-prong standard of review for Exemption 3 cases. See CIA v. Sims, 471 U.S. 159, 167 (1985); Fitzgibbon, 911 F.2d at 761 (applying the Sims test). First, it must be determined whether the statute in question is a statute of exemption as contemplated by Exemption 3. Id. at 167. Second, the withheld material must satisfy the criteria of the exemption statute.

A. The Procurement Integrity Act

We have concluded in previous decisions that the PIA, 41 U.S.C.A. § 423(a)-(p), is a statute of exemption as contemplated by Exemption 3. See Energy Research Corporation, 21 DOE ¶ 80,130 at 80,600 (1991) (affirming the withholding of winning proposal and preliminary contract before conclusion of final contract negotiations and award of final contract) (Energy Research); Olin Pantex, Inc., 21 DOE ¶ 80,152 (affirming the withholding of information on winning proposal); John T. Allen, 23 DOE ¶ 80,131 (1993) (affirming the withholding of proposals submitted to DOE before contract award as proprietary information); Federal Sources, Inc., 24 DOE ¶ 80,141 (1994) (affirming the withholding of DOE documents containing procurement information prior to release of RFP and contract award).

The PIA is a federal statute that contains language specifically prohibiting the authorizing official from releasing protected information. The statute states, in pertinent part, that:

[d]uring the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly dislose such information, directly or indirectly, to any person other than a person authorized by the head of such an agency or the contracting officer to receive such information.

41 U.S.C.A. § 423(d).

The PIA therefore meets the subpart (A) requirement of allowing contracting officials no discretion whatsoever in withholding certain information. Having satisfied the threshold inquiry by classifying the PIA as a statute of exemption, we must now determine if the information withheld from FSI satisfies the criteria of the statute.

B. The Withheld Material

To satisfy the exemption, the issue paper withheld from USE must meet the criteria laid out above in 41 U.S.C.A. § 423(d). We conclude that this information was properly withheld for the following reasons.

1. The Withheld Document Was Properly Considered Source Selection Material

The issue paper is a two-page document, written in August 1995, that discusses USE's unsolicited proposal. See Memorandum of Telephone Conversation between Dorothy Riehle, OEA, and Valerie Vance Adeyeye, OHA Staff Attorney (December 7, 1995). In its evaluation of the proposal, the document reveals information that was used to create the "scope of work" section of a draft RFP for the new

DOE/RL management contract that was issued to the public in August 1995. See Memorandum of Telephone Conversation between Ted Turpin, DOE/RL, and Valerie Vance Adeyeye, OHA Staff Attorney (December 7, 1995). Because the procurement is ongoing, the OEA contends that release of the issue paper to USE would jeopardize the procurement process and result in "substantial competitive harm" if released prior to contract award. *E.g.*, Energy Research Corp. at 80,601; Olin Pantex , Inc., 21 DOE ¶ 80,152 at 80,653 (1991). We agree, and after reviewing the document find that the issue paper is source selection information as contemplated by the PIA, and thus required to be properly secured to prevent disclosure to a competing contractor. 41 U.S.C.A. § 423(p)(7).

2. The Document Was Withheld During The Conduct of an Agency Procurement

USE requested information from the OEA in September 1995. We have determined that a federal agency procurement was well underway by the request date. DOE/RL is changing its operations from management by a "management and operations" contractor to management by a "management and integration" contractor. In conjunction with this change, the agency initiated a new procurement for operation of the Hanford facility. See Memorandum of Telephone Conversation Between Ted Turpin, DOE/RL, and Valerie Vance Adeyeye, Staff Attorney, OHA (December 7, 1995). Low level waste disposal is one of the services to be procured. In August 1995, DOE/RL issued a draft request for proposal ("RFP") for bids on the contract which was expected to be awarded in June 1996. See Memorandum of Telephone Conversation Between Yvonne Sherman, FOIA Officer, OEA, and Valerie Vance Adeyeye, Staff Attorney, OHA (December 6, 1995).

The term "during the conduct of any Federal agency procurement of property or services" means the period beginning on the earliest specific date on which an authorized official orders or requests one of eight actions listed in the PIA, including "[t]he preparation or issuance of a procurement solicitation in that procurement." 41 U.S.C.A. § 423(p). *See also* Energy Research Corp. at 80,600. Because issuance of the draft RFP is a qualifying action, and the request was made after the draft RFP was issued, we find that this document was withheld during the conduct of an agency procurement. Federal Sources Inc., 24 DOE ¶ 80,141 (1994); John Allen, 23 DOE ¶ 80,131 (1993).

III. Conclusion

We find that the issue paper relating to unsolicited USE proposals was properly withheld by the OEA under Exemption 3 of the FOIA. The issue paper is source selection information which, if released, could jeopardize the integrity or successful completion of an ongoing procurement action. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by U. S. Ecology, Inc., on November 14, 1995, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 13, 1995

<1>The identified documents were reviewed and released in their entirety to USE in a letter dated November 20, 1995. A search of headquarters found three additional documents also--two were released and one is being reviewed by its originating

office. See Memorandum of Telephone Conversation between Chris Morris, FOIA/Privacy Act Division, DOE and Valerie Vance Adeyeye, OHA Staff Attorney (December 5, 1995).

<2>"'Source selection information' means information determined by the head of the agency or the contracting officer to be information-

(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure . . . ." 41 U.S.C.A. § 423(p)(7).

Case No. VFA-0100, 25 DOE ¶ 80,161

January 22, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terrence Willingham

Date of Filing: December 14, 1995

Case Number: VFA-0100

On December 14, 1995, Terrence Willingham filed an Appeal from a determination issued to him on October 17, 1995 by the Freedom of Information and Privacy Act Division of the Office of the Executive Secretariat (ES) of the Department of Energy (DOE). <1> In his Appeal, Willingham asserts that ES failed to perform an adequate search for responsive documents regarding two Freedom of Information Act (FOIA) Requests he submitted on March 9, 1995 and June 2, 1995.

I. Background

On March 9, 1995, Willingham filed a FOIA Request with ES requesting documents regarding 21 categories of information pertaining to various job announcements concerning the Director and Deputy Director of the Department of Energy's (DOE) Office of Civil Rights (OCR) and various named DOE and OCR officials. Subsequently, on June 2, 1995, Willingham expanded his request to cover four additional categories of information. Willingham subsequently submitted a letter dated August 31, 1995 clarifying his March 9 and June 2 FOIA Requests. In its October 17, 1995 determination letter, ES provided Willingham with 42 documents responsive to his March 9 and June 2 FOIA Requests. The determination letter also stated that ES was in the process of reviewing a number of other potentially responsive documents.

In his Appeal, Willingham cites six occasions, discussed below, where he claims ES's search for responsive documents was inadequate regarding various categories of information sought in his FOIA Requests. Additionally, Willingham, while not giving specific reasons, challenges the

adequacy of the search which was conducted for all categories of information mentioned in his FOIA Requests.

II. Discussion

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

After reviewing the search which was made for responsive documents regarding each of the categories of

information specified in the FOIA Requests, we find that ES made, with two exceptions, an adequate search for responsive documents. As discussed below, we have been informed that additional information may exist regarding one category of information Willingham sought in his FOIA Requests and that ES has not completed its search for responsive documents regarding another category of information. Consequently, we are remanding this matter to ES to complete further searches for responsive documents regarding those two categories of information. Additionally, in our review, we have discovered that one of the documents provided to Willingham, regarding the minutes of a meeting, was not provided to him in its entirety and without an explanation why a portion of the document was withheld. On remand, ES should provide Willingham with a new determination regarding that document.

A. The Search for Senior Executive Service Documents

In his March 9 FOIA Request, Willingham requested all documents regarding the downgrading and elimination of the Senior Executive Service (SES) positions of Director and Deputy Director of OCR. ES provided Willingham with 12 documents regarding the two positions and the transfer of OCR to the Office of Economic Impact and Diversity (OEID). The determination letter also stated that ES had been informed by the DOE's Office of Personnel (OP) that these two SES positions had not been downgraded but were eliminated due to the realignment of OCR. Willingham asserts that he was not provided with documents specifically referring to the elimination of the two SES positions other than documents referring to the transfer of OCR to OEID. Willingham argues that documents specifically relating to the elimination of the SES positions must exist in the Office of Personnel and should be provided to him.

We contacted ES to ascertain the extent of the search which had been conducted for documents relating to the elimination of the SES positions at OCR. ES had determined that OP and OCR were the offices most likely to possess responsive documents and accordingly a search was undertaken in those offices. See Memorandum of meeting between Verlette Moore, FOIA Specialist, Office of the Executive Secretariat, and Richard Cronin, Staff Attorney, OHA (December 28, 1995). OCR informed us that it undertook a search for responsive documents in the files most likely to contain such information and provided ES with all the responsive documents it located. See Memorandum of telephone conversation between Pablo Griego, Office of Civil Rights, and Richard Cronin, Staff Attorney (January 2, 1996). We also contacted OP to ascertain the extent of the search it made for responsive documents. We were informed that OP determined that the most likely place that documents relating to the elimination of the SES positions would exist was in the OP's Office of Executive Resources (OER) and consequently, OER conducted a search for responsive documents. See Memorandum of telephone conversation between Bruce Murray, Office of Personnel, and Richard Cronin, Staff Attorney, OHA (January 11, 1996). OER informed us that it examined its files and provided ES with all documents in its possession relating to the transfer of OCR to OEID. With regard to the lack of specific documents regarding the elimination of the two SES positions, we were informed by OER that the elimination of SES positions which had not been filled would not usually require documentation. See Memorandum of telephone conversation between Stephanie Diamond, Office of Executive Resources, and Richard Cronin, Staff Attorney, OHA (January 11, 1996).

Given the facts above, we find that ES conducted an adequate search for documents relating to the elimination of the two SES positions. However, we have discovered that one of the documents that OER provided to ES, entitled "Minutes of Meeting" and dated October 5, 1994 (Minutes Document), was not provided to ES in its entirety. OER only provided a portion of the Minutes Document to ES because it determined that the remainder of the Minutes Document was not responsive to Willingham's request. Id. However, the FOIA does not contain any provision authorizing the segregation of a record into responsive and non-responsive portions. Rather the FOIA requires that, where a record has been identified as responsive to a FOIA request, an agency must provide either the entire record to the requestor or a written statement explaining which specific exemption under the FOIA authorizes withholding information from the record and a statement why discretionary release is not appropriate. See 5 U.S.C. § 552 (b); 10 C.F.R. § 1004.7(b). The determination letter Willingham was issued does not state why material was withheld from the Minutes Document and further, fails even to state that material has in fact been withheld. Consequently, we will remand this matter to ES so that it may either release the entire Minutes Document

to Willingham or provide him with an explanation as to which exemptions of the FOIA authorize the of withholding the deleted material from that document.

B. The Search for Documents Regarding Dolores Rozzi

Willingham also requested documents regarding the termination or reassignment of Dolores Rozzi (Rozzi) from the position of Director of Administration and Human Resources and the approval of her sabbatical to California University of Pennsylvania. ES provided Willingham with a number of documents including a copy of a January 28, 1993 settlement agreement (Settlement Agreement) between the DOE and Rozzi and documents pertaining to a bonus which was granted to Rozzi on October 6, 1992. Willingham asserts that one of the provisions of the Settlement Agreement states that Ms. Rozzi would use her best efforts to seek other employment. Willingham argues that ES failed to provide documents showing Rozzi's attempts to find other employment or other documents relating to Rozzi's compliance with the Settlement Agreement. Additionally, Willingham asserts that Rozzi was subsequently obligated to return the bonus and that he was not provided a copy of the SF-52 form documenting the reimbursement of the bonus. Lastly, Willingham asserts that Rozzi's sabbatical was eventually canceled and that ES failed to provide him with a copy of the SF-52 form canceling the sabbatical.

ES informed us that it determined that OP would be the office most likely to possess responsive documents regarding Rozzi and that OP conducted a search for responsive documents. We were further informed that a search was made of Rozzi's official personnel file along with other files where responsive material was most likely to exist and that OP provided ES with all the responsive documents which were discovered. See Memorandum of telephone conversation between Bruce Murray, Office of Personnel, and Richard Cronin, Staff Attorney, OHA (January 3, 1996). We were also informed that, with regard to Willingham's assertion regarding the existence of a SF-52 for the cancellation of the sabbatical, OP would not create a SF-52 for the cancellation of a sabbatical. Id. Further, we were informed by OP that no other documents were discovered regarding Rozzi's compliance with the Settlement Agreement or documenting her attempts to find other work. See Memorandum of telephone conversation between Bruce Murray, Office of Personnel, and Richard Cronin, Staff Attorney, OHA (January 11, 1996). OP informed us that it had no information that Rozzi was required to return her bonus and found no documents indicating that the bonus was returned. Id. Given this factual background we find that an adequate search was conducted for documents regarding Rozzi's bonus, termination, reassignment and sabbatical.

C. The Search for Baldwin-Claytor Settlement Documents

In his June 2, 1995 FOIA Request, Willingham requested documents containing information on the settlement of an Equal Employment Opportunity complaint and civil suit by Ms. Hattie Baldwin and Mr. Lewis Claytor. ES informed us that it determined that the Office of General Counsel (OGC) would be the office most likely to possess responsive documents and that OGC conducted a search for documents. OGC informed us that a search was made of its files regarding the Baldwin-Claytor settlement and a number of responsive documents were found. OGC further informed us that all of the documents relating to the Baldwin-Claytor settlement were provided to ES. See Memorandum of telephone conversation between Ellen Quattrucci, OGC, and Richard Cronin, Staff Attorney, OHA (January 3, 1996). Willingham received all of the responsive documents which had been filed with the court. The remaining documents are still under review and a final determination on these documents will be issued to Willingham. Id. Given the facts described to us above, we believe that ES has made an adequate search for responsive documents. However, if after he receives a determination regarding the documents currently under review, Willingham wishes to appeal the adequacy of the search made for Baldwin-Claytor settlement documents, he should specify why he believes the search was inadequate.

D. The Search for O'Leary-Maupin-Moody Meeting Documents

In his March 9 FOIA Request, Willingham sought any documents regarding a meeting that took place

between Secretary of Energy Hazel O'Leary, Ellis Maupin, President of Chapter 213 of the National Treasury Employees Union, and Corlis Moody, Director of the Office of Economic Impact and Diversity, that was referenced in a copy of an answer to a suit Willingham has filed against DOE. ES did not provide Willingham with any documents responsive to this request. Willingham challenges the search which was made for responsive documents to this specific request asserting that, since the O'Leary-Maupin-Moody meeting resulted in a "certain personnel action," it is highly unlikely that DOE has no documents such as an agenda or a calendar pertaining to that meeting. ES informed us that it is still searching for responsive documents regarding this meeting. See Memorandum of telephone conversation between Verlette Moore and Richard Cronin, Staff Attorney (January 16, 1996). Consequently, on remand, ES should complete its search for responsive documents regarding the O'Leary-Maupin-Moody meeting and provide Willingham with a determination regarding the result of its search.

E. The Search for Documents Regarding Jay Pagano's Alleged Failure to Accurately Describe His Previous Experience

In his June 2 FOIA Request, Willingham requested documents regarding Jay Pagano's (Pagano) alleged failure to note in his application for job announcement ERM-92-48 that a prior position he had occupied at the Equal Employment Opportunity Commission had been downgraded. ES did not provide any documents responsive to this request. Willingham argues that documents must exist regarding what he asserts is a "material omission of job experience" by Pagano which was disclosed in a deposition by Pagano. <2> In analyzing this request, ES determined that OGC would be the office most likely to possess responsive documents. OGC personnel contacted the DOE attorney present at the deposition when Pagano chronicled his experience. The DOE attorney informed OGC that she had not filed any ethics complaint against Pagano as a result of his deposition. Additionally, OGC was informed by the designated DOE ethics official that there was no record of any ethics complaint being filed against Pagano. See Memorandum of telephone conversation between Ellen Quattrucci, OGC, and Richard Cronin, Staff Attorney, OHA (January 3, 1996). We find that, given the facts described above, the search that ES conducted for documents regarding Pagano's alleged misstatement of his employment experience was adequate.

F. The Search for Documents Regarding the Positions of Director and Deputy Director of the DOE's Office of Civil Rights

Willingham requested in his March 9 FOIA Request that he be provided documents pertaining to various actions taken regarding job announcements ERM-92-48 and ERM-92-47 which advertised the positions of Director and Deputy Director of OCR. In a letter dated August 31, 1995, Willingham clarified his request stating that he was seeking all documents referring to the elimination, downgrading, reclassification, conversion or any other personnel action taken regarding the positions of Director and Deputy Director of OCR from the date of the job announcements to the present. ES provided Willingham with several documents responsive to this request. However, Willingham contends that ES made an inadequate search for documents. As support for his argument, Willingham states that he received no documents regarding the temporary promotion of Rufus Smith to the position of Acting Deputy Director of OCR. We contacted OP which conducted the search for responsive documents. OP searched their files which are most likely to contain responsive documents and sent all responsive documents that they found to ES. However, OP has informed us that other branches of DOE may have in their possession responsive documents regarding the detailing of Mr. Smith to be Deputy Director of OCR. See Memorandum of telephone conversation between Bruce Murray, Office of Personnel, and Richard Cronin, Staff Attorney (January 11, 1996). Consequently, we will remand this matter to ES to make another search for responsive documents regarding personnel actions concerning the position of Deputy Director of OCR as described in Willingham's August 31, 1995 letter.

G. The Search for Documents Regarding All Categories of Requested Information

Finally, while giving no specific grounds, Willingham challenges the search that ES made regarding all 25 categories of information he requested. ES informed us that it analyzed Willingham's two FOIA Requests and determined that OCR, OP, OGC and ES itself would be the DOE offices most likely to contain responsive documents. See Memorandum of telephone conversation between Verlette Moore, Office of the Executive Secretariat and Richard Cronin, Staff Attorney, OHA (December 28, 1995). After contacting these offices, we were informed that, with the exceptions noted above, each of these offices searched the files most likely to contain responsive documents and that all responsive documents were submitted to ES to provide to Willingham. Consequently, we find that ES conducted an adequate search for documents for all categories of information mentioned in Willingham's FOIA Requests other than the categories identified above as inadequate or incomplete.

In sum, we have determined that ES made an adequate search with regard to all categories of information sought in Willingham's FOIA Requests except for the categories identified above where we have determined that the search was inadequate or incomplete. On remand, ES should complete its searches for documents pertaining to personnel actions regarding the position of Deputy Director of OCR as described in Willingham's August 31, 1995 clarification letter and the O'Leary-Maupin-Moody meeting. With regard to the Minutes Document, on remand, ES should either release the entire Minutes Document to Willingham or provide him with a new determination supporting the withholding of the deleted material.

It Is Therefore Ordered That:

(1) The Appeal filed by Terrence Willingham on December 14, 1995 is granted in part as set forth in the above Decision and is denied in all other respects.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 22, 1996

<1>We received Willingham's Appeal on November 17, 1995. However, Willingham's Appeal did not contain a copy of the determination letter from which he was appealing. Because DOE regulations require that a copy of the determination letter be submitted with the appeal, Willingham's Appeal was not considered filed until December 14, 1995, the date we received a copy of ES's determination letter. See 10 C.F.R. § 1004.8(b).

<2>This deposition was taken in connection with Baldwin-Claytor suit against the DOE.

Case No. VFA-0101, 25 DOE ¶ 80,154

December 13, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Linda P. Yeatts

Date of Filing: November 20, 1995

Case Number: VFA-0101

On November 20, 1995, Linda P. Yeatts filed an Appeal from a determination issued to her on October 23, 1995 by the Freedom of Information Act (FOIA) Officer at the Department of Energy's (DOE) Oak Ridge Operations Office (hereinafter "FOI Officer" or "Oak Ridge"). She had filed a request for information pursuant to the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If this Appeal were granted, Oak Ridge would be ordered to conduct a more thorough search for material responsive to Ms. Yeatts' request.

I. Background

On August 10, 1995, Ms. Yeatts filed a FOIA request for the personnel records of her father, Maurice Compton Pickral. According to Ms. Yeatts, her father was a contractor employee who died in July 1945 while employed by Carbide Chemicals Corporation in Oak Ridge. In its response, Oak Ridge explained that the personnel records for employees who worked for Carbide Chemicals Corporation during the 1940s were destroyed because the project was a temporary operation for the war effort. The only document found to be responsive to Ms. Yeatts' request was Maurice Pickral's "employment card." A copy of this card was included in the FOI Officer's response. In her Appeal, Ms. Yeatts challenges the adequacy of the search for responsive documents.

II. Analysis

The FOIA generally requires federal agencies to release documents to the public upon request. The Office of Hearings and Appeals (OHA) has stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. In fact, the office has remanded cases where it was evident that the search conducted was inadequate. See, e.g., James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires only that the search be reasonable, not exhaustive. "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller); accord, Weisberg v. Department of Justice, 745 F.2d at 1476, 1485 (D.C. Cir. 1984). We must determine whether Oak Ridge's search for Mr. Pickral's personnel records was reasonable.

We contacted Oak Ridge for an explanation of the steps taken to locate the requested information. We were informed that there are three types of records kept at various Oak Ridge locations: personnel records of contractors, personnel medical records and personnel radiation experiment records. There are three

plants at Oak Ridge which were searched: the K-25 Gaseous Diffusion Plant, the Y-12 Weapons facility and the Oak Ridge National Laboratory. In addition, the other two locations searched were the Oak Ridge Records Center and the Oak Ridge Associated Universities, the site that produced the historical "employment card." Memorandum of telephone conversation between Kimberly Parker, OHA and Amy L. Rothrock, FOI Officer, Oak Ridge Operations (November 27, 1995).

Based on this information, we conclude that the search for responsive material was reasonable. As set forth above, that search included three different record systems at five Oak Ridge facilities. We find that this constitutes a thorough and conscientious search for responsive documents.

III. Conclusion

For the foregoing reasons, we find that the search performed by Oak Ridge was reasonably calculated to uncover the materials sought by the Appellant. Accordingly, we will deny this Appeal.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Linda P. Yeatts on November 20, 1995 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 13, 1995

Case No. VFA-0102, 25 DOE ¶ 80,155

December 21, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Keith E. Loomis

Date of Filing: November 21, 1995

Case Number: VFA-0102

On November 21, 1995, Keith E. Loomis (Appellant) filed an Appeal from a final determination issued on October 17, 1995 by the Department of Energy's (DOE) Office of Naval Reactors (ONR). In that determination, the DOE released copies of several documents requested by the Appellant. However, portions of one document released to the Appellant were withheld under FOIA Exemption 6. This partial release occurred in response to a request for information filed by the Appellant, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information and to conduct an additional search for responsive documents.

I. BACKGROUND

On April 10, 1995, the Appellant filed his original request seeking a wide range of information. As a result of ongoing negotiations between the Appellant and ONR, the Appellant's original request was modified on several occasions. On October 17, 1995, ONR issued a determination in response to the Appellant's modified request. The Determination Letter released several responsive documents to the Appellant, withheld some of the information requested by the Appellant under FOIA Exemptions 1, 3, and 6, and explained that the search for responsive documents did not locate some of the information requested by the Appellant. On November 21, 1995, the Appellant filed the present Appeal contending that the DOE's refusal to release the deleted information was improper, and that the agency's search for responsive documents was inadequate.

The original Appeal filed by Loomis on November 21, 1995, has been bifurcated into two separate Appeals. This decision will consider those portions of the original Appeal that do not concern information withheld by the DOE's Office of Naval Reactors (ONR) under FOIA Exemptions 1 and 3. Specifically, this decision will consider whether:

1) ONR's withholding of portions of the deposition of R. Simons under Exemption 6 was proper;

2) its search and response to the Appellant's request for "Copies of all out-of-pocket cash receipts submitted [by him] to MAO" was adequate;

3) its search for "a copy of the Audit Report prepared by D. Durnan, during August September 1988" was adequate; and,

4) its search for "copies of all Radiation Surveys conducted at the Windsor Site on March 8, 1988" was

adequate.

The issues raised in the original appeal concerning ONR's withholding of information under Exemptions 1 and 3 will be considered in a second Appeal which has been assigned OHA Case Number VFA-0104.

II. ANALYSIS

A. Exemption 6

We turn first to the Appellant's contentions that the ONR improperly withheld information under Exemption 6. While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 6 is at issue in the present case. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In response to the Appellant's request for a transcript of an individual's deposition, the ONR released a copy of the transcript of that individual's deposition from which information had been redacted and withheld under Exemption 6. On Appeal, the Appellant seeks release of questions directed to the deponent which were withheld under Exemption 6. <1> The Appellant categorically claims that release of questions directed at deponents cannot reasonably be expected to intrude upon privacy interests. While we do not agree that the substance of questions asked of a deponent can never intrude upon privacy interests, we are also convinced that the release of the information contained in the particular questions at issue in the present case would not likely result in an invasion of privacy interests. After we conferred with ONR about this matter, ONR agreed to release the questions to the Appellant. We are therefore remanding this portion of the Appeal to ONR for release of the questions.

B. Adequacy of the Search

If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985); accord, Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Moreover, any successful challenge to the adequacy of a search must be supported by evidence showing that the search was not reasonably calculated to identify the requested information. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992).

We turn first to the Appellant's contention that ONR's search for copies of all out-of-pocket cash receipts submitted by the Appellant to MAO was inadequate. The record shows that after conducting a preliminary search for documents responsive to this request ONR had contacted the Appellant in order to determine whether he wished to continue the search for the out-of-pocket cash receipts. Specifically, ONR informed the Appellant that:

Copies of two responsive documents which were readily available are provided. Search time was .5 hours. We understand from MAO that there may be additional responsive documents stored in archive files.

However, the search through these files would be very time consuming with no guarantee of success. If you wish this to be pursued further, please advise. The documents comprise 2 pages.

Attachment 1 to August 16, 1995 Letter from Jonathan Kiell, Office of Naval Reactors to Keith E. Loomis. Apparently, the Appellant never specifically advised ONR that he desired a more extended search for responsive documents to be conducted at his expense. Instead, the Appellant's September 11, 1995 letter to GayLa D. Sessoms, director of the FOIA/Privacy Act Division, indicted that he considered his request for the cash receipts to be "an open matter." While the Appellant's September 11, 1995 letter indicated that he considered this matter to be open, it did not indicate the Appellant's willingness to pay search fees for the extensive search that would most likely be required in order to locate the additional cash receipts. Unless the Appellant is willing to pay for the search time expended in attempting to locate the additional receipts, the ONR is under no obligation to conduct the more extensive search. See, 10 C.F.R. § 1004.4(e) ("no request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees . . . associated with the request.") Since the Appellant's response to ONR's inquiry was ambiguous, we are remanding this matter to ONR for clarification of the Appellant's intentions. On remand, ONR shall contact the Appellant and determine his willingness to pay for the additional search. If the Appellant is willing to pay the additional search fee, the ONR should conduct a more extensive search; otherwise ONR is under no obligation to do so.

The Appellant also claims that ONR's search for a copy of the "Audit Report prepared by D. Durnan during August or September of 1988" was inadequate. The Determination Letter states that ONR's search did not locate any documents responsive to this request. In support of his assertion that ONR's search was inadequate, the Appellant notes that a September 20, 1988 letter to him from D. Durnan specifically refers to an audit report. However, our investigation has revealed that although an audit report was prepared, it was not prepared by D. Durnan. Instead, the audit report relied upon by D. Durnan was prepared by E.D. Shollenberger, an employee of the DOE's Pittsburgh Naval Reactors Office. Accordingly, ONR correctly determined that it did not have any documents responsive to the Appellant's request for an audit report prepared by D. Durnan. This portion of the Appeal is therefore denied. However, ONR has now agreed to provide the Appellant with a copy of the Audit Report prepared by Shollenberger.

Finally, we turn to the Appellant's contention that ONR's search for copies of all radiation surveys conducted at the Windsor site on March 8, 1988 was inadequate. The Appellant contended that radiation surveys should have been conducted on a daily basis and that DOE should therefore have a copy of a radiation survey conducted on March 8, 1988 at the Windsor site. ONR disputes this contention, claiming that radiation surveys were not conducted on a daily basis and that no radiation survey was conducted at the Windsor site on March 8, 1988. In support of these contentions, ONR has submitted the statement of K.A. Berta, Manager of Windsor Site Office SO Radiological Controls, which indicates that no radiation survey was conducted at the Windsor Site on March 8, 1988. Instead, according to Berta: "There were three such surveys performed in period of early March, 1988, specifically, on March 6, March 11, and March 13." Since the Appellant's request specifically seeks copies of radiation surveys conducted on March 8, 1988 and the record indicates that no radiation surveys were conducted on that date, it is clear that ONR correctly determined that there were no documents responsive to this request.

During the pendency of this Appeal, the Appellant was informed that although a radiation survey was conducted on March 6, 1988, no radiation surveys were conducted on March 8, 1988. The Appellant then asserted that he should be provided with a copy of the March 6, 1988 radiation survey. We disagree. The Appellant's original request is clearly limited to those radiation surveys conducted on March 8, 1988. Any radiation survey conducted on March 6, 1988 would therefore be outside the scope of the original request. We have consistently held that FOIA appellants are not permitted to broaden their requests for information in their appeals. Alan J. White, 17 DOE ¶ 80,117 at 80,539 (1988); see also Arthur Scanla, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). Since the Appellant now wishes to obtain information outside the scope of his original request, his broadened request is a new request for information, which must be filed with the ONR, in order to be processed under the FOIA.

III. CONCLUSION

For the reasons set forth above, we are remanding portions of the present Appeal to the Office of Naval Reactors for further processing in accordance with the instructions given above, and are denying it in all other aspects.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Keith E. Loomis on November 21, 1995 (Case Number VFA-0102) is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is remanded to the Office of Naval Reactors for further processing in accordance with the instructions given above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 21, 1995

<1> The Appellant does not challenge ONR's withholding of the deponent's answers to these questions under Exemption 6.

Case No. VFA-0103, 25 DOE ¶ 80,156

January 4, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Raytheon Company

Date of Filing: November 22, 1995

Case Number: VFA-0103

On November 22, 1995, Raytheon Company (Raytheon) filed an Appeal from a determination issued on October 12, 1995, by the Office of Economic Impact and Diversity of the Department of Energy (DOE/ED), in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, Raytheon asks that the DOE release materials withheld under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), and/or identify the responsive documents in its possession.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 10, 1994, Raytheon requested from the DOE any and all records related to a DOE Office of Inspector General investigation of allegations of sexual harassment or other inappropriate conduct made against a particular DOE employee. Letter from Jeffrey H. May, Raytheon Company, to Denise Diggin, DOE (August 10, 1994). In its October 12, 1995 determination letter, DOE/ED stated that it had "conducted its own inquiry into the matter . . . , and a report of record was written, with attachments." Letter from Corlis S. Moody, Director, DOE/ED, to Jeffrey H. May, Raytheon Company (October 12, 1995). However, DOE/ED found that the documents in question were "exempt from disclosure pursuant to Exemption 7(C) of FOIA, 5 U.S.C. 552(b)(7)(C)." Id. DOE/ED stated that it had "balanced the public interest in disclosure and determined that it does not outweigh the significant privacy interests at stake. In addition, non-exempt information cannot be reasonably segregated and released." Id. The appellant's request was therefore denied. Id.

II. Analysis

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law

enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied Donolon v. IRS, 414 U.S. 1024 (1973). Amendments to the FOIA in 1986 extended the protection of Exemption 7 to all records compiled for "law enforcement purposes." See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987).

In determining whether the release of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, the courts have used a balancing test, weighing the privacy interests which would be infringed against the public interest in disclosure. Reporters Committee, 489 U.S. at 762; Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980). Furthermore, in applying this test, we have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). In Reporters Committee, the Supreme Court held that information that does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." 489 U.S. at 775.

In its Appeal, Raytheon states that "there is a strong public interest in discerning whether the Department of Energy effectively monitors its employees and assures that it enforces its policies and procedures with respect to prohibiting sexual harassment in the workplace." Appeal at 3. The appellant also contends that DOE/ED did not "support its assertion that the persons identified in the report would be subject to any harassment or intimidation." Id. at 4 (citing Fine v. Department of Energy, 823 F. Supp. 888, 908 (D.N.M. 1993)). Finally, the appellant argues that "in order to protect the identity of the ?witnesses and, sources and other personnel,' their names and any identifying data could be redacted from the report and other related documents. In this way no privacy interests of sources, witnesses or other personnel would be compromised." Id.

First, we disagree with the appellant that DOE/ED must necessarily make a particularized finding regarding the privacy interests of each individual that would be infringed by a release of information. As the Supreme Court has stated, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." Reporters Committee, 489 U.S. at 776. For example, since the issuance of the Reporters Committee decision, the U.S. Court of Appeals for the D.C. Circuit has concluded that names of private individuals appearing in an agency's law enforcement files are "categorically" exempt from disclosure under Exemption 7(C), unless access to that information "is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity . . . ." Safecard, 926 F.2d at 1205-06; see James L. Schwab, 21 DOE ¶ 80,117 at 80,556-57 (1991).

Similarly, in the present case, we believe that the names and identifying information of investigating officials named in the subject report may be withheld by DOE/ED. Withholding the names of law enforcement officials is justified where their release in connection with a particular investigation "conceivably could subject [agents] to annoyance or harassment in either their official or private lives." Baez v. Department of Justice, 647 F.2d 1328, 1339 (D.C. Cir. 1980); Lesar, 636 F.2d at 487; see Jon Berg, 22 DOE ¶ 80,140 (1992) (upholding the determination of the DOE Inspector General to withhold the names and identification numbers of its investigators). Absent a countervailing public interest in release of the names, such as exists when the conduct of an investigator is called into question, we find that the resulting invasion of privacy would be unwarranted in this case. See Baez, 647 F.2d at 1339.

With regard to names and other information which could reasonably be expected to identify these persons, we have also found that witnesses and sources have a strong privacy interest in remaining anonymous. Schwab, 21 DOE at 80,556; Lloyd R. Makey, 20 DOE ¶ 80,109 at 80,524 (1990). Furthermore, the public interest favors protecting their identities, rather than disclosing them, in order to insure that witnesses

continue to provide information voluntarily for law enforcement investigations, without fear of retribution. See generally King v. Department of Justice, 830 F.2d 210, 232-36 (D.C. Cir. 1987).

Finally, we find that DOE/ED may withhold information that could reasonably be expected to constitute an unwarranted invasion of personal privacy of the subject of the investigation. Moreover, it may not be sufficient to merely withhold the name and identifying information and the subject. Because the appellant has requested documents regarding the investigation of a particular individual, any information provided to the public in response to such a request could potentially invade the privacy interests of that individual. The D.C. Circuit has acknowledged that investigation subjects possess substantial privacy interests. "There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm. . . . Recognizing this danger, Exemption 7(C) affords broad privacy rights to suspects, witnesses, and investigators." Safecard, 926 F.2d at 1205.

Despite the fact that there is clearly information in the documents at issue that may be withheld under Exemption 7(C), we agree with the appellant that portions of the documents can be released. The fact that a document contains material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central v. Department of Air Force, 566 F.2d 242, 259-62 (D.C. Cir. 1977); see also Safecard, 926 F.2d at 1206 (upholding release of documents by the Securities and Exchange Commission with names and addresses of individuals redacted and withheld under Exemption 7(C)). Of course, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that segregation would impose "an inordinate burden" on the agency. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979)). In addition, DOE/ED may find that in certain documents "the redaction of exempt material is so great that the document degenerates into utter nonsense." WPC Companies, 22 DOE ¶ 80,163 at 80,640 (1992) (citing Local 3, Int'l Bhd. of Elec. Workers v. National Labor Relations Board, 845 F.2d 1177, 1180 (2d Cir. 1988)). In those instances, DOE/ED should not be required to segregate and release the non-exempt material. Id.

For example, there are certain entire sections of the investigative report, such as the section entitled "Legal Authority", that could be released without impacting any privacy interests. There are some sections, e.g., the title page, which could be released with the redaction of only one name. There are clearly other sections, however, such as those memorializing witness interviews, which contain numerous names and other information that could identify the complainant, witnesses, or other sources. Such information should be redacted from these sections, and any segregable non-exempt portions released.

We will therefore remand this case to DOE/ED, which should issue a new determination either releasing information other than that which we have found to be protected by FOIA Exemption 7(C), or explaining the reasons for withholding that information. DOE/ED is in the best position to make a determination as to whether the information in question should be protected under Exemption 7(C).

Raytheon also requests in its Appeal "that the Department of Energy provide it with an index of the responsive documents and a specific statement of the privacy interests which would be compromised if the documents were disclosed." On previous occasions, we have stated that, although such an index may be required of the agency when it is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990). At the administrative levels, determinations need only include a general description of the withheld material and a statement of the reason for the withholding. We anticipate that the new determination issued by DOE/ED, which may again be appealed to this office, will provide sufficient detail to comport with these

requirements.<1>

For the reasons explained above, the present Appeal will be granted as specified above. In all other respects, the Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Raytheon Company on November 22, 1995, Case Number VFA-0103, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Economic Impact and Diversity, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 4, 1996

<1>In its determination, DOE/ED stated that "among the attachments [to the report withheld by DOE/ED] is correspondence between Raytheon and the Equal Employment Opportunity Commission; you should contact the EEOC directly if you are interested in obtaining those records." Letter from Corlis S. Moody, Director, DOE/ED, to Jeffrey H. May, Raytheon Company (October 12, 1995). In preparing its new determination, DOE/ED should process any records from the EEOC in accordance with the requirements of the DOE FOIA regulations. See 10 C.F.R. § 1004.4(f)(2) ("Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official will coordinate with the appropriate official of the other agency.")

Case No. VFA-0104, 25 DOE ¶ 80,183

March 25, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Keith E. Loomis

Date of Filing: November 21, 1995

Case Number: VFA-0104

Keith E. Loomis filed an Appeal from a determination issued to him on October 17, 1995, by the Office of Naval Reactors of the Department of Energy. In that determination, Naval Reactors denied in part a request for information that Mr. Loomis initially filed on April 10, 1995, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. After assisting Mr. Loomis with subsequent modifications to his request, Naval Reactors ultimately responded by releasing some documents responsive to portions of his modified request, withholding some material under the exceptions to mandatory disclosure permitted under the FOIA, and stating that other documents requested either were not found or were known not to exist. This Appeal, if granted, would require the DOE to release the information that was withheld for national security reasons in the October 17, 1995 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his Appeal, Mr. Loomis contended that the DOE's search for responsive documents was inadequate and that its failure to disclose the material it withheld under Exemptions 1, 3, and 6 of the FOIA was improper. In order to handle this case as efficiently as possible, the Office of Hearings and Appeals bifurcated this Appeal, separating those issues on which it could rule without additional Departmental support from those issues requiring such support. As a result, this Office issued a final Decision and Order regarding the adequacy of Naval Reactors' search and its invocation of the FOIA's Exemption 6 on December 21, 1995 (Case No. VFA-0102). Keith E. Loomis, 25 DOE ¶ 80,155 (1995). The remaining issues, which concern Naval Reactors' withholding of certain information pursuant to Exemptions 1 and 3 of the FOIA, will be addressed in this Decision and Order.

In his request, Mr. Loomis sought, among other documents, "[c]opies of all Radiation Surveys conducted at the Windsor Site on March 8, 1988, and the containment layout plan," and "[c]opies of the Basic Reference Documents DOE provides to Prime Contractors as guidance for the propagation of Radiological Control requirements and procedures to protect the health and lives of Rad Con workers," further specified as two documents, NAVSEA 389-0153 and NAVSEA 389-0288. In its October 17, 1995 response, Naval

Reactors withheld the containment layout plan, asserting that the plan "is classified CONFIDENTIAL since it reveals the arrangement of, and numbers of components in, a Naval nuclear propulsion plant," and withholding the plan under Exemption 1 of the FOIA. NAVSEA 389-0153 was also determined to be classified as confidential and withheld under Exemption 1. NAVSEA 389-0288 was determined to be Naval Nuclear Propulsion Information (NNPI), the disclosure of which is restricted by statute, and was therefore withheld under Exemption 3. According to the response, both of these documents "reveal extensive information about practices and procedures implemented in the Naval nuclear propulsion program regarding the management of radioactivity, which would be of value to foreign nations."

In his Appeal, Mr. Loomis contends that the type of map he is seeking, "a lowest level plant layout sketch or map . . . posted at or near the reactor compartment entry checkpoint," the purpose of which is "to protect radiation workers' health and safety," should not be classified because it "in no way relate[s] to the design and operation of U.S. warships and associated support facilities." With respect to the NAVSEA documents, Mr. Loomis contends that any portions of those documents that implement the DOE's policy of conducting radiological operations "in a manner that ensures the health and safety of" all workers and the public should be segregated and released.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see also 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification of information concerning "programs for safeguarding nuclear materials or facilities." Executive Order 12958, § 1.5(f). The Executive Order also provides for the classification of compilations of unclassified items if the compilations meet established standards. Executive Order 12958, § 1.8(e). Information properly classified under this Executive Order is exempt from mandatory disclosure by Exemption 1. See A. Victorian, 25 DOE ¶ 80,166 (1996).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). The controlling statutory provision in this case is 10 U.S.C. § 130, which permits the Secretary of Defense to withhold from public disclosure "any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside the United States without an approval, authorization, or license" granted under specified statutes. 10 U.S.C. § 130(a). The term "technical data with military or space application" is defined as "any blueprints, drawings, . . . or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment." 10 U.S.C. § 130(c).

The "technical data" statute has been found to satisfy subpart (B) of the Exemption 3 criteria because it refers to sufficiently "particular types of matter to be withheld." Chenkin v. Department of the Army, No. 93-494, slip op. at 7 (M.D. Pa. Jan. 14, 1994), affirmed, 61 F.3d 894 (3d Cir. 1995); Colonial Trading Corp. V. Department of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990). It therefore qualifies as a statute upon which a claim of withholding under Exemption 3 may be based. The federal regulations treat NNPI as technical data with military application of the sort envisioned in 10 C.F.R. § 130. See, e.g., 15 C.F.R. §§ 778.1, 778.5. Consequently, information accurately identified as NNPI is exempt from mandatory disclosure to the public under Exemption 3 of the FOIA.

Consistent with Executive Order 12344, 3 C.F.R. 128 (1982), reprinted in 42 U.S.C. § 7158 (1995), and statutorily prescribed by the Department of Defense Authorization Act, P.L. 98-525, 98 Stat. 2492 (1984), the Director of the Office of Naval Reactors (Director of NR) has been designated as the official who shall

make the final determination for the DOE regarding FOIA appeals involving classified Naval Reactors information and NNPI. Upon referral of this Appeal from the Office of Hearings and Appeals, the Director of NR reviewed the containment layout plan and the two NAVSEA documents and concluded that they should continue to be withheld from Mr. Loomis in their entirety.

In his review of the containment layout plan initially identified and withheld by the DOE, the Director of NR verified that the identified document was in fact the plan used by the radiological controls personnel during the relevant period to indicate radiation levels in the reactor compartment at the Windsor site. The Director of NR then reviewed that responsive document to determine whether it contained classified information. Because the plan is a scale drawing that shows the number and arrangement of components and major structures in the reactor compartment and labels the components and structures, he concluded that the plan is properly classified under section 1.5 of Executive Order 12958 and accordingly exempt from mandatory disclosure under Exemption 1 of the FOIA.

With respect to NAVSEA 389-0153, the Director of NR determined on review that release of the document would reveal programmatic and technical information about the design and operations of nuclear-powered warships. Although individual items of information contained in this document may arguably be unclassified, the Director of NR determined that the compilation of the information in this document "reveals an additional association or relationship that (1) meets the standards for classification under [Executive Order 12958] and (2) is not otherwise revealed in the individual items of information." Executive Order 12958, § 1.8. Consequently, the Director of NR concluded that NAVSEA 389-0153 is properly classified in its entirety under sections 1.5 and 1.8 of Executive Order 12958 and accordingly is exempt from mandatory disclosure under Exemption 1 of the FOIA.

Finally, after reviewing NAVSEA 389-0288, the Director of NR determined that release of this document would reveal programmatic and technical information about the overhaul and maintenance of the United States Navy nuclear propulsion plants. Although not classified, this information is defined by the Navy as NNPI, the uncontrolled dissemination of which to foreign nationals is prohibited by 10 U.S.C. § 130 and the regulations cited above. The Director of NR maintains that because Naval Reactors would be unable to control the further dissemination of the NNPI contained in the requested document if it were released to the requester or any other member of the public, disclosure of this information would be tantamount to disclosure to foreign nationals. Such disclosure is therefore prohibited by the "technical data" statute and accordingly is exempt from mandatory disclosure under Exemption 3 of the FOIA.

The Director of NR also reviewed the two NAVSEA documents to consider the possibility of release of portions of the documents that are responsive to Mr. Loomis's request yet are not classified or controlled. He concluded that those portions are not reasonably segregable from those responsive portions that must be withheld from disclosure under Exemptions 1 and 3. Accordingly, the Director of NR determined that the two NAVSEA documents should be withheld in their entireties.

III. Conclusion

Based on the review performed by the Director of the Office of Naval Reactors, we have determined that Executive Order 12958, which currently governs the protection of classified information, requires the continued withholding of the entire contents of the containment layout plan and NAVSEA 389-0153, two of the items requested in Mr. Loomis's request under the FOIA. Based on that same review, we have also determined that 10 C.F.R. § 130 requires the continued withholding of the entire NAVSEA 389-0288, due to the Naval Nuclear Propulsion Information contained in that document. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the non-disclosure is required by statute or Executive Order. Accordingly, Mr. Loomis's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Keith E. Loomis on November 21, 1995, Case No. VFA-0104, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 25, 1996

Case No. VFA-0105, 25 DOE ¶ 80,157

January 16, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William Kuntz III

Date of Filing: December 11, 1995

Case Number: VFA-0105

On December 11, 1995, William Kuntz III (Kuntz) filed an Appeal from a determination issued to him on November 3, 1995, by the Department of Energy's Albuquerque Field Office (DOE/AL). That determination was issued in response to a request for information submitted by Kuntz under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require DOE/AL to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 12, 1995, Kuntz filed a request under the FOIA in which he sought a copy of the contract between Sandia National Laboratories (SNL) and the Intel Corporation. SNL is a DOE site currently operated under a contract between the DOE and Sandia Corporation/Lockheed Martin Corporation. The Sandia Corporation is a subsidiary of Lockheed Martin Corporation. DOE/AL issued a determination on November 3, 1995, in which it stated that the information sought by Kuntz is contained in "procurement records in the possession and control of the Lockheed Martin Corporation [LMC] and not the DOE." Letter from Elva Ann Barfield, Freedom of Information Officer, DOE/AL, to William Kuntz III (November 3, 1995). According to DOE/AL, "the contract between the DOE and LMC clearly defines procurement records . . . as being the property of the contractor." Id.

In his Appeal, Kuntz encloses a copy of an article from The New York Times which states that the "DOE would finance the creation of the Intel Corporation's next stab at the world's fastest computer."

See Appeal Letter at 1. On this basis, Kuntz asks that the OHA direct DOE/AL to release the requested information.

II. Analysis

Our threshold inquiry in this case is whether procurement records generated by and in the possession of a

DOE contractor are subject to the FOIA. First, we must determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and are not subject to the FOIA under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as Sandia National Laboratories, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at ¶ 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F.Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, the Lockheed Martin Corporation is the prime contractor responsible for maintaining and operating SNL. While the DOE obtained the Corporation's services and exercises general control over the contract work, it does not supervise the Corporation's day-to-day operations. We therefore conclude that Lockheed Martin Corporation is not an "agency" subject to the FOIA.

Although the Lockheed Martin Corporation is not an agency for the purposes of the FOIA, its records relevant to the Kuntz request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, documents in questions had not been obtained by the DOE and were not in the agency's control at the time of the appellant's request. Thus, the procurement records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to voluntary release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that

are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and Lockheed Martin Corporation to determine the status of these records. That contract states:

Except as provided in paragraph (b) below, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government . . .

Contract DE-AC04-94AL85000, Modification No. M009, Clause 10(a) states that the category of Contractor's records excluded in paragraph (b) is modified to include "all records related to any procurement action by the Contractor." Id. at Cl. 14. Thus, because procurement records are not among the records which are property of the Government under the DOE's contract with Lockheed Martin Corporation, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under the DOE regulations. Accordingly, Kuntz's Appeal is should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by William Kuntz III on December 11, 1995 , Case Number VFA-0105 , is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 16, 1996

Case No. VFA-0106, 26 DOE ¶ 80,164

January 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nathaniel Hendricks

Date of Filing: December 27, 1995

Case Number: VFA-0106

On December 27, 1995, Nathaniel Hendricks (Appellant) filed an Appeal from a determination issued on November 22, 1995, by the Office of Human Radiation Experiments (OHRE) of the Department of Energy's Office of Environment, Safety & Health (DOE/EH). In its determination, OHRE stated that it was providing the sole document in its possession which was responsive to the Appellant's July 29, 1994 request under the Freedom of Information Act (FOIA). This Appeal, if granted, would require an additional search for responsive documents.

I. Background

On July 29, 1994, the Appellant submitted a FOIA request to the Advisory Committee on Human Radiation seeking information relating to accidental and/or planned releases of radiation between 1940 and 1946 from the University of Chicago's Stagg Field, or from any other location in Chicago.<1>This request was forwarded to the

DOE. In a September 28, 1994 letter, DOE notified the Appellant that his request had been sent to the two offices where responsive documents might be stored, DOE/EH and the Chicago Operations Office (COO). On May 25, 1995, COO issued its determination, releasing one responsive document and stating that no other documents responsive to Appellant's request were found at that location. The Appellant later received OHRE's November 22, 1995 determination and subsequently filed the present Appeal in which he contends that the search for responsive documents was inadequate.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

In his Appeal, the Appellant states that he witnessed the release of weather balloons at Stagg Field during the period in question, and he also notes that the document released to him by OHRE refers to past

measurements of radiation at Stagg Field and to the need for meteorological measurement instruments. He therefore asserts that additional responsive documents must exist. This is not necessarily so. Although documents may have been created fifty years ago, this does not mean that the DOE (or its predecessors) ever came into possession of these documents, that they were retained until the present time, or that the DOE's search was inadequate.<2>

We contacted both OHRE and COO to determine the extent of the search which had been performed.<3>For COO, the search was done by Dr. Robert Schlenker, Director of Environmental Health and Safety at Argonne. Dr. Schlenker stated that most pre-1946 documents were searched in an effort to find responsive material, and that a former scientist from the Manhattan Project was contacted as well. That scientist recalled the existence of a responsive scientific study which was in COO's possession and this study was supplied to the Appellant in its determination. However, the scientist had no personal knowledge of weather balloons being released at Stagg Field in the 1940s or any documents concerning that topic.<4>Dr. Schlenker further noted that, as the Appellant was earlier informed, it is possible that Stagg Field documents are included with documents sent by Argonne to the National Archives.<5> Dr. Schlenker also believed that because the Manhattan Project was carried out under the auspices of the U.S. Army Corps of Engineers, some documents could be currently held by the U.S. military. Further, in his previous contacts with the University of Chicago, Dr. Schlenker has been informed that the University possesses no Metallurgy Laboratory documents. See Memorandum of Telephone Conversation between Dawn L. Koren and Robert Schlenker (January 2, 1996).

However, through our inquiries, we have discovered that there is one category of documents which COO did not search. COO possesses about 5,000 scientific notebooks compiled by Manhattan Project scientists in the early 1940s, which have been preliminarily determined to be radioactive. According to Dr. Schlenker, it would cost approximately $100,000 to determine precisely which books are radioactive, several thousand additional dollars to equip Argonne to read the material, 5,000 working days to then read and summarize the material, and perhaps the additional cost of a radiation protection technician's presence during document examination. For these reasons, COO has never read these notebooks. See Memoranda of Telephone Conversations between Dawn L. Koren and Robert Schlenker (January 17 and 18, 1996). Thus, although no one knows whether these notebooks contain responsive material, it is possible, given the broad nature of the Appellant's request, that they do. Nevertheless, we have determined that it would be unreasonable and unduly burdensome to perform a search of the 5,000 notebooks whose contents are almost completely unknown, in order to respond to the request at issue. See Government Accountability Project, 23 DOE ¶ 80,139 at 80,594 (1993). This would be so even if those notebooks were not believed to be radioactive. The additional cost of the radioactivity determination and related safeguards clearly confirms this judgment. Thus, we find that the search performed by COO was reasonable.

We were informed that the OHRE search was conducted by Robert Zielinski. Mr. Zielinski informed us that both the Human Radiation Experiments Information Management System (HREX) and the bibliography of the DOE Office of Science, Technology and Information were searched for responsive documents, by utilizing the search query "Stagg Field and radiation" as well as "Stagg Field" individually. See Memorandum of Conversation between Dawn L. Koren and Robert Zielinski (January 2, 1996). However, it appears that OHRE did not search for documents using the search query, "Chicago and radiation" or for the term "weather balloon," although all of these terms were used in the Appellant's request. Consequently, in light of the fact that OHRE has stated its intention to continue to search for responsive documents using other search queries, see Memorandum of Telephone Conversation between Dawn L. Koren and Robert Zielinski (January 11, 1996), we shall remand this case to OHRE. On remand, OHRE shall identify all documents responsive to the Appellant's request, and either release them or provide adequate justification for withholding any portion of them.

It is Therefore Ordered That:

(1) The Appeal filed by Nathaniel Hendricks on December 27, 1995, Case Number VFA-0106, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Office of Human Radiation Experiments, which shall conduct a search for documents responsive to the Appellant's request as described in the above Decision and Order, and shall promptly issue a new determination regarding the result of that search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 26, 1996

<1>Stagg Field was used by scientists of the Manhattan Project, which began in August 1942, as the site of the first nuclear reactor. The reactor began operating in December of that year. See Memorandum of Conversation between Dawn L. Koren, OHA Staff Attorney, and Robert Zielinski, OHRE (January 2, 1996). These scientists were part of the Metallurgy Laboratory of the University of Chicago. The Metallurgy Laboratory's successor, Argonne National Laboratory (Argonne), was created in 1946. Since that time, Argonne has been operated by the University of Chicago as a contractor for the DOE and the agency's predecessors. See Memorandum of Telephone Conversation between Dawn L. Koren and Dr. Robert

Schlenker, Director, Office of Environment, Health and Safety, Argonne (January 2, 1996).

<2>The Appellant also referred to medical studies conducted at the University of Chicago Laboratory School, and questioned whether University of Chicago or other records had been

searched for documents relating to those studies. The subject matter of this inquiry is outside the Appellant's original request for documents concerning the release of radiation into the atmosphere. If the Appellant now wishes to obtain information of a different nature than that which he originally requested, he should file a new request for that information.

We note further that the document sent by OHRE to the Appellant is marked as being held by the University of Washington. It is possible that other documents relevant to the Appellant's request are held there as well.

<3>Although the Appellant did not appeal the COO determination (possibly because COO did not inform him of his right to appeal to this Office), in order to fully respond to the appeal at issue, we have chosen to investigate COO's search as well.

<4>That scientist speculated that weather balloons might have been used to discover wind direction prior to reactor operation, in an effort to prevent unsafe radiation distribution. See Memorandum of Telephone Conversation between Dawn L. Koren and Robert Schlenker (January 17, 1996).

<5>In 1984, a number of Metallurgy Laboratory documents were sent to the National Archives. On April 5, 1995, a detailed list of those documents was provided to the Appellant.

Case No. VFA-0107, 25 DOE ¶ 80,159

January 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeffrey R. Leist

Date of Filing: December 12, 1995

Case Number: VFA-0107

On December 12, 1995, Jeffrey R. Leist filed an Appeal from a determination issued to him on November 15, 1995, by the Manager of the Ohio Field Office (OFO) of the Department of Energy (DOE). In that determination, the Manager partially denied a request for information filed by Mr. Leist on September 21, 1995, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA will nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. Leist sought copies of documents showing: (i) Fernald Environmental Restoration Management Company (FERMCO) employees who he contends were placed on "at risk" lists for Voluntary Reduction in Force (VRIF) benefits in 1995; and (ii) FERMCO employees who he contends were placed on the "at risk" list for VRIF benefits and who were ultimately allowed to accept these benefits. On November 15, 1995 the Manager of the OFO provided Mr. Leist with a copy of an employee list responsive to the first part of Mr. Leist's request, but he redacted all names in accordance with Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Furthermore, the Manager of the OFO was unable to locate any documents responsive to the second part of Mr. Leist's request.

In his Appeal, Mr. Leist amended the second part of his request for information. In his amendment, Mr. Leist requests that the DOE indicate from the responsive employee list provided to him on November 15, 1995 "those individuals by Division (along with the total count of people) from this "at risk" list who did or will (scheduled to) [sic] get VRIF benefits as part of the 1995 reduction in force program."

II. Analysis

Initially, we note that the OFO is in the process of reviewing Mr. Leist's amended request for information.<1> Accordingly, we will direct the OFO to complete this process and send to Mr. Leist any responsive documents it may find or state the reasons why any responsive documents are exempt from

mandatory disclosure.<2> However, we must still consider the releasability of all of the remaining redacted names from the employee list provided to Mr. Leist on November 15, 1995.

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Pursuant to the established legal precedent, there is no doubt that the names of individuals redacted in this case qualify as "similar files" under Exemption 6.

In order to determine whether a record may be withheld pursuant to Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Comm.). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

A. Privacy Interest

The Supreme Court has long found a privacy interest in the names and addresses of individuals significant enough to warrant protection from disclosure pursuant to Exemption 6. Department of the Air Force v. Rose, 425 U.S. 352, 375 (1976). Moreover, at least seven Circuit Courts have found that an individual has a significant privacy interest in avoiding the unlimited disclosure of his or her name. See, e.g., Hopkins v. Department of Hous. and Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991); Painting and Drywall Work Preservation Fund v. Department of Hous. and Urban Dev., 936 F.2d 1300, 1303 (D.C. Cir. 1991); Halloran v. Veterans Admin., 874 F.2d 315, 324 (5th Cir. 1989); Department of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. Department of Agric. 737 F.2d 784, 787 (9th Cir. 1984); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir. 1984); American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983). In light of the overwhelming weight of authority, we find that disclosure of the names of the individuals who were considered for VRIF benefits in 1995 would result in a substantial invasion of personal privacy.

B. Public Interest in Disclosure

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Comm., 489 U.S. at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987). Mr. Leist has simply not demonstrated and we do not find any public interest in the disclosure of the requested information. We fail to see how release of the names would aid the public in understanding anything about the workings of the government. In view of the fact that there is no apparent public interest to balance against the significant potential invasion of personal privacy, we find that the Manager properly withheld the names of employees from disclosure. Accordingly, we must deny Mr. Leist's Appeal with respect to the redacted names.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey R. Leist on December 12, 1995, Case Number VFA-0107, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) The Manager of the Ohio Field Office is directed to complete his review of Mr. Leist's amended request and send to Mr. Leist any responsive documents he may find or state the reasons why any responsive documents are exempt from mandatory disclosure.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 18, 1996

<1>See January 3, 1996 Record of Telephone Conversation between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and Jane Greenwalt, OFO.

<2>We note that Federal agencies are not required to create new documents, such as the requested list, in response to FOIA requests.

Case No. VFA-0108, 25 DOE ¶ 80,163

January 25, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Williams & Trine, P.C.

Date of Filing: December 21, 1995

Case Number: VFA-0108

On December 21, 1995, Williams & Trine, P.C. (Williams) filed an Appeal from two determinations issued to the firm. The determinations were issued in response to a request for documents submitted by Williams under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. One determination was issued on November 20, 1995, by the Ohio Field Office (DOE/OH) of the DOE, and the second was issued on December 12, 1995, by the FOIA/Privacy Act Division of the Office of the Executive Secretariat (DOE/HQ). Both DOE/OH and DOE/HQ informed Williams that no documents responsive to its request exist. This Appeal, if granted, would require that we order DOE/OH and DOE/HQ to conduct an additional search for responsive documents.

I. Background

On October 18, 1995, Williams filed a request for information pursuant to the FOIA with DOE/HQ. In its request, Williams sought information in any form in DOE's custody or control pertaining to the transportation or shipping of hazardous waste materials, including plutonium, from Mound Laboratory (Mound) of Miamisburg, Ohio, the "Manhattan Project," Oak Ridge National Laboratory, or any nuclear facility under the control or regulation of DOE or its predecessors for processing in the Canon City, Colorado area from 1970 to the present. *See* Letter from Williams & Trine, P.C., to FOIA Officer, DOE/HQ (October 18, 1995) (Request Letter). Williams alleged that processing or other disposition of the material would likely have taken place at a facility owned and/or operated by the Cotter Corporation (Cotter), a subsidiary of Commonwealth Edison. In addition, Williams claimed that any material from the "Manhattan Project" may be referred to as the "Congo raffinates," and could have been milled at the Mallinkrodt facility in the St. Louis, Missouri area. *Id.*

DOE/HQ notified DOE/OH of the request, and on November 20, 1995, DOE/OH informed Williams that it was unable to locate any responsive records. See Letter from Authorizing Official, DOE/OH, to Williams & Trine, P.C. (November 20, 1995) (Ohio Determination Letter). The following month,

DOE/HQ also informed Williams that it was unable to locate records responsive to the request. *See* Letter from Director, FOIA/Privacy Act Division, DOE/HQ, to Williams & Trine, P.C. (December 12, 1995) (DOE/HQ Determination Letter). On December 21, 1995, Williams filed this Appeal, requesting that OHA direct DOE/HQ and DOE/OH to conduct an additional search for responsive material. *See* Letter from Williams & Trine, P.C. to Director, OHA (December 21, 1995) (Appeal Letter).

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. *See* W. R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord* Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted DOE/HQ and DOE/OH to ascertain whether their search was reasonably calculated to uncover the information sought by Williams. DOE/HQ informed us that they had contacted several offices within the agency including DOE/OH, Oak Ridge, Defense Programs (DP), Environment, Safety and Health (EH) and Environmental Management (EM). Oak Ridge, DP and EH found no responsive material.

EM maintains the DOE Automated Transportation Management System (ATMS), and searched for shipments to Cotter and the Canon City, Colorado area. This system contains information about hazardous (including radioactive) shipments. *See* Memorandum from DOE/EM to DOE/HQ (December 7, 1995). Eleven shipments were tracked to Canon City, Colorado, but none contained hazardous or radioactive material. The shipments consisted of printed forms and express mail documents. *Id.* According to EM, it is possible that information exists that is not on the system, but this is not likely. The Hazardous Materials Transportation Authorization Act of 1994, which controls the retention of information regarding hazardous (including radioactive) material shipments, only requires that shipping papers be maintained for one year. *See* 49 U.S.C. § 5110(e) (1995). DOE actually exceeds the guidelines by retaining historical information in ATMS about radioactive DOE shipments dating back to 1983. Hazardous waste information is retained back to 1992.

DOE/OH is the DOE field office responsible for Mound Laboratory, one of the sites alleged to be the origin of the shipment of hazardous and/or radioactive material to the Cotter Corporation in Canon City, Colorado. DOE/OH conducted a search of its files and those of EG&G Mound Applied Technologies, Inc., the contractor responsible for the management and operation of the Mound facility. No responsive documents were found. *See* Letter from Authorizing Official, DOE/OH, to Williams & Trine (November 20, 1995). DOE/OH also interviewed several employees who worked in the Operations Division during the time period mentioned in the request and would be knowledgeable of the location of any responsive records that may exist. None of these employees were aware of any relevant material. *Id.*

According to DOE/OH, the Atomic Energy Commission (AEC) had expressed interest in acquiring thorium and protactinium from Cotter. This material was needed for research to be conducted by the Mound Laboratory. In exchange, Cotter would receive uranium concentrate from the AEC stockpile. *See* Letter from Executive Vice President, Cotter Corporation, to Manager, Mound Laboratory at 2 (February 2, 1972). However, it is not apparent from the documents included in the Appeal Letter (and offered by Williams as the basis for its allegation that material was shipped to Cotter) that an agreement was ever confirmed. *See* Appeal Letter at 1. In fact, the most recent document submitted by Williams is a letter from E. J. McGrath, then counsel to Cotter. In the letter, Cotter's lawyer states that the AEC was then conducting an audit of his client, and that Cotter hoped to conclude the matter (*i.e.*, the agreement) upon completion of the audit. *See* Letter from E. J. McGrath, Esq., to Manager, Mound Laboratory (June 29, 1972).

DOE/OH contends that no reprocessing was done, and no radioactive material was shipped to Cotter in Colorado. In the course of this investigation, personnel at DOE/OH located a nuclear physicist who had

worked on the proposed reprocessing program during the relevant time period. He stated that the program was never implemented because Congress reduced funding for Mound, and this program was a casualty of those budget cuts. The radioactive material intended for use in the program was then shipped to Nevada, where it remains today.

III. Conclusion

We find that the DOE has conducted a search reasonably calculated to uncover the information sought by Williams in this Appeal. DOE/OH, the field office most likely to contain any responsive information due to its relationship with Mound, not only searched its files but also identified and interviewed employees who worked on the project in question during the relevant time period. From the information in this case, it appears that the contention of DOE/OH is credible-- no agreement was completed, no material was shipped to Cotter, and the proposed reprocessing program became a casualty of budget cuts.

It Is Therefore Ordered That:

(1) The Appeal filed by Williams & Trine, P.C. on December 21, 1995, Case No. VFA-0108, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 25, 1996

Case No. VFA-0109, 25 DOE ¶ 80,162

January 25, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David R. McMurdo

Date of Filing: December 26, 1995

Case Number: VFA-0109

On December 26, 1995, David R. McMurdo filed an Appeal from a determination issued on December 7, 1995, by the Department of Energy's Richland Operations Office (Richland) under the Privacy Act of 1974, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In that determination, Richland stated that the search it conducted for documents responsive to McMurdo's Privacy Act request had not located any responsive documents.

I. Background

In his Appeal, McMurdo states that he is a former employee of the Foothill Electric Corporation, a former sub-contractor at DOE's Hanford Nuclear Reservation. On September 28, 1995, McMurdo requested copies of any radiation exposure or medical records pertaining to him in Richland's possession. On December 7, 1995, Richland issued a determination in response to McMurdo's request stating in pertainent part: "We have conducted a thorough search by name, date of birth and Social Security Number and no records were found in the possession of the Department of Energy, Richland Operations Office." December 7, 1995 Determination Letter. In his Appeal, McMurdo claims that while working at the Hanford Site in 1954, he and a co-worker were involved in an incident requiring the rescue efforts of approximately 30 men and two cranes. According to the Appeal, after the rescue, the two men were taken to a first aid station "where [they] were both found to be ?HOT' . . ." McMurdo contends that this incident should have generated medical or radiation reports which should have been located by Richland's search. McMurdo then speculates that Richland used the wrong name or social security number when conducting its search.

II. Analysis

The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a

system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

We have investigated the search undertaken by Richland in response to McMurdo's request, and have been advised that a thorough search of the applicable systems of records under Richland's control has been

conducted. Memorandum of telephone conversation between Steven L. Fine, OHA Staff Attorney, and Angela Ward, FOI and Privacy Act Analyst, Richland Operations Office (January 17, 1996). The systems searched in response to McMurdo's request include: the REX Database (searched by name and Social Security Number); the Hanford Plant Index (searched by name and Social Security Number); Visitors' results records (searched by name); Construction Dose Results (searched by name and Social Security Number); Old General Electric Pay Number Issue books (searched by name and dates); Microfiche of Old Keypunch Cards (searched by Name); Medical Treatment Records (searched by name date of birth and Social Security Number) and the incident report files maintained at Richland's public reference room. Id. In response to McMurdo's concern that the wrong name or social security number was used in conduction the search, Richland verified that the original search had been conducted using the correct information by repeating portions of that search, but it was still unable to locate any responsive documents.

Based on the foregoing, we conclude that Richland has adequately searched all the systems of records under its control that might reasonably be expected to contain the material sought by McMurdo. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by David R. McMurdo on December 26, 1995, Case Number VFA-0109, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 25, 1996

Case No. VFA-0110, 25 DOE ¶ 80,168

February 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Williams & Trine, P.C.

Date of Filing: January 11, 1996

Case Number: VFA-0110

On January 11, 1996, Williams & Trine, P.C. (Williams) filed an Appeal from a determination issued to the firm in response to a request for documents submitted by Williams under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on December 12, 1995, by the FOIA/Privacy Act Division of the Office of the Executive Secretariat (DOE/HQ). DOE/HQ informed Williams that no documents responsive to its request exist. This Appeal, if granted, would require that we order DOE/HQ to conduct an additional search for responsive documents.

I. Background

On October 18, 1995, Williams filed a request for information pursuant to the FOIA with DOE/HQ. In its request, Williams sought information in any form in DOE's custody or control pertaining to the transportation or shipping of hazardous waste materials, including plutonium, from Mound Laboratory (Mound) of Miamisburg, Ohio, the "Manhattan Project," Oak Ridge National Laboratory, or any nuclear facility under the control or regulation of DOE or its predecessors for processing in the Canon City, Colorado area from 1970 to the present. *See* Letter from Williams & Trine, P.C., to FOIA Officer, DOE/HQ (October 18, 1995) (Request Letter). Williams alleged that processing or other disposition of the material would likely have taken place at a facility owned and/or operated by the Cotter Corporation (Cotter), a subsidiary of Commonwealth Edison. In addition, Williams claimed that any material from the "Manhattan Project" may be referred to as the "Congo raffinates," and could have been milled at the Mallinkrodt facility in the St. Louis, Missouri area. *Id.*

DOE/HQ notified the Ohio Field Office (DOE/OH), Oak Ridge, Defense Programs (DP), Environment, Safety and Health (EH) and Environmental Management (EM) of the request. *See* Williams & Trine, 25 DOE ¶ , (January 25, 1996) (Williams). Oak Ridge, DP, and EH found no responsive records. DOE/OH submitted its own determination, and on November 20, 1995, DOE/OH informed Williams that it was unable to locate any responsive records. See Letter from Authorizing Official, DOE/OH, to Williams & Trine, P.C. (November 20, 1995) (Ohio Determination Letter). The following month, DOE/HQ also informed Williams that it was unable

to locate records responsive to the request. *See* Letter from Director, FOIA/Privacy Act Division, DOE/HQ, to Williams & Trine, P.C. (December 12, 1995) (DOE/HQ Determination Letter). On December 21, 1995, Williams filed an Appeal of DOE's responses, attaching both the Ohio and DOE/HQ Determination Letters to its Appeal. Williams alleged that the DOE/OH search was inadequate, and that no

search had been performed at Headquarters. That Appeal was denied. *See* Williams.

On January 11, 1996, Williams filed this Appeal, based on the same December 12th DOE/HQ Determination Letter. *See* Letter from Williams & Trine, P.C. to Director, OHA (January 11, 1996) (Appeal Letter). This Appeal requests (1) that OHA direct DOE/HQ to release additional material withheld as nonresponsive, (2) that OHA direct DOE to conduct another search of its files, and (3) that DOE provide information regarding the manner in which the files were searched. *Id.*

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. *See* W. R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord* Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Release of Previously Withheld Material

The present Appeal was filed prior to the publication of Williams, which we believe provides the requester with the type of information about the agency searches that it is seeking. Williams does raise a new issue in this Appeal, however. It requests the release of information about eleven shipments of documents to the Canon City, Colorado area. DOE headquarters did not consider this material responsive because Williams had requested information about the shipment of *radioactive or hazardous materials*, not paper, to that area. Williams contends that its request is sufficiently broad to cover this material, and asks us to release the documentation. We do not agree. However, we have asked DOE/HQ to review the Appeal again and, subject to any applicable exemptions, determine if the material can be released to Williams.

Request for Additional Search

Williams has also requested that DOE perform an additional search, or in the alternative, provide information regarding the manner in which the files were searched. With respect to the DOE/OH search, Cotter alleges that it participated in an agreement with the Atomic Energy Commission (AEC) whereby Cotter would receive uranium concentrate from the AEC stockpile in exchange for sending thorium and protactinium to Mound Laboratory in Ohio. *See* Williams. However, DOE/OH contends that the transaction was proposed as part of a program that was never implemented, and the radioactive material was shipped instead to Nevada. DOE/OH has agreed to search the archives of its contractor for information related to the proposed program, and will respond directly to the requester.

As to the manner in which the Headquarters search was conducted, we refer the requester to the previous Appeal in which we stated that the search of the shipment tracking system and the pertinent DOE offices was reasonably calculated to uncover the requested information. *See* Williams. In addition, this office contacted the Office of the Historian, and requested a search for any information relating to Cotter. A document dated July 22, 1971 was located, which discussed the burial of radioactive material owned by Cotter at a disposal site in Hazelwood, Missouri. This does not appear to be responsive to the request. Accordingly, DOE's search for material responsive to Williams' Request Letter was adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Williams & Trine, P.C. on January 11, 1996, Case No. VFA-0110, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 12, 1996

Case No. VFA-0111, 25 DOE ¶ 80,181

March 21, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The News Tribune

Date of Filing: January 11, 1996

Case Number: VFA-0111

On January 11, 1996, The News Tribune of Tacoma, Washington, through its attorneys, filed an Appeal from a determination issued on December 4, 1995, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). That determination denied in part The News Tribune's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On November 28, 1995, a member of The News Tribune staff filed a FOIA request with BPA seeking correspondence between BPA and two named individuals. The requester believed that the correspondence would involve property owned by the two individuals in Tacoma, Washington on which BPA has an easement. BPA responded on December 4, 1995 and identified eight letters dating from late 1992 through late 1995 as responsive to the request. The letters, to the property owners, dealt with potential encroachments on transmission line easements on certain properties. These easements require the property owner to keep the transmission line right-of-way clear of, inter alia

"brush, timber, inflammable structures and fire hazards ... and to prevent any use of the area that would interfere in any manner with BPA's use of the area for transmission purposes." Over the course of the correspondence, BPA stated that its crews had variously spotted a semi-trailer, mobile homes, buses, trailers, boat hulls, wood, dirt piles, various other debris, and a gate impeding access to the lines. In the letters, BPA sought removal of these items and outlined steps it would take to insure compliance with its requests. BPA released the body of the letters including legal descriptions and plats of the properties involved. The only material withheld was the name, address and salutation from each letter. BPA withheld this information under Exemption 6 of the FOIA. BPA also informs this Office that the material was taken from DOE Record Group 24 (Land Records) and the withheld information is, therefore, not subject to

discretionary release because of the restrictions of the Privacy Act. 5 U.S.C. § 552a. The News Tribune appeals the decision to withhold the names and addresses.

ANALYSIS

Exemption 6 permits an agency to make a discretionary withholding of information which must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered, the application of Exemption 6 requires an agency to balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991) (Ray); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (Rose); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991). In this case, we will examine the propriety of withholding the names and addresses separately.<1>

A. Personnel and Medical Files and Similar Files

The News Tribune asserts that the letters fail the threshold test for Exemption 6. It claims that the letters do not contain the type of private material found in personnel or medical records. Thus, it claims, they are not "similar files" that qualify for Exemption 6 treatment. The Supreme Court has rejected The News Tribune view and has taken an expansive view of what constitutes "similar files" for the purposes of Exemption 6. As the Court has explained, the exemption covers "'detailed Government records on an individual which can be identified as applying to that individual.'" Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (Washington Post) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428 (House Report)). See also Annotation, When Are Government Records "Similar Files" Exempt From Disclosure Under Freedom of Information Act Provision (5 USCS § 552(b)(6)) Exempting Certain Personnel, Medical and "Similar Files", 106 A.L.R. Fed. 94, 102 (1992). In this case, the letters are written to specific individuals and obviously can be connected with those persons. Thus, they fall within the Supreme Court's definition for "similar files" covered by Exemption 6.

B. The Names

1. The Privacy Interest

The first question we must address in applying the Exemption 6 balancing test is the quantum of privacy in the withheld names. That is, we must determine how release of this withheld information might reveal something personal about the people involved. To resolve this question, we must examine whether the information withheld falls within Exemption 6's primary purpose: "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Washington Post, 456 U.S. at 599 (emphasis added). Thus, it is only when the release of some personal information about an individual would cause a "clearly unwarranted invasion of privacy" that the information may be exempt from mandatory release under the FOIA.

There are four possible privacy interests present in this case which might be impacted by release of the names. First, there is the arguable privacy interest in the name itself. However, an invasion of privacy ordinarily becomes significant only when a name is linked with some other information that reveals something personal about an individual. Ray, 502 U.S. at 176 & n.12; Reporters Committee, 489 U.S. at 762; Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1354 (9th Cir. 1994); Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1415 (9th Cir. 1987). Therefore, we must examine the withheld names in the context of the information to which it is associated; i.e. what release of the names, combined with other specific facts, would reveal about those particular persons. Paul A. Rubin,

Note, Applying the Freedom of Information Act's Privacy Exemption for Lists of Names and Addresses, 58 Ford. L.Rev. 1033, 1048-50 (1990). See also National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876 (D.C. Cir. 1989), cert. denied sub. nom., National Ass'n of Retired Fed. Employees v. Newman, 494 U.S. 1078 (1990) (Horner) ("The extent of any invasion of privacy that release of the list might occasion thus depends upon the nature of the defining characteristics"). In this case, the context links particular persons with (1) ownership of specific parcels of property, (2) what is happening on those properties, and (3) agency contact. We address each of these in turn as well as any privacy interest in the name standing alone.

First, we can find no privacy interest in being named as the owner of a particular plot of land. In order to secure good title to real property in the State of Washington, the conveyance of the property must be recorded in the county where the property is located. Wash. Rev. Code Ann. § 65.08.070 (West 1994). See also Wash. Rev. Code Ann. § 65.12.330 (West 1994) (Torrens). Once recorded, it is notice to all the world of ownership by that person. See Paganelli v. Swendsen, 50 Wash.2d 304, 305, 309-11, 311 P.2d 676, 677, 679-80 (1961); 11 Thompson on Real Property § 92.15(b)(1) at 169 (Thomas ed. 1994). Land records are among the most easily found, most accessible, and perhaps most heavily used government records in this country. This is not the type of publicly available information that is hidden in "practical obscurity." Reporters Committee, 489 U.S. at 762, 780. Given the long history of compulsory public registration of land ownership in this country, we believe that there is no privacy interest in title to real property once notice has been given to all the world.

Second, in this case, the allegations of encroachments upon BPA's easements do not raise a privacy concern. There is no evidence before us that indicates that the property owner created the conditions referred to, or even knew about them until the BPA letters were issued.<2>In addition, there is no evidence in the record that the subject properties are the residences of the individuals involved. Release of their names would not connect these persons with activities in or around their own homes. See, e.g., Wine Hobby USA, Inc. v. Internal Revenue Serv., 502 F.2d 133, 137 (3d Cir. 1974) (Wine Hobby). Thus, although release of the names in conjunction with the contents of the letters may reveal something about some parcels of property, it discloses nothing about those persons nor reveals personal or private information in any traditional sense of the meaning. Reporters Committee, 489 U.S. at 762; cf. Viacom Int'l, Inc. v. Environmental Protection Agency, No. 95-2243, 1995 WL 695098, at *4 (E.D. Pa. Nov. 17, 1995), reconsideration denied 1996 WL 46419 (E.D. Pa. Jan 29, 1996) (no privacy interest in condition of land tested by EPA for contaminants).

Third, we do not find a privacy interest in the simple fact that some branch of the United States Government contacted a person. This is not to say that there is no privacy interest involved in any exchange between the federal government and an individual. That privacy interest, however, depends on the subject and substance of the matter under discussion. Cf. Ray, 502 U.S. at 175-76. It is not, in general, created by the simple fact that an agency had some contact with a person. Any other rule would swallow the FOIA whole. Congress has provided specific protection for those rare instances where the mere matter of contact between an individual and a branch of the federal government is so sensitive that the very fact of the contact can be withheld. See, e.g., William A. Hewgley, 17 DOE ¶ 80,146 at 80,615 n.1 (1988) (discussing Exemption 3 and statute protecting privacy of those who have interaction with the Central Intelligence Agency). In the absence of some compelling governmental interest not apparent in this case, we believe that there is no valid privacy interest in the very fact of government contact.

The remaining issue is whether individuals' names, by themselves, hold an inherent privacy interest. We do not believe that there is a privacy interest in a name absent some other indicia of information about that individual. "A man's 'name' is simply the sound or sounds by which he is commonly designated by his fellows, and by which they distinguish him. It is a mere means of description." State v. Howard, 30 Mont. 518, 521, 77 P. 50, 51 (1904). This is not the type of item in which there is a privacy interest. The interest in individual privacy has traditionally protected "the right to one's personality.... [and] those [areas] which concern the private life, habits, acts, and relations of an individual...." Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 207, 216 (1890). This same sentiment forms the basis

for the general FOIA principle that Exemption 6 was designed to guard the "confidentiality of personal matters," Rose, 425 U.S. at 375 n.14, where "the threat to privacy interests [are] more palpable than mere possibilities." Id. at 380 n.19. We do not believe that a simple appellation, standing alone, falls within any reasonable zone of personal privacy.<3>

2. The Privacy Interest/Public Interest Balance

In this case, we have been unable to discern any privacy interest in withholding the names of the individuals to whom these particular letters were sent. If there is no identifiable privacy interest, then information may not be withheld under Exemption 6. Ripskis v. Department of Hous. & Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984); J/R/A Associates, 24 DOE ¶ 80,165 at 80,655 (1995); William D. Lawrence, 24 DOE ¶ 80,139 at 80,600 (1994); Virginia Johnson, 23 DOE ¶ 80,168 at 80,664-65 (1993). Accordingly, we will remand this matter to BPA to either release the names or to issue a new determination identifying the properties as the residences of the addressees or some other privacy interest that justifies withholding these names.

C. The Addresses

In addition to the names, BPA withheld the addresses to which the letters were sent. BPA believes that some of the addresses may be the homes of the addressees, but it is not certain. Some may be business addresses. It is the practice of the DOE to release business addresses. Thus, we will remand this matter to the BPA to determine if any of the addresses are business locations, and if they are, to release the addresses. We will, however, determine whether BPA correctly withheld any home addresses.

1. The Privacy Interest

To the extent that the addresses are the residences of the individuals involved, we believe they have a substantial privacy interest. Department of Defense v. Federal Labor Relations Auth., 510 U.S. ___, ___, 127 L.Ed.2d 325, 337-38, 114 S.Ct. 1006, 1015-16 (1994) (FLRA). A home has always enjoyed a special status in the law as a refuge for a person from unsolicited intrusions, even if the location somehow can be determined from publicly available information. Id. Thus, home addresses have always been accorded considerable (albeit not inviolate) protection under Exemption 6. Id.; Painting Indus. of Hawaii Mkt. Recovery Fund v. Department of the Air Force, 26 F.3d 1479, 1483 (9th Cir. 1994); Horner, 879 F.2d at 875-78; Annotation, When Are Government Records "Personnel Files" Exempt From Disclosure Under Freedom of Information Act Provision (5 USCS § 552(b)(6)) Exempting Certain "Personnel," Medical, and Similar Files, 104 A.L.R. Fed. 757, 772-800 (1991) (collecting types of cases).

2. The Public Interest

As noted above, once a privacy interest is identified, we must then determine whether there is a FOIA-defined public interest in release of the withheld material. In its appeal letter, The News Tribune asserts that release of the addresses serves a valid public interest. We contacted The News Tribune's counsel to clarify its position. The News Tribune has asserted three public interests in the release of the withheld information.

First, The News Tribune claims that there is "a legitimate public interest in knowing who is endangering the health and safety of the public's property." In any ordinary sense of the meaning of public interest this may be true. However, in this case, we do not believe it falls within the meaning of "public interest" under the definition established by the Supreme Court. In Reporters Committee, the Court took an exceptionally narrow view of what is in the public interest for the purposes of the FOIA. The only relevant public interest, in the Court's view, is release of information that is likely to contribute "'significantly to public understanding of the operations or activities of the government.'" Reporters Committee, 489 U.S. at 775

(quoting 5 U.S.C. § 552(a)(4)(A)(iii)). See also FLRA, 510 U.S. at ___, 127 L.Ed.2d at 334-35, 114 S.Ct. at 1012-13.

In this case, it is not apparent that release of the addresses would in any way "shed light on the conduct of any Government agency or official," Reporters Committee, 489 U.S. at 773, or the public's understanding of what the government has done and is doing. That interest has already been served. BPA, in the best tradition of the FOIA, released the entire substance of the correspondence requested. This is precisely what Congress sought to accomplish in enacting the FOIA. See House Report at 11. Because BPA released the entire substance of the requested documents, we find that no further benefit would accrue to the public interest, under the Supreme Court's definition, by release of the addresses. Reporters Committee, 489 U.S. at 766 n.18.

Second, The News Tribune asserts that it needs the addresses to judge the government's performance and position. It states that there is a public interest in knowing the other side of the story. Thus, the addresses are needed to contact the people involved and get their view of the controversy. So armed, The News Tribune contends, the public will be able to evaluate the BPA position. We do not believe that in this particular case this constitutes a sufficient public interest under the Supreme Court's constrained construct. See Robert S. Foote, 25 DOE ¶ 80,126 at 80,567 (1995) (discussing narrowness of Supreme Court standard); Morrison & Foerster, 24 DOE ¶ 80,107 at 80,518 (1994) (same).

The News Tribune does not contend that release of the names themselves shed light on the government's conduct. Rather, their argument is one of "derivative use;" that by learning the addresses, they could put together other information or gather more facts. The Supreme Court has expressly declined to rule on the "derivative use" doctrine. Ray, 502 U.S. at 178-79. Although the Circuit Courts have widely divided on the issue, Sheet Metal Workers Int'l Assoc., Local No. 9 v. United States Air Force, 63 F.3d 994, 998 n. 3 (10th Cir. 1995), the DOE has never addressed the question of "derivative use." We need not deal with the issue in this case and leave the matter open for another day. However, assuming the availability of the "derivative use" idea, we do not believe that the withheld information should be released in this case. The reason for this is clear. Even if we to take The News Tribune's "derivative use" at face value and assess the information already in its possession, the "derivative use" would not in itself in this case reveal anything about government operations. Cf. Minnis v. Department of Agric., 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The information The News Tribune would garner is exactly what it claims, the story of the landowners and what they may or may not have known or done. In this case, it would not learn additional information on the position or actions of the government. The News Tribune has already been apprised of these matters through the information previously released. Cf. FLRA, 510 U.S. at ___, 127 L.Ed.2d at 336, 114 S.Ct. at 1013-14. Thus, The News Tribune would not, under these particular circumstances, amass any further "official information that sheds light on [BPA's] performance of its statutory duties [16 U.S.C. §§ 832-832k]," Reporters Committee, 489 U.S. at 773, as required by the Supreme Court public interest standard. Accordingly, we can give no weight to this public interest argument. See also Federal Labor Relations Auth. v. Department of the Treasury, 884 F.2d 1446, 1452 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990) (possibility of providing leads for investigative reporter does not outweigh privacy interest of federal retirees in their names and addresses).

Finally, The News Tribune parades before us a collection of horribles that it says it will not be able to investigate without release of the withheld information. These range from racial discrimination to potential conflicts of interest. The News Tribune, however, not only fails to produce any evidence to support its claims, it does not even explain why it thinks these might be true. Simple speculation cannot form the basis of a valid public interest argument. Reporters Committee, 489 U.S. at 774; Robert S. Foote, 25 DOE at 80,565; Casey O. Ruud, 24 DOE ¶ 80,170 at 80,675 (1995). Thus we must reject this asserted public interest as well.

3. The Privacy Interest/Public Interest Balance

Because agency practice indicates any business addresses should be released, we are left with balancing

the "not insubstantial" privacy interest in home addresses, FLRA, 510 U.S. at ___, 127 L.Ed.2d at 337, 114 S.Ct. at 1015, against no discernible public interest as defined by the Supreme Court. The Exemption 6 balancing test presupposes that there is some public interest to balance. Thus, where there is no public interest to balance, as in this case, the privacy interest in non-disclosure, however small, must prevail. Id. at ___, 127 L.Ed.2d at 337, 114 S.Ct. at 1015; Maynard v. Central Intelligence Agency, 986 F.2d 547, 566 n.21 (1st Cir. 1993); Federal Labor Relations Auth. v. Department of Defense, 984 F.2d 370, 374 (10th Cir. 1993). Accordingly, we must find that the privacy interest in the home addresses in this case outweighs the lack of a FOIA-defined public interest, and that they were properly withheld from disclosure. As noted above, however, we remand this matter to BPA to release any business addresses.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of The News Tribune of Tacoma, Washington, OHA Case No. VFA-0111 is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 21, 1996

<1>/ Both this Office and the courts frequently examine the withholding of names and addresses under Exemption 6 as a unitary package. We believe this is the correct manner of proceeding where the privacy interests are the same for both the name and address. As we explain in detail below, this case presents us with the somewhat unusual instance where there are different privacy interests for the name and for the address.

<2>/ Two of the letters do contain sentences referring to "Your encroachments...." Read in context, we do not believe that the BPA is accusing these persons of creating or knowing about the encroachments.

<3>/ We emphasize, however, that in the ordinary case, where the name and address are linked together, that linking would create a privacy interest in the name. See, e.g., Wine Hobby, 502 F.2d at 136-37. This issue does not arise in this case because there are separate privacy issues for the name and the address.

Case No. VFA-0112, 25 DOE ¶ 80,170

February 14, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Knolls Action Project

Date of Filing: January 11, 1996

Case Number: VFA-0112

On January 11, 1996, the Knolls Action Project (KAP) filed an Appeal from a determination issued to it by the Department of Energy's Office of Naval Reactors (NR) on November 29, 1995. In that determination, NR provided information to KAP under the terms of a fee waiver originally sought in a request for information filed by KAP under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require NR to release additional information pursuant to the terms of the fee waiver.

I. Background

In submissions dated July 11, 12, 13 and 14, 1995, KAP filed four requests under the FOIA requesting various documents from NR pertaining to the shipment and management of spent nuclear fuels from U.S. naval vessels. In these FOIA requests, KAP requested a fee waiver for the costs associated with processing the FOIA requests. NR denied KAP's fee waiver request and stated that much of the releasable portions of the material requested would not contribute significantly to the public understanding of the operations and activities of the Department.

On October 13, 1995, KAP filed an Appeal from the determination issued by NR. See Knolls Action Project, 25 DOE ¶ 80,148 (1995) (Knolls). In that Appeal, KAP asked that the Office of Hearings and Appeals (OHA) reverse NR's determination and grant KAP a waiver of fees in connection with its four July 1995 FOIA requests. OHA performed a *de novo* review of the merits of KAP's fee waiver request. It found that KAP was eligible for a fee waiver for some materials which may be located pursuant to its July 11, 1995 FOIA request, in which KAP asked for documents regarding the railroad cars and casks used to transport spent nuclear fuels by the U.S. Navy's and the DOE's naval reactor program. The OHA found that the material requested in the remaining three FOIA requests was properly denied a fee waiver by NR. Id.

On November 29, 1995, NR issued a new determination providing KAP with information it believed was within the scope of information for which the OHA granted a fee waiver. In its present Appeal,

KAP asserts that NR did not provide two categories of information which it argues are encompassed by the scope of the fee waiver granted by OHA in its previous decision.

II. Analysis

Our sole inquiry in this case is whether NR properly interpreted the scope of the fee waiver granted on Appeal by the OHA with regard to KAP's July 11, 1995 FOIA request. In considering this Appeal, we reviewed our previous decision to ascertain the scope of the fee waiver granted to KAP. In that decision and, as stated above, we performed a *de novo* review of the merits of KAP's fee waiver request. Knolls, 25 DOE ¶ 80,148 (1995). With respect to KAP's four FOIA requests, we determined that KAP is eligible for a fee waiver for some materials which may be located pursuant to its July 11, 1995 FOIA request. However, we found that the material requested in the remaining portion of the July 11 request and in the remaining three FOIA requests filed by KAP would not significantly contribute to the public's understanding of governmental activities and operations since the information is already in the public domain or is trivial in nature. Id.

As stated above, KAP's July 11 request asked for documents regarding the railroad cars and casks used to transport spent nuclear fuels by the U.S. Navy's and the DOE's naval nuclear reactor program. In our previous decision, we specifically determined that a fee waiver should be granted only with regard to material concerning the maintenance and repair status of the railroad cars and casks, which included those railroad cars that were either under repair or out of service. We found that the information regarding railroad car serial numbers, cask configuration, and location of the railroad cars was properly denied a fee waiver by NR. To this end, in its November 29 response, NR provided the loading status, repair status and location for the shipping containers used to transport spent nuclear fuels as of November 27, 1995. See Determination Letter at 2. According to NR, only one railroad car was out of service on that date. NR further stated that the out of service car would no longer be used.

KAP argues that NR did not provide it with the "car number . . . of each car," nor "the current configuration of each car/cask by fuel core type," information which was also requested in its July 11 request. See Knolls Action Project Appeal Letter at 1. Further, KAP states that these two categories of information are relevant to the maintenance and repair status of the railroad cars and casks, "in that they would assist citizens in determining which cars and casks were used for discrete shipments of fuel in what condition." Id. We disagree. We believe, as stated in our previous decision, that the public's interest here lies in its understanding of potential risks, if any, associated with mechanical problems with the fleet of railroad cars and casks used to transport spent nuclear fuels. We do not believe that the specific car numbers or the configuration of each car/cask by fuel core type fall within the scope of the maintenance and repair status of the railroad cars and casks or would significantly assist the public's understanding of the risk associated with the transporting of spent nuclear fuels. Knolls, 25 DOE ¶ 80,148 at 80,616 (1995). The specific daily status of each individual car, cask and configuration changes so frequently that this additional information does not increase the public's understanding of this issue. Therefore, we find that NR properly provided relevant information within the scope of the fee waiver granted to KAP. Accordingly, the Knolls Action Project's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Knolls Action Project on January 11, 1996 , Case Number VFA-0112 , is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 14, 1996

Case No. VFA-0113, 25 DOE ¶ 80,169

February 13, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: ITech, Inc.

Date of Filing: January 16, 1996

Case Number: VFA-0113

On January 16, 1996, ITech, Inc., filed an Appeal from a determination issued to it on December 15, 1995, by the Department of Energy's Western Area Power Administration (WAPA), in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide for fees to be assessed to cover the cost of responding to requests for information. 10 C.F.R. § 1004.9.

I. Background

On November 8, 1995, ITech filed a request under the FOIA for a copy of a technical proposal that had been submitted to WAPA. WAPA issued a determination on December 15, 1995, in which it released the document requested by ITech, with certain information withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Letter from J.M. Shafer, Administrator, WAPA, to Lisa Kristen Ola, ITech (December 15, 1995). WAPA further informed the requester that:

The total cost of the search, reproduction, and review fees associated with the requested document is as follows:

105 pages at .10 [sic] cents each $ 10.50

5 hours of search and review time 118.00

16 percent manual search fee 18.88

In accordance with 10 CFR 1004.9(1) [sic]

Total $147.38

Id.

In its Appeal, ITech acknowledges receiving the requested document, but states that

[T]he entire document was blacked out, and as a result, is worthless. ITech agreed to pay any fair and reasonable costs associated with the reproduction of the requested document, but the $147.38 fee seems in excess.

The reproduction and paper costs of $10.50 and the manual search fee of $18.88 are reasonable, but the $118.00 fee for search and review time is not considered reasonable. It is implausible that it took five hours to black-out the entire document, and this does not justify the $118.00 fee.

ITech will pay the $29.38 fee for paper and manual search costs; however, it would like to dispute the $118.00 charge for search and review time.

Letter from Patrick Truex, Vice President, ITech, to Director, Office of Hearings and Appeals (December 21, 1995).

II. Analysis

The FOIA requires that each agency issue regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. 552(a)(4)(A)(I). The DOE FOIA regulations provide that the agency "will charge fees that recoup the full allowable direct costs incurred." 10 C.F.R. § 1004.9(a). "Whenever feasible, the DOE will charge for manual searches at the salary rate(s) (i.e. basic pay plus 16 percent) of the employees making the search." 10 C.F.R. § 1004.9(a)(1). In addition, "[t]he DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure." 10 C.F.R. § 1004.9(a)(3).

Unless a requester qualifies for a fee waiver, the fees specified in the DOE regulations must be imposed. Although ITech characterizes the document released as "worthless," that is not relevant to whether appropriate fees were charged. There can never be any assurance that a FOIA request will yield any releasable documents or that the requester will find the documents released to be useful. Fees are not charged because the requester may derive a benefit from the documents, but because the government expends money to process the request. In fact, the regulations specifically provide that fees will be assessed even if no responsive documents are located. 10 C.F.R. § 1004.9(b)(6).

We contacted WAPA to determine how the fees charged to the appellant were calculated in the present case. WAPA informed us that the $118.00 charged for "search and review time" was based on five hours spent by a WAPA employee in processing ITech's request (5 hours at the employee's basic pay of $23.60/hour). The five hours included the time required to search for the requested document, review the document for exempt material, and finally to redact the exempt material from the document to prepare it for release. The purpose of the additional charge of $18.88 (16 percent of $118.00) is to recoup additional overhead costs associated with the search. 10 C.F.R. § 1004.9(a)(1).

We have no reason to believe that WAPA did not, in fact, spend 5 hours processing ITech's request. Under these circumstances, and given WAPA's explanation of how it calculated the fee in this case, we conclude that the fees imposed were reasonable and necessary to recoup the cost of the processing the request. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by ITech, Inc., on January 16, 1995, Case Number VFA-0113, is hereby denied.

(2) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 13, 1996

Case No. VFA-0115, 25 DOE ¶ 80,167

February 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: STAND of Amarillo, Inc.

Date of Filing: January 16, 1996

Case Number: VFA-0115

On January 16, 1996, STAND of Amarillo, Inc. (STAND) filed an Appeal from a determination issued to it on December 5, 1995, by the Department of Energy's Albuquerque Field Office (DOE/AL). The DOE/AL issued that determination in response to a request for information submitted by STAND under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the DOE/AL to release the requested information.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that an agency shall nonetheless release a document exempt from mandatory disclosure under the FOIA to the public if the DOE determines that federal law permits disclosure and if disclosure is in the public interest. 10 C.F.R. § 1004.1.

On November 2, 1995, STAND filed a request under the FOIA in which it sought copies of 96 legal documents produced in connection with a hearing before the Texas Natural Resource Conservation Commission. The DOE/AL issued a determination on December 5, 1995, in which it stated that the legal files sought by STAND are "records in the possession and control of Mason & Hanger, Silas Mason Co., Inc., (M&H) and are therefore not 'agency records' subject to the provisions of the FOIA." Letter from Elva Ann Barfield, Freedom of Information Officer, DOE/AL, to STAND (December 5, 1995). Furthermore, Ms. Barfield wrote that "[t]he contract between the DOE and M&H, clearly defines legal files . . . as being the property of the contractor." Id.

In its Appeal, STAND contends: (1) that the requested documents are "agency records" pursuant to the FOIA because DOE officials created, possess, and control the records; and (2) that DOE regulations require it to "maximize public disclosure of [contractor] records that pertain to concerns about the environment, public health or safety" and that all of the requested records relate to environmental concerns regarding hazardous waste and water quality at the Pantex Plant. Based on these contentions, STAND requests that the OHA direct the DOE/AL to release the requested information.

In reviewing the Appeal, we contacted the FOIA branch at the DOE/AL to inquire about the background behind the search it had conducted.<1> From these conversations it is clear that the FOIA Officer's December 5, 1995 determination was premature. Due to a communication problem, the DOE employees involved in the hearing did not make the FOIA Officer at the DOE/AL aware that they needed more time to conduct a thorough search and that the DOE might possess responsive documents.<2> We will therefore remand the case to the Freedom of Information Officer, Office of Public Affairs, DOE/AL, for a

new search for responsive documents.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND of Amarillo, Inc. on January 16, 1996 is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Officer, Office of Public Affairs, Albuquerque Operations Office of the Department of Energy who will conduct a new search for documents responsive to the Freedom of Information Act request filed by STAND of Amarillo, Inc., on November 2, 1995. Any documents found to be responsive to this request shall be released or a detailed explanation as to why the information is exempt from public disclosure under the Freedom of Information Act shall be provided.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 12, 1996

<1>See memoranda of telephone conversations between Leonard M. Tao, DOE Office of Hearings and Appeals, and Jim Snyder, DOE/AL Office of Public Affairs (Case No. LFA-0115).

<2>See memorandum of February 6, 1996 telephone conference call between Leonard M. Tao, DOE Office of Hearings and Appeals; Jim Snyder, DOE/AL Office of Public Affairs; Betty Hollowell, DOE Pantex Plant; Karen Richardson, M&H; Eva Fromm, Fulbright & Jaworski; and Tom Walton, DOE/AL Office of Public Affairs.

Case No. VFA-0116, 25 DOE ¶ 80,185

March 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Phoenix Rising Communications

Date of Filing: February 29, 1996

Case Number: VFA-0116

On February 29, 1996, Phoenix Rising Communications (Phoenix) filed an Appeal from a Determination issued to it by the Oakland Operations Office (DOE-Oakland) of the Department of Energy (DOE). In that Determination, DOE-Oakland stated that it was unable to locate any documents responsive to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Phoenix challenges the adequacy of the search conducted by DOE-Oakland.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Pursuant to an appropriate request, agencies are required to search their records for responsive documents. If responsive documents cannot be located, the requester must be told whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

On October 26, 1995, Phoenix filed a request for information in which it sought records relating to discussions conducted between Lawrence Radiation Laboratory (now known as Lawrence Livermore National Laboratory (LLNL)) and the Federal Aviation Administration's (FAA) San Francisco IFSS Transmitter Facility at Tracy, California. The dialogue concerned the effects of transmission of radio frequency energy by FAA near Site 300, a LLNL laboratory site. On December 28, 1995, DOE-Oakland issued a Determination which stated that it conducted a search, but that no responsive documents had been found. On February 29, 1996, Phoenix filed the present Appeal with the Office of Hearings and Appeals (OHA). Phoenix asks that a new search be conducted. In its Appeal, Phoenix attached an internal memoranda obtained from the FAA which discusses a meeting and a phone call concerning the FAA Transmitter and Site 300. (FAA memo).

II. Analysis

The OHA has consistently stated that a FOIA request warrants a thorough and conscientious search for responsive documents. See W.R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have remanded cases where it is evident that the search conducted was inadequate. See, e.g., Cowles Publishing Co., 16 DOE ¶ 80,136 (1987); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice,

745 F.2d 1476, 1485 (D.C. Cir. 1984).

In considering the present Appeal, we contacted RoseAnn Pelzner, Legal Assistant, DOE-Oakland who coordinated the search for responsive documents to determine the extent of the search that had been performed. She informed us that searches had been performed of the DOE's records in Oakland and LLNL's records at Site 300. Although no responsive records were located at either site, we were informed that the Site 300 Facility Representative remembers destroying a 1962 working file containing handwritten notes of a meeting held between two LLNL employees and the FAA. This file was destroyed in August 1995 prior to an office move. In an attempt to obtain information concerning the destroyed file and the FAA meeting, the LLNL Deputy Site Manager contacted the two retired employees mentioned in the FAA memo to ascertain if they recalled creating any documents which would be responsive to the request. Neither former employee recalled generating any memorandum or letters as a result of the 1962 meeting because they did not believe that the FAA Transmitter was a hazard to the work at LLNL.<1>

Based on the factors referred to above, we are convinced that the DOE followed procedures which were reasonably calculated to uncover the material sought by Phoenix in its FOIA request and that no such documents exist at either DOE-Oakland or LLNL. Accordingly, Phoenix's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Phoenix Rising Communications on February 29, 1996, Case No. VFA-0116, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 26, 1996

<1>Although DOE-Oakland does not believe that responsive records exist at the National Archives and Records Administration (NARA), it has forwarded Phoenix's request to the Federal Records Center, a NARA storage site, in San Bruno, California. If any responsive records still exist, they would reside at this Records Center.

Case No. VFA-0117, 26 DOE ¶ 80,203

July 21, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Barton J. Bernstein

Date of Filing: January 22, 1996

Case Number: VFA-0117

Barton J. Bernstein filed an Appeal from a determination issued to him on December 22, 1995, by the Department of Energy's Albuquerque Operations Office (Albuquerque). In that determination, Albuquerque denied in part a request for information that Dr. Bernstein filed on June 27, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the document released to Dr. Bernstein in that determination was withheld after a review of the document had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require Albuquerque to release the information that it withheld in the December 22, 1995 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 27, 1994 Dr. Bernstein submitted a request to Albuquerque under the FOIA for a copy of the Minutes of the February 24, 1944 meeting of the Los Alamos Governing Board (Minutes). After locating and reviewing the responsive document, Albuquerque forwarded it to the DOE's Office of Declassification for review. On December 22, 1995, after the Office of Declassification completed its review,

Albuquerque released to Dr. Bernstein a copy of the Minutes from which it withheld information it claimed to be classified as Restricted Data pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the requested document. In his Appeal, Dr. Bernstein contends that under a more judicious, and less mechanical, application of Exemption 3, much, if not all, of those portions could be declassified and released.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to the Office of Declassification, the portions that the DOE deleted from the requested document under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

In performing his review the Director of SA considered the concerns Dr. Bernstein specifically raised in his appeal, and performed as well a general review of the material under the current classification guidance. From the context of the surrounding passages, Dr. Bernstein presumed the substance of the three withheld sections of the Minutes, and on the basis of those presumptions, he contended that the material deleted could safely be declassified.

Based on the review performed by the Director of SA under current classification guidance, we have determined that the Atomic Energy Act requires the continued withholding of most of those portions of the Minutes that were previously identified as classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the Minutes that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. However, on review the Director of SA was able to perform more precise deletions of one of the three passages previously excised, and as a result we can now release some information that had previously been withheld. A newly redacted version of the Minutes will be provided to Dr. Bernstein under separate cover. Accordingly, Dr. Bernstein's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Barton J. Bernstein on January 22, 1996, Case No. VFA-0117, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the Minutes of the February 24, 1944 Meeting of the Governing Board, Los Alamos, New Mexico, in which additional information is released, will be provided to Dr. Bernstein.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 21, 1997

Case No. VFA-0120, 25 DOE ¶ 80,171

February 20, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Archie M. LeGrand, Jr.

Date of Filing: January 22, 1996

Case Number: VFA-0120

On January 22, 1996, Archie M. LeGrand, Jr., filed an Appeal from a determination issued by the FOIA/Privacy Act Division (FOIA Division) of the Department of Energy (DOE) on December 11, 1995. In its determination, the FOIA Division denied Mr. LeGrand's request submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. LeGrand challenges the adequacy of the DOE's search for responsive documents.

I. Background

From 1953 to 1969, Mr. LeGrand worked at the DOE's Savannah River Site as an employee of DuPont Company, a government contractor, in a position requiring a security clearance. In a request dated October 11, 1995, Mr. LeGrand sought records of investigations conducted regarding his suitability for a clearance. The FOIA Division issued a determination on December 11, 1995, stating that "[a] search of the records in the [DOE's] Office of Safeguards and Security and the Savannah River Operations Office was conducted and no records were found responsive to your request." Letter from GayLa Sessoms, Director, FOIA/Privacy Act Division, DOE, to Archie LeGrand, Jr. (December 11, 1995).<1> In his Appeal, Mr. LeGrand states, "I find it hard to believe that no records of these investigations exist, when I know of my own knowledge that four investigations were made at the times I indicated in my original request." Letter from Archie M. LeGrand, Jr. to Director, Office of Hearings and Appeals (OHA) (January 6, 1996).

II. Analysis

A FOIA request deserves a thorough and conscientious search for responsive documents, and the OHA has remanded cases where it was evident that the search conducted was inadequate. See, e.g., James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

As it alluded to in its determination letter, the FOIA Division referred Mr. LeGrand's request to the Office of Safeguards and Security (OSS) at DOE Headquarters and to the DOE's Savannah River Operations Office (DOE/SR). In reviewing the present Appeal, we have obtained information from these two offices regarding their search for responsive documents. Both offices destroy personnel security clearance records ten years after the termination of employment or the death of the employee. Memorandum of telephone

conversation between Darcy Goddard, OHA Staff Analyst, and Victor Hawkins, OSS (January 31, 1996); Memorandum of telephone conversation between Steven Goering, OHA Staff Attorney, and Tina Hardy, DOE/SR (February 16, 1996).<2> We also contacted Westinghouse Savannah River Company (Westinghouse), the current DOE contractor operating the Savannah River Site. The company stated that it maintains security clearance files on its employees which contain some, but not all, of the information kept in the files located at DOE/SR. Westinghouse destroys these records three years after employment is terminated. Memorandum of telephone conversation between Darcy Goddard, OHA Staff Analyst, and Deborah Smith, Westinghouse (February 8, 1996). Because Mr. LeGrand's employment at the Savannah River Site ended over 25 years ago, any security clearance records maintained by the DOE or DuPont regarding Mr. LeGrand would no longer exist.

The OSS nonetheless searched its microfiche index of all DOE and DOE contractor employees who have held security clearances in the past, and Mr. LeGrand is not listed in this index. Memorandum of telephone conversation between Darcy Goddard, OHA Staff Analyst, and Victor Hawkins, OSS (January 31, 1996). DOE/SR indexes its personnel security files in a computer database searchable by Social Security number. A search was performed on this database using Mr. LeGrand's Social Security number, and no records were located. Memorandum of telephone conversation between Steven Goering, OHA Staff Attorney, and Tina Hardy, DOE/SR (February 16, 1996). Finally, Westinghouse, which indexes its files by the last name of the employee, also searched for a file pertaining to Mr. LeGrand and found no records. Memorandum of telephone conversation between Steven Goering, OHA Staff Attorney, and Deborah Smith, Westinghouse (February 20, 1996).

We are persuaded that the searches conducted at DOE Headquarters, DOE/SR, and Westinghouse were reasonably calculated to uncover the documents sought by LeGrand. Moreover, LeGrand has provided no evidence that additional documents would be located in other offices at the DOE. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Archie M. LeGrand, Jr. on January 22, 1996, Case Number VFA-0120, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 20, 1996

<1>In its determination, the FOIA division described Mr. LeGrand's request as a "Privacy Act request." The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). Under the above definition, the Appellant probably would have been entitled to any responsive documents, had any been found, under both the FOIA and the Privacy Act.

<2>U. S. Government records are retained for varying lengths of time before they are destroyed. The

length of time that a DOE record must be retained is governed by the General Records Schedule (GRS), which is produced by the National Archives and Records Administration, and the Department of Energy Records Schedule (DOERS). The DOERS references records unique to the Department of Energy. It is used to schedule disposition of department records that are not addressed in the GRS.

Case No. VFA-0121, 25 DOE ¶ 80,192

May 14, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martha Julian

Date of Filing: January 25, 1996

Case Number: VFA-0121

On January 25, 1996, Martha Julian of Newburgh, Indiana filed an Appeal from a determination issued on January 8, 1996 by the Albuquerque Operations Office of the Department of Energy (DOE). That determination denied in part a request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would result in release of further requested information.

Background

On January 15, 1994, Lisa Doyle of Bowling Green, Kentucky filed a request for records dealing with radiation exposure received by her grandfather, Wendell Eskridge. Cf. 10 C.F.R. § 835.801(d). Mr. Eskridge had worked as a contractor employee at DOE's Sandia Laboratory site from March 8, 1951 until November 7, 1958. Mr. Eskridge died two days later. In January of 1996, the Albuquerque Operations Office responded that it had searched relevant DOE records in its possession and at the Kirtland Area Office (which is the DOE Office responsible for Sandia National Laboratory) as well as the records at Sandia Laboratory and that the only record it had uncovered was a radiation exposure record for calendar year 1957. This was released to Mrs. Doyle. Martha Julian, Mrs. Doyle's mother and the daughter of Mr. Eskridge, appealed to this Office.

Analysis

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information which it has created or obtained at the time of the request. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein); Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983); Martha L. Powers, 24 DOE ¶ 80,147 at 80,618 (1994); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Safecard Services, Inc. v. Securities and Exchange

Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (and cases cited therein); Meeropol v. Meese, 790 F.2d 942, 950-51 (D.C. Cir. 1986); Weisberg

v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); William H. Payne, 24 DOE ¶ 80,145 at 80,615 (1994); Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)). This Office will remand a case for more research if it is evident that an inadequate search was conducted, or if evidence reveals that other documents that were not identified during the initial search exist. Id. See also Linda J. Carlisle, 24 DOE ¶ 80,124 at 80,560 (1994); McGraw-Hill Nuclear Publications, 22 DOE ¶ 80,157 at 80,627 (1992); James L. Schwab, 21 DOE ¶ 80,153 at 80,658 (1991).

We have had extensive discussions with the Albuquerque Operations Office about the search conducted in this case. At our request, it has provided us with a detailed search methodology employed in this case. For DOE records, the Albuquerque Operations Office searched the records which were identified during the human experimentation document search. No responsive documents were found in that collection. The Kirtland Area Office also searched its Occupational Safety and Health Division. It reported it had no responsive documents and noted that the DOE will not take custody of contractor radiation records until the facility in question is closed. Cf. 10 C.F.R. § 835.702(h). The Albuquerque Operations Office informs us that these are the only likely DOE locations for the records sought.

In addition to the DOE-held material, the records at the Sandia National Laboratory were searched. A computer data base search by Sandia's Radiation Protection Technical Services Department found no records. A hand search was performed of microfilm radiation records. These begin in the late 1940s and each reel of microfilm through 1958 was checked. The listings on each microfilm are supposed to show a cumulative dose for each person to whom a dosimetry badge was issued. Thus, a name should appear on the microfilm record whenever a person received a radiation badge even when there was no radiation exposure measured. According to Sandia, Mr. Eskridge's name appeared only in the 1957 microfilm. By using this technique Sandia located the original 1957 "Radex" card showing Mr. Eskridge's radiation readings for 1957 which was released to Mrs. Doyle.<1>Sandia surmises that this is the only year Mr. Eskridge received a radiation badge.

In addition to its searches of the radiation records, Sandia corporate personnel files were searched, although these records are neither agency records nor the property of or in the control of the DOE, and thus are not subject to the FOIA. See William Payne, 25 DOE ¶ 80,___ at__,___, OHA Case No. VFA-0128, slip op. at 8-9 (March 26, 1996). The microfilm of Mr. Eskridge's personnel record contained only a notice of his employment ending due to his death. Although the personnel at Sandia found this unusual, they had no explanation other than that the rest of his file had been inadvertently destroyed or misplaced at some point. In addition, Sandia searched the corporate medical database. This listed Mr. Eskridge as being an employee. However, no medical records were found on file. Sandia informs us that it likely would have medical records only if Mr. Eskridge came to the medical unit of his own volition. The Albuquerque Operations Office informs us that these are the only probable locations at Sandia National Laboratories for the type of documents sought.

In this case, we find that the Albuquerque Operations Office constructed a search reasonably calculated to uncover the requested records, and conscientiously carried out that search. Whether or not other records may have existed, we believe that a reasonable search was undertaken and that the results of that search have been transmitted to the requester. Thus, under these circumstances, we find that the search undertaken by the Albuquerque Operations Office was adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Martha Julian, OHA Case No. VFA-0121, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records

are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 14, 1996

<1>Mrs. Julian informs us that she did not receive a copy of the 1957 microfilm cumulative dose material. At our request, the Albuquerque Operations Office is sending her a copy of that document with the listings of other employees removed. If Mrs. Julian believes that this document demonstrates that other records ought to exist, she may file a new FOIA request with the Albuquerque Operations Office or a motion for reconsideration with this Office.

Case No. VFA-0122, 25 DOE ¶ 80,172

February 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugene Maples

Date of Filing: January 25, 1996

Case Number: VFA-0122

On January 25, 1996, Eugene Maples (Maples) filed an Appeal from a determination issued to him on December 27, 1995, by the Department of Energy's Office of the Inspector General (OIG). That determination was issued in response to a request for information submitted by Maples under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OIG to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 29, 1995, Eugene Maples filed a request under the FOIA in which he sought a copy of a final report issued by the OIG which summarized an investigation into "the mis-use (sic) of oil overcharge funds by the State of South Carolina . . . conducted by Ms. Vera Sheppard and Lynn Moran of the Savannah River Site during 1993-94." See OIG Determination Letter at 1. On December 27, 1995, the OIG issued a determination denying Maples request in its entirety. The OIG stated that "the responsive document was being withheld pursuant to Exemption 7(A)." Id. In invoking Exemption 7(A), the OIG stated that it has not reached a final resolution of the investigation; therefore, release could prematurely disclose enforcement efforts and interfere with its ongoing investigation. The OIG also stated that the public interest would not be served by release because individuals involved in the investigation may gain an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses or otherwise impede an appropriate resolution of its investigation. Id.

In his Appeal, Maples maintains that his request was improperly denied by the OIG. Further, Maples states that the release of the final report would be in the public interest because "the public stands to benefit in the recovery of up to $40 million doled out fraudently and politically." See Appeal Letter at 4. On this basis, Maples asks that the OHA direct the OIG to release the requested information.

II. Analysis

A. Exemption 7(A)

Exemption 7(A) of the FOIA allows agencies to withhold at their discretion "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552 (b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(i). Clearly, the documents at issue in this case satisfy the threshold test for application of Exemption 7. They have been compiled for a law enforcement purpose by the Inspector General who is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1) - (2), 4 (a)(1), (3) - (4), (d), 6(a)(1) -(4), 7(a), 9(a)(1)(E). Because the statute's mandate clearly gives an Agency discretion to withhold records compiled for law enforcement proceedings whenever release "could reasonably be expected" to interfere with those proceedings, we need only find that release of the requested information could reasonably be expected to interfere with the OIG's investigation.

In applying this standard in the past, we have found that the OIG is not required to make a particularized, case-by-case showing of interference with its investigation. Rather, a generic determination of likely interference is sufficient. See Murray, Jacobs & Abel 25 DOE ¶ 80,130 (1995); NRLB v. Robbins Tire and Rubber Co., 437 U.S. 214, 224 (1978); Crancer v. United States Dep't of Justice, 999 F.2d 1302, 1306 (8th Cir. 1993). The Supreme Court has held that Congress did not intend to prevent federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings." NLRB v. Robbins, 437 U.S. at 236. In its discussion concerning the plain meaning of Exemption 7(A), the Supreme Court stated that although Congress could easily have required in so many words that the government in each case show a particularized risk to the enforcement proceeding at issue, Congress did not do so. NLRB v. Robbins, 437 U.S. at 234. By contrast, the Court explained, since 7(A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made. Id. at 224. As a result, the Court upheld a generic determination that the release of witness statements would interfere with enforcement proceedings within the meaning of Exemption 7(A).

In Bevis v. Department of State, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986) (Bevis), the United States Court of Appeals for the District of Columbia discussed how the government could make generic determinations pursuant to Exemption 7(A). Bevis provided for a three-step process. First, the government must define its categories functionally. Second, it must conduct a document-by- document review in order to assign documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings. Id. An explanation is sufficient if there is "a rational link" between the nature of the document and the alleged likely interference in enforcement proceedings. Id., quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C. Cir. 1986). As indicated above, in light of the Supreme Court's decision in NLRB v. Robbins, if the category of records is of the type that could reasonably be expected to interfere with enforcement proceedings generally, the government need not make any particularized, case-specific showing.

Applying the above standard here, we find that the OIG has given a reasonable, generic determination that the release of the final report could likely interfere with its investigation. As stated earlier, the OIG maintains that the release of the final report could prematurely disclose enforcement efforts or provide individuals involved in the investigation an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede an appropriate resolution of the investigation. Further, in additional comments submitted to the OHA on February 14, 1996, the OIG has indicated that the requested "Final Report of Investigation" has not yet been issued. However, it states that a Report of Investigation has been presented to the Department of Justice for their prosecutorial determination. The OIG considered this report to be responsive to Maples's request and withheld it under Exemption 7(A). Based on the foregoing, we have concluded that the OIG has properly applied Exemption 7(A) to the responsive document at issue.

B. The Public Interest Analysis

This case involves competing interests which cannot be harmonized. It requires a balancing of Maples's desire to take action in an effort to recover fraudulently spent funds by the State of South Carolina against the public's desire for the proper resolution of an ongoing investigation into allegations of the misuse of oil overcharge funds by the State of South Carolina. See Appeal Letter at 3. The OIG's investigation into these kinds of allegations inherently endeavors to bring about precisely the type of government accountability that the Freedom of Information Act seeks to promote. We find therefore that release of the responsive information is not in the public interest so long as the investigation is underway and the risks from premature release remain unabated. We further find that the existence of these tangible risks satisfies the reasonably foreseeable harm standard set forth by the Attorney General in 1993. This relatively new standard applies a presumption of disclosure which, in the absence of a reasonably foreseeable harm to an interest protected by an Exemption, should result in a determination by the agency that the public interest lies with disclosure. See J. Reno, Memorandum for Heads of Departments and Agencies (October 4, 1993). On the basis of the foregoing determination, we find that this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Eugene Maples on January 25, 1996 , Case Number VFA-0122 , is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 23, 1996

Case No. VFA-0123, 25 DOE ¶ 80,177

March 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James H. Stebbings

Date of Filing: February 12, 1996

Case Number: VFA-0123

On February 12, 1996, James H. Stebbings (Appellant) filed an Appeal with the Office of Hearings and Appeals (OHA) from a determination issued on January 4, 1996, by the Department of Energy's Argonne Group of its Chicago Operations Office (COO). In its determination, the Argonne Group stated that a thorough search conducted by Argonne National Laboratory (Argonne) failed to locate any documents responsive to the Appellant's March 2, 1992 request under the Freedom of Information Act (FOIA). This Appeal, if granted, would require an additional search for responsive documents.

I. Background

On March 2, 1992, the Appellant submitted a FOIA request to the DOE seeking information relating to radiation level testing of human subjects who had been in Eastern Europe during the 1986 nuclear incident at Chernobyl. In an April 17, 1992 letter, the DOE notified the Appellant that his request had been forwarded to the office where responsive documents might be located, the Chicago Operations Office (COO). On October 6, 1993, the Appellant received a letter notifying him that his request had been sent to the Argonne Group for response. On January 4, 1996, the Argonne Group issued its determination, stating that no documents responsive to the Appellant's request were found at Argonne. The Appellant subsequently filed the present Appeal in which he contends that the search for responsive documents was inadequate.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988).

In his Appeal, the Appellant lists three publications relating to the subject of his request that he had located in a commonly accessed internal Argonne bibliography. He also states that he is aware of a fourth publication devoted to the Chernobyl radiation studies. When questioned about the existence of these publications, Rory S. Simpson of the Argonne Group stated that he would contact the author of the three

publications listed in the Appeal and request that the author search his records for documents responsive to the Appellant's request. Mr. Simpson also stated that Argonne would conduct another search for documents responsive to the Appellant's request. See Memorandum of Telephone Conversation between Amani L. Roland, OHA Staff Analyst, and Rory S. Simpson, Contract Specialist, Argonne Group (February 28, 1996). Consequently, since the Argonne Group has stated its intention to continue to search for responsive documents we shall remand this case to that office.

In the Appellant's original request, he named Brookhaven National Laboratory (Brookhaven) as another location which might contain responsive material. We contacted Linda Rohde of the COO to determine if the Appellant's request had been forwarded to Brookhaven. Ms. Rohde stated that it had not. See Memorandum of Telephone Conversation between Amani L. Roland, OHA Staff Analyst, and Linda Rohde, FOI Officer, COO (February 26, 1996). Therefore, we shall also remand this case to COO in order that it may forward this case to Brookhaven. On remand, Brookhaven and the Argonne Group shall identify all documents responsive to the Appellant's request, and either release them or provide adequate justification for withholding any portion of them.

It is Therefore Ordered That:

(1) The Appeal filed by James H. Stebbings on February 12, 1996, Case Number VFA-0123, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Argonne Group and the Chicago Operations Office. Each shall conduct a search for documents responsive to the Appellant's request as described in the above Decision, and each shall promptly issue a new determination regarding the result of that search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 11, 1996

Case No. VFA-0124, 25 DOE ¶ 80,175

March 4, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kenneth H. Besecker

Date of Filing: February 2, 1996

Case Number: VFA-0124

On February 2, 1996, Kenneth H. Besecker filed an Appeal from a determination issued to him by the Director of the Office of Economic Impact and Diversity (hereinafter referred to as "the Director"). This determination was issued on January 22, 1996 in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Besecker contests the adequacy of the Director's search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

I. Background

In his FOIA request, Mr. Besecker sought access to a copy of the contract under which the investigation of a specified Equal Employment Opportunity (EEO) complaint was conducted at the DOE's Savannah River Operations Office. On January 22, 1996, the Director responded to this request by providing Mr. Besecker with a copy of this contract, after deleting information which tended to identify

the complainant. The Director stated that this information was being withheld pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). <1>

In his Appeal, Mr. Besecker does not contest the Director's withholding of information pursuant to Exemption 6. Instead, he contends that the Director failed to include a portion of the contract entitled "Statement of Work" in the document that was provided to him. <2> In support of his position, Mr. Besecker cites a portion of the contract which refers to "the attached statement of work." Although there was a document attached to this portion of the contract, Mr. Besecker claims that it is not the statement of work.

II. Analysis

The FOIA generally requires that documents held by federal agencies be released to the public upon request. Accordingly, upon receiving an appropriate FOIA request, an agency is required to search its records for responsive documents. See 5 U.S.C. § 552(a)(3); Energy Products, Inc., 23 DOE ¶ 80,114 at

80,528 (1993). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and that would we [have] not hesitate[d] to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., In Defense of Animals, 24 DOE ¶ 80,151 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981).

In order to evaluate the validity of Mr. Besecker's claim, we examined a copy of the contract that was provided to him. The next-to-last page of that copy is entitled "Request for Bid - Statement of Work," and states, in pertinent part, that "[t]he specific requirements for this request are detailed in the attached statement of work." Five specific requirements for the contract are then briefly listed, followed by a brief description of the complaint to be investigated.

We then examined statements of work submitted by Mr. Besecker that had been generated by the DOE in conjunction with other EEO related contracts. Because these statements differed significantly in form and in substance from the statement provided to Mr. Besecker, we contacted the Office of Economic Impact and Diversity. We were then informed that two statements of work had been generated in connection with the contract in question; the brief and case-specific statement that was provided to Mr. Besecker and a lengthier and more comprehensive generic statement of work. We have examined the generic statement and we find that it is responsive to Mr. Besecker's request and that it is not exempt from mandatory disclosure under the FOIA. A copy of this document has been provided to us by the Office of Economic Impact and Diversity, and we will forward it to Mr. Besecker under separate cover.

It Is Therefore Ordered That:

(1) The Appeal filed by Kenneth H. Besecker on February 2, 1996 is hereby granted.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 4, 1996

<1>1/ Exemption 6 protects from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

<2>2/ A statement of work is a detailed description of the duties to be performed by the contractor.

Case No. VFA-0125, 25 DOE ¶ 80,174

February 29, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Keith E. Loomis

Date of Filing: February 5, 1996

Case Number: VFA-0125

On February 5, 1996, Keith E. Loomis (Appellant) filed an Appeal from a determination issued on January 3, 1996 by the Department of Energy's (DOE) Office of Naval Reactors (ONR). This determination was issued in response to a request for information filed by the Appellant, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, the DOE released copies of several documents requested by the Appellant. However, portions of one document released to the Appellant were withheld under FOIA Exemption 6. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

On April 10, 1995, the Appellant filed a request seeking a wide range of information including a copy of a deposition of R. Simons. On October 17, 1995, ONR issued a determination releasing most of the Simons deposition transcript but withholding portions of it under FOIA Exemption 6. On November 21, 1995, the Appellant filed an Appeal with this office (Case Number VFA-0102). Among the issues raised in that Appeal were the Appellant's contention that ONR's withholding of portions of the R. Simons deposition under Exemption 6 was improper. After conferring with this office, ONR issued a determination in which it released most of the previously withheld portions of the Simons deposition but continued to withhold some information under Exemption 6. On February 5, 1996, the Appellant filed the present appeal, in which he claims that the remaining portions of the Simons deposition were not properly withheld under Exemption 6.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 6 is at issue in the present case. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury

and embarrassment that can result from the unnecessary disclosure of personal information." Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a

three step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468, 1481 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

According to the Appellant, the context of the released portions of the Simons deposition suggests that the portions still withheld under Exemption 6 involve the Appellant. The Appellant contends that since the privacy interests being asserted are that of the Appellant, the ONR has improperly applied the exemption. As an initial matter, it is important to note that two of the assumptions upon which the Appellant bases his appeal are not accurate. First, the Appellant assumes that the withheld remarks concern him. While the context of those portions of the Simons Deposition that have already been released to the Appellant suggest that the Appellant might be the subject of the withheld information, our inspection of the withheld information has revealed that it does not concern or involve the Appellant. The Appellant also contends that ONR is asserting the Appellant's own privacy interests in order to withhold information from him. This assumption is also incorrect. Our review of the withheld information reveals that ONR is protecting Mr. Simon's privacy interests rather than that of the Appellant. In fact, we find that the Appellant has no privacy interest in the withheld information. Our review of the withheld information reveals that Mr. Simon has a strong privacy interest in the withheld information. If the DOE were to release this information, it would reveal Mr. Simons' opinions and actions concerning a sensitive issue. Revealing Mr. Simon's opinions and actions could therefore be reasonably expected to subject him to retaliation, retribution or embarrassment. Accordingly, we find that Mr. Simon has a privacy interest in the withheld information to which we attach great weight.

Having concluded that a protectable privacy interest exists in the withheld information, we turn to the next step in our analysis; the determination of the public's interest in disclosure of the withheld information. In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public which may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Id. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest that the FOIA was enacted to serve." Id.

Applying these holdings to the facts of the present case, we have determined that disclosure of the identifying information would not be strongly affected with the public interest. After personally inspecting the withheld information, we are of the opinion that its release could possibly advance the public's understanding of the operations and activities of the government. However, the weight of the public's interest in disclosure is diminished by the fact that it consists merely of one individual's vague and subjective opinion. Accordingly, we find that the public interest in disclosure to be of modest weight.

III. CONCLUSION

Weighing the significant privacy interests present in this case against the less substantial public interest we find that release of the withheld information would result in a clearly unwarranted invasion of personal privacy. For the reasons set forth above, we are hereby denying the present Appeal.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Keith E. Loomis on February 5, 1996 (Case Number VFA-0125) is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 29, 1996

Case No. VFA-0128, 25 DOE ¶ 80,184

March 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: February 28, 1996

Case Numbers: VFA-0128

VFA-0137

VFA-0138

VFA-0139

VFA-0140

VFA-0141

On February 28, 1996,<1> William H. Payne filed an Appeal from three determinations, two letters and one Decision and Order. Mr. Payne requests that we release information that he requested from the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. If responsive documents cannot be located, the requestor must be informed whether the requested record is known to have been destroyed or never to have existed. 10 C.F.R. § 1004.4(d).

I. Background

In a letter dated February 5, 1996, Mr. Payne seeks to appeal various FOIA requests and DOE FOIA determinations. Specifically Mr. Payne requests that we review the DOE's handling of three requests for information concerning: (i) the names, last known addresses, and phone numbers of what he claims are 60 to 100 whistleblowers with unsettled cases in the Office of Contractor Employee Protection (OCEP) (Request No. 9512210001), (ii) all DOE authored investigation reports examining allegations that the National Security Agency willfully and purposely attempted to sabotage Sandia National Laboratory (SNL) cryptographic projects (Request No. 9511200002) and (iii) reports on certain investigations of misconduct made by DOE's Office of Inspector General (IG) (Request No. 9512110004) (OHA Case No. VFA-0137). Additionally, Mr. Payne appeals a January 24, 1996 DOE-AL determination denying a requested fee waiver for law firm invoices he requested under the FOIA (OHA Case No. VFA-0128), and a November 6, 1995 DOE-AL determination stating that documents responsive to his request for current SNL employees who are retired from the military ("double dippers") are not agency records subject to the FOIA (OHA Case No. VFA-0139). Mr. Payne also seeks review of a January 5, 1996 DOE-AL determination stating that no responsive documents exist concerning husband-wife pairs employed at

either SNL or DOE-AL (OHA Case No. VFA-0140); and a December 14, 1995 letter signed by a University of California<2> employee concerning husband-wife pairs employed at Los Alamos National Laboratory (LANL) (OHA Case No. VFA-0138). Finally Mr. Payne has also filed a Motion for Reconsideration (OHA Case No. VFA-0141) of a Decision and Order issued by this office concerning his request for LANL "double dippers." See William H. Payne, 25 DOE ¶ 80,147 (1995) (Payne).<3>

In support of his fee waiver request which DOE-AL denied on January 24, 1996, Mr. Payne stated that he has published three books (one book was published in both English and Spanish) and six magazine articles. <4> He also notes that he has supplied information to the Baltimore Sun for its whistleblowing series on the National Security Agency and "published" numerous letters on the Internet. Moreover, Mr. Payne indicates that he is writing a book about fraud, waste, mismanagement, corruption, violations of law, classification abuse, and the abuse of national security interests at the DOE. Finally, Mr. Payne references two articles that discuss his allegations with regard to his "whistleblower" activities.<5>

II. Analysis

1. Pending FOIA requests at the FOIA Division

This portion of Mr. Payne's FOIA appeal relates to three requests for documents submitted to the FOIA Division for information concerning certain investigations performed by DOE's IG and OCEP (OHA Case No. VFA-0137). In the course of evaluating this matter, we learned that these requests are still pending with the FOIA Division. See Memorandum of Telephone Conversation between Ariane Cerlenko, OHA Staff Attorney and Ed McGinnis, FOIA Division analyst (February 15, 1996). OHA can only assume jurisdiction over a FOIA matter after a DOE Authorizing Official has rendered an initial determination. See Suffolk County, L.I., 17 DOE ¶ 80,111 at 80,524 (1988). Because the FOIA Division has not yet issued determinations regarding these requests Mr. Payne's appeal is not ripe and we will dismiss this portion of Mr. Payne's FOIA appeal.

2. Fee Waiver Denial

This portion of Mr. Payne's FOIA appeal concerns a determination issued by DOE-AL in which Mr. Payne's request for a fee waiver was denied (OHA Case No. VFA-0128). Mr. Payne requested a fee waiver with respect to his FOIA request for law firm billing invoices stating that he intended to use the information in a book he was writing on waste, fraud and abuse. Mr. Payne argues that the billing invoices would show the amount of taxpayer money "wasted" by Sandia Corp. in contesting certain lawsuits. DOE-AL found that "any benefit associated with the release of the requested documents will flow primarily to [Mr. Payne] and not to a greater understanding or for a greater benefit to the public." See January 24 Determination Letter at 2.

The FOIA generally requires that requesters pay the cost of fees for the processing of their requests.

5 U.S.C. § 552(a)(4)(A)(ii); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii). The burden of satisfying this two prong test rests on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (Larson). The DOE has implemented this statutory standard for fee waivers in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition, public understanding of the government, has

been met:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i).<6>

A fee waiver is only appropriate where the subject matter of the requested records specifically concerns the operations or activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772-75 (1989). Therefore, fees may be waived only when the records are sought for their informative value in relation to specifically identified government operations or activities. See William H. Payne, 24 DOE ¶ 80,134 (1994) (finding that telephone billing records of certain DOE-AL employees had no informative value in relation to government operations or activities). In the present case, the law firm invoices sought by Mr. Payne relate to the amount of taxpayer money spent by a contractor defending lawsuits at a national laboratory. It appears clear that this information concerns identifiable "operations or activities of the government." Cf. Indian Law Center v. Department of Interior, 477 F. Supp. 144 (D.D.C. 1979); The Rio Grande Sun, 15 DOE ¶ 80,132 (1987); H. Michael Clyde, 13 DOE ¶ 90,101 (1985).

Even if the particular records requested concern the operations or activities of the government, in order to be granted a fee waiver, the requester must demonstrate at least some capability to disseminate the information received from responsive documents to the public. See Larson, 843 F.2d at 1483. This ability to disseminate information includes an examination of the qualifications of the requester to determine if they have the ability to understand and process the requested records. See McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9th Cir. 1987).

In the present case , Mr. Payne's representations that he is writing a book do not allow us to infer an ability to disseminate information regarding the requested law firm invoices. See Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) (denial of fee waiver request "based upon mere representation that [the requester] is a researcher who plans to write a book" is not an abuse of discretion). Similarly, Mr. Payne's claim that he has "published" numerous letters on the Internet concerning waste, fraud and abuse and that this "publication" establishes an ability to disseminate information regarding the law firm billing invoices, is unconvincing. <7> In addition, while Mr. Payne has shown some media interest in his "whistleblowing" activities, he has shown an interest on the part of neither the media in general nor a particular publisher on the subject matter of his request, i.e. law firm billing invoices as evidence of waste, fraud and abuse. See Eugene Maples, 23 DOE ¶ 80,111 (1993); James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992).

Mr. Payne also asserts that his proven ability to publish material in the past is evidence of his ability to disseminate the requested material. While it is true that Mr. Payne has published in the past, the vast majority of his published material concerns computer programming and is not linked to government or other waste, fraud and abuse. The two articles that Mr. Payne wrote which arguably concern waste, fraud and abuse were written over 23 years ago while Mr. Payne was a visiting Research Associate and serving on a Graduate Studies committee. This does not establish the type of current, specialized knowledge necessary to extract, synthesize and then convey the information to the general public. See Pederson v. Resolution Trust Corp., 847 F. Supp. 851 (D. Colo. 1994).

As mentioned earlier, the burden of satisfying the fee waiver requirements rests on the requester. In the present case, Mr. Payne has not demonstrated that he can meaningfully disseminate information about the law firm invoices, even if they concern the operations or activities of government.<8> Accordingly, this portion of Mr. Payne's Appeal should be denied.

3. Agency Records

This portion of Mr. Payne's appeal concerns two determinations issued by DOE-AL. The first determination issued on November 6, 1995, found that responsive records, to the extent that they exist, and contain the names and dates of employment of retired military personnel employed at SNL ("double dippers"), are not agency records subject to the provisions of the FOIA (OHA Case No. VFA-0139). In this portion of the Decision we also address a second determination issued by DOE-AL for records containing the names and dates of employment of "double dippers" employed at LANL (OHA Case No. VFA-0141). Since the second determination was the subject of a Decision and Order already issued by this office, we have treated Mr. Payne's attempted "appeal" of that determination as a Motion for Reconsideration of this Office's Decision and Order.

a. Retired Military Personnel Employed at SNL

The threshold inquiry in addressing this portion of Mr. Payne's appeal is whether personnel files, which would possibly contain responsive information, generated by and in the possession of a DOE contractor are subject to the FOIA. In making this determination, we must first determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Records that do not meet these criteria however can nonetheless still be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). In the present case, we conclude that the records in question are not "agency records" and are not subject to the FOIA under DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as the Sandia Corp., are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Sandia Corp. manages and operates SNL. While the DOE obtained Sandia Corp.'s services and exercises general control over the contract work, it does not supervise Sandia Corp.'s day-to-day operations. We therefore conclude that Sandia Corp. is not an "agency" subject to the FOIA. See William Kuntz, III, 25 DOE ¶ 80,157 (1996).

Although Sandia Corp. is not an agency for the purposes of the FOIA, its records relevant to Mr. Payne's request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. See Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980) (Kissinger); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the appellant's request. Thus, the records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; Forsham, 445 U.S. at 185-86; Kissinger, 445 U.S. at 150-51.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We therefore next look to the contract between the DOE and Sandia Corp. to determine the status of these records. That contract states:

Except as is provided in paragraph (b) of this provision and as may be otherwise agreed upon by the Government and the Contractor, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the progress of the work, or in any event, as the Contracting Officer shall direct upon settlement of this contract.

Contract DE-AC04-94AL85000, Cl. H-18 (a). Paragraph (b) of this clause states that the category of records that remain the property of the Contractor includes "Personnel records, medical records and files (excluding personnel radiation exposure records) maintained on individual employees, applicants and former employees[.]" Id. at H-18 (b)(1). Thus, because personnel records are not among the records which are "property of the Government" under the DOE's contract with Sandia Corp., these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under DOE regulations. Accordingly, we shall deny this portion of Mr. Payne's Appeal.

b. Retired Military Personnel Employed at LANL

Mr. Payne's Motion for Reconsideration concerns a request for information concerning "double dippers" working at LANL. See Payne, 25 DOE at 80,611. In circumstances similar to those detailed above with respect to Sandia Corp. records, we found in the Payne case that the requested documents were contained in personnel files in the possession and control of the University of California, the prime contractor responsible for maintaining and operating LANL and were therefore not agency records subject to the provisions of the FOIA. Id. Accordingly, we denied Mr. Payne's appeal.

We have thoroughly reviewed this Motion for Reconsideration, and have found no new material or circumstances that would lead us to alter our prior Decision.<9>In his Motion, Mr. Payne merely states

that he wishes to appeal the denial of the information. Since he has provided no new additional information or shown changed circumstances, we will deny this Motion for Reconsideration. See E.O. Smelser, 24 DOE ¶ 80,161 (1994).

4. Adequacy of the Search

This portion of Mr. Payne's appeal concerns a January 5, 1996 DOE-AL determination in which DOE-AL states that it did not find material responsive to Mr. Payne's request for documents containing the "names, date of employment, current salaries of all husband-wife pairs employed at [SNL or DOE-AL]" (OHA Case No. VFA-0140).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Barton Kaplan, 22 DOE ¶ 80,125 (1992); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

In order to determine whether an agency's search was adequate, its actions are examined under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted Elva Barfield, FOIA Officer, DOE-AL, to ascertain the extent of the search that had been performed and to determine whether any documents responsive to the Mr. Payne's request might exist. According to Ms. Barfield, searches were conducted by the Kirtland Area Office (KAO) and the Human Resources Division (HRD) of DOE-AL. In addition, searches were conducted by Sandia Corp. to determine if it possessed responsive documents which are the property of the DOE. No responsive records were located in any of the offices searched. While it is theoretically possible that the information that Mr. Payne requested could be retrieved by comparing each and every personnel file, the FOIA neither requires the creation of a responsive record where none exists, nor an exhaustive search. See Miller, 779 F.2d at 1384-85; Linda P. Yeatts, 25 DOE ¶ 80,154 (1995); Lloyd Makey, 24 DOE ¶ 80,163 (1994); Dr. Robert Sanchez, 24 DOE ¶ 80,136 (1994).

Under these circumstances, we are convinced that DOE-AL followed procedures which were reasonably calculated to uncover the information sought by Mr. Payne. DOE-AL has performed a rationally based search for responsive agency records. Moreover, despite the fact that the FOIA does not apply to records of nongovernmental entities, including government contractors, those facilities were searched as well. Furthermore, Mr. Payne has not presented any evidence that DOE possesses responsive documents. See Mark S. Boggs, 22 DOE ¶ 80,102 (1992). Accordingly, this portion of Mr. Payne's appeal will also be denied.

5. Contractor Response to a Request for Information

Lastly, Mr. Payne appeals a December 14, 1995 letter sent to Mr. Payne by a University of California employee in response to his request for information concerning husband and wide pairs employed at LANL (OHA Case No. VFA-0138). The OHA can assume jurisdiction over a FOIA matter only after an Authorizing Official has rendered an initial determination on the matter. See 10 C.F.R. § 1004.8(a). An Authorizing Official is a DOE officer having custody of or responsibility for records requested under the FOIA. See 10 C.F.R § 1004.2. The December 14 letter is not an agency determination under the FOIA.

Accordingly, this portion of Mr. Payne's Appeal will also be dismissed.

It Is Therefore Ordered That:

(1)The Appeal filed by William H. Payne, Case No. VFA-0137, on February 28, 1996, is hereby dismissed.

(2)The Appeal filed by William H. Payne, Case No. VFA-0128, on February 28, 1996, is hereby denied.

(3)The Appeal filed by William H. Payne, Case No. VFA-0139, on February 28, 1996, is hereby denied.

(4)The Motion for Reconsideration filed by William H. Payne, Case No. VFA-0141, on February 28, 1996, is hereby denied.

(5)The Appeal filed by William H. Payne, Case No. VFA-0140, on February 28, 1996, is hereby denied.

(6)The Appeal filed by William H. Payne, Case No. VFA-0138, on February 28, 1996, is hereby dismissed.

(7)This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 26, 1996

<1>Mr. Payne's correspondence with the Secretary of Energy was forwarded to this Office on February 21, 1995 (Feb. 5 Payne correspondence). In reviewing the correspondence we determined that Mr. Payne was appealing several different Freedom of Information Act (FOIA) matters. However, the correspondence did not include copies of the determinations so that this Office could begin processing the FOIA Appeal. See 10 C.F.R. § 1004.8(b). After contacting Mr. Payne and speaking with FOIA officials at the Department of Energy's Albuquerque Operations Office (DOE-AL) and its Headquarters Freedom of Information and Privacy Act Division (FOIA Division), we believe that we now possess the Decision and Order, letters and determinations which were the subject of Mr. Payne's correspondence. His Appeal was considered to be filed as of February 28, 1996.

<2>The University of California is the prime contractor responsible for maintaining and operating LANL.

<3>In addition to those items mentioned above, it appears that Mr. Payne also desired to appeal a denial under the FOIA of copies of Sandia Corporation (Sandia Corp.) computer chip purchase orders at SNL. However, we have been unable to locate any FOIA request filed by Mr. Payne or a determination letter issued by the DOE concerning this matter. DOE-AL informs us that its database, which tracks all incoming FOIA requests, shows no record of a request for computer chip purchase orders, and DOE-AL would be the appropriate operations office to process such a request if it was filed pursuant to the FOIA. See Memorandum of Telephone Conversation between Elva Barfield, DOE-AL FOIA Officer and Ariane Cerlenko, OHA Staff Attorney (February 14, 1996). FOIA appellants may not file new requests for information in their appeals. See Alan J. White, 17 DOE ¶ 80,117 at 80,539 (1988); Arthur Scanla, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). Mr. Payne should therefore file a request for this information with DOE-AL if he seeks to determine whether there is any responsive information on this matter.

<4>It appears that Mr. Payne has published the following materials:

(1) William H. Payne, Machine, Assembly and System Programming for the IBM 360 (1969) (in English and 1971 in Spanish);

(2) William H. Payne, Implementing BASICs: How BASICs Work (1982);

(3) William H. Payne, Embedded Controller Forth for the 8051 Family (1990);

(4) William H. Payne, Graduate Education: The Ph.D. Glut, 16 Communications of the ACM (1973);

(5) P. Freeman, M.A. Malcolm, William H. Payne, Graduate Education: The Ph.D. Glut, Response and Rebuttal, 17 Communications of the ACM 206-07 (1973);

(6) William H. Payne, Setting FORTH, 4 Timex/Sinclair User 42-46 (1982);

(7) William H. Payne, ROMable FORTH Applications Code Development, 4 IEEE Software 100-102 (1984);

(8) William H. Payne , Decode overlapped EPROM, RAM, and I/O, EDN (May 17, 1987);

(9) William H. Payne, Combine FORTH with other Tools for Rapid Software Development, Electronic Design 103-06 (1988).

<5>The two articles, which appeared in the Albuquerque Journal, discuss the lawsuit that Mr. Payne filed against Sandia Corp. and efforts by the DOE to scrutinize old "whistleblower" cases. See Stieber, Tamar, Fired Worker Files Lawsuit Against Sandia, Albuquerque Journal (April 25, 1993); Spohn, Lawrence, DOE to Scrutinize Fairness in Old Whistleblower Cases, Albuquerque Journal (November 7, 1995). Mr. Payne was interviewed for the article written by Mr. Spohn.

<6>If the DOE finds that a request satisfies these four factors, it must also consider whether disclosure of the information is primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii).

<7>In investigating Mr. Payne's claim to have "published" letters via posting on the Internet, we performed four comprehensive searches of the various resources available on the Internet (World Wide Web, Gopher, Telnet and Usenet Newsgroups) using Yahoo, AltaVista, Webcrawler and Lycos search engines. We searched for any documents containing his name. The only responsive material we discovered consisted of a Decision and Order issued by this office containing Mr. Payne's name and the book published by Mr. Payne entitled Embedded controller Forth for the 8051 family. We note that the posting of an article or articles on the Internet is not necessarily the type of broad circulation envisioned by courts evaluating fee waiver requests. See e.g. National Treasury Employees Union v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987); Crooker v. Department of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984). Further, our inability to locate this "published" information supports the finding that the "publication" claimed by Mr. Payne is insufficiently broad to show dissemination ability.

<8>Even if we had found that Mr. Payne had the ability to disseminate the requested information, we would still have upheld DOE-AL's denial of his fee waiver request. In evaluating a fee waiver request, the agency must also determine whether disclosure of the information is "likely to contribute" to the public's understanding of the government operations and activities. In this regard, we note that the Office of Chief Counsel, DOE-AL, has released to Mr. Payne the aggregate invoice amount related to both the "Morales" litigation and the work performed by the law firm of Simons, Cuddy and Friedman at SNL. See Letter from Charles S. Przybylek, Chief Counsel, DOE-AL to William H. Payne (February 21, 1996). Since Mr. Payne already possesses the total amount of money spent on these matters at SNL, the itemization of amounts claimed on any particular invoice is not likely to contribute anything new to the public's understanding. See e.g. Knolls Action Project, 25 DOE ¶ 80,148 (1995); U.A. Plumbers and Pipefitters

Local 36, 24 DOE ¶ 80,148 (1994).

<9>We will modify a prior Decision and Order in an FOIA proceeding where an applicant persuasively demonstrates that (1) the prior determination was incorrect because we did not consider all material facts or we misapplied the law, or (2) the prior determination, though correct when issued, is no longer correct because of a change in the applicable law or the circumstances of the case. See Ron Vader, 23 DOE ¶ 80,183 (1994); Power City Electric, Inc., 23 DOE ¶ 80,126 (1993).

Case No. VFA-0129, 25 DOE ¶ 80,173

February 29, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nathaniel Hendricks

Date of Filing: February 8, 1996

Case Number: VFA-0129

On February 8, 1996, Nathaniel Hendricks (Appellant) filed a Motion for Reconsideration (Motion) of a Decision and Order issued to him by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). Nathaniel Hendricks, Case No. VFA-0106 (January 26, 1996). In that Decision, we remanded the Appellant's Freedom of Information Act (FOIA) request to the DOE's Office of Environment, Safety and Health (DOE/EH). In his current Motion, the Appellant requests that his case also be remanded to the DOE's Chicago Operations Office (COO).

Background

On July 29, 1994, the Appellant submitted a FOIA request to the President's Advisory Committee on Human Radiation Experiments (Committee) seeking information relating to accidental and/or planned releases of radiation between 1940 and 1946 from the University of Chicago's Manhattan Project site, Stagg Field, or from any other location in Chicago. The Committee forwarded the request to the DOE which in turn sent his request to DOE/EH and COO. After COO and DOE/EH issued their determinations, the Appellant filed an Appeal in which he contended that the search for responsive documents had been inadequate. In the OHA's January 26 Decision, we upheld the reasonableness of the COO search, which had been conducted by its contractor, Argonne National Laboratory (Argonne). Specifically, the OHA found that Argonne's refusal to search some 6,500 scientific notebooks which were likely to be radioactive was reasonable.<1>However, the OHA concluded that

DOE/EH's search of available, relevant databases had been inadequate and accordingly, remanded the matter to DOE/EH for further action. On February 8, 1996, the present Motion challenging the COO portion of the Decision was filed with the OHA.

Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order of an appeal. See 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. Cf. Chuck Hansen, 18 DOE ¶ 80,116 (1988). In the present case, we have decided, as a discretionary matter, to consider only some of the points raised by the Appellant in his Motion for Reconsideration.

In the Motion, the Appellant raises numerous arguments, labeled as A through P. In Items A through C, the Appellant argues that the DOE improperly failed to search the files of the National Archives, the U.S.

Army Corps, other military agencies, and "federal health records." Under the FOIA, each agency is responsible for conducting its own FOIA searches and therefore, our January 26 Decision correctly advised the Appellant to direct his request to those other agencies. In Item J, the Appellant argues that the DOE should have searched City of Chicago and State of Illinois records. Neither of those bodies are federal agencies, and therefore their records are not agency records subject to the requirements of the FOIA. In Item E, the Appellant argues that the University of Chicago's records should have been searched by DOE. Some DOE contractor records may be subject to the FOIA under 10 C.F.R. § 1004.3(e). See 59 Fed. Reg. 63,884 (December 12, 1994). However, as stated in our January 26, 1996 Decision, COO had previously determined that the University of Chicago has no documents from the University's Manhattan Project research location, the Metallurgy Laboratory. Thus, because none of the information the Appellant gave in his initial FOIA request indicated there were responsive agency records at the University, the DOE was not required to ask the University to conduct a search. But see Footnote 2.

Furthermore, in Item A, the Appellant states that COO did not notify him of his right to appeal to this Office in its original determination. The OHA cured this defect in its January 26 Decision when it considered the adequacy of the COO search. In Items F, G, I, and P, the Appellant repeats many of the same arguments raised in his original Appeal. The OHA dealt with each of these arguments in the January 26 Decision and thus need not consider them here. Also, in Item D, the Appellant argues that this Office should have required that the thousands of radioactive scientific notebooks be searched regardless of the time and expense of such a laborious process. However, as we stated in the January 26 Decision, it would be unreasonable to require the expenditure of perhaps more than $100,000 and many thousands of hours to conduct this "needle in a haystack" search. The Appellant has presented no substantive argument that would convince us otherwise. Accordingly, we uphold our original decision regarding the notebooks and the other issues raised in the Motion and discussed above.

However, Items K through O do present facts which the Appellant has not previously brought to the DOE's attention, and we will exercise our discretion to consider them. In the course of reviewing the Appellant's Motion, Dr. Schlenker of Argonne stated that since the Appellant had not included these facts in his request, the earlier search may not have revealed documents which would have been responsive. See Memorandum of Telephone Message from Dr. Robert Schlenker to Dawn Koren (February 20, 1996). Consequently, we shall remand this portion of the case to COO.<2>On remand, COO shall identify any additional documents found to be responsive in light of the new facts presented, and either release them or provide adequate justification for withholding any portion of them. <3>Since this Office already remanded this case to DOE/EH to continue its portion of the search, the DOE/EH search is not at issue in this Motion for Reconsideration. However, in the course of our most recent telephone conversation with Bob Zielinski of DOE/EH, he asked whether the DOE is required by the FOIA to search two relevant Internet databases which the DOE has created. See Memorandum of Telephone Conversation between Dawn Koren, OHA Staff Attorney, and Bob Zielinksi, Office of Human Radiation Experiments (February 13, 1996). In Department of Justice v. Tax Analysts, 492 U.S. 136 (1989)(Tax Analysts), the Supreme Court decided that under the FOIA, an agency may direct requesters to locations where that agency has previously made responsive documents publicly available. Tax Analysts, 492 U.S at 152-153. Therefore, we have directed the Appellant in a separate letter to a publicly-available source of the two relevant DOE Internet databases. But because there is a remaining non-computerized database which includes more documents than are available on the Internet, that database still must be searched by DOE/EH, taking into account new information provided by the Appellant. Therefore, the Motion was forwarded by this Office to DOE/EH for use in its continuing search. <4>

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Nathaniel Hendricks on February 8, 1996, Case Number VFA-0129, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Chicago Operations Office, which shall conduct a search for documents responsive to the Appellant's request as described in the above Decision and Order, and shall

promptly issue a new determination regarding the result of that search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 29, 1996

<1>The number of these documents was described as 5,000 in the January 26 Decision. It appears that COO actually holds

approximately 6,500 radioactive notebooks. See Memorandum of Telephone Conversation between Dawn Koren, OHA Staff Attorney, and Dr. Robert Schlenker, Director, Environment, Safety and Health, Argonne (January 17, 1996)(located in Case No. VFA-0106).

<2>These new facts include that the Appellant witnessed colored smoke and men marching at Stagg Field during the Manhattan Project. When the Appellant questioned men who appeared to be taking measurements of the field, he was told that "sub-chasers" were being built at Gary, Indiana. Also, the Appellant specified that he was interested in radiation releases and measurements involving the air, water and soil of Stagg Field and surrounding areas. See Letter from Nathaniel Hendricks, Appellant, to Director, OHA (February 8, 1996)(Appeal Letter). Further, we note that the Appellant has now informed us that

while he attended the University of Chicago Laboratory School during the early 1940's, the school physically examined him, took urine samples and tested him with an electronic monitoring device. See Memorandum of Telephone Conversation between Dawn Koren and Nathaniel Hendricks (February 9, 1996) and Appeal Letter. While the University does not possess documents of the Metallurgy Laboratory itself, on remand, COO should determine whether either Argonne or the University possess responsive Laboratory School records.

<3>Since this Office previously remanded this case to DOE/EH to continue its portion of the search in our earlier Decision, the DOE/EH search is not at issue in this Motion for Reconsideration. However, in the course of our most recent telephone conversation with Bob Zielinski of DOE/EH, he suggested directing the Appellant to the two relevant Internet databases which the DOE has created. See Memorandum of Telephone Conversation between Dawn Koren and Bob Zielinski, Office of Human Radiation Experiments (February 13, 1996). We have determined that the DOE may direct the requester to a publicly-available Internet source, because under United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989)(Tax Analysts), an agency can direct requesters to locations where that agency has made responsive documents publicly available. See Tax Analysts, 492 U.S. at 152-153. Therefore, we have informed the Appellant in the cover letter to this Decision of the locations of these Internet sources. But because there is a remaining non-computerized source

<4>(the DOE Office of Science, Technology and Information (OSTI) bibliography) which includes more documents than are available in the Internet databases, the OSTI bibliography still must be searched by DOE/EH, taking into account the new facts provided by the Appellant in Items K through O of his Motion. Accordingly, this Office forwarded the Motion to DOE/EH for use in its continuing search of the OSTI bibliography.

Case No. VFA-0130, 25 DOE ¶ 80,178

March 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Hellen Ruth Sutton-Pank

Date of Filing: February 9, 1996

Case Number: VFA-0130

On February 9, 1996, Hellen Ruth Sutton-Pank filed an Appeal from a determination issued to her on January 2, 1996 by the Department of Energy's Albuquerque Operations Office (DOE/AL). That determination was issued in response to a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

On September 12, 1995, Ms. Sutton-Pank sent letters to the President of the United States and the Secretary of Energy in which she sought records pertaining to possible radiation exposure of her father, Audrey Phillip Sutton, during his employment at the Sandia National Laboratory (SNL) in Albuquerque, New Mexico. SNL is a DOE facility currently operated by Lockheed/Martin Corporation (Lockheed/Martin). <1> DOE Headquarters forwarded Ms. Sutton-Pank's request to DOE/AL which processed her request under the Freedom of Information Act. In its January 2, 1996 determination letter, DOE/AL provided Ms. Sutton-Pank with a redacted copy of DOE dosimetry records pertaining to Mr. Sutton. Additionally, DOE/AL informed Ms. Sutton-Pank that Lockheed/Martin had located employee and medical records pertaining to Mr. Sutton in its files. Because the records in the Lockheed/Martin files were not DOE property, DOE/AL informed Ms. Sutton-Pank that the employee records could be obtained by writing directly to Lockheed/Martin at SNL. With regard to the medical records, DOE/AL provided Ms. Sutton-Pank with a Lockheed/Martin "Authorization for Release of Medical Information Form" (Authorization Form) and stated that she should have her mother complete the form and mail it to SNL.

Ms. Sutton-Pank sent a letter to Lockheed/Martin requesting Mr. Sutton's employee records and submitted the Authorization Form. Ms. Sutton-Pank subsequently received Mr. Sutton's employee records from Lockheed/Martin but has not received a response from Lockheed/Martin regarding Mr. Sutton's medical records. See Memorandum of Telephone Conversation between Helen Ruth Sutton-Pank and Richard Cronin, OHA Staff Attorney (February 20, 1996). In her Appeal, Ms. Sutton-Pank argues that DOE/AL should have provided the medical records possessed by Lockheed/Martin. In support of her argument she notes that the records were generated pursuant to projects at a DOE facility and paid for by DOE's predecessor agencies.

II. Analysis

Our threshold inquiry in this case is whether the Lockheed/Martin medical records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). We

note however that records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). After reviewing the facts regarding this Appeal, we conclude that the records in question are not "agency records" and are not subject to the FOIA under DOE regulations. As discussed below, the fact that the Lockheed/Martin medical records may have been created at a DOE facility or pursuant to a DOE funded project is not determinative on the issue of whether the medical records should be considered subject to the FOIA.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created or acquired by non-federal organizations, such as Lockheed/Martin, are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Lockheed/Martin, through its wholly owned subsidiary Sandia, is the prime contractor responsible for maintaining and operating SNL. While the DOE obtained Lockheed/Martin's (including Sandia's) services and exercises general control over the contract work, it does not supervise its day-to-day operations. We therefore conclude that Lockheed/Martin (including Sandia) is not an "agency" subject to the FOIA.

Although Lockheed/Martin is not an agency for the purposes of the FOIA, its records responsive to Ms. Sutton-Pank's request could have become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In the present case, the medical records in question had not been obtained by the DOE and were not in DOE/AL's control at the time of the appellant's request. See Memorandum of Telephone Conversation between Elva Barfield, FOIA Officer, DOE/AL and Richard Cronin, OHA Staff Attorney (February 26, 1996). Thus, the medical records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document

in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We therefore next look to the contract between DOE and Lockheed/Martin's subsidiary, Sandia, to determine the status of these records. Subsection H-18 (a) of that contract states:

Government's Records. *Except as is provided in paragraph (b) of this provision* and as may be otherwise agreed upon by the Government and the Contractor, all records acquired or generated by the Contractor in its performance of this Contract shall be property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the progress of the work or, in any event, as the Contracting Officer shall direct upon settlement of this contract.

Contract No. DE-AC04-94AL85000, Subsection H-18 (a) (emphasis added). Paragraph (b) of this subsection states:

Contractor's Records. The following records acquired or generated by the Contractor in its performance of this contract (to the extent not listed and maintained as a Privacy Act record pursuant to the Section H provision entitled "Privacy Act System of Records") are the property of the Contractor and not within the scope of paragraph (a), above:

(1) Personnel records, medical records and files (excluding personnel radiation exposure records) maintained on individual employees, applicants, and former employees of the Contractor ....

Thus, because the medical records (other than the dosimetry records already provided to Ms. Sutton-Pank) are not among the records which are "property of the Government" under the DOE's contract with Lockheed/Martin's subsidiary, Sandia, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under DOE regulations. Accordingly, we shall deny the present FOIA Appeal. <2>

It Is Therefore Ordered That:

(1) The Appeal filed by Hellen Ruth Sutton-Pank on February 9, 1996, Case Number VFA-0130, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 11, 1996

<1>

Lockheed/Martin created Sandia Corporation (Sandia) to operate SNL. The medical records at issue were obtained by Lockheed/Martin from a prior contractor at SNL. See Memorandum of Telephone Conversation between Elva Barfield, FOIA Officer, DOE/AL and Richard Cronin, OHA Staff Attorney (February 28, 1996).

<2>

While we find in this Decision that the Lockheed/Martin medical records are not agency records subject to the FOIA, we have no reason to believe that Lockheed/Martin will not ultimately provide Ms. Sutton-Park with the requested medical records.

Case No. VFA-0131, 25 DOE ¶ 80,176

March 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janis C. Garrett

Date of Filing: February 12, 1996

Case Number: VFA-0131

On February 12, 1996, Janis C. Garrett (the appellant) filed an Appeal from a determination issued to her by the Department of Energy's (DOE) Western Area Power Authority (WAPA). In that determination, WAPA denied a request for information filed by her under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require WAPA to conduct an additional search for responsive documents.

I. BACKGROUND

On December 14, 1995, the appellant filed a twelve-part request for information with WAPA concerning the selection process for employment vacancy No. SAO-1-95. On January 11, 1996, WAPA issued a determination releasing documents responsive to six parts of the appellant's request, and finding that no documents that were responsive to the other six parts existed. Portions of the responsive documents released to the appellant were withheld pursuant to FOIA Exemption 6. <1> On February 12, 1996, the present Appeal was filed with this office.

II. ANALYSIS

The FOIA generally requires that documents held by federal agencies be released to the public upon request. If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981).

The present Appeal seeks copies of any waivers requested from the Office of Personnel Management's Hiring Moratorium by WAPA. In addition, the Appeal contains an additional set of questions concerning the selection process. Finally, the appellant seeks an explanation of why no documents showing the ranking of individuals for SAO-1-95 were identified and released to her. We need not consider the appellant's request for copies of any waivers sought by WAPA from the Office of Personnel Management's hiring moratorium. Since this request was not included in the appellant's original request it is in fact a new request for information. We do not permit FOIA

appellants to broaden their requests for information in their appeals. Alan J. White, 17 DOE ¶ 80,117, 80,539 (1988); see also Arthur Scanla, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). The appellant should

therefore file a new request for this information with WAPA in order to obtain the information she is seeking.

The FOIA does not require agencies to respond to questions directed to them by requesters. See 10 C.F.R. § 1004.4(d). Instead, the FOIA is limited to requiring the "disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975); see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 192 (1975). Therefore, we will not consider those portions of the Appeal constituting questions. Moreover, most of the questions contained in the Appeal are raised for the first time on Appeal and therefore constitute a broadening of the appellant's original request. For these reasons, we are dismissing those portions of the Appeal which consist of questions.

The remainder of the appeal challenges the adequacy of WAPA's search for documents containing the ranking of qualified candidates for SAO-1-95. We contacted WAPA and were informed that no documentation of the ranking of qualified individuals for the SAO-1-95 position exists because the selection process for that position was terminated before a list of qualified candidates was produced. Memorandum of February 29, 1996 telephone conversation between Matthew Lavender, WAPA Staff Attorney and Steven Fine, OHA Staff Attorney. Accordingly, we find that WAPA's conclusion that no responsive documents for this request exist is reasonable. WAPA's search for responsive documents is therefore adequate. Accordingly, we are denying this portion of the Appeal.

III. Conclusion

For the reasons stated above, we find that the Freedom of Information Act Appeal filed by Janis C. Garrett, Case No. VFA-0131, shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Janis C. Garrett, Case No. VFA-0131, on February 12, 1996, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 11, 1996

<1> The appellant does not contend that Exemption 6 was improperly applied.

Case No. VFA-0132, 25 DOE ¶ 80,179

March 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James E. Minter

Date of Filing: February 12, 1996

Case Number: VFA-0132

On February 12, 1996, James E. Minter filed an Appeal from a determination issued to him on January 9, 1996, by the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE). That determination concerned a request for information submitted by Mr. Minter pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Albuquerque would be required to conduct a further search for responsive material.

I. Background

In his April 13, 1995 request, Mr. Minter, an employee at the DOE's Oak Ridge Operations Office (Oak Ridge), sought all information concerning an alleged assault and battery that occurred at Albuquerque on January 26, 1994. Mr. Minter was accused of assaulting Frank Oakes, another Oak Ridge employee, while both employees were traveling on DOE business. Albuquerque conducted a search for documents responsive to Mr. Minter's request. On July 2, 1995, Albuquerque issued its determination, releasing responsive documents but further stating that the Transportation Safety Division (TSD) could not find any responsive statements or reports by Ray Parrett, Chief of the TSD at Oak Ridge at the time of the incident.

On August 8, 1995, Mr. Minter filed an Appeal with the Office of Hearings and Appeals of the DOE, contending that Albuquerque's search for statements or reports by Mr. Parrett was inadequate. During that Appeal, Mr. Minter stated that he believed Mr. Parrett took handwritten notes during a meeting Mr. Minter had with Mr. Parrett soon after the incident. As a result of this information, Albuquerque contacted Mr. Parrett, who had retired since the incident, and determined that the notes could be located in a place that had not yet been searched. Therefore, the Appeal was remanded to Albuquerque to search for additional documents. On January 9, 1996, Albuquerque sent Mr. Minter a letter explaining that, although Mr. Parrett recalled having taken notes about the incident, an additional search located no documents. In response, Mr. Minter filed this Appeal. Appeal Letter dated February 1, 1996, from James E. Minter to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably

calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we contacted Terry Apodaca at Albuquerque to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Mr. Minter's request might exist. We were informed by Mrs. Apodaca that Mr. Parrett had been contacted at his home and a search had been conducted of his old office and the files where he thought he may have left the notes. Memorandum of Telephone Conversation between Janet R. H. Fishman, Staff Attorney, OHA, and Terry Apodaca, Albuquerque, February 22, 1996. Mrs. Apodaca stated that no handwritten notes were located. She indicated that it is possible Mr. Parrett's handwritten notes were discarded by his successor.

As we stated in our September 6, 1995 Decision, we are convinced that Albuquerque followed procedures which were reasonably calculated to uncover the material sought by Mr. Minter in his request. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that neither search uncovered documents Mr. Minter believed may be in the possession of DOE does not mean that the search was inadequate. In addition, Mr. Minter has not provided any evidence, beyond his personal belief, that any additional documents exist in the Albuquerque's files. Therefore, under the circumstances of this case, we find that Albuquerque's search for responsive documents was adequate and that no further documents responsive to Mr. Minter's request exist at Albuquerque. Accordingly, Mr. Minter's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on February 12, 1996, by James E. Minter, Case No. VFA-0132, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 12, 1996

Case No. VFA-0135, 25 DOE ¶ 80,186

April 3, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David K. Hackett

Date of Filing: February 28, 1996

Case Number: VFA-0135

On February 28, 1996, the Office of Hearings and Appeals (OHA) received an Appeal filed by David K. Hackett from a determination issued to him by the Manager of the Department of Energy's (DOE) Oak Ridge Operations Office (hereinafter referred to as "the Manager"). This determination was issued in response to requests for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Manager to release portions of a document that was provided to Mr. Hackett in redacted form, and to conduct a further search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 6 and November 23, 1994, Mr. Hackett submitted FOIA requests to DOE Headquarters (DOE/HQ). In his November 6 submission, Mr. Hackett requested access to all documents relating to his complaints against Lockheed Martin Energy Systems, Inc. (LMES), a DOE contractor, including all such documents located in the following DOE Offices: Oak Ridge, Contractor Employee Protection, Inspector General, Declassification and the Executive

Secretariat. In his November 23 filing, Mr. Hackett requested a list of all of LMES's subcontractors to its contract with the DOE.

DOE/HQ coordinated a department-wide search for documents responsive to Mr. Hackett's requests. In so doing, DOE/HQ identified four Offices in which responsive documents might be found: Oak Ridge, Inspector General, Field Management and Economic Impact and Diversity. Mr. Hackett's requests were forwarded to these Offices. On February 22, 1995, the Manager issued his determination on behalf of the Oak Ridge Office concerning Mr. Hackett's November 6 request, releasing 64 pages of responsive documents.

On March 8, 1995, Mr. Hackett filed an Appeal with the OHA (Case No. VFA-0032) contesting the adequacy of Oak Ridge's search for responsive documents. In a Decision and Order issued on March 31, 1995, we determined that there may have been responsive documents that were not identified in the initial

search. See David Hackett, 25 DOE ¶ 80,107 (1995). This conclusion was based on discussions with Mr. Hackett and with the Oak Ridge Office, during which it became evident that responsive documents might be located in the files of William Stephens, a former employee of the Office of Chief Counsel. Id. at 80,514 n.4. Consequently, we remanded the matter to the Manager for an additional search. In addition, we requested that upon remand, the Oak Ridge Office investigate Mr. Hackett's claim that Rufus Smith of the Oak Ridge EEO Office was maintaining a file concerning Mr. Hackett, and that such a file should contain responsive documents.

In response to the OHA's March 31, 1995 Decision and Order, the Manager conducted a further search for responsive documents, and issued another determination to Mr. Hackett on June 30, 1995. All responsive documents that were located as a result of this search were released to Mr. Hackett in their entirety, except for Document 11, which was released in redacted form. In his determination, the Manager cited Exemption 4 of the FOIA (5 U.S.C. § 552(b)(4)) in support of his decision to withhold portions of Document 11. Exemption 4 protects from public disclosure any "trade secrets and commercial or financial information obtained from a person and [which is] privileged or confidential."

On February 28, 1996, the OHA received Mr. Hackett's Appeal of the Manager's June 30, 1995 determination. <1> In his Appeal, Mr.Hackett contests the Manager's decision to withhold portions of Document 11 pursuant to Exemption 4. He again claims that the search for responsive documents was inadequate, and he also contends that contracts between LMES and its subcontractors are agency records that are subject to mandatory disclosure pursuant to the FOIA, and that a list of those subcontractors should therefore have been provided to him.

II. Analysis

A. Document 11

Document 11 is an invoice for legal fees that were incurred by LMES in connection with its contract with the DOE. The invoice was forwarded by LMES to the DOE for payment in accordance with the provisions of the DOE's contract with LMES. The withheld portions of the document consist of a description of the services rendered, the amount of hours billed for each service, and the cost for each service.

Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be exempt from mandatory disclosure under Exemption 4, a document supplied to the DOE on a non-voluntary basis must meet the following criteria: the document must contain either (A) "trade secrets" or (B) information which is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Association v. Morton, 498 F 2d. 765 (D.C. Cir. 1974) (National Parks). Cf. Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F 2d. 871, 879 (D.C. Cir. 1992) (information voluntarily provided to the Government is confidential under Exemption 4 if it is the kind of information that the provider would not customarily make available to the public).

We will analyze the withholding of portions of Document 11 under the National Parks test described above because LMES submitted the invoice to the DOE on a non-voluntary basis. Applying this test, we conclude that the Manager properly applied Exemption 4 in withholding portions of Document 11. Clearly, a request for payment for services rendered is "commercial" within the meaning of Exemption 4. In addition, the information was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of that Exemption. See Ronson Management Corp., 19 DOE ¶ 80,117 (1989). Finally, the withheld portions of the document consist of information that is subject to the attorney work product privilege. Specifically, those portions include descriptions of the legal services provided, the cost of each service and the amount of time spent by the attorneys in performing each service. The descriptions of the services provided reflect the legal theories and strategies of the attorneys. The time and

cost figures reveal the relative importance attached to each task by the attorneys. For these reasons, we have previously determined that this type of information is subject to the attorney work product privilege. C.D. Varnadore & Betty Freels, 24 DOE ¶ 80,123 (1994). We therefore reject Mr. Hackett's contention that the Manager improperly withheld portions of Document 11.

B. Adequacy of the Search for Responsive Documents

In his Appeal, Mr. Hackett also contests the adequacy of the Manager's search for responsive documents. Specifically, he states that because his original complaint was made to Mr. Smith's office, that office should possess responsive documents. In addition, Mr. Hackett contends that a reasonably thorough search should have produced documents from LMES' EEO Office relating to his complaints, and a list of LMES' subcontractors.

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In connection with Mr. Hackett's March 8, 1995 Appeal, we contacted the Oak Ridge Office to ascertain the nature of the search that was conducted. At that time, we were informed that the EEO Office, the Safety and Health Division and the Office of Chief Counsel were searched for responsive documents. Each of these Offices certified to Oak Ridge's FOIA Officer that the search was performed in a reasonable manner. See David Hackett, 25 DOE ¶ 80,107 at 80,514 (1995). However, as we stated previously, during discussions with Mr. Hackett and with the Oak Ridge Office, it became evident that additional responsive documents might be located in Mr. Stephens' files. We therefore remanded the matter to the Manager so that a search of those files could be performed, and so that Mr. Hackett's claim that Rufus Smith maintained a file concerning Mr. Hackett could be investigated. Id. at 80,514 n.4.

Subsequent to our remand, an additional search was performed. Specifically, Mr. Stephens' files were searched for documents responsive to Mr. Hackett's November 6 and November 23, 1994 requests, and such documents were provided to him. In addition, we have been informed by the Oak Ridge Office that Mr. Smith has been contacted on numerous occasions concerning the matter of EEO files relating in any way to Mr. Hackett, and that he has repeatedly affirmed that he has no responsive documents in his possession. Also, the Oak Ridge National Laboratory and the Oak Ridge Associated Universities were searched.

Nevertheless, Mr. Hackett claims that a reasonable search should have produced documents generated by LMES's EEO Office concerning his complaints and a listing of LMES's subcontractors. In this regard, he argues that these documents are agency records of the Department of Energy because they were "produced as official papers in the operation of the federal facility, [and] should therefore be available under the" FOIA. November 23, 1994 FOIA Request of David Hackett. <2>

The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in United States Department of Justice vs. Tax Analysts, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency; and, (2) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch..., or any independent regulatory agency." 5 U.S.C. § 552(f). In addition, where the provisions of

an agreement between the DOE and a prime contractor provide that documents relating to work under the contract shall be the property of the government, such records shall be subject to disclosure under the FOIA. 10 C.F.R. § 1004.3(e)(1).

LMES, which is a privately owned and operated corporation, is clearly not an "agency" as that term is defined in the FOIA. Moreover, after conducting a thorough search of its facilities, the Oak Ridge Office has informed us that it does not possess copies of documents generated by LMES' EEO Office concerning Mr. Hackett's complaints, nor does it possess copies of LMES' contracts with its subcontractors or a list of those subcontractors. Furthermore, the agreement between the DOE and LMES provides that these records, if they exist, are the property of LMES. Therefore, these documents are neither agency documents under the Tax Analysts test, nor otherwise subject to the FOIA by operation of regulation.

III. Conclusion

We have thoroughly considered each of the issues raised in Mr. Hackett's Appeal, and we conclude that the deleted portions of Document 11 were properly withheld, that the Oak Ridge Office's search for responsive documents was adequate, and that LMES' contacts with its subcontractors and any existing list of those subcontractors are not agency documents and are not subject to the FOIA. Mr. Hackett's Appeal will therefore be denied.

It is Therefore Ordered That:

(1) The Appeal filed by David K. Hackett on February 28, 1996 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 3, 1996

<2>Mr. Hackett also contends that LMES' contracts with its subcontractors are federal contracts pursuant to the McNamara- O'Hara Services Contract Act of 1965, 41 U.S.C. §§ 351 et seq.,and should therefore be considered agency records. Therefore, Mr. Hackett claims, a listing of such contractors would consist of "public information required to be released under the FOIA," and should therefore be released to him.

As an initial matter, the FOIA does not require an agency to create a document that did not previously exist in order to satisfy a FOIA request. See Yeager v. Drug Enforcement Administration, 678 F.2d 315, 321 (D.C. Cir. 1982). Therefore, even if agency records exist from which such a list could be compiled, the FOIA does not compel the DOE to create it.

Furthermore, the McNamara-O'Hara Services Contract Act does not support Mr. Hackett's contention that contracts entered into by LMES and its subcontractors are agency records. That Act establishes minimum standards for compensation and health and safety protection of employees performing work on service contracts entered into with the federal government. Nowhere does it state that contact documents executed by a federal contractor and a subcontractor are the property of the federal government, or that such documents are agency records within the meaning of the FOIA.

Case No. VFA-0136, 25 DOE ¶ 80,180

March 21, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gilberte R. Brashear

Date of Filing: March 7, 1996

Case Number: VFA-0136

On March 7, 1996, Mrs. Gilberte R. Brashear filed an Appeal from a determination issued to her on January 31, 1996, by the FOIA Officer of the Oak Ridge Operations Office (FOIA Officer) of the Department of Energy (DOE). In that determination, the FOIA Officer stated that she did not find any documents responsive to the appellant's information request under the Freedom of Information Act (FOIA) at the Oak Ridge Operations Office, but forwarded the request to the DOE Albuquerque Operations Office for an additional search and separate determination.

I. Background

In a September 10, 1995 letter, the appellant requested from the United States Army Medical Command at Fort Sam Houston, Texas, copies of any information regarding her husband, Junior R. Brashear (a.k.a. John R. Brashear), especially information regarding his dosimeter readings while stationed in Los Alamos, New Mexico in the 1940s during the Manhattan Project. The United States Army Medical Command forwarded Mrs. Brashear's request for information to the DOE Oak Ridge Operations Office on January 5, 1996. In her determination, the FOIA Officer stated that she conducted a search of the records at the Oak Ridge Operations Office using both names provided by Mrs. Brashear, but did not find any responsive documents. In her Appeal, the appellant contends that the DOE's search was inadequate. The Appeal, if granted, would require the DOE to conduct a further search for documents responsive to her FOIA request.

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires that agencies search their records for responsive documents. We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). When an agency reports that no responsive documents can be found, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's

search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In order to determine whether an agency's search was adequate, we must examine the agency's actions

using a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In considering the Appeal, we contacted Mrs. Brashear to determine if she had any evidence indicating that the Oak Ridge Operations Office might have responsive documents. Mrs. Brashear stated that she had no reason to believe that the Oak Ridge Operations Office had any responsive documents because the United States Army never stationed her husband there. See Record of March 7, 1996 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Mrs. Gilberte R. Brashear. In reviewing the Appeal, we also contacted the FOIA Officer at the Oak Ridge Operations Office to ascertain the extent of the search she had performed. See Record of March 18, 1996 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Amy Rothrock, Oak Ridge Operations Office FOIA Officer. The FOIA Officer stated that she searched: (1) the DOE Radiation Study Registry; (2) the DOE Radiation Exposure Records; (3) the DOE Personnel Security Clearance Index; (4) the DOE Radiation Accident Registry; and (5) the US Diethylenetriaminepentaacetic Acid Registry. The FOIA Officer stated that these indexes list the individuals exposed to radiation and/or involved in accidents. These indexes include people involved in the Manhattan Project, the Atomic Energy Commission, or the Energy Research and Development Administration. The FOIA Officer also stated that the DOE does not have any records from the United States Army.

Since Mr. Brashear's name did not appear in any of the indexes searched, the FOIA Officer concluded that no records exist at the Oak Ridge Operations Office pertaining to Mrs. Brashear's request. However, since the United States Army stationed Mr. Brashear in Los Alamos, New Mexico, the FOIA Officer believed there is a possibility that documents might exist at the DOE's Albuquerque Operations Office, also in New Mexico. For this reason, the FOIA Officer properly forwarded the request to the DOE Albuquerque Operations Office for a search of that facility and a separate determination. Given these facts, we have no reason to believe that any responsive documents exist at the Oak Ridge Operations Office and conclude that the FOIA Officer followed procedures reasonably calculated to uncover all material at the Oak Ridge Operations Office within the scope of the appellant's September 10, 1995 information request. Accordingly, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Gilberte R. Brashear on March 7, 1996 is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district in which the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 21, 1996

Case No. VFA-0142, 25 DOE ¶ 80,188

April 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:A. Victorian

Date of Filing: March 13, 1996

Case Number: VFA-0142

Dr. A. Victorian filed an Appeal from a determination issued to him on February 8, 1996, by the Office of Defense Programs (Defense Programs) of the Department of Energy. In that determination, Defense Programs responded in part to the request by neither confirming nor denying the existence of the records being sought in two portions of a request for information that Dr. Victorian filed on November 18, 1991, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The appropriateness of the type of response employed by Defense Programs has been addressed by the Federal courts. In this Decision we review the nature of the response and reach a determination that the response was proper.

I. Background

In his request, Dr. Victorian sought a number of documents, which he identified as "items." In its February 8, 1996 response, Defense Programs stated, "With respect to items 1 and 2 of your request, we can neither confirm nor deny the existence of the records you requested."

In his Appeal, Dr. Victorian contends that the projects that comprise the subject matter of items 1 and 2 exist. He bases this premise on information bearing the names of the projects that, according to Dr. Victorian, the Department of Energy had previously released to him. He then goes on to argue that, given the existence of the projects that are the subjects of items 1 and 2 of his request, information about those projects should be released to him.

II. Analysis

Although the Department rarely responds to requests for information in this manner, Defense Programs' statement that it will neither confirm nor deny the existence of records is not without precedent. This type of response is commonly called a Glomar response, which refers to the first instance in which the adequacy of such a response was upheld by a Federal court. In Phillippi v. CIA, the agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Agencies have typically used this response where the existence or non-existence of requested documents is itself a classified fact exempt from disclosure under Exemptions 1 and 3 of the Freedom of Information Act, see, e.g., id. at 1012, or where admission that documents exist would indicate

that the agency was involved in a certain issue, Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982), or that an individual is the target of investigation or surveillance, Marrera v. Department of Justice, 622 F. Supp. 51 (D.D.C. 1985).

We have reviewed the circumstances surrounding Dr. Victorian's request for items 1 and 2. We have spoken with representatives of the Office of Declassification who were directly involved in formulating the response. On the basis of that review and those conversations, we have acquired a thorough understanding of the rationale for providing Dr. Victorian with a Glomar response to portions of his request. We are furthermore convinced that, under the circumstances, such a response is the necessary and appropriate determination of Dr. Victorian's request.

In his Appeal, Dr. Victorian raises various arguments in support of the declassification and release of responsive documents that he maintains must exist. By affirming Defense Programs' Glomar response, we need not address these arguments, since we are not acknowledging the existence of any such documents.

Accordingly, Dr. Victorian's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by A. Victorian on March 13, 1996, Case No. VFA-0142, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 11, 1996

Submit

Case No. VFA-0143, 25 DOE ¶ 80,187

April 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Petrucelly & Nadler, P.C.

Date of Filing: March 14, 1996

Case Number: VFA-0143

On March 14, 1996, Petrucelly & Nadler, P.C. (Petrucelly) filed an Appeal from a determination issued to the firm in response to a request for documents submitted by Petrucelly under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on February 8, 1996, by the Oak Ridge Operations Office (DOE/OR). DOE/OR informed Petrucelly that no documents responsive to its request exist. This Appeal, if granted, would require that we order DOE/OR to conduct an additional search for responsive documents.

I. Background

On December 22, 1995, Petrucelly filed a request for information pursuant to the FOIA with DOE/OR. In its request, Petrucelly sought:

The names and last known addresses of any and all persons involved in the calcium and/or iron scientific experiments performed on students at the Fernald State School, Waltham, Massachusetts, in the 1940's and 1950's. This request includes, but is not limited to, information on all Department employees involved in the approval or procurement of radioactive isotopes used in the experiments. This request also includes, but is not limited to: S. Allan Lough and Paul Abersold.

Letter from Petrucelly & Nadler, P.C. to FOIA Officer, DOE/OR (December 22, 1995) (Request Letter).

DOE/OR performed a search of its offices, but did not forward the request to Headquarters (DOE/HQ) or any other DOE location. DOE/OR handled the matter itself because the Request Letter was very similar (although expanded in scope) to a request that Petrucelly filed with DOE/HQ earlier

in the year. *See* Letter from Petrucelly & Nadler, P.C. to DOE/HQ (March 15, 1995) (March Request). The March Request was forwarded to DOE/OR and the DOE's Office of Human Radiation Experiments<1>, and some responsive documents were released.

Upon receipt of the Request Letter, DOE/OR searched its offices and informed Petrucelly that it was unable to locate the names and addresses of any persons associated with the experiments performed at Fernald State School. *See* Letter from FOIA Officer, DOE/OR, to Petrucelly & Nadler, P.C. (February 8, 1996) (Determination Letter). The Determination Letter went on to say that information from the OHRE database on the Internet suggests that Atomic Energy Commission (AEC) files can be found either at the

DOE Archives in Washington, D.C., or at the National Archives. *Id.* DOE/OR released to Petrucelly journal articles about the experiment, AEC correspondence involving isotope distribution, and a set of records released in response to the previous request. *Id.* On March 14, 1996, Petrucelly filed an Appeal of DOE's response, alleging that the DOE/OR search was inadequate. This Appeal requests that OHA direct DOE to conduct another search of its files. *See* Request Letter at 2.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. *See* W. R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord* Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In conversations with DOE/OR, this office learned that the request remained at Oak Ridge and was never transmitted to any other DOE office for review. However, DOE/OR had contacted OHRE for the name of a person in Massachusetts who is allegedly researching this particular experiment.<2> DOE/OR intends to work with this person to determine where the records from Fernald State School were sent, and then either provide that name to Petrucelly or obtain the records for DOE and release the responsive information to the requester, subject to any applicable exemptions. *See* Memorandum of Telephone Conversation Between FOIA Officer, DOE/OR and Valerie Vance Adeyeye, OHA Staff Attorney (March 20, 1996). DOE/OR also referred us to DOE/HR's Records Management Team for information on archive searches. That organization then referred us to OHRE for any human radiation experiment records. *See* Memorandum of Telephone Conversation between Records Management Team Leader, DOE/HR, and Valerie Vance Adeyeye, OHA Staff Attorney (March 27, 1996).

III. Conclusion

In view of the available information, OHRE is the likely repository of the names and addresses of anyone involved with the Fernald State School experiments. The office was created not only to accumulate all DOE information relevant to the human radiation experiments, but also to provide the public with access to this data. It is not surprising that DOE/OR could not find any responsive material since its search was confined to Oak Ridge. This request should be reviewed by the FOIA/Privacy Act Division of DOE/HQ, which should then transmit the request to relevant DOE offices (e.g., OHRE and Records Management). If there is a possibility that responsive material is in the DOE Archives (as stated in the Determination Letter), then the Archives should be searched and the requester advised of the results of that search. Accordingly, the Appeal filed by Petrucelly & Nadler should be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by Petrucelly & Nadler, P.C. on March 14, 1996, Case No. VFA-0143, is hereby granted as set forth in Paragraph (2).

(2) This matter is hereby forwarded to the FOIA/Privacy Act Division for processing in accordance with the instructions provided in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are

situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 11, 1996

<1>The Office of Human Radiation Experiments (OHRE), established in March 1994, leads the DOE's efforts to tell the Cold War story of radiation research using human subjects. The OHRE is tasked with identifying and cataloging relevant historical documents from the 3.2 million cubic feet of agency records scattered across the country. *See* OHRE Web Page at http://www.ohre.doe.gov/.

<2>In the early to mid-1950's, radiation-related studies were carried out at the Fernald State School in Massachusetts using students as subjects. The students were administered radioactive isotopes orally and intravenously. They were told that they were participants in a "Science Club." These studies were supported by the AEC.

See Human Radiation Experiments Associated With DOE And Its Predecessors, Experiment OT-19, Radioisotope Studies at the Fernald State School, Massachusetts, OHRE Internet Database.

Case No. VFA-0144, 25 DOE ¶ 80,196

May 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Industrial Constructors Corporation

Date of Filing: April 2, 1996

Case Number: VFA-0144

On April 2, 1996, the Office of Hearings and Appeals (OHA) received an Appeal filed by Industrial Constructors Corporation (ICC) from a determination issued to it by the Department of Energy's (DOE's) Albuquerque Operations Office (DOE-AL). That determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require DOE-AL to release portions of documents which were provided to ICC in redacted form.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b). Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On September 12, 1995, ICC submitted a FOIA request for documents pertaining to Request for Proposal (RFP) 1348, Monticello Remedial Action Project, Operable Unit-1, Millsite Remediation (RFP 1348). In its March 15, 1996 determination, DOE-AL released several responsive documents pertaining to the company which was awarded the contract, OHM Remediation Services Corporation (OHM), but concluded that portions of these documents were exempt from mandatory disclosure pursuant to Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). The portions withheld were categorized by DOE-AL as (1) technical and management strategies or methodologies, (2) conflict of interest statements (including a standstill and non-competition agreement), (3) cost and financial information and (4) names and resumes of key personnel. DOE-AL found that these four categories of information were vital to OHM's competitive position and revealed how OHM conducts its business. According to DOE-AL, a release of documents containing these types of information would place OHM at a competitive disadvantage in pursuing subsequent contracts. See Letter from David L. Geary, Director, Office of Public Affairs, to William T. Murphy, Esq. (March 15, 1996).

In performing a de novo review of the withheld information, we note that DOE-AL also withheld evaluations of proposals submitted by several companies competing for RFP 1348 (evaluation reports). This included not only the evaluations of OHM but those of ICC and one other company.

In its Appeal, ICC argues that (1) DOE-AL's application of Exemption 4 was overbroad; (2) DOE-AL took the word of OHM without substantiation that all of the requested documents were confidential and

(3) DOE-AL did not adequately state the reasons behind its failure to release responsive information, but merely stated that the information was confidential. See Appeal Letter from William T. Murphy, Esq., to Director, OHA (March 17, 1996).

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (I) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have held consistently that information submitted in response to a request for proposal is submitted involuntarily and therefore is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

DOE regulations further outline the criteria for determining the applicability of Exemption 4. Such criteria include whether (1) "the information has been held in confidence by the person to whom it pertains," (2) the information is "customarily [and reasonably] held in confidence by the person to whom it pertains", (3) "the information was transmitted to and received by the DOE in confidence," (4) "the information is available from public sources," (5) "the disclosure of the information is likely to impair the [g]overnment's ability to obtain similar information," and (6) "the disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained." 10 C.F.R. § 1004.11(f)(1)-(6). The DOE regulations further provide that the DOE must solicit the submitter's views regarding the impact of release of the information if the DOE is considering release. 10 C.F.R. § 1004.11(c). The submitter's view on the impact of the release of the information is only one factor to be evaluated and weighed in the analysis, which must involve a balancing of the objective standards set forth in 10 C.F.R. § 1004.11(f). DOE-AL obtained comments from OHM in this case. OHM claims that all of the redacted information was proprietary and that its release would competitively harm OHM.

We note that both the FOIA and DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal.

The withheld materials at issue in this Appeal are clearly "commercial" within the meaning of Exemption 4 since the material was developed and submitted specifically for the purpose of acquiring a contract. See Tri-City Herald, 16 DOE ¶ 80,114 (1987) (Tri-City). In addition, the information was obtained from a "person" as required by Exemption 4, since corporate entities are deemed "persons" for purposes of Exemption 4. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985) (O'Rourke). It is not clear, however, whether all of the material withheld by DOE-AL is "privileged or confidential." In the context of this case, a claim of privilege is highly unlikely; however, portions of this proposal may possibly be "confidential" as defined in National Parks.

As stated above, for information to be found to be "confidential," it must meet one of two tests: its release would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. National Parks, 498 F.2d at 770. It is unlikely

that the government's ability in the future to obtain necessary information of the type withheld in this case would be impaired because those companies which want to compete for government contracts want to provide the government with as much information as possible to win the award for the contract. Therefore, the first alternative condition cannot be met. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release would substantially harm OHM's competitive position.

DOE-AL's decision to withhold the majority of the proposal documents is essentially based upon the blanket assertion by OHM that it would be placed at a competitive disadvantage in pursuing subsequent contracts if proprietary data, which reveals how OHM conducts its business, is released. We performed a de novo review of the withheld documents and now address each category of withheld information or documents separately.

1. Technical and Management Strategies Information

Within the category of technical and management strategies information, DOE-AL withheld the vast majority of two documents, the OHM Technical and Business Proposal and the OHM Best and Final Offer-Technical and Business Proposals. In the past OHA has found that this type of material can be withheld under Exemption 4 of the FOIA. However, in reviewing this type of material we have noted that the mere fact that the contents of a proposal may be useful to competitors in future competitions is not sufficient ground to withhold the material unless the material is unique. See Morgan, Lewis & Bockius, 20 DOE ¶ 80,165 (1990) (Morgan, Lewis). After reviewing these documents, we find that as a whole they do not meet the proper standard for withholding this information.

It is apparent from the record that DOE-AL made an attempt to segregate non-exempt material from the above-mentioned documents as required by the FOIA. For example, DOE-AL released title pages, the table of contents, introductions and some substantive content of the proposal. However, upon reviewing the withheld documents, we believe that DOE-AL could segregate and release more material than it did. For example, we note that although DOE-AL released a list of resources used by OHM to prepare its RFP, DOE-AL withheld the citations to various laws applicable to any work performed at the site. Moreover, DOE-AL released specific portions of the Best and Final Offer-Technical and Business Proposal while withholding the entire corresponding sections of the Technical Proposal. Further, DOE-AL withheld one specific award presented to OHM for work performed in the past but released other similar awards. Finally, with regard to the vast majority of the Technical and Business Proposals, DOE-AL has not sufficiently explained why release of the withheld portions would likely cause competitive harm to the submitter or how the material can be considered unique. See Tri-City, 16 DOE at 80,534. Any determination that a firm would suffer substantial competitive harm from disclosure must be supported by well-founded reasons. Id. An adequate explanation would, for example, indicate the type of competitive injury which would result from disclosure, e.g., revealing specific strategies used to complete work and how resources are allocated could enable a competitor to learn the strengths and weaknesses of a particular company and then underbid that competitor in future procurements. See, e.g., Stock Equipment Co., 18 DOE ¶ 80,104 (1988). We therefore should remand this category of withheld material to DOE-AL for a new determination complying with this analysis.

2. Conflict of Interest Statements

DOE-AL withheld in its entirety the Conflict of Interest Statements and the Standstill and Non-Competition Agreement submitted by OHM. Some of these documents appear to contain non-exempt segregable material. For example, portions of the information contained in these documents are publicly available in publications such as Moody's Industrial Manual. See 2 Moody's Industrial Manual, 6125, 6347, J-Z (1995). Since no attempt was made to segregate and release non-exempt material to the requester, we will remand this category of responsive documents to DOE-AL either to release these documents or to formulate a complete and reasoned determination regarding the withholding of this

information. As we stated above, any determination to withhold information must be supported by well-founded reasons.

3. Cost and Financial Information

With respect to the cost and financial information contained in the withheld material, we agree with DOE-AL that release of this information would result in competitive harm to OHM. This material could be used by a competitor to undercut OHM's bids in future procurements and eliminate it from effective competition. See International Technology Corporation, 22 DOE 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991); Omega World Travel, Inc, 18 DOE ¶ 80,134 (1989). However, DOE-AL also withheld the total price of the contract awarded to OHM. In the past OHA has found that since the total price of a contract, when requested after the contract has been awarded, does not reveal the submitter's bidding strategy, it could not be withheld under Exemption 4. See Covington & Burling, 20 DOE ¶ 80,124 (1990). Therefore we will remand this matter to DOE-AL either to release the total price of the awarded contract or to explain how release of the total price would competitively harm OHM.

Further, DOE-AL withheld from the Technical Proposal the prevailing wage rates set by the Davis-Bacon Act. 40 U.S.C. § 276a. While release of the actual wage rates that OHM pays to employees might cause competitive harm to OHM, DOE-AL has not adequately explained how release of the prevailing wage which federal law requires contractors to pay workers on federal projects would competitively harm OHM. Therefore, we will remand this portion of the financial and cost information to DOE-AL either to release the withheld information or to explain how the information contained in the withheld documents would competitively harm OHM.

4. Names and Resumes of Key Personnel

We agree with DOE-AL that release of the names, qualifications, and experience of OHM's key personnel would cause competitive harm to OHM. Release of this information would reveal to OHM's competitors the approach used by OHM to perform the work of the project. See Wayne T. Long, 22 DOE ¶ 80,154 (1992); Morgan, Lewis, 20 DOE at 80,688-91. Moreover, since the resumes of the companies' employees are written from OHM's viewpoint and contain only that information that OHM believes is relevant to the project, release of the resumes would also reveal OHM's view regarding the personnel skills necessary for a successful job. See, e.g., Electronic Data Systems Corp., 20 DOE ¶ 80,135 at 80,601 (1990); O'Rourke, 12 DOE at 80,706.

5. Evaluation Reports

DOE-AL withheld all of the evaluation reports related to RFP 1348. While some of the withheld documents contain information that falls into the categories outlined by DOE-AL (technical/management strategies, cost and financial information, or names and resumes of key personnel), the vast majority of the documents were neither categorized nor addressed by DOE-AL in its March 15 determination. We will therefore remand these documents to DOE-AL to describe the documents withheld and then, adequately explain the reason for withholding them.

The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Painters District Council No. 55, 24 DOE ¶ 80,149 (1994). Accordingly, we may not consider whether the public interest warrants discretionary release of the cost and financial information and other information properly withheld under Exemption 4.

III. Conclusion

We have determined to remand in full to DOE-AL the following categories of information and documents: technical and management strategies, conflict of interest statements and evaluation reports. With regard to these categories, DOE-AL shall either release the information or documents or provide ICC with newly segregated copies of the documents along with a new determination justifying the withheld information. With respect to the cost and financial information, DOE-AL shall either release the total price of the contract and the Davis-Bacon Act prevailing wage rates or issue a new determination justifying the withholding of the information. We find that DOE-AL properly withheld under Exemption 4 the remaining cost and financial information. We also find that DOE-AL properly withheld under Exemption 4 the names and resumes of key personnel.

It Is Therefore Ordered That:

(1) The Appeal filed by Industrial Constructors Corporation on April 2, 1996, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) The matter is remanded to the Department of Energy's Albuquerque Operations Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 23, 1996

Case No. VFA-0145, 25 DOE ¶ 80,189

April 29, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Stoel Rives, LLP

Date of Filing: April 2, 1996

Case Number: VFA-0145

On April 2, 1996, Stoel Rives, LLP (Appellant) filed an Appeal from a final determination issued on March 8, 1996, by the Department of Energy's (DOE) Office of Inspector General (IG). In that determination, the IG released copies of the majority of documents requested by the Appellant. However, the IG withheld one document in its entirety and deleted additional information from a number of the remaining responsive documents. This partial release occurred in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

The Appellant is a law firm representing Tenaska Washington Partners II, L.P. (TWP), a Bonneville Power Administration (BPA) Energy Resource Program contractor. On October 6, 1995, the Appellant submitted a request for information to the DOE seeking the following documents:

1) All documents and records reviewed or relied upon by the IG's office in preparing its Report of Audit of BPA's Energy Resource Programs, DOE/IG-0379 (the "Report").

2) All communications between any IG's office representative and any BPA Representative on the subject of the Report, including but not limited to all BPA comments on or relating to the Report.

3) Any other IG's office report commenting upon or evaluating BPA energy resource or energy acquisition programs or practices.

Appeal at 2. On March 8, 1996, the IG issued a determination in response to TWP's request releasing most of the requested records. However, the IG withheld one

document in its entirety and portions of several other documents under Exemption 5. In addition, the IG deleted and withheld information under Exemptions 6 and 7(C) from several documents. On April 2, 1996, the present Appeal was filed contending that the DOE's withholding of the deleted information was improper.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information

agencies are not required to release. Only Exemptions 5, 6 and 7(C) are at issue in the present case.

A. Exemption 5

The IG withheld one document in its entirety and portions of several other documents under Exemption 5 claiming that they contain "preliminary discussions of the audit that were subject to further review and change" and therefore were subject to the deliberative process privilege. Determination Letter at 1. However, after consultation with this office, the IG has agreed to conduct a further review of its withholdings under Exemption 5. We are therefore remanding this portion of the Appeal to the IG, which will issue a new determination after completing its review. Accordingly, we need not consider any of the Appellant's contentions concerning the IG's application of Exemption 5.

B. Exemptions 6 and 7

The IG has withheld the identities of audit information sources under both Exemptions 6 and 7(C). The IG has expressed a concern that release of these individual's identities might subject them to harassment, intimidation or other personal intrusions. The Appellant contends that these exemptions were improperly applied by the IG.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7, an agency must undertake a three step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would either: (1) constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), *or* (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7 standard). See generally Ripskis, 746 F.2d at 3.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The Appellant contends that the documents from which the identities of the sources were withheld are not law enforcement documents. That contention is without merit. The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. It is therefore a classic example of an organization with a clear law enforcement mandate. In the present case, where the IG investigated allegations of improprieties

concerning the BPA's Energy Resource Program, its investigatory actions were clearly within this statutory mandate.

The Appellant next contends that the identities of the sources cannot be withheld under Exemption 6, claiming that the:

identity of DOE interview subjects is not the sort of "highly personal" information or "intimate details" that are protected by the exception protecting "personnel and medical and similar files" where disclosure would be an "invasion of personal privacy."

Appeal at 5. However, it is well settled that information need not be of an intimate or highly personal nature to be protected from disclosure by Exemption 6. Department of State v. Washington Post Co., 456 U.S. 595, 102 S. Ct. 1957 (1982) (specifically rejecting argument that phrase "similar files" is limited to files containing intimate details and highly personal information); National Ass'n of Retired Fed. Emp. v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (Horner). Rather, as the Supreme Court has held, any information which applies to a particular individual falls within the category of "Personnel and Medical and Similar Files." Id. Since an individual's identity clearly applies to a particular person, it may properly be withheld under Exemption 6 if the public interest in its disclosure is outweighed by the resulting invasion of personal privacy.

(1) Privacy Interest

The courts, recognizing the possibility of harassment or intimidation of these sources, have consistently recognized that privacy interests in the identities of individuals providing information to government investigators are greatly amplified. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY-TV) (finding withholding necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,524 (1990).

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public which may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also Horner, 879 F.2d at 879.

It is well settled that disclosure of the identity of individuals that have provided information to government investigators is not affected with the public interest. See e.g., Safecard, 926 F.2d at 1205; KTVY-TV, 919 F.2d at 1469. In the absence of a compelling reason for deviating from this body of precedent we find that disclosure of the identifying information in the present case would not be "affected with the public interest."

(3) The Balancing Test

Because release of the names could reasonably be expected to subject the individuals to harassment or intimidation or other personal intrusions, we have found a significant privacy interest . After weighing the significant privacy interest present in this case against an insubstantial or non-existent public interest, we have found that release of information revealing the individuals' identities (1) would result in a clearly unwarranted invasion of personal privacy (the standard for Exemption 6), and (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the standard for Exemption 7). Our findings are consistent with those reached by several appellate courts, that when presented with a similar set of facts, have found that the privacy interests of individuals supplying information to government investigators clearly out weigh the negligible public interest in disclosure of these individuals. See, e.g., Safecard; KTVY-TV, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); Cucarro, 770 F.2d at 359.

While we are strongly committed to keeping the public fully informed about the BPA's Energy Resource Programs, we are also concerned about preserving the privacy rights of individuals providing information to the IG's investigators. The agency, by releasing the responsive documents with only those redactions necessary to prevent identification of specific individuals, has provided important information that will significantly contribute to the public's understanding of the Government's operations while safeguarding individual privacy rights.

C. Vaughn Index

The Appellant requests that it be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation of why that exemption is applicable. On previous occasions, we have stated that, although such an index may be required of the agency when it is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990). At the administrative levels, determinations need only include a general description of the withheld material and a statement of the reason for the withholding. Therefore, we reject the Appellant's request for a Vaughn index.

III. CONCLUSION

On the basis of the facts presented and federal case law, we have found significant privacy interests in the individuals' names. We have also determined that disclosure would not significantly increase the public's understanding of the operations and activities of the government. Accordingly, we find that this information was properly withheld under Exemptions 6 and 7(C). Since the Office of Inspector General has indicated its intention to reconsider its withholdings under Exemption 5, we are remanding that portion of the Appeal.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Stoel Rives, LLP on April 2, 1996 (Case Number VFA-0145) is hereby remanded in part as set forth in Paragraph (2) and denied in all other aspects.

(2) Those portions of this Appeal concerning withholdings under Exemption 5 are hereby remanded to the Office of Inspector General for prompt further review. That office will then issue a new determination concerning its withholdings under Exemption 5.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 29, 1996

Case No. VFA-0147, 25 DOE ¶ 80,191

May 13, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen M. Jameson

Date of Filing: April 15, 1996

Case Number: VFA-0147

On April 15, 1996, Glen M. Jameson filed an Appeal from a determination issued to him on March 5, 1996, by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE). In that determination, Oak Ridge partially denied Mr. Jameson's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oak Ridge to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE Regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 21, 1995, Mr. Jameson requested a "copy of invoices for pension plan costs submitted by PAI Corporation [(PAI)] to the US DOE for payment during the twelve month period ending with their most recent invoice submittal." Request Letter dated October 21, 1995 from Glen M. Jameson to Joan Ogbazghi, DOE, Headquarters (Request Letter). PAI is a DOE contractor. Mr. Jameson has alleged that its 401(k) and 401(a) Profit Sharing Pension Plan contributions are billed to the DOE. Request Letter. Mr. Jameson's request was forwarded to the Oak Ridge and the Nevada Operations Offices because portions of the information that he is seeking are located there.<1> By letter dated December 20, 1995, Oak Ridge informed Mr. Jameson that the information he was requesting was voluminous. For example, one month's invoice was several inches thick. Mr. Jameson, therefore, amended his request and sought one month's invoice, so that he could determine what portion of each invoice would be responsive to his request. In addition, Mr. Jameson requested the relevant portions of Contract No. AC08-87ER80517 that define PAI's

allowable overhead charges, particularly allowable pension and profit sharing costs. Letter dated January 4, 1996, from Glen M. Jameson to Amy L. Rothrock, FOIA Officer, Oak Ridge. In response, on March 5, 1996, Oak Ridge sent Mr. Jameson a redacted copy of one invoice and the relevant portion of the PAI Contract. In its determination, Oak Ridge withheld portions of the documents pursuant to 5 U.S.C. § 552(b)(4) (FOIA Exemption 4). Determination Letter dated March 5, 1996, from James C. Hall, Manager, Oak Ridge, to Glen M. Jameson. In response, Mr. Jameson filed this Appeal.

In his Appeal, Mr. Jameson argues that the public interest will be served in releasing the information and that the requested documents are not privileged or confidential. He contends, therefore, that OHA should

grant his Appeal and release the requested documents in full. Appeal Letter dated March 28, 1996, from Glen M. Jameson to Director, OHA (Appeal Letter). Mr. Jameson supports his claim by contending that (1) PAI Corporation should not have been permitted to have any input in the response to his request; (2) the contract is not a prospective procurement; (3) DOE procurement has been greatly curtailed; therefore, PAI is winding down and does not have a competitive advantage to be protected; (4) he does not work in or with anybody in the federal contracting arena, and is no position to divulge the information to any of PAI's competitors; and (5) the information that has been withheld is not privileged or confidential.<2> Appeal Letter at 1, 3.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (I) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. We consistently have held that information submitted in response to a request for proposal is not considered to have been submitted voluntarily and is therefore to be considered "confidential" if it meets the test set out in National Parks.

Pursuant to FOIA Exemption 4, Oak Ridge withheld portions of the monthly invoice submitted by PAI for overhead charges. In response, Mr. Jameson first argues that PAI should not have been permitted to comment on his FOIA request and what information it deemed confidential. He maintains that such a procedure is a conflict of interest. Appeal Letter at 1. In fact, the submitter's response to a relevant FOIA request is not only allowed, it is required by Executive Order. Exec. Order No. 12,600, 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994). This Executive Order recognizes that submitters of proprietary information have procedural rights. Id. at § 1. Therefore, it mandates that notice be given to submitters and a reasonable time be allowed for the submitter to object to disclosure of information. Id. at § 4. Even though DOE asks for comments from the submitter of the information, the DOE makes the final decision whether the information can be withheld under Exemption 4. 10 C.F.R. § 1004.11(a). Therefore, the request for PAI comment was not improper.

Secondly, Mr. Jameson argues that because the contract is not a prospective procurement, the information he is requesting should be released. It is true that more information is subject to mandatory release after a contract has been awarded. Nevertheless, the DOE still must consider the application of Exemption 4 to the information in such a contract. When looking at whether Exemption 4 applies to information that is being requested, we must consider whether the submitter of the information may be competitively disadvantaged if it is released. Oak Ridge believed that release of this information could cause competitive disadvantage. We agree. The information that was withheld includes names and labor hours for particular PAI employees and financial information consisting of hours, rates, and costs. If this financial information were released, it would allow competitors to calculate other information that is confidential and not generally made available to the public. Disclosure of the names of the employees could allow competitors to offer employment to the PAI personnel. The hours each employee or category of employee worked would allow competitors to discern PAI's management approach and the way the contract was being performed.<3>

Thirdly, Mr. Jameson argues that because DOE procurement has been greatly curtailed, PAI does not have a competitive advantage to protect. Although such an argument as this may have merit if, for example, PAI were going out of business, there is no indication that PAI will not be bidding for future DOE or other government contracts. The fact that DOE's procurement may have been curtailed<4> does not mean that PAI's competitive position is no longer important. PAI may have contracts with other government agencies or may be bidding on contracts with other government agencies.

Fourthly, Mr. Jameson argues that because he does not work in the contracting arena, he is in no position to divulge the information to any of PAI's competitors. Appeal Letter at 3. We are not persuaded by this argument. The Supreme Court has stated that a FOIA requester's basic rights to access are neither increased nor decreased by virtue of having a greater interest in the records than that of an average member of the general public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). Therefore, if a person's greater interest in the information does not increase his basic right to access, a person's lesser interest in the information does not decrease the duty of the agency to exempt the information under Exemption 4. Further, if the information were released to Mr. Jameson, it could not be withheld from one of PAI's competitors because it would have been deemed to be released to the public.

Finally, Mr. Jameson argues that the information is not privileged or confidential because "a narrow FOIA exemption standard . . . applies to any information that a submitter ?is required to supply,' while a broader Exemption 4 standard . . . applies only to information that is submitted to an agency ?on a voluntary basis.'" Appeal Letter at 2. Mr. Jameson argues that the submission of the cost invoices and contract was a requirement, not a voluntary act on PAI's part. Id. at 2. We agree that the narrower standard applies in this case. As we stated earlier, we have consistently held that information submitted in response to a request for a proposal is not considered to have been submitted voluntarily and is therefore to be considered "confidential" if it meets the test set out in National Parks. We believe that the information Oak Ridge withheld does meet the National Parks test. It is commercial or financial information that has been obtained from a person. Further, this information can be considered confidential, because its release would cause substantial harm to the PAI's competitive position.

After reviewing the documents in question and the arguments presented by Mr. Jameson, we agree with Oak Ridge that portions of these documents should be withheld under Exemption 4. Information is confidential if it is not the type usually released to the public and, if released to the public, would cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks, 498 F.2d at 770. In order to show the likelihood of substantial competitive harm it is not necessary to show actual competitive harm; actual competition and the likelihood of substantial injury is all that is necessary. Gulf and Western Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979). The withheld information would cause substantial harm to the competitive position of PAI if it were released because it shows the manner in which PAI conducts its business under the contract and would not normally be shared with competitors. Clearly, PAI could be injured if one of its competitors could learn this information. Professional Review Org. of Fla., Inc., v. HHS, 607 F. Supp. 423 (D.D.C. 1985). Therefore, the information withheld falls within Exemption 4. We conclude that Oak Ridge properly withheld the information under Exemption 4 and the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Glen M. Jameson, on April 15, 1996, Case No. VFA-0147, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 13, 1996

<1>The Nevada Operations Office response is not at issue in this Appeal.

<2>Mr Jameson also claims that President Clinton signed a law curtailing the section 8(a) set aside program, further curtailing PAI 's procurement prospects. The Small Business Administration's section 8(a) program is a congressionally authorized business development program for companies owned and controlled by socially and economically disadvantaged individuals. 15 U.S.C. § 637. A reduction of the section 8(a) program would have an impact on an Exemption 4 evaluation only if such a reduction would force PAI to close. We are unable to ascertain that PAI would be affected by the end of this program. PAI may be able to win contracts with the DOE or other government agencies without the help of the section 8(a) program. Therefore, its competitive position still needs to be protected.

<3>In his Appeal Letter and also his April 15, 1996 letter, Mr. Jameson reiterates that he is only interested in the hours worked and that he would be willing to have titles and names redacted instead of the hours and names redacted. Although it could be possible to redact the documents to reflect only the number of hours worked, the information already released to Mr. Jameson contains the job titles of employees. If additional information is released, in the form of job hours, Mr. Jameson would be able to determine the number of hours worked by individuals in each job category.

<4>Mr. Jameson has made this statement with no support. However, since the veracity of the statement is irrelevant, we will not address it.

Case No. VFA-0148, 25 DOE ¶ 80,190

May 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: April 11, 1996

Case Number: VFA-0148

On April 11, 1996, William H. Payne (Appellant) filed an Appeal from a determination issued on March 21, 1996, by the Department of Energy (DOE). In that determination, the Office of Contractor Employee Protection (OCEP) denied in part a request for information which the Appellant filed on August 24, 1994 under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008, and under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. See Letter from GayLa D. Sessoms, Director, FOIA/Privacy Act Division, to Appellant (March 21, 1996) (Determination Letter). In his request, the Appellant sought from OCEP all documents containing his name which were generated after January 1993.<1>In response to that request, OCEP released over ninety documents to the Appellant under the FOIA, but under Exemption 6 of that Act, redacted a portion of one document, 35c, and withheld another document, 92b, entirely.<2>This Appeal, if granted, would require the DOE to release the withheld information.

ANALYSIS

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Thus, there is no doubt that the documents at issue in this case qualify as "similar files" under Exemption 6. See Jeffrey R. Leist, 25 DOE ¶ 80,159 at 80,651 (1996).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three step analysis. First, the agency must determine whether or not a substantial privacy interest would be invaded by the disclosure of the record. If no privacy interest or if only a de minimis privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) (Reporters Committee). Finally,

the agency must weigh the privacy interests it has identified against the public interest in order to

determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

In this case, OCEP redacted a handwritten name from Document 35c and withheld Document 92b in its entirety, including its author's name. Document 92b is a memorandum which briefly discusses the Appellant's dealings with OCEP. According to the Determination Letter, disclosure of the withheld information could subject both individuals to "unwanted communications and other personal intrusions." See Determination Letter at 2. Further, because Ms. Schneider felt that the text of Document 92b would identify its author, she withheld the text as well. Id.

1. The Privacy Interest

Before we address the Exemption 6 balancing test, we note that the text of Document 92b can only be withheld under Exemption 6 if release would be tantamount to identification of its author. After carefully examining the document, it is unclear whether the memorandum's text clearly reveals its author. Assuming, however, that the text of the withheld document could be reasonably linked with its author, the text may only be potentially withheld if its author has a significant privacy interest in the withheld information. As discussed below, we find that the author does not have this type of interest.

In order to determine whether there is a privacy interest in the withheld information, we must determine whether release of this information might reveal something personal about the people involved. See News Tribune, 25 DOE ¶ 80,180 (1996). Thus, it is only when the release of some personal information about an individual would cause a "clearly unwarranted invasion of privacy" that the information may be exempt from mandatory release under the FOIA.

There are three possible privacy interests present in this case which might be impacted by release of the withheld information. First, there is the privacy interest in the names of these individuals. However, as we held in News Tribune, there is no privacy interest in a name itself, absent some other indicia about the individual. 25 DOE at 80,700. An invasion of privacy can become recognizable when a name is linked with some other information that reveals something personal about an individual. Department of State v. Ray, 502 U.S. 164, 176 & n.12 (1991) (Ray); Reporters Committee, 489 U.S. at 762; Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1354 (9th Cir. 1994); Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1415 (9th Cir. 1987). Therefore, we must examine the withheld information in the context with which it is associated; i.e. what release of the information would specifically reveal about those particular persons. See News Tribune, 25 DOE at 80,699; see also National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876 (D.C. Cir. 1989), cert. denied sub nom. National Ass'n of Retired Fed. Employees v. Newman, 494 U.S. 1078 (1990)(Horner).

In this case, both persons whose alleged privacy interests are at issue are linked with OCEP's mediation efforts between DOE and the Appellant. The second potential privacy interest at stake is that the author of Document 92b is linked with a discussion of the Appellant's communications with OCEP. These two potential privacy interests may be analyzed together. After carefully examining the withheld information, we conclude that neither of these interests is the type of "personal information" referred to in Rose. See 425 U.S. at 375 n.14. The aim of Exemption 6 is to guard against unnecessary disclosure of files "which would contain ?intimate details' of a ?highly personal' nature." New York Times Co. v. National Aeronautics and Space Administration, 782 F. Supp. 628, 631 (D.D.C. 1991) (citations omitted). Further, some material which is not strictly personal, but is nonetheless identifying, is protected if release could cause interference with personal privacy. See Southwest Resource Development, 24 DOE ¶ 80,164 (1995) (individuals involved in Inspector General's investigations protected under Exemptions 6 and 7(c)).

In applying these tests to the facts of the present case, we find first that the nature of the material withheld in the present case is not the type of strictly personal information usually protected by Exemption 6. See Department of Defense v. Federal Labor Relations Auth., 114 S. Ct. 1006 (1994) (home addresses); Ray (marital and familial status); Sangre de Cristo Animal Protection, Inc., 25 DOE ¶ 80,121 (1995) (Social

Security numbers); A. Victorian, 25 DOE ¶ 80,111 (1995) (autopsy pictures); Foundation for Fair Contracting, 21 DOE ¶ 80,169 (1991) (names and addresses redacted from payroll records); Robert E. Caddell, 20 DOE ¶ 80,164 (1990) (some SF-171 information). Second, we are unable to find OCEP's fears of unwanted workplace intrusions to be a sufficient basis for withholding the material and names under Exemption 6. Generally, we do not consider workplace contacts concerning work-related matters to be unwarranted or substantial invasions. Further, we note that federal employees have a much smaller expectation of privacy than do private employees. See 5 C.F.R. § 293.311 (names, titles, grades, salaries and duty stations of civilian federal employees must be released); Stern v. Federal Bureau of Investigation, 737 F.2d 84 92 (D.C. Cir. 1984) ("[T]he status of the individuals in this case as federal employees diminishes their privacy interests . . . because of the corresponding public interest in knowing how public employees are performing their jobs").

Moreover, we do not find the text of Document 92b to be of such an inflammatory nature that a "substantial probability" of true intrusion is created. See Horner, 879 F.2d at 878. Rather, we find the wording of this document to be trivial and innocuous. Unless there is a substantial likelihood that the work-place communications will rise to the level of actual harassment, i.e., through the use of obscenities, threats, or other seriously abusive conduct or language, we simply cannot protect federal employees from communications from the public that they serve. Thus, we are unable to find that a privacy interest exists in this case.

2. The Privacy Interest/Public Interest Balance

In this case, we have been unable to discern any privacy interest in withholding any of the material redacted by OCEP. If there is no identifiable privacy interest, then information may not be withheld under Exemption 6. Ripskis, 746 F.2d at 3; J/R/A Associates, 24 DOE ¶ 80,165 at 80,655 (1995); William D. Lawrence, 24 DOE ¶ 80,139 at 80,600 (1994); Virginia Johnson, 23 DOE ¶ 80,168 at 80,664-65 (1993). Accordingly, we will remand this matter to OCEP to either release the withheld information or issue a new determination identifying some other privacy interest that justifies the continued withholding of this information.<3>

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by William H. Payne on April 11, 1996 (Case Number VFA-0148) is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Office of Contractor Employee Protection, which shall release the information withheld pursuant to Exemption 6 described above or issue a new determination justifying any withholding of this information in accordance with the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 6, 1996

<1>The Appellant had asked OCEP to mediate a settlement to resolve ongoing litigation between himself and DOE. See Record of Telephone Conversation between Dawn Koren, OHA Staff Attorney, and Sandra

Schneider, Assistant Inspector General for Contractor Employee Protection, OCEP (April 16, 1996).

<2>Although the Appellant made his request under both the Privacy Act and the FOIA, OCEP correctly responded to this request exclusively under the FOIA. The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). In this case, because the two documents at issue were not a part of the Appellant's file at OCEP, they were never in a "system of records" subject to the Privacy Act. See Record of Telephone Conversation between Dawn Koren and Sandra Schneider (April 16, 1996). Therefore, OCEP analyzed this request solely according to the provisions of the FOIA. See Greentree v. United States Customs Service, 674 F.2d 74 (D.C. Cir 1982); Jeffrey L. Turek, 11 DOE ¶ 80,149 at 80,678 (1983).

<3>We note that, in the event OCEP attempts to justify the withholding of these names, it should consider whether there are different privacy interests at stake with respect to each of the withheld names.

Case No. VFA-0153, 25 DOE ¶ 80,193

May 16, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James Minter

Date of Filing: April 19, 1996

Case Number: VFA-0153

On April 19, 1996, James Minter filed an Appeal from a determination issued to him on April 3, 1996, by the Director of the Office of Public Affairs (Director) of the Albuquerque Operations Office of the Department of Energy (DOE). In that determination, the Director partially denied a request for information filed by Mr. Minter on February 17, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. Minter sought retirement information concerning a Mr. Frank Oakes and what, if any, retirement compensation plan Mr. Oakes received. On April 3, 1996, the Director provided Mr. Minter with copies of two standard forms (SF 52 and SF 50-B) regarding Mr. Oakes's retirement, but he redacted personal information, including a social security number, date of birth, and home address, in accordance with Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). In his written Appeal, Mr. Minter requested that the DOE disclose to him "the records that were withheld" and that it provide him with any additional information. Since the Albuquerque Operations Office did not have any specific "records that were withheld," we contacted Mr. Minter to clarify his Appeal. See Record of May 4, 1996 Telephone

Conversation between Leonard M. Tao, OHA Staff Attorney, and James Minter. In that conversation, Mr. Minter stated that he is not interested in receiving any of the information redacted pursuant to Exemption 6, including Mr. Oakes's social security number, date of birth or home address, but wants to know what type of retirement compensation, if any, Mr. Oakes received upon retirement. Specifically, Mr. Minter suggested that Mr. Oakes may have filed forms CA 1, 16 and 17 with the Transportation Safeguards Division at the Albuquerque Operations Office and that these forms may contain responsive information.

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In his Appeal, Mr. Minter asks for any additional information to show what compensation, if any, Mr. Oakes received upon retirement. Mr. Minter did not provide any evidence showing that additional information exists, but requested that we search for responsive information in CA Forms 1, 16 and 17, if Mr. Oakes filed them. Accordingly, we contacted the Albuquerque Operations Office to ascertain the extent of the search it performed.<1> From these conversations it is clear that the Albuquerque Operations Office searched all of the areas that might reasonably contain retirement compensation information concerning Mr. Oakes. Specifically, the Albuquerque Operations Office searched its Transportation Safeguards Division, the division that employed Mr. Oakes, and its Human Resources Division, the division responsible for handling Mr. Oakes's retirement from the DOE. The Albuquerque Operations Office determined that Mr. Oakes filed CA forms, but that these forms do not disclose any information regarding his retirement compensation. However, a representative from the Albuquerque Operations Office informed us that the Transportation Safeguards Division has in its files a responsive document that originated at the Department of Labor. In accordance with 10 C.F.R. § 1004.4 (f)(1), the representative from the Albuquerque Operations Office informed us that it had already referred Mr. Minter's request for a copy of this document to the Department of Labor. Since we find that the Albuquerque Operations Office followed procedures reasonably calculated to uncover all material within the scope of the appellant's February 17, 1996 information request, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by James Minter on April 19, 1996, Case Number VFA-0153, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 16, 1996

<1>/ See memoranda of telephone conversations between Leonard M. Tao, OHA Staff Attorney, and Terry Apodaca, Albuquerque Operations Office.

Case No. VFA-0154, 25 DOE ¶ 80,194

May 20, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

NAME OF PETITIONER: Chey A. Temple

DATE OF FILING: April 22, 1996

CASE NUMBER: VFA-0154

On April 22, 1996, Chey A. Temple filed an Appeal from a determination issued to him on April 3, 1996, by the Privacy Act Officer of the Richland Operations Office (DOE/RL) of the Department of Energy (DOE). In that determination, DOE/RL denied in part Mr. Temple's requests for information filed on September 10, 1995, and December 15, 1995, under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require the Privacy Act Officer to release certain documents which were withheld in part pursuant to 5 U.S.C. § 552a(k)(5).

The Privacy Act requires, in part, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). The DOE regulations also permit an individual to request that information about him or her which is contained in a DOE system of records be amended or corrected. See 10 C.F.R. § 1008.6(a)(3). A "system of records" is defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5); 10 C.F.R. §1008.2(m). The Act also includes a number of general and specific exemptions which allow federal agencies to withhold certain information. 5 U.S.C. § 552a(j), (k).

I. Background

On September 10, 1995, Mr. Temple filed a Privacy Act request with DOE/RL for a copy of his Westinghouse Hanford Company (WHC) employment records. At the same time, he filed a request pursuant to the FOIA for a copy of all documents associated with disciplinary actions taken against him while employed at WHC. On December 8, 1995, the Privacy Act Officer of DOE/RL responded to Mr. Temple's request by sending him a copy of his WHC employment records. She also informed him that the FOIA search was still in progress.

On December 15, 1995, Mr. Temple filed another Privacy Act request with DOE/RL, this time for a copy of his DOE Personnel Security File. For administrative efficiency, both requests were combined. On January 24, 1996, the Director of the Office of External Affairs sent Mr. Temple a determination letter along with redacted copies of the responsive agency documents. The letter also stated that "[i]n order to protect the privacy interests of individuals listed within [Temple's] security record, names and other personal identifiers have been deleted." See Letter from Director, Office of External Affairs, DOE/RL, to Chey A. Temple (January 24, 1996) ("Determination Letter"). The Determination Letter did not, however, include a citation to the appropriate regulation containing the reason for withholding information.

On March 7, 1996, Mr. Temple filed an Appeal with the Office of Hearings and Appeals (OHA) requesting an unredacted copy of his security records, pursuant to 10 C.F.R. § 1008.11. See OHA Case No. VFA-0133. However, because the Determination Letter was deficient, Case No. VFA-0133 was dismissed. See Letter from Deputy Director, OHA, to Chey Temple (April 4, 1996). DOE/RL promptly reissued a corrected determination letter on April 3, 1996, which Mr. Temple then appealed in a letter to OHA filed on April 22, 1996. In this Appeal, Mr. Temple requests unredacted copies of his DOE Personnel Security File, stating that the records of all interviews were "heavily deleted." See Letter from Chey Temple to Director, OHA (April 22, 1996). Mr. Temple questions the veracity of "several disturbing references" in his files and alleges that the investigation is based on faulty information. Id.

II. Analysis

The purpose of the Privacy Act of 1974 is to prevent the unnecessary dissemination of erroneous personal information compiled on individuals by federal agencies. Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974). To effectuate this purpose, the Privacy Act contains several provisions which grant the individual access to agency information retained on him or her in certain "systems of records" in order to determine whether the agency is disseminating misinformation. See e.g., 5 U.S.C. § 552a(c)(3), (d), (e)(4)(G), (H), (I), and (f). The Act also permits the head of an agency to promulgate rules to exempt certain systems of records within the agency from the Act's disclosure provisions. Id. § 552a(j), (k). Section 552a(k) lists specific exemptions for systems of records containing certain types of information. An exemption may be applied only if the DOE has promulgated rules applying that exemption to a system of records. The DOE has promulgated regulations applying Exemption k(5) to Personnel Security Clearance Files, the system of records involved in this proceeding. 10 C.F.R. § 1008.12 (b)(3). See Dale R. Callaghan, 20 DOE ¶ 80,150 (1990) (Callaghan).

Exemption k(5) allows an agency to promulgate rules exempting any system of records from the Privacy Act's disclosure provisions if the system of records contains:

investigatory material compiled solely for the purpose of determining suitability,

eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, [prior to September 27, 1975] under an implied promise that the identity of the source would be held in confidence[.]

5 U.S.C. § 552a(k)(5); 10 C.F.R. § 1008.12(b)(3). In creating Exemption (k)(5), Congress recognized a need to protect the sources of information to whom promises of confidentiality had been made. See Londrigan v. FBI, 670 F.2d 1164, 1172 (D.C. Cir. 1981). Accordingly, Congress created a limited exemption from the Privacy Act's disclosure provisions. However, "[t]o fall within the protection of Section 552a(k)(5), the government must demonstrate that the information was furnished under a promise that the identity of the source would be held in confidence." Nemetz v. Dept. of Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978). See also Jeffery L. Turek, 11 DOE ¶ 80,142 (1983) (Turek).

We have determined that the documents at issue in this Appeal are contained within a system of records as defined by the Privacy Act and are therefore subject to the provisions of that Act. 5 U.S.C. § 552a(a)(4), (5). DOE/RL retrieved the documents using the name of the requester, a method of retrieval that follows the standard described in the Privacy Act. According to DOE/RL, an investigator promised confidentiality to each interviewee to enable him or her to speak freely. See Memorandum of Telephone Conversation between Angela Ward, DOE/RL, and Valerie Vance Adeyeye, OHA Staff Attorney (May 3, 1996). Because this system of records is exempted from the access provisions by Exemption (k)(5), any properly redacted material is subject to neither disclosure nor amendment by a requesting party. Accord Callaghan; Turek.

We concur with DOE/RL's deletions of "names and other personal identifiers" from the requested material. However, our review of the unredacted documents finds that some non-identifying (and therefore releasable) information was also withheld from the requester. We refer to Attachments 1, 2, 4, 5, 6, and 7 to the Investigative Summary.<1> Also, the redacted Privacy Act request number in an internal memo dated December 12, 1995 may be releasable. DOE/RL should review this material and consider whether it can release any portion of the material without identifying the source, subject to any other applicable exemptions. Accordingly, we will remand this matter to DOE/RL.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by Chey A. Temple on April 22, 1996, OHA Case No. VFA-0154, is granted in part as set forth in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Privacy Act Officer of the Richland Operation Office of the Department of Energy who shall release all non-identifying portions of the requested material or issue a new determination adequately justifying continued non-disclosure of this information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 20, 1996

<1>We agree that Attachment 3 should be withheld in its entirety since it describes conversations that would easily identify the source.

Case No. VFA-0155, 25 DOE ¶ 80,204

June 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Larson Associated, Inc.

Date of Filing: April 30, 1996

Case Number: VFA-0155

On April 30, 1996, Robert D. Larson, President of Larson Associated, Inc., filed an Appeal from a determination issued on April 16, 1996, by the Department of Energy's Oak Ridge Operations Office (DOE/OR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 8, 1995, Larson filed a request under the FOIA for a copy of a Community Involvement Proposal submitted to DOE/OR by Martin Marietta Corporation (Martin) in 1983 before it took over management of DOE's Oak Ridge facilities. The Community Involvement Proposal was Volume 4 of an overall proposal submitted by Martin in response to a DOE request for proposals (RFP). DOE/OR issued a determination on April 16, 1996, in which it stated that it was withholding the requested document in its entirety under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Letter from James C. Hall, Manager, DOE/OR, to Robert D. Larson, President, Larson Associates (April 16, 1996). The present Appeal was filed on April 30, 1996. In his Appeal, Larson states:

My appeal is based on several reasons. The first is that the reply from the U.S. Department of Energy is not timely. The second is that the letter from Oak Ridge is not signed by the Freedom of Information Officer. The third and most important is that the information requested is obtained from public funds spent on a federally funded contract in which the information has been provided to special interest groups and should be available for review and a determination if the benefits of economic development plans applied at Oak Ridge couldn't be applied to other government sites such as at Hanford, Richland, Washington.

Appeal at 1.

II. Analysis

A. Timeliness of Response

When an agency receives a proper FOIA request, it is required to inform the requester of its decision

to grant or deny access to the requested records within ten working days. 5 U.S.C.§ 552(a)(6). However, the federal courts have held that agencies may exceed the initial time limits in certain situations. For example, the D.C. Circuit has approved the general practice of handling backlogged FOIA requests on a "first-in, first-out" basis, and it is the standard practice of DOE/OR to process FOIA requests in this manner. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C.§ 552(a)(6)(C)). Thus, while DOE/OR clearly exceeded the ten day statutory limit, we find that, under the standards set forth by the federal courts, there was no legal error in processing Larson's request.

B. Signatory of Determination Letter

Larson notes that DOE/OR's determination letter was not signed by the DOE/OR Freedom of Information Officer. The letter was signed by Steven D. Richardson for James C. Hall, the Manager of DOE/OR. Larson contends that the DOE/OR was not the proper signatory. However, the DOE FOIA regulations specifically provide that a "reply denying a request for a record . . . will be signed by the Denying Official." 10 C.F.R. § 1004.7(b). The regulations explain that, "In the Field Offices, the term [Denying Official] refers to the head of a field location," i.e. in the case of DOE/OR, the Manager. 10 C.F.R. § 1004.2(b). Therefore, the proper official at DOE/OR signed the determination issued to Larson.

C. Withholding of Information Under FOIA Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). The United States Court of Appeals for the District of Columbia Circuit has found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879.

Clearly, a proposal submitted by a prospective contractor to the DOE is "commercial" within the meaning of Exemption 4 because of the bidder's commercial interest in the proposal. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post. Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)) (records are commercial so long as the submitter has a "commercial interest" in them). In addition, the information was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of that Exemption. See Allnet Communications Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations"), aff'd, No 92-5351 (D.C. Cir. May 27, 1994); see also Ronson Management Corp., 19 DOE ¶ 80,117 (1989).

Regarding whether the document at issue is "confidential," we consistently have held that information submitted in response to a RFP is not submitted voluntarily and is therefore to be considered confidential only if it meets the test set out in National Parks. E.g., Glen M. Jameson, 25 DOE ¶ , Case No. VFA-0147

(May 13, 1996). However, Martin argues that its Community Involvement Proposal was provided to the DOE voluntarily. "[I]t was not a required part of the response to RFP #DE-RP05-84OR21400, as the submission of a fourth volume was considered ?optional.'" Attachment to Memorandum from G. Wilson Horde, Martin, to Gary Draper, Martin (March 20, 1996) at 2. Martin cites no language in the RFP to support its contention that the submission of Volume IV was "considered ?optional,'" and we find none. Indeed, the RFP specifically states that proposers were "required to describe the manner in which they would promote and assist the industrial development of the Oak Ridge community . . . ." Request for Proposal DE-RP05-84OR21400 (April 15, 1983) at 164 (emphasis added); see also id. at 70 (setting forth requirements for proposal format). Therefore, Martin has failed to show that its proposal was submitted to DOE/OR voluntarily. Accordingly, we will find this document to be "confidential" only to the extent that its disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of Martin. For the reasons set forth below, we find that DOE/OR has not set forth an adequate basis for withholding the requested document from the Appellant under FOIA Exemption 4, and we will therefore remand this matter to DOE/OR for a new determination.

Both the FOIA and the DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents. Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Data Technology Industries, 4 DOE ¶ 80,118 (1979). Thus, a FOIA determination that material should be withheld under Exemption 4 because its disclosure is likely to cause substantial harm must include the reasons for believing such harm will result to the competitive position of the person from whom the information is obtained. Federal Information Tools, 3 DOE ¶ 80,163 at 80,807 (1979).

In its determination letter, DOE/OR states that the information in Martin's Community Involvement Proposal is "being used today" by the company to bid on DOE and other government contracts, and that the information, if released, "would give competitors an unfair advantage on future procurements." Letter from James C. Hall, Manager, DOE/OR, to Robert D. Larson, President, Larson Associates (April 16, 1996) at 1, 2. However, no examples are given, and there is no explanation why release of the various elements of the proposal would likely cause substantial harm to the competitive position of Martin.

DOE/OR mentions that release of the proposal would reveal the "style and research used in preparation of such document which can be easily a winning point in the award of a contract." Id. at 2. But we have previously held that the "style" of a proposal is not withholdable under Exemption 4. See, e.g., Government Sales Consultants, Inc., 13 DOE ¶ 80,115 at 80,556 (1985). And while the disclosure of specific innovative research techniques may be likely to cause competitive harm to Martin, this possibility does not justify withholding the entire document, as we discuss below.

The submitter points to several specific types of information in its proposal that it argues should be withheld, among them the names of universities and colleges sharing joint programs with the corporation; license agreements, "many of which are still in existence;" and "financial commitments" of Martin which "can be extrapolated to the present day by merely adding inflation and other factors known by the public." Attachment to Memorandum from G. Wilson Horde, Martin, to Gary Draper, Martin (March 20, 1996) at 2. We agree that information regarding current licensees of Martin can be withheld, for the same reasons we have held that the names of subcontractors may be withheld under Exemption 4. See, e.g., Consultec, Inc., 24 DOE ¶ 80,140 at 80,603-04 (1994). Similarly, financial commitments of a corporation, such as cost and pricing data, may also be withheld if they are sufficiently indicative of future pricing conduct to cause competitive injury if released. See, e.g., U.S. News and World Report, 23 DOE ¶ 80,118 at 80,540 (1993). We note that the passage of time does not necessarily lessen the competitive harm that may result from the disclosure. See, e.g., Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. 507, 514 (D. Kan. 1984) (nine-year-old data protected). In contrast, regarding the universities and colleges listed and Martin's past licensees, the corporation makes no allegation of the specific nature of the competitive harm that would result if this information were released. That harm must be specified if the information is going to be withheld.

On the other hand, damage to the public image of a corporation is not one of the harms cognizable under Exemption 4. See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987)

("unfavorable publicity" insufficient for showing of competitive harm). Also, information already publicly available generally may not be withheld. Id.<1>

Thus, provided that there is an identifiable competitive harm that is likely to result from its release, and this has been adequately explained to the requester, some of the information in Martin's proposal may be withheld. However, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate, Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979), and this is the justification offered by DOE/OR for withholding the proposal in its entirety. However, in light of the findings above, there is no basis for withholding the entire document from the requester. For example, if the style of the proposal were in fact withholdable, the non-exempt portions of the proposal's substance probably might not be easily segregated and released. Because style is not withholdable, only those portions the release of which would be likely to cause competitive harm to Martin may be withheld under Exemption 4.

Accordingly, we will remand this case to DOE/OR, which should promptly issue a new determination releasing the non-exempt information to the appellant. Though we are not upholding DOE/OR's initial determination, we still believe DOE/OR is in the best position to make an initial determination as to whether the release of specific information within the proposal would impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of Martin. In making its determination, DOE/OR should keep in mind that conclusory allegations of harm do not suffice to protect information from disclosure under Exemption 4. Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (Westlaw, DCT database) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict").

For the reasons explained above, the present Appeal will be granted as specified above. In all other respects, the Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Larson Associated, Inc., Case No. VFA-0155, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE's Oak Ridge Operations Office, which shall promptly issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 18, 1996

<1> / Though Larson states in his appeal that "the information has been provided to special interest groups," he explained to our office that he was referring to briefings on community development held in Oak Ridge by Martin. Larson is not contending that the document he has requested has already been released to special interest groups, and Martin denies this specifically. Record of telephone conversation between Robert D. Larson, President, Larson, and Steven Goering, OHA Staff Attorney (June 11, 1996); Letter from G. Wilson Horden, Martin, to Amy Rothrock, DOE/OR (June 3, 1996).

Case No. VFA-0156, 25 DOE ¶ 80,195

May 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arline Jolles Lotman

Date of Filing: April 30, 1996

Case Number: VFA-0156

On April 30, 1996, Arline Jolles Lotman filed an Appeal from a determination issued to her under the Freedom of Information Act (FOIA) on April 1, 1996, by the Department of Energy's Albuquerque Operations Office (AO). In her Appeal, Ms. Lotman asserts that AO failed to provide her with all of the responsive documents in its possession regarding a Request for Information she made on February 15, 1996.

I. Background

On February 15, 1996, Ms. Lotman contacted the Department of Energy's telephone information line to request information regarding the possible exposure to radiation of her late husband, Maurice Lotman, while he was in the U.S. Army at Los Alamos. The Department of Energy forwarded Ms. Lotman's Request to AO so that it could conduct a search for any radiation exposure records regarding Mr. Lotman. <1> In its April 1, 1996 Determination Letter, AO stated that it had conducted a search of its records at AO's Occupational Safety and Health Division (OSHD) and at the Los Alamos National Laboratory (LANL). Along with the Determination Letter, AO provided Ms. Lotman with a copy of the radiation dosimetry records it discovered at LANL.

In her Appeal, Ms. Lotman implicitly argues that AO conducted an inadequate search for records relating to her husband. Ms. Lotman, however, does not state any specific reasons why she considers the search made by AO to be inadequate.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095,1100-01 (D.C. Cir. 1983), modified in part on

rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted officials at AO to ascertain the extent of the search that had been performed. Upon receiving Ms. Lotman's Request for Information, AO instituted searches at the only two facilities it expected would possess radiation exposure records, OSHD and LANL. See Memorandum of telephone conversation between Terry Apodaca, AO, and Richard Cronin, OHA Staff Attorney (May 6, 1996). With regard to the search conducted at LANL, we were informed that a LANL official manually searched through the binders containing LANL's radiation exposure records using Mr. Lotman's name. Id. All of the radiation exposure records LANL discovered pertaining to Mr. Lotman were provided to Ms. Lotman. Id. With regard to OSHD, we were informed that it does not normally possess radiation exposure records of U.S. Army personnel, as it only possesses radiation exposure records for civilian federal employees. Id. Nonetheless, AO requested that a search of the radiation exposure records at OSHD be conducted. Id. OSHD officials conducted a search of their computer database of radiation exposure records and found no responsive records. Id. Given the facts presented to us, we find that AO conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Lotman's Request. Consequently, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Arline Jolles Lotman on April 30, 1996, is denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 23, 1996

<1>AO processed Ms. Lotman's Request for Information as a request under the FOIA. See Memorandum of telephone conversation between Terry Apodaca, Office of Public Affairs, AO, and Richard Cronin, OHA Staff Attorney (May 2, 1996).

Case No. VFA-0157, 26 DOE ¶ 80,105

August 9, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:STAND of Amarillo, Inc.

Date of Filing:April 30, 1996

Case Number:VFA-0157

On April 30, 1996, STAND of Amarillo, Inc. (STAND) filed an Appeal from a determination issued on March 22, 1996 by the Albuquerque Operations Office of the Department of Energy (DOE). That determination denied in part STAND's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

BACKGROUND

On November 2, 1995, STAND, Serious Texans Against Nuclear Dumping, filed a FOIA request with the Albuquerque Operations Office. In its request it sought ninety-six specific items. Most of these appear to be scientific, technical, or similar documents. These ninety-six records were part of a larger group of fifty-seven boxes of material produced in a proceeding before the Texas Natural Resource Conservation Commission (TNRCC). That Commission was considering applications for hazardous waste and water quality permits at the DOE's Pantex Plant. The applications were jointly submitted by the DOE and Mason & Hanger-Silas Mason Co., Inc. (Mason & Hanger), the management and operating contractor at the Pantex Plant. STAND was permitted to review copies of these documents in its position as a party before the TNRCC protesting the issuance of the permits, but was not able to keep copies of the documents. This led to its FOIA request. The Albuquerque Operations Office responded to STAND on December 5, 1995. That Office claimed that the requested documents were not "agency records" within the meaning of the FOIA because the items were part of Mason & Hanger's legal files and, by the terms of the management and operating contract, were the property of Mason & Hanger. STAND

appealed that determination. In a Decision and Order dated February 12, 1996, we found that the

December 5, 1995 determination was premature and remanded the matter to the Albuquerque Operations Office to complete a search of the records. STAND of Amarillo, Inc., 25 DOE ¶ 80,167 (1996).

The Albuquerque Operations Office completed its search and issued its second determination to STAND on March 22, 1996. In that letter, the Albuquerque Operations Office stated that it had contacted the appropriate DOE facility, the Amarillo Area Office, which identified five responsive documents out of the ninety-six STAND requested. These were released to STAND in their entirety. One of the documents apparently came from one of the offices under the Assistant Area Manager for Projects and Environmental Management at the Amarillo Area Office. The other four responsive items were located in the Mason & Hanger files and were documents that either originated with or were received by DOE officials. The

Albuquerque Operations Office again concluded that the remaining ninety-one items were documents contained only in Mason & Hanger's legal files and by contract were not "agency records" subject to the FOIA. STAND appeals this determination.

ANALYSIS

In its request, STAND seeks documents related to two environmental permits whose issuance was being considered by the TNRCC. The Amarillo Area Office informs us that after the determination letter was issued in this case and while this Appeal was pending, the TNRCC granted both permits. In addition, the Amarillo Area Office provided us with a copy of a February 2, 1996 letter Mason & Hanger sent to STAND. That letter states, inter alia, that once the permits have been issued, both DOE and Mason & Hanger would review STAND's request "in terms of what documents would have been available under FOIA absent the contested [TNRCC] case proceeding." Letter from Chief Counsel, Mason & Hanger to President, STAND (February 2, 1996).

As a result of the new post-permit FOIA review which DOE and Mason & Hanger have agreed to perform for all of the requested records, STAND conceivably could receive all the information it desires. As a result, the circumstances surrounding this Appeal have significantly changed. The proper course of action is, therefore to remand this matter to the Albuquerque Operations Office for further action and to issue a new determination. See, e.g., Franc Pajek Co., 20 DOE ¶ 80,112 at 80,534 (1990). We believe this course furthers the best interests of all parties concerned. It gives the agency and the contractor, who are the closest to and the most familiar with the requested material, the opportunity to respond directly to the requester on those matters. Further, a remand in this situation is proper because it does not require us to make premature legal and contractual determinations. In addition, because we are remanding this matter without ruling on the merits of its arguments, this determination is without prejudice, and STAND may seek a ruling on any issue that arises directly from the new Albuquerque Operations Office determination. Finally, because this request has already been appealed twice to this Office, the Albuquerque Operations Office should act expeditiously in this matter and issue a new determination to STAND as soon as possible and in any event no later than ninety days of its receipt of this Decision and Order.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of STAND of Amarillo, Inc., OHA Case No, VFA-0157 is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further action in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 9, 1996

Case No. VFA-0159, 25 DOE ¶ 80,197

May 29, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ball, Janik and Novack

Date of Filing: April 30, 1996

Case Number: VFA-0159

On April 30, 1996, Ball, Janik and Novack (Appellant) filed an Appeal from a final determination issued to it on April 17, 1996, by the Department of Energy's (DOE) Bonneville Power Administration (BPA). In that determination, BPA denied in part a request for information filed by the Appellant on April 2, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information requested by the Appellant.

I. BACKGROUND

The BPA has begun a process of re-engineering itself to resemble more closely a private sector utility. As part of this process, BPA has engaged in an ongoing process of analyzing the markets in which it now competes, its potential customer base and its pricing strategy. The present Appeal concerns a request for a document prepared by BPA's Office of Marketing Support (OMS) as part of that effort.

On April 2, 1996, the Appellant filed a Request for Information with BPA seeking:

Copies of any analyses, memoranda, lists or other documents prepared by BPA . . . relating to, referring to, or identifying electric power consumers presently served by other suppliers which could, as a technical matter, be served by BPA without necessity for the construction of electric transmission or distribution facilities that would make such a transaction uneconomic [sic].

Appellant's April 2, 1996 Request for Information. On April 17, 1996, BPA issued a determination in which it identified several responsive documents: (1) a proprietary database obtained from the Petroleum Information Corporation (PIC); (2) a list of potential customers prepared by BPA's Office of Marketing Support (the customer list), and (3) a set of accompanying maps. BPA withheld each of these documents under

Exemption 4 of the FOIA. On April 30, 1996, the Appellant filed the present Appeal contending that BPA's withholding of the customer lists and accompanying maps was improper. The Appellant does not challenge BPA's withholding of the PIC database.

II. ANALYSIS

The FOIA generally requires that federal agencies release documents to the public upon request. However,

the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). BPA withheld the customer lists and accompanying maps under Exemption 4, citing potential competitive harm to PIC. BPA used PIC's proprietary database to prepare some of the withheld documents. Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). After reviewing these documents, however, we are of the opinion that while these documents might be properly withheld under Exemption 4, they are more appropriately withheld under Exemption 5.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149; 95 S. Ct. 1504, 1515 (1975) (Sears). The courts have identified three traditional privileges that fall within this exemption: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184; 95 S.Ct. 1491, 1500 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be ?routinely' or ?normally' disclosed upon a showing of relevance." F.T.C. v. Grolier, 462 U.S. 19, 26; 103 S. Ct. 2209, 2214 (1983) (citing Sears, 421 U.S. at 148-49; 95 S. Ct. at 1515 (1975)). Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 797, 799-801; 104 S. Ct. 1488, 1492-93 (1984).

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." See, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340; 99 S. Ct. 2800 (1979) (Merrill) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982) (Land Bank) (withholding a government generated real estate appraisal).

"The Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." Merrill, 443 U.S. at 356; 99 S. Ct. at 2810. The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. Id., 443 U.S. at 360; 99 S. Ct. at 2812. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." Land Bank, 671 F.2d at 665 (footnote omitted).

However, the protection afforded by this privilege is limited in scope and lasts only as long as necessary to protect the government's commercial interests. Id. Moreover, the application of this privilege is not automatic. Merrill, 443 U.S. at 362; 99 S. Ct. at 2813. The burden is upon the agency to show that the records it seeks to withhold under the privilege are confidential and that their disclosure might be harmful. American Standard v. Pfizer, Inc., 828 F.2d 734, 746 (Fed. Cir. 1987) (applying the privilege in the civil discovery context). In the civil discovery context, once these burdens are met, the burden shifts to the party seeking disclosure to prove that disclosure should occur by establishing a substantial need for those documents. R&D Business Systems v. Xerox Corp., 152 F.R.D. 195, 196-197 (D. Colo. 1993) (Xerox). In the FOIA context however, the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. See Merrill, 443 U.S. at 362-63; 99 S. Ct. at 2813, and cases cited therein. Accordingly, courts have found that documents which are immune from discovery absent a showing of substantial need are not "routinely" or "normally" available to parties in litigation and therefore are exempt from mandatory disclosure under Exemption 5. F.T.C. v. Grolier, Inc., 462 U.S. 19, 27; 103 S. Ct. 2209, 2214 (1983).

Accordingly, if the agency has shown that it has maintained the confidentiality of the withheld records and that their release might result in harm to the government's commercial interests, the agency could properly withhold the records under Exemption 5. In the present case, there is no indication in the record that BPA has not maintained the confidentiality of the documents in question. We therefore turn to the next issue before us: whether release of the customer lists and accompanying maps would likely result in harm to BPA's commercial interests or ability to consummate contracts.

Release of the withheld information would provide BPA's competitors with otherwise unavailable insight into BPA's potential future marketing strategies. The lists and accompanying maps identify which of BPA's existing customers are vulnerable to switching to BPA's competitors and also identify a number of industrial end-users not presently served by BPA that are in close proximity to BPA's existing transmission grid. BPA developed this information for the purpose of enabling it to formulate a marketing strategy for securing its existing customer base and possibly broadening it as well. If BPA's competitors obtained this marketing research, it would provide them with valuable insights into BPA's future marketing strategy, hindering BPA's ability to compete in the manner of a private sector actor. See Xerox, 152 F.R.D. at 197 (disclosure of marketing strategy and research would cause competitive harm); In Re Adobe Systems, Inc. Securities Litigation, 141 F.R.D. 155, 162 (disclosure of documents containing marketing information would educate competitors and would adversely affect negotiating leverage with customers); Weed Associates, 24 DOE ¶ 80,159 at 80,645 (1994) (disclosure of future marketing plans would likely cause substantial harm to competitive position). If BPA's present and potential customers obtained this information, it would provide them with undue leverage in future contract negotiations for the purchase of electrical services from BPA. Accordingly, BPA has established a likelihood of significant competitive harm that would result from release of the customer lists and accompanying maps. We therefore find that they are properly withheld under Exemption 5.

It Is Therefore Ordered That:

(1) The Appeal filed by Ball, Janik and Novack, Case No. VFA-0159, on April 30, 1996, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 29, 1996

Case No. VFA-0160, 25 DOE ¶ 80,199

May 31, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Howard T. Uhal

Case Number: VFA-0160

Date of Filing: May 6, 1996

Howard T. Uhal (Uhal) files this appeal from a determination letter issued by the Freedom of Information Officer (FOI Officer) of the Albuquerque Operations Office (Albuquerque). The determination letter answered Uhal's request, dated July 18, 1995, for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In the determination letter, the FOI Officer said that no documents responsive to Uhal's request had been found. Uhal's appeal, if granted, would require the Albuquerque Operations Office to conduct a further search for responsive documents.

Background

Uhal directed his request to two laboratories administered by Albuquerque, Sandia National Laboratories (Sandia) and Los Alamos National Laboratory (Los Alamos). He divided the request into four categories of information, each asking for documents dealing with equipment for detecting chemical and biological warfare (CBW) agents. Because the wording of Uhal's request, and the wording of the determination letter, are critical for this appeal, we will quote the relevant portions in full.

The first three categories concern various aspects of the light detection and ranging (LIDAR) system. Under the fourth category, however, Uhal asked for:

Any and all documents which pertain to the detection (or lack of detection) of CBW agents or similar substances in the Southwest Asia region during the Persian Gulf conflict *by any other equipment* under the purview of the Department of Energy.<1>

The FOI Officer says in the determination letter that she is responding to Uhal's "request for documents pertaining to the LIDAR system."<2> She informed Uhal that personnel at Sandia searched their files and found no responsive documents. In addition, she stated that personnel at Los Alamos searched their files and reported that LIDAR was a project of the Department of the Army. She notified Uhal that she would forward a copy of his request to the Department of the Army. She does not mention a search for documents about non-LIDAR systems.

Subsequently, the Department of Defense, on behalf of the Department of the Army, sent Uhal a letter acknowledging the receipt of his request from the FOI Officer. In this letter, Uhal's request is described as "information on a … LIDAR system …[and] the detection (or lack of detection) of … CBW agents … by this system in Southwest Asia."<3> Uhal is concerned that the letter mentions only the LIDAR system. He suggests this means that the FOI Officer forwarded only a paraphrase to the Department of the Army. He asks in his appeal that we send the full text and attachments of his original request to the Department of

the Army.

Analysis

The question raised by Uhal's appeal is whether Sandia and Los Alamos searched only for documents concerning LIDAR or included other CBW detection devices in their search. Uhal contends that the scope of the search was inadequate because the determination letter mentions only the LIDAR system. Consequently, he asks in his appeal that we remand for a search to include non-LIDAR detection devices.

The FOIA generally requires federal agencies to release agency records to the public upon request. If a requester has reasonably described the information he is seeking and has complied with the DOE's FOIA regulations, 10 C.F.R. Part 1004, the Department must conduct a thorough and conscientious search for responsive documents. In responding to a request for information filed under

the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). Accordingly, the Office of Hearings and Appeals will remand a case where a search was inadequate. *E.g., Petrucelly & Nadler, P.C.*, 25 DOE ¶ 80,187 (1996); *Dennis McQuade*, 25 DOE ¶ 80,158 (1996).

To evaluate the adequacy of the search, we telephoned staff members of Albuquerque and Los Alamos. We learned that both Sandia and Los Alamos did indeed conduct a search for documents responsive to all four categories of Uhal's request.<4> Staff members at Albuquerque reported that Sandia found no documents responsive to any of the four categories of Uhal's request.

At Los Alamos, staff members also found no documents that were responsive to any of the four categories of the request. They said further that some work on the LIDAR system had been done at Los Alamos. The work was done under contract with the Department of the Army, however, and not under contract with the Department of Energy. Under these circumstances, the regulations provide that the Department of Energy is to refer the request to the originating agency, the Department of the Army. 10 C.F.R. § 1004.4(f)(1); *see Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989); *Mid-Missouri Nuclear Weapons Freeze*, 25 DOE ¶ 80,104 (1995); *Physicians for Social Responsibility*, 25 DOE ¶ 80,106 (1995). Albuquerque therefore forwarded a photocopy of Uhal's request to the appropriate office of the Department of the Army.

Conclusion

The determination letter issued in this case did not accurately state the scope of the search that Sandia and Los Alamos actually conducted. Although the determination letter explicitly mentioned only materials concerning the LIDAR system, Sandia and Los Alamos conducted a search for all items covered by the request, including material on non-LIDAR detection systems. We find no reason, therefore, to remand this request for a further search.

Furthermore, we find Uhal's concern about the transmission of his request to the Department of the Army to be misplaced. The FOI Officer forwarded a photocopy, and not a paraphrase, of Uhal's request to the Department of the Army. If Uhal has further questions about the scope of his request, then the appropriate action for him is to discuss the matter with the Department of the Army.

It Is Therefore Ordered That:

(1) The appeal filed by Howard T. Uhal, Case No. VFA-0160, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are

situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 31, 1996

<1>/ Letter to Uhal from Elva Ann Barfield, Freedom of

Information

Officer, Albuquerque Operations Office, dated July 26, 1995 (emphasis added).

<2>/ Letter to Uhal from Barfield, dated April 2, 1996.

<3>/ Letter to Uhal from A.H. Passarella, Director, Freedom of Information and Security Review, Department of Defense, dated April 12, 1996.

<4>/ Telephone statement of James C. Snyder, Information Programs Specialist, Albuquerque Operations Office, May 13, 1996; telephone statement of Terry Hawkins, Deputy Director of Nonproliferation and National Security, Los Alamos National Laboratory, May 21, 1996.

Case No. VFA-0161, 25 DOE ¶ 80,198

May 30, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gilberte R. Brashear

Date of Filing: May 8, 1996

Case Number: VFA-0161

On May 8, 1996, Gilberte R. Brashear filed an Appeal from a determination issued to her on April 8, 1996, by the Department of Energy's Albuquerque Operations Office (AO). That determination was issued in response to a request for information submitted by Mrs. Brashear under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Mrs. Brashear asserts that AO failed to provide her with responsive documents in its possession regarding a Request for Information she made on September 10, 1995.

I. Background

On September 10, 1995, Mrs. Brashear wrote to the Health Physics Policy and Programs, Dose Assessment Section, of the Los Alamos National Laboratory (LANL) to request information regarding the possible exposure to radiation of her late husband, Junior R. (John R.) Brashear, while he was in the U.S. Army at Los Alamos, New Mexico. Mrs. Brashear specifically requested the LANL to provide her the Radiation Dosimetry data pertaining to her late husband. On January 11, 1996, the LANL provided Mrs. Brashear a copy of a two-page Dosimetry Response for her late husband. The LANL forwarded Mrs. Brashear's Request to AO so that it could conduct a search for any radiation exposure records regarding Mr. Brashear. In its April 8, 1996 Determination Letter, AO stated that it conducted a search of its records at AO's Occupational Safety and Health Division (OSHD) and that it found no responsive documents.

In her Appeal, Mrs. Brashear impliedly argues that AO conducted an inadequate search for records relating to her husband. She maintains that her late husband was not given accurate facts regarding the danger of working with and being exposed to radioactive substances. See Appeal Letter at 1. Mrs. Brashear asks that the Office of Hearings and Appeals direct AO to conduct a new search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive

documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at AO to ascertain the extent of the search that had been performed. Upon receiving Mrs. Brashear's Request for Information, AO instituted a search at the only facility other than the LANL it expected would possess radiation exposure records, OSHD. With regard to the search conducted at OSHD, we were informed that it does not normally possess radiation exposure records of U.S. Army personnel, as it only possesses radiation exposure records for civilian federal employees. Nonetheless, AO requested that a search of the radiation exposure records at OSHD be conducted. OSHD officials conducted a search of their computer database of radiation exposure records and found no records concerning Mr. Brashear. Given the facts presented to us, we find that AO conducted an adequate search which was reasonably calculated to discover documents responsive to Mrs. Brashear's Request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Gilberte R. Brashear on May 8, 1996, is denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 30, 1996

Case No. VFA-0162, 25 DOE ¶ 80,200

June 6, 1996

Decision and Order

of the Department of Energy

Appeal

Name of Petitioner: Association of Public Agency Customers

Date of Filing: May 8, 1996

Case Number: VFA-0162

On May 8, 1996, the Association of Public Agency Customers (Appellant) filed an Appeal from a determination issued on April 19, 1996, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). In that determination, BPA withheld information identified as responsive to the Appellant's February 27, 1996 Request under the Freedom of Information Act (FOIA) and charged $1,151.77 for search and review. This Appeal, if granted, would require the DOE to release the withheld information, and reduce the amount which the Appellant has been ordered to pay for search and review costs.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 27, 1996, the Appellant submitted a FOIA request to BPA seeking information regarding four separate matters. Two of these matters are at issue in this Appeal:

(2) documents created since January 1993 demonstrating BPA's ability to serve new direct service industrial customers or other end use customers;

(3) documents relating to BPA's 1995 power and energy sales agreements with Kaiser Aluminum and Chemical and Elf Atochem North America, including relevant documents relating to BPA's power purchases from Enron and the Washington Water Power Company.

Letter from Melinda J. Horgan, Attorney for the Appellant, to Gene Tollefson, Freedom of Information Act Officer, BPA, at 1-2 (February 27, 1996) (Request Letter).

In its April 19, 1996 Determination Letter, BPA released 26 pages to the Appellant, some of which were redacted, and withheld approximately 1,500 other pages, citing FOIA Exemptions 4 and 5. The documents that were withheld include legal and policy analyses and discussions, draft talking points, and negotiating principles and notes, of BPA employees. BPA charged the Appellant $1,151.77 for fees, including search

and review costs. Letter from Steven G. Hickok, Authorizing Official, BPA, to Melinda J. Horgan (April 19, 1996) (Determination Letter). On May 8, 1996, the Appellant filed the present Appeal in which it contends that BPA's refusal to release withheld information was improper and that BPA's fees were excessive. Appeal Letter from Melinda J. Horgan, to Director, Office of Hearings and Appeals (May 8, 1996) (Appeal Letter).

II. Analysis

A. Reasonableness of Fees

The DOE regulations provide for fees to be assessed to cover the "full allowable direct costs incurred" of responding to requests for information. 10 C.F.R. § 1004.9. Pursuant to the FOIA, the DOE has issued regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. § 552(a)(4)(A)(i). Under this fee schedule, the DOE charges for manual searches at the salary rate(s) (i.e. basic pay plus 16 percent) of the employees making the search. 10 C.F.R. § 1004.9(a)(1). In addition, "[t]he DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure." 10 C.F.R. § 1004.9(a)(3).<1>

The Appellant makes several arguments regarding the fees assessed in this case. First, the Appellant believes that the search time spent must have been exorbitant in view of the large fee and the release of only 26 pages. In connection with that belief, the Appellant asserts that this amount of search time must have been due to BPA's lack of an organized filing system. Second, the Appellant argues that lower-paid employees should have been used to conduct the search and review. Third, the Appellant states that the DOE is not permitted to charge for legal review of the documents to determine the applicability of FOIA exemptions. Finally, the Appellant notes that, because it is currently in litigation with BPA, it requested that it not receive any responsive documents which were already in the public record, and therefore, already possessed by the Appellant. Because 16 pages of responsive documents were released which were duplicative of public record documents, the Appellant argues that BPA's charges should be reduced.

We reject these arguments. First, unless a requester qualifies for a fee waiver, the fees specified in the DOE regulations must be imposed. Although the Appellant complains that only 26 responsive documents were produced, that is not relevant to whether appropriate fees were charged. There can never be any assurance that a FOIA request will yield any releasable documents or that the requester will find the documents released to be useful. Fees are not charged because the requester may derive a benefit from the documents, but because the government expends money to process the request. See ITech, Inc., 25 DOE ¶ 80,169 at 80,678 (1996). In fact, the regulations specifically provide that fees will be assessed even if no responsive documents are located. 10 C.F.R. § 1004.9(b)(6).

We contacted BPA to determine how the fees charged to the Appellant were calculated. In this case, BPA charged $682.33 for search time, based on 27 hours of search time by approximately 25 BPA employees, and charged $462.00 for 17 hours of review time by several employees. See Memorandum of Telephone Conversation between Dawn Koren, OHA Staff Attorney, and Brian Altman, Attorney, BPA (May 9, 1996). We find that this amount of search and review time was reasonable in this case. The Appellant made an extremely broad request for documents which were part of complex, technical, projects staffed by many employees. Moreover, the Appellant itself defined "relating to" in 21 different ways and "document" in more than 50 ways, see Attachments 1 and 2 of Request Letter, thus widening the search. Thus, we believe that 27 hours of search time is appropriate in this case. Nor do we view 17 hours as an unreasonable amount of time to spend reviewing approximately 1,500 pages of material.

Next, we find that it was not unreasonable to have highly-paid employees conduct the search and review. In BPA's view, it was most efficient to request that the attorneys and salespeople who possessed the documents and were most familiar with the technical terminology used in those documents search their own offices. See Memorandum of Telephone Conversation between Dawn Koren and Brian Altman (May

9, 1996). Because the documents at issue were so technologically complex, we do not fault BPA for using attorneys familiar with these matters to review the material for the applicability of FOIA exemptions. Thus, we find that personnel was reasonably allocated to find responsive material quickly and redact it correctly.

We also reject the Appellant's assertion that it may not be charged for legal review time. DOE is permitted to charge commercial use requesters for all time spent determining whether material is exempt from mandatory disclosure, except time spent reviewing this administrative appeal. See 10 C.F.R. § 1004.9(a)(3).

We further find that the Appellant may be charged for the search and review of the sixteen pages of documents which the Appellant already possessed. Due to the extensive, dispersed nature of the responsive material, BPA judged that it would be inefficient to have every searcher and reviewer cross-reference the 1,500 pages of responsive material against the 44-page index of documents in the public record of the litigation between BPA and the Appellant. See Records of Telephone Conversations between Brian Altman and Dawn Koren (May 9 and 20, 1996). BPA further explained that although the reviewers attempted to separate out those documents already in the public record, and did so in many cases, these sixteen documents were simply mistakenly included. We find that, in this particular case, it would have been unreasonably time-consuming (and more costly to the requester) to cross-reference the responsive documents against the public record. Therefore, we find that BPA may charge for the search and review of those sixteen pages.

Under these circumstances, and given BPA's explanation of how it calculated the fee in this case, we conclude that the fees imposed were reasonable and necessary to recoup the cost of processing the request, with the exception of one incorrect charge, the $6.14 charged for photocopying time. Although BPA is permitted to charge five cents a page for the photocopies themselves (and did so), it is not permitted to charge the salary of the photocopier operator. See 10 C.F.R. § 1004.9(a)(4). Thus, we will require BPA to reduce the Appellant's charges by the amount of $6.14.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; see also Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. Because the information at issue in this case was necessary in order for the corporations at issue to negotiate contracts with BPA, this information is not considered to have been submitted voluntarily and is therefore considered "confidential" if it meets the test set out in National Parks. Cf. Nayar & Company, P.C., 23 DOE ¶ 80,185 at 80,710 (1994) (information submitted in response to request for proposal).<2>

In the present case, the information withheld by BPA under Exemption 4 consists of certain information utilized in negotiating new contracts between BPA and two of its customers, Kaiser Aluminum and Chemical Corporation (Kaiser) and Elf-Atochem North America (Atochem). These portions include the cost and amount of power to be sold, as well as the amount that the customers may refuse to purchase

from BPA. This information is clearly "commercial" within the meaning of Exemption 4, and was obtained from a "person," since the definition of "person" includes corporate entities. 5 U.S.C. § 551(2). The issue to be determined therefore is whether release of the withheld information would either cause competitive harm or impair the government's ability to obtain necessary information in the future.<3>

Unlike previous contracts between these two customers and BPA, the new contracts are "take or pay." Under these contracts, Kaiser and Atochem must receive a certain amount of energy from BPA or pay a penalty. Thus, according to Kaiser and Atochem, access to the withheld information will inform their competitors of their energy supplies and cost, which is a major component of the costs of these corporations, and thus their production plans for the next five years. See Record of Telephone Conversation between Paul Murphy, Attorney, Atochem, and Dawn Koren (May 13, 1996).

The Appellant argues that the amount of power purchased by customers has historically been publicly available. However, we note that only past amounts of energy purchased (load data) are released to the public. See Record of Telephone Conversation between Paul Murphy and Dawn Koren (May 13, 1996). BPA has never released its customers' planned purchases of power. We have determined that it is the forward-looking nature of this data which would create an unfair competitive edge in the hands of Kaiser and Atochem's competitors, because it shows future business strategy.

The Appellant also argues that this future load data would not have the predictive powers attributed to it by Kaiser and Atochem; not only can they reduce the amount that they purchase from BPA, they have the right to purchase additional power from third parties. Thus, according to the Appellant, the mere knowledge of how much energy Kaiser and Atochem are under contract to purchase from BPA does not allow their competitors to estimate their production capacities. However, the Appellant's assumptions are incorrect. First, the contracts are meant to be the exact statements of Kaiser and Atochem's planned energy usage for the next five years. See Contract between Atochem and BPA, Sections 9a and 9b (December 6, 1995) and Contract between Kaiser and BPA, Sections 9a and 9b (November 6, 1995). These firms may only vary the amount of energy purchased by an extremely small amount without penalty; any greater variance would require Kaiser and Atochem's plants to cease to operate and that each company pay the full contract value of the energy to BPA, yet only be reimbursed for the market value of the energy, placing the companies at full market risk. See Records of Telephone Conversations between Paul Murphy, Attorney, Atochem, and Dawn Koren (May 13 and 28, 1996); each contract at Section 18(b)(4). We agree that this provision does not easily allow Kaiser or Atochem to vary its purchases from BPA. Further, even if Kaiser and Atochem could reasonably purchase less energy from BPA, statutory restrictions prevent these customers from purchasing significant amounts from local utilities. 16 U.S.C. §§ 839a(13), 839e(b)(4), 839e(f). Thus, we find that release of the withheld information would give competitors a reliable enough picture of Kaiser's and Atochem's production capacities to be able to adjust their own production accordingly, creating a competitive harm.<4> We further find that the information meets each of the requirements of 10 C.F.R. § 1004.11(f): the information has been held in confidence by Kaiser and Atochem; it is of the type customarily held in confidence by these types of corporations and there is a reasonable basis for doing so; it was transmitted to and received by DOE in confidence; and it is not available in public sources. We therefore find that BPA correctly withheld this information under Exemption 4.

The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

C. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). Exemption 5 is generally recognized as encompassing certain distinct privileges, including the attorney-client privilege, the attorney work product privilege, and the governmental deliberative process privilege. Coastal States Gas Corp. v. DOE, 617 F.2d 854, 862 (D.C. Cir. 1980). In the present case, BPA relied on the deliberative process and attorney-client privileges of Exemption 5.

1. Deliberative Process

The deliberative process privilege permits the government to withhold under Exemption 5 documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of the agency decisions. Sears, 421 U.S. at 151. In order for an agency to withhold information properly under the deliberative process privilege, the information in question must be (1) predecisional and (2) deliberative. Vaughn v. Rosen, 523 F.2d 1136, 1143-33 (D.C. Cir. 1975). See also Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985).

In this case, BPA withheld almost all 1,500 pages under the deliberative process privilege. First, the Appellant takes issue with BPA's statement that material was withheld because it did not contain any final decision made by BPA. According to the Appellant, if the documents do not contain a final decision, they are not protected by the deliberative process privilege. This argument reflects a misunderstanding of the deliberative process privilege, because if any of the documents contained a final decision, the document would fail to be pre-decisional. A document eligible for protection under the deliberative process privilege must reflect deliberative processes of the agency, concerning and leading up to a policy-oriented decision. Therefore, BPA is correct in withholding documents which do not contain a final decision, and in contrast, releasing documents such as the Atochem "Record of Decision," (with proper Exemption 4 redactions) which reflected BPA's final decision.

The Appellant further argues that once the contracts at issue were signed in 1995, any documents containing information relating to the contracts became post-decisional. This is also incorrect. As long as the documents withheld in this case were generated before the signing of the contracts, and are also deliberative, they always remain pre-decisional and withholdable under Exemption 5. We find, upon review of representative samples of the documents, that these documents were in fact central to the deliberative processes surrounding the formulation of a policy-oriented judgment, see Ethyl Corp. v. EPA, 25 F.3d 1241, 1248 (4th Cir. 1995), whether and how to enter into the contracts at issue. Thus, the documents were properly withheld under Exemption 5.

2. Attorney-Client Privilege

The attorney-client privilege exists to protect confidential communications, including facts, (a) from a client to an attorney, if for the purpose of securing legal advice, and (b) from an attorney to a client, if the communication is based on confidential information provided by the client. Sears, 421 U.S. at 154; In Re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1042 (11th Cir. 1990) (MIA); Schefler v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); In Re Grand Jury Subpoena of Slaughter, 694 F.2d 1258, 1259-60 (11th Cir. 1982); Brinton v. Department of State, 636 F.2d 600, 603-04 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Murphy v. Department of the Army, 613 F.2d 1151, 1154 n.8 (D.C. Cir.

1979); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Not all communications between attorney and client are privileged, however. Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) (Clarke). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Fisher v. United States, 425 U.S. 391, 403-04 (1976). Correspondence which reveals the motive of the client in seeking legal advice, litigation strategy or the specific nature of the services provided, such as researching particular areas of law, falls within the privilege. Clarke, 974 F.2d at 129; see also Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977). In addition, for purposes of the attorney-client privilege, documents created by in-house counsel, such as these authored by BPA attorneys, generally are treated the same as those created by outside attorneys. See Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968).

After reviewing representative samples of the documents at issue, we find them to contain extensive legal analysis, recommendations and advice based on BPA-supplied information. These are communications which, if released, would have a tendency to reveal confidences of the client, BPA. The Appellant makes three arguments as to why the documents are not protected by the privilege: the client has not been sufficiently identified; the communications do not involve "actual legal advice"; and some of the information consists of communications between BPA attorneys. We reject each of these arguments. First, the client whose information is at issue here is clearly BPA. Second, it is untrue that only "actual legal advice" is protected by the privilege; as long as the information meets the requirements of the privilege, any type of information, including factual matters, can be protected. See MIA, 899 F.2d at 1042 (citing United States v. Jones, 517 F.2d 666, 670 (5th Cir. 1975)). The documents at issue here concern the negotiation of BPA contracts by BPA attorneys, and accordingly contain a mixture of legal and business advice, which is precisely the kind of information the attorney-client privilege protects. Third, the Appellant is wrong in its assertion that communications between BPA attorneys are not protected by the privilege. A communication between attorneys is protected so long as the communication is based on information supplied by the client, and satisfies the other requirements for application of the privilege. Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982). Here, the confidential communications were based on BPA-supplied information. Therefore, we find that this information was properly withheld under the attorney-client privilege of Exemption 5.

3. Public Interest Analysis and Reno Memorandum

As explained earlier, under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. We find that the public interest in the deliberative material in these documents is best served by non-disclosure in order to insure continued honest and open discourse of situations and options confronting DOE. See Arent, Fox, Kitner, Plotkin & Kahn, 16 DOE ¶ 80,106 at 80,511 (1987). Were DOE employees or their agents to become inhibited in their analyses, reporting, or recommendations, and thus deprive the agency of the benefit of their complete and candid thoughts, it would stifle the free exchange of ideas and opinions which is essential to the sound operation of DOE programs. Boulder Scientific Company, 19 DOE ¶ 80,126 at 80,578 (1989). In this case, the Appellant has not claimed any public interest in releasing this material, nor can we imagine one. Therefore, we find that the public interest does not mandate release of the material withheld under Exemption 5.

We further find that the existence of these tangible risks to the deliberative process and the attorney-client relationship satisfies the reasonably foreseeable harm standard set forth by the Attorney General in 1993. This relatively new standard applies a presumption in favor of disclosure which, in the absence of a reasonably foreseeable harm to an interest protected by an Exemption, should result in a determination by the agency that the public interest lies with disclosure. See J. Reno, Memorandum for Heads of Departments and Agencies (October 4, 1993).

D. Duty to Segregate Non-Exempt Material

The FOIA, as implemented by 10 C.F.R. § 1004.10(c), requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See The Oak Ridger, 21 DOE ¶ 80,120 at 80,564-65 (1991) (and cases cited therein); Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989) (and cases cited therein). The only exceptions to the command of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin., 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id. In the instant case, the Appellant has asserted that BPA failed to segregate non-exempt material from documents withheld under Exemption 4. We have reviewed representative samples of the material withheld under each exemption at issue, and find that there is no reasonably segregable non-exempt material. On the basis of the foregoing discussion, we find that the portions of the Appeal pertaining to the application by BPA of Exemption 4 and Exemption 5 should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Association of Public Agency Customers on May 8, 1996, Case Number VFA-0162, is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Bonneville Power Administration, which shall reduce its fees in this case by the amount of $6.14.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 6, 1996

<1>The Appellant has not challenged the determination that it is a commercial use requester. It is a consortium of several large corporations. See Record of Telephone Conversation between Brian Altman and Dawn Koren (May 9, 1996).

<2>DOE regulations set forth four additional criteria to be considered in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4: (i) whether the information has been held in confidence by the person to whom it pertains; (ii) whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor; (iii) whether the information was transmitted to and received by the DOE in confidence; and (iv) whether the information is available in public sources. 10 C.F.R. § 1004.11(f).

<3>In its Appeal, the Appellant noted that although BPA made specific arguments with respect to the information submitted by Kaiser, no such arguments were made with respect to Atochem. Brian Altman of BPA has informed us that BPA had mistakenly failed to describe Atochem's specific Exemption 4 arguments. However, he explained that these arguments were very similar to those made on behalf of Kaiser. Moreover, we have given Atochem an opportunity to present its arguments directly to us, see Record of Telephone Conference between Paul Murphy, Attorney, Atochem, and Dawn Koren (May 13, 1996); Letter from Paul Murphy to Dawn Koren (May 13, 1996), and sent a copy of the letter (which summarized arguments made in the telephone conversation) to the Appellant's attorney. We will therefore

consider the validity of those arguments with respect to both customers.

<4>Because of this finding of competitive harm, there is no need to examine the "impairment prong" of the National Parks analysis.

Case No. VFA-0163, 25 DOE 80,202

June 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dorothy M. Bell

Date of Filing: May 9, 1996

Case Number: VFA-0163

On May 9, 1996, the Office of Hearings and Appeals (OHA) received an Appeal filed by Dorothy M. Bell from a determination issued to her by the Freedom of Information Officer at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "the Officer"). The Officer's determination was issued in response to a request for information that was processed in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Officer to conduct a further search for documents responsive to the request.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Ms. Bell's request was originally submitted to the U.S. Department of Defense (DOD). The DOD referred the request to DOE Headquarters (DOE/HQ), and DOE/HQ then transferred the matter to the Albuquerque Operations Office, having identified that Office as being most likely to possess documents responsive to Ms. Bell's request. In that request, Ms. Bell sought access to all documents concerning any occupational exposures to hazardous materials endured by her husband, John Bell, during his employment at the DOE's Pantex plant

in Amarillo, Texas. Specifically, she sought access to any documents relating to an incident that occurred at Pantex on September 1, 1987, during which Mr. Bell was allegedly exposed to radioactive material.

In her determination, the Officer described the search for responsive documents that was conducted pursuant to the request. She stated that the Occupational Safety and Health Division and the Office of Chief Counsel of the Albuquerque Office were searched, and that the request was also forwarded to the Mason and Hanger-Silas Mason Co., Inc. (M&H), which operates the Pantex facility under contract with the DOE. The Officer further stated that no responsive documents were found in the Occupational Safety and Health Division, and that all relevant records in the possession of the Office of Chief Counsel and M&H had already been provided to Ms. Bell through the discovery related to a lawsuit that was filed by Ms. Bell and her husband against M&H and its insurance carrier. The Officer therefore concluded that no additional documents exist that are responsive to Ms. Bell's request.

In her Appeal, Ms. Bell does not directly address the scope of the search that was conducted. Instead, she contends that the search was inadequate because the documents provided to her have not answered all of her questions. These questions relate to the September 1, 1987 incident and the trial that followed the filing of the Bells' lawsuit against M&H.

II. Analysis

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In order to evaluate the scope of the search, we contacted the employee in the Albuquerque Office who coordinated the search. That employee indicated that the search was comprehensive, and that she was unaware of any locations, other than those already searched, in which responsive documents were likely to be found. She further stated that the discovery process in a civil lawsuit generally allows access to a much broader range of documents than is available under the FOIA, and that discovery in the Bells' suit was extensive. See memorandum of May 14, 1996 telephone conversation between Carolyn Becknell, Albuquerque Operations Office, and Robert Palmer, OHA Staff Attorney. In addition, we have reviewed documents that were submitted by Ms. Bell. These documents were apparently obtained by the Bells during their lawsuit against M&H, and they relate to the September 1, 1987 incident and M&H's response to that incident. There is no mention in those documents of additional locations in which responsive documents are likely to be found. Based on the information before us, we conclude that the search for documents responsive to Ms. Bell's request was adequate. Her Appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Dorothy Bell on May 9, 1996 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in

which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 6, 1996

Case No. VFA-0164, 25 DOE ¶ 80,201

June 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Todd M. Clark

Date of Filing: May 9, 1996

Case Number: VFA-0164

On May 9, 1996, Todd M. Clark filed an Appeal from a determination issued to him on April 8, 1996, by the Freedom of Information Act Contact of the Office of Environmental Management (FOIA Contact) of the Department of Energy (DOE). In that determination, the FOIA Contact granted a request for information filed by Mr. Clark on January 11, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. Clark sought:

Records of any telephone calls, including appointment calendars, between Hazel O'Leary, Tom Grumbly, Willis Bixby or any other senior official of DOE and officials of ICF Kaiser or their agents including, but not limited to, James Edwards, Wilson Golden and Mike Driver.

Records of any meeting or discussion, including appointment calendars, within the last 12 months involving the Democratic National Committee and officials of DOE, particularly Hazel O'Leary or Tom Grumbly, where officials of ICF Kaiser were involved, present or participating including, but not limited to, James Edwards, Wilson Golden and Mike Driver.

Any records, minutes or notes, including appointment calendars, where DOE Headquarters officials met with ICF Kaiser officials or their agents where the Mound procurement was discussed.

Any records, minutes or notes, of any meetings or discussion between DOE Headquarters officials, specifically Hazel O'Leary and/or Tom Grumbly, and Tom Schneider of Restructuring Associates, concerning Mound.

Any consulting contracts between DOE and Tom Schneider of Restructuring Associates.

On April 8, 1996, the FOIA Contact provided Mr. Clark with copies of responsive documents. The FOIA Contact's determination letter referred to Mr. Clark's request as dealing with "correspondence documents between various named individuals cited in the request." In his written Appeal, Mr. Clark contends that the search should have been broader than the description the FOIA Contact used in his determination letter. Mr. Clark requests that we direct the FOIA Contact to conduct a further search concerning each item in his initial request as quoted above. Furthermore, the FOIA Contact had previously informed Mr. Clark that his request had been forwarded to the Office of the Executive Secretariat for a response regarding the portions of his inquiry dealing with Hazel O'Leary, the Secretary of Energy. Since he has not yet received a response from the Office of the Executive Secretariat, Mr. Clark requests that we direct that Office to respond formally to his request. ??

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In considering this Appeal, we conferred with the FOIA Contact to ascertain the extent of the search he performed. The FOIA Contact informed us that in conducting his search he sent photocopies of Mr. Clark's January 11, 1996 request letter to all of the parties who might have responsive information. He stated that these parties therefore did not rely on his subsequent characterization of Mr. Clark's request, but relied on Mr. Clark's actual request letter in conducting their searches.<1> Accordingly, the search for documents was not in any way based on the FOIA Contact's imprecise characterization of Mr. Clark's request and his search could not have been any broader than the way in which he conducted it. Since we find that the FOIA Contact followed procedures reasonably calculated to uncover all material within the scope of Mr. Clark's May 9, 1996 information request, we must deny this Appeal.

As for Mr. Clark's remaining request that we order the Office of the Executive Secretariat to respond formally to his request, the OHA lacks jurisdiction to order the relief requested. Specifically, the DOE regulations state that the Office of Hearings and Appeals has jurisdiction to consider FOIA Appeals when "the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Office has denied a request for waiver of fees." 10 C.F.R. § 1004.8(a), 53 Fed. Reg. 14660 (May 3, 1988). Since the Office of the Executive Secretariat has not issued an appealable determination regarding Mr. Clark's request, the OHA has no jurisdiction to consider this portion of his appeal. However, the FOIA Contact has contacted the Office of the Executive Secretariat and reminded the Office of the need to respond promptly to Mr. Clark's request.

It Is Therefore Ordered That:

(1) The Appeal filed by Todd M. Clark on May 9, 1996, Case Number VFA-0164, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). The requester may seek judicial review in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 6, 1996

<1>/ See memoranda of telephone conversations between Leonard M. Tao, OHA Staff Attorney, and Jeffrey J. Williams, FOIA Contact of the Office of Environmental Management.

Case No. VFA-0166, 25 DOE ¶ 80,210

June 28, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Keith E. Loomis

Date of Filing: May 16, 1996

Case Number: VFA-0166

Keith E. Loomis filed an Appeal from a determination issued to him on October 17, 1995, by the Office of Naval Reactors of the Department of Energy. In that determination, Naval Reactors denied in part a request for information that Mr. Loomis initially filed on April 10, 1995, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. After assisting Mr. Loomis with subsequent modifications to his request, Naval Reactors ultimately responded by releasing some documents responsive to portions of his modified request, withholding some material under the exceptions to mandatory disclosure permitted under the FOIA, and stating that other documents requested either were not found or were known not to exist. This Supplemental Order addresses one aspect of his Appeal that was inadvertently omitted from consideration in a Decision and Order concerning information that was withheld for national security reasons in the October 17 determination. Keith E. Loomis, 25 DOE ¶ 80,183 (1996).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his Appeal, Mr. Loomis contended that the DOE's search for responsive documents was inadequate and that its failure to disclose the material it withheld under Exemptions 1, 3, and 6 of the FOIA was improper. In order to handle this case as efficiently as possible, the Office of Hearings and Appeals bifurcated this Appeal, separating those issues on which it could rule without additional Departmental support from those issues requiring such support. As a result, this Office issued a final Decision and Order regarding the adequacy of Naval Reactors' search and its invocation of the FOIA's Exemption 6 on December 21, 1995 (Case No. VFA-0102). Keith E. Loomis, 25 DOE ¶ 80,155 (1995). The remaining issues, which concern Naval Reactors' withholding of certain information pursuant to Exemptions 1 and 3 of the FOIA, were addressed in a later Decision and Order issued on March 25, 1996 (Case No. VFA-0104). Keith E. Loomis, 25 DOE ¶ 80,183 (1996).

It has been brought to our attention that the two Decisions and Orders, when taken together, fail to address one aspect of Mr. Loomis's appeal. One of the documents that Naval Reactors provided, in redacted ("desensitized") form, to Mr. Loomis in response to his request was a Schenectady Naval Reactors

investigative report on Mr. Loomis's allegations. Naval Reactors determined that the portions of the document it withheld from disclosure contained "information related to reactor vessel design, evaluation, and analyses" that it identified as Naval Nuclear Propulsion Information (NNPI) and withheld under Exemption 3 of the FOIA. On appeal, Mr. Loomis contended that some of the withheld information in that report are titles of documents, identification numbers and dates, and that such information could not be properly withheld from disclosure. This Decision will address this sole remaining unresolved aspect of Mr. Loomis's appeal.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). The controlling statutory provision in this case is 10 U.S.C. § 130, which permits the Secretary of Defense to withhold from public disclosure "any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside the United States without an approval, authorization, or license" granted under specified statutes. 10 U.S.C. § 130(a). The term "technical data with military or space application" is defined as "any blueprints, drawings, . . . or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment." 10 U.S.C. § 130(c).

The "technical data" statute has been found to satisfy subpart (B) of the Exemption 3 criteria because it refers to sufficiently "particular types of matter to be withheld." Chenkin v. Department of the Army, No. 93-494, slip op. at 7 (M.D. Pa. Jan. 14, 1994), affirmed, 61 F.3d 894 (3d Cir. 1995); Colonial Trading Corp. V. Department of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990). It therefore qualifies as a statute upon which a claim of withholding under Exemption 3 may be based. The federal regulations treat NNPI as technical data with military application of the sort envisioned in 10 C.F.R. § 130. See, e.g., 15 C.F.R. §§ 778.1, 778.5. Consequently, information accurately identified as NNPI is exempt from mandatory disclosure to the public under Exemption 3 of the FOIA.

Consistent with Executive Order 12344, 3 C.F.R. 128 (1982), reprinted in 42 U.S.C. § 7158 (1995), and statutorily prescribed by the Department of Defense Authorization Act, P.L. 98-525, 98 Stat. 2492 (1984), the Director of the Office of Naval Reactors (Director of NR) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving classified Naval Reactors information and NNPI. Upon referral of this Appeal from the Office of Hearings and Appeals, the Director of NR reviewed the material that Mr. Loomis contended in his Appeal to have been improperly withheld from the investigative report. The Director's review revealed that the contents of the withheld material does not include document titles and identification numbers and dates, as Mr. Loomis has contended. Instead, the withheld portions of the documents contain information regarding specific naval propulsion plant components and other technical information concerning naval reactors.

As a result of that review, the Director of NR concluded that the redacted information should continue to be withheld from Mr. Loomis. Although not classified, this information is defined by the Navy as NNPI, the uncontrolled dissemination of which to foreign nationals is prohibited by 10 U.S.C. § 130 and the regulations cited above. The Director of NR maintains that because Naval Reactors would be unable to control the further dissemination of the NNPI contained in the requested document if it were released to the requester or any other member of the public, disclosure of this information would be tantamount to disclosure to foreign nationals. Such disclosure is therefore prohibited by the "technical data" statute and accordingly is exempt from mandatory disclosure under Exemption 3 of the FOIA.

Based on the review performed by the Director of the Office of Naval Reactors, we have determined that 10 C.F.R. § 130 requires the continued withholding of the redacted portions of the investigative report. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not

permitted where, as in the application of Exemption 3, the non-disclosure is required by statute. Accordingly, Mr. Loomis's Appeal will be denied.<1>

It Is Therefore Ordered That:

(1) The portion of Keith E. Loomis's November 21, 1995 Appeal that concerns the withheld portions of a responsive document described as a Schenectady Naval Reactors investigative report on Mr. Loomis's allegations, Case No. VFA-0166, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 28, 1996

<1>Although this report is properly withheld from unrestricted disclosure under the "technical data" statute and Exemption 3 of the FOIA, NR has reiterated to us its offer, first presented to Mr. Loomis in its October 17, 1995 determination letter, to afford him access to the report under appropriate conditions, that is, conditions that would not violate the disclosure restrictions of the "technical data" statute.

Case No. VFA-0167, 25 DOE ¶ 80,203

June 17, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: May 17, 1996

Case Number: VFA-0167

On May 17, 1996, the Government Accountability Project (GAP) filed an Appeal from a determination issued to it by the Department of Energy's Albuquerque Operations Office (AO) on April 8, 1996. In that determination, AO denied a request for a waiver of fees in connection with a FOIA request filed by GAP under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, GAP asks that we reverse AO's determination and grant it a fee waiver.

I. Background

In a submission dated January 16, 1996, GAP filed a Request for Information under the Freedom of Information Act requesting from AO "any and all reports made by Dr. Jay Feierman for the U.S. Department of Energy prepared since May 1, 1994 to the present." In its FOIA Request, GAP also requested a fee waiver for the costs associated with processing its FOIA Request. In support of this request, it claimed that it was a non-profit, public interest organization which seeks to serve the public through achieving governmental accountability by assisting governmental and private employees who observe and report threats to public health and safety and other abuses by government entities ("whistleblowers"). GAP also asserted that the requested information would contribute significantly to the public's understanding of the operations of government by highlighting potential abusive practices such as the subjecting of whistleblowers to security clearance psychiatric evaluations for the purposes of reprisal.

In its April 8, 1996 determination letter (Determination Letter), AO denied GAP's fee waiver request. AO concluded that the documents responsive to GAP's information request, psychiatric evaluations of government and government contractor employees prepared by Dr. Feierman, would not contribute significantly to the public's understanding of the operations or activities of the government. In support of its conclusion, AO noted that the fact that DOE uses contractor psychiatrists such as Dr. Feierman is already public knowledge and that the individual medical analysis contained in each evaluation contains no information which illuminates the government's activities or operations. AO further stated in its Determination Letter that the individual psychiatric evaluations would be heavily redacted due to the nature of the personal information contained in the reports and the requirements of the Privacy Act. Thus, AO stated that the redacted reports would

reveal nothing more than that a psychiatric evaluation was conducted on an individual because of a particular type of concern. The AO noted that the types of concerns which DOE has determined that merit psychiatric evaluations are listed in DOE regulations or could be determined by reviewing DOE's psychiatric evaluation request letters to Dr. Feierman. Additionally, AO noted that it had already provided

to GAP, pursuant to a March 1994 FOIA request, a number of redacted psychiatric evaluations prepared by Dr. Feierman and that in light of these released documents, AO did not believe that additional information would be gleaned from the documents requested by GAP in its present request.

AO, in its Determination Letter, also concluded that GAP was not eligible for a fee waiver on the grounds that its FOIA Request was primarily in the commercial interest of an individual. Specifically, AO stated that it had information which led it to believe that GAP was seeking the documents mentioned in its FOIA Request solely for the benefit of Marlene Flor, an individual who is currently engaged in litigation against Dr. Feierman. Thus, AO concluded that the information was being requested solely for the personal and commercial purposes of Ms. Flor.

In its Appeal, GAP argues that it was wrongly denied a fee waiver by AO. Specifically, GAP states that it was previously granted a fee waiver for costs associated with its March 1994 FOIA request for similar reports created by Dr. Feierman. Thus, GAP argues that DOE has already determined that the subject matter of the requested reports would shed light on the activities and operations of the government and that it is eligible for a fee waiver. GAP also argues that the requested documents would help it determine whether DOE is using psychiatry as a tool of discrimination with regard to whistleblowers. <1> GAP asserts that the requested documents as well as the other psychiatric evaluations it has previously obtained will be incorporated as part of its on-going advocacy and reform campaign.

With regard to AO's assertion that GAP's request for documents is exclusively on behalf of Ms. Flor, GAP argues that it has an independent interest in the requested information. GAP asserts that it seeks the requested information in order to shed light on an allegedly abusive practice of using psychiatric evaluations to remove the security clearances of whistleblowers whom AO's management seeks ultimately to fire. GAP states that it does engage in pro bono legal representation of Ms. Flor with regard to her EEO complaint. However, GAP asserts that it is not representing Ms. Flor with regard to her individual suit against Dr. Feierman. GAP further argues that its involvement with Ms. Flor is not inconsistent with its intent to use the requested information to shed light on government activities. Specifically, GAP notes that it has publicized Ms. Flor's case to several major newspapers and maintains an Internet web site highlighting Ms. Flor's case. Finally, GAP argues that the fact that a requester may seek information to assist in a suit seeking compensation does not mean that such a suit is a commercial interest within the meaning of the applicable fee waiver statute. GAP draws our attention to McClelland Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (MESS), as authority supporting its position.

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(I); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (Larson). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;"

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(c) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(I). If the DOE finds that a request satisfies these four factors, it must also consider the following two factors in order to determine whether disclosure of the information is primarily in the commercial interest of the requester:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

10 C.F.R. § 1004.9(a)(8)(ii).

We have performed a de novo review of the merits of GAP's request for a fee waiver and find that GAP should be granted a fee waiver for the reasons described below.

As an initial matter, we reject GAP's argument that by waiving fees in regard to GAP's March 1994 request, DOE has already determined the subject matter of the requested documents would shed light on government activities or operations and would significantly contribute to the public's understanding. DOE's letter waiving fees in regard to GAP's March 1994 request explicitly stated that the justification given by GAP for a fee waiver was not sufficient to satisfy the fee waiver criteria but that despite this failure, DOE would nevertheless grant a fee waiver to GAP. Thus, we find no evidence that DOE has previously determined that documents similar to those currently sought by GAP would shed light on government activities or would significantly contribute to the public's understanding.

Factor A

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is only appropriate where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." See Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1481-83 (1989); U.A. Plumbers and Pipefitters Local 36, 24 DOE ¶ 80,148 at 80,621 (1994) (Local 36). The requested documents are psychiatric evaluations performed by Dr. Feierman on individuals undergoing review of their security clearances. Since these reports are expert evaluations upon which DOE directly relies in determining whether individuals should retain their security clearances, see, e.g., 10 C.F.R. § 710.9(a), we conclude that the requested information concerns a government activity and thus, the Factor A criterion is satisfied.

Factor B

Factor B requires a consideration of whether the disclosure of information is "likely to contribute" to the public's understanding of government operations and activities. See Local 36; Seehuus Associates, 23 DOE ¶ 80,180 (1994) (Seehuus). With regard to Factor B, AO has argued that the releasable portions of the requested documents would not contribute to the public's understanding of government operations. AO asserts that the redacted reports would reveal nothing more than the fact that a psychiatric evaluation was

conducted on an individual because of a particular type of concern and that these concerns are contained in the DOE regulations or are available by obtaining copies of DOE letters referring individuals for psychiatric evaluations. After reviewing one of the requested documents, we disagree with AO's conclusion. Employing the same redactions made by AO in responding to the March 1994 request for psychiatric evaluations, we find that the report contains significant amounts of information relating to the specific reasons why an individual was selected for a psychiatric evaluation and the diagnostic methodology and rationale used by Dr. Feierman in his evaluations, information which is not available through publicly available sources such as the DOE regulations. Accordingly, such redacted reports could enable GAP to determine whether a suspect criterion, such as an individual's filing of a complaint with the DOE Office of Civil Rights, is used to determine whether an individual is referred for evaluation or are used in making a diagnosis of such an individual. See James L. Schwab, 21 DOE ¶ 80,154 (1991) (Schwab) (government treatment of an individual may be indicative of its operations generally). In addition, the fact that information may be available in other non-requested, non-publicly available agency documents, such as the DOE psychiatric request letters referred to in the Determination Letter, is irrelevant to the determination whether the requested documents would contribute to the public's understanding of government activities or operations.

AO further argues that it has already provided GAP, pursuant to its March 1994 FOIA request, Dr. Feierman's reports prepared prior to March 1994 and that providing GAP with reports prepared since May 1, 1994 would add little to the public's understanding. We must again disagree with AO. The requested documents cover a time period different from GAP's March 1994 FOIA request. Consequently, the requested documents could provide significantly different information regarding DOE psychiatric evaluations which could assist the public's understanding of government operations.

In sum, we find that the information which may possibly be obtained from the requested documents is likely to contribute to the public's understanding of government operations.

Factor C

Factor C requires us to consider whether the requested documents would contribute to the understanding of the subject by the general public. To meet this test, the requester must have the ability and intention to disseminate this information to the public. James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992). In the present case, GAP has asserted that information it discovers regarding potential abuse of whistleblowers would be published in its newsletter which has a circulation of 15,000 and on its WebPage site on the Internet. Further, GAP has demonstrated an ability to obtain media coverage on whistleblower issues, and has been able to interest newspapers such as the Houston Post, the Albuquerque Journal and the Sante Fe New Mexican to write articles regarding Ms. Flor's case. Given the totality of the facts and assertions presented to us and GAP's demonstrated history of publicizing information, we find that GAP has demonstrated that it has the ability to disseminate information to the general public. See Knolls Action Project, 25 DOE ¶ 80,148 (1995) (ability to disseminate information to public demonstrated through record of involvement with published articles). We also find that GAP has also demonstrated the intention to disseminate information it obtains from the requested documents to the general public and thus improve the general public's understanding of government operations.

Factor D

In order to satisfy the requirements of Factor D the requested documents must contribute significantly to the public understanding of government operations or activities. The Department of Justice has suggested the following test for this factor:

To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.

1995 Justice Department Guide to the Freedom of Information Act 381 (1995); See Local 36; Seehuus.

In the present case, GAP asserts that the requested documents will enable it to determine whether whistleblowers are inappropriately targeted for security clearance psychiatric evaluations and thus will contribute significantly to the public's understanding of government operations and activities. If the requested documents do in fact contain information indicating the inappropriate use of psychiatric evaluations or bearing on the issue of the circumstances under which such evaluations are used, we believe that the public's understanding regarding the DOE's treatment of whistleblowers and the integrity of the security clearance system would likely be enhanced to a significant extent by disclosure.

In view of our evaluation of the foregoing factors, we find that GAP has satisfied the four factors which must be weighed by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., whether disclosure of the requested documents is in the public interest because it is likely to contribute significantly to the public understanding of government operations or activities. However, we must next determine whether there is any commercial interest that would be furthered by the requested disclosure.

B. Commercial Interest

A "commercial interest" has been defined as "one that furthers a commercial, trade or profit interest as those are commonly understood." See 1995 Justice Department Guide to the Freedom of Information Act 382 (1995); Local 36.

AO asserts that GAP is in reality requesting documents in order that it may provide them to Ms. Flor free of charge. Specifically, AO claims that Ms. Flor is currently in litigation with Dr. Feierman over various tort, implied contract and Unfair Trade Practice Act causes of action regarding his psychiatric evaluation of her and seeks to use the requested documents in that litigation. In support of this claim, AO has submitted a copy of a letter from GAP authorizing Ms. Flor to receive the

psychiatric evaluations requested in its March 1994 FOIA request. AO also brings our attention to the fact that Ms. Flor sent it a letter attempting to modify GAP's January 16, 1994 FOIA Request. AO also argues that the very nature of the requested documents, documents specific to only Dr. Feierman, indicates that GAP is seeking the documents for Ms. Flor and thus, should be deemed to have a commercial interest in the requested documents.

Assuming arguendo that GAP is requesting the documents for Ms. Flor in connection with her case against Dr. Feierman, Ms. Flor's suit can not be considered a "commercial interest" under the FOIA. Courts have held that where a requester seeks information to assist in a suit seeking "compensation or retribution," such a suit is not a "commercial interest" within the meaning of the Freedom of Information Act. MESS, 835 F. 2d at 1285; Government Accountability Project, 23 DOE ¶ 80,169 at 80,668 (1993). The remedies available in Ms. Flor's tort, implied contract and Unfair Trade Practice Act suit against Dr. Feierman entail seeking compensation and retribution for alleged improper conduct. As such, her suit against Dr. Feierman does not constitute a "commercial interest" within the meaning of the FOIA. Since we find there is no commercial interest, we need not consider the factor regarding the primary interest in disclosure.

Having determined that GAP has satisfied the regulatory fee waiver requirements discussed above, we find that GAP's Appeal should be granted and that GAP should be granted a fee waiver for regarding its January 16, 1996 FOIA Request. <2>

It Is Therefore Ordered That:

(1) The Appeal filed by the Government Accountability Project on May 17, 1995, is hereby granted in part as set forth in Paragraph (2) below.

(2) The fees assessed for complying with the January 16, 1996 Government Accountability Project FOIA Request shall be waived in full.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 17, 1996

<1>In support of its Appeal, GAP has submitted a copy of an amended final agency decision issued by the DOE's Office of Civil Rights regarding several equal employment opportunity (EEO) complaints filed by Ms. Flor. In the decision, the DOE found that Ms. Flor's mental status had been inappropriately questioned on the basis of her having filed various EEO complaints, and that a psychiatric evaluation performed on Ms. Flor had been inappropriately based in part on her participation in the EEO process. See May 17, 1996 GAP FOIA Appeal Letter, Attachment 7 at 20-22.

<2>AO has also argued that it should not be required to grant a fee waiver to GAP in light of the tremendous hardship complying with the GAP FOIA request would impose on personnel and financial resources at AO. See Memorandum of telephone conversation between Richard Cronin, OHA Staff Attorney, and Elva Barfield, FOIA Officer, Albuquerque Operations Office (May 30, 1996). The fee waiver standards, however, do not permit consideration of these concerns with regard to whether a fee waiver should be granted to a requester.

Case No. VFA-0168, 25 DOE ¶ 80,205

June 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burlin McKinney

Date of Filing: May 20, 1996

Case Number: VFA-0168

On May 20, 1996, Burlin McKinney filed an Appeal from a determination issued to him on April 26, 1996, by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge found that there were no responsive documents to a request for information filed by Mr. McKinney on March 4, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA generally requires that federal agencies release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. McKinney sought information concerning the enactment of safety measures prohibiting the ingestion of food and smoking in areas of Oak Ridge's Y-12 plant in which beryllium was handled. On April 26, 1996, Oak Ridge issued a determination in which it informed Mr. McKinney that it had not located any documents responsive to his request. However, the determination letter also stated that:

The subject of eating, drinking, and smoking in facilities handling beryllium is addressed in several Y-12 plant Standard Practice Procedures and Depleted Uranium Operations Organization (formerly

Fabrication Division) Operating Procedures dating back to early 1952. We were informed by the contractor that you have copies of these procedures.

Determination Letter at 1. On May 20, 1996, Mr. McKinney filed the present Appeal contending: (1) that it is unlikely that DOE does not possess responsive documents, and (2) that he was not in fact provided with copies of the procedures referred to in the determination letter.

II. Analysis

The FOIA generally requires that federal agencies release documents to the public upon request. Following

an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). We review the adequacy of an agency's search under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(I). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations.

In the present case, the determination letter does not provide enough information to allow us to determine the reasonableness of Oak Ridge's search. This office generally attempts to clarify ambiguous determinations through telephone consultations with the field office in question. However, our conversations with Oak Ridge did not resolve the ambiguities present in the instant case. For that reason, we have determined that this matter shall be remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions given below.

Oak Ridge's determination letter appears to claim simultaneously that its search did not locate any responsive documents and that the requester had previously been provided with responsive documents. While it is entirely possible that a logical explanation exists for this apparent contradiction, that explanation is not apparent in the determination letter. Nor have we been able to clarify Oak Ridge's determination through telephone conversations. As a result both the requester and this office are left to speculate about the actual results of Oak Ridge's search. On remand, Oak Ridge should issue a new determination letter that provides a clear description of the results of Oak Ridge's search, and lists the responsive documents (if any) which it found.

Oak Ridge's letter is also confusing because it claims that the responsive documents discussed above were already provided to Mr. McKinney by "the contractor." Mr. McKinney has previously, through several prior FOIA requests, already received numerous documents from Oak Ridge or the contractor. Since Oak Ridge has failed to sufficiently specify which of these documents were those it considers to be responsive to the present request, Mr. McKinney and this office can only guess which of these documents Oak Ridge considers responsive to this request. Oak Ridge's new determination letter should specifically identify each operating procedure that it considers responsive to Mr. McKinney's request.

Finally, we note that the determination letter states that Oak Ridge was "informed by the contractor that

[Mr. McKinney has] copies of these procedures." Since Mr. McKinney has denied receiving these procedures, it is important that, on remand, Oak Ridge verify that Mr. McKinney has actually received copies of all responsive documents. If on remand Oak Ridge is unable to verify that Mr. McKinney has been previously provided with any responsive documents, Oak Ridge should promptly supply him with copies of those documents.

For the reasons set forth above, we are remanding this matter to the Oak Ridge Operations Office with instructions to promptly issue a new determination letter that clearly addresses the concerns discussed above.

It Is Therefore Ordered That:

(1) The Appeal filed by Burlin McKinney on May 20, 1996, Case Number VFA-0168, is hereby granted and remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions set forth above.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 18, 1996

Case No. VFA-0169, 25 DOE ¶ 80,206

June 25, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Cincinnati Enquirer

Date of Filing: May 22, 1996

Case Number: VFA-0169

On May 22, 1996, The Cincinnati Enquirer filed an Appeal from a determination issued on May 17, 1996 by the Ohio Field Office of the Department of Energy (DOE). That determination denied in part The Cincinnati Enquirer's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On April 8, 1996, a member of The Cincinnati Enquirer staff filed a FOIA request with the DOE seeking documents of the DOE and the Fernald Environmental Restoration Management Company (FERMCO) regarding the latter's proposed ten-year accelerated "rebaseline" proposal. The newspaper reporter limited his request to those documents generated after December 15, 1995 because he believed that is when FERMCO submitted its first "rebaseline" proposal for DOE review. The Ohio Field Office identified responsive documents and released the information to the requester. It withheld from the documents, however, the names of DOE employees who had made comments on the "rebaseline" proposal. The DOE withheld this information under Exemption 6 of the FOIA, which permits an agency to withhold information the release of which could infringe upon personal privacy. The Cincinnati Enquirer appeals the withholding of these names.

ANALYSIS

EXEMPTION 6

Exemption 6 permits an agency to make a discretionary withholding of information which must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5

U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered by Exemption 6, an agency must balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991). We will assume, without deciding, for the purposes of our analysis that the documents here meet the threshold test of being "personnel and medical files and similar files."

We have recently found that names, by themselves, reveal nothing private about a person and therefore they are not the type of information that creates a protectable privacy interest for the purposes of Exemption 6. The News Tribune, 25 DOE ¶ 80,181 at 80,700 (1996). Rather, we noted that a privacy interest may be created when an individual's name is linked with some other piece of information "which reveals something personal about an individual." Id. at 80,699. In an Exemption 6 analysis, we must examine this linkage of information to determine the extent of any privacy interest.

In this case, release of the names would identify particular individuals as DOE employees. In addition, release of the names would link certain individuals with their opinions on the "rebaseline" proposal. Absent unusual circumstances usually directly related to the nature of the job where the possibility of harassment is inherent in the position such as Inspector General investigators, see, e.g., Fine v. Department of Energy, 823 F. Supp. 888, 909 (D.N.M. 1993), individuals do not have a privacy interest in the fact that the federal government employs them. In fact, from virtually its establishment, the United States Government has made public the names, titles, and emoluments of its employees. See, e.g., Alexander Hamilton, List of Civil Officers of the United States, 2d Cong., 2d Sess. (1793), reprinted in 20 American State Papers, Class X, 1 Miscellaneous, No. 34 at 57 (W. Lourie & W. Franklin, eds., 1834); Thomas Jefferson & Albert Gallatin, Role of the Officers, Civil, Military and Naval of the United States, 7th Cong., 1st Sess. (1802), reprinted in 20 American State Papers, Class X, 1 Miscellaneous, No. 154 at 260 (W. Lourie & W. Franklin, eds., 1834). This is a practice the Federal Government has continued to the present day by routinely releasing names, titles, grades, salaries and duty stations of civilian federal employees. 5 C.F.R. § 293.311. Under these conditions, we do not believe that, except in unusual cases, there is a privacy interest in being identified as an employee of the Federal Government. See William Payne, 25 DOE ¶ 80,190 at 80, 727 (1996) (William Payne); Center for Community Action, 20 DOE ¶ 80,120 at 80,560 (1990) (and cases cited therein); cf. Richard M. Ross, 25 DOE ¶ 80,116 at 80,549 (1995) (and cases cited therein).

Nor do we think there is any privacy interest in these government evaluators being linked with their comments. It is perfectly appropriate, when individuals are involved, to analyze under Exemption 6 whether personal privacy might be implicated. Robert S. Foote, 24 DOE ¶ 80,169 at 80,672-73 (1995). However, we do not believe there is ordinarily any privacy interest in being linked with a particular work-product done in the course of federal employment unless the work somehow reveals something personal or private about an individual, William H. Payne, 25 DOE at 80,727, or there is some other special circumstance (for example, a reasonable, articulable belief that the person could be subject to harassment, see, e.g., Robert S. Foote, 25 DOE ¶ 80,127 at 80,566 (1995)). We agree with the Ohio Field Office that there is a "significant privacy interest in avoiding the public disclosure of their names which would subject them to unwanted public inquiries." However, we believe this generally means that steps may be taken to protect federal employees from inquiries related to personal or private matters. William Payne, 25 DOE at 80,727. While this privacy interest may even extend to inquiries about official business at a time or location other than the person's official duty station, we do not believe a privacy interest usually extends to most activities undertaken in the ordinary course or time of federal employment. Id. As a general matter. it can hardly be contested that there is no discernable privacy interest in the vast majority of official actions taken by government employees and the public does have at least some level of interest in knowing which public employees perform which actions. See Lawyers Committee for Human Rights v. Immigration and Naturalization Serv., 721 F. Supp. 552, 569 (S.D.N.Y. 1989). As we noted above, if the inquiries become vexatious, it is possible that a privacy interest may arise. However, in many cases, simply declining comment or referring the matter to a more highly ranked official may ameliorate any problem. However,

without a more definite explanation than provided here, we are unable to determine if any of these concerns are present in this case. We believe that it is appropriate to allow the Ohio Field Office to make this determination. Accordingly, we will remand this matter to the Ohio Field Office to either release the names or provide a more definite statement of the privacy interest involved in the names, balance this with any relevant public interest, and explain how the privacy interest identified outweighs the public interest.

EXEMPTION 5

The fact that there may be no privacy interest in these names, however, does not necessarily mean that the Ohio Field Office may not withhold the names. Because these apparently are internal government documents expressing the individual opinions and views of the authors prior to final agency action, and do not necessarily reflect an official agency position, they may be eligible for treatment under the "deliberative process" or "predecisional" privilege incorporated into Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5).

Exemption 5 allows an agency to withhold material in intra- or inter-agency documents which falls within a generally accepted civil litigation discovery privilege. Environmental Protection Agency v. Mink, 410 U.S. 73, 86-87 (1973). One of the most common of the accepted Exemption 5 privileges is the "deliberative process" or "predecisional" privilege. As its names imply, this Exemption 5 privilege allows the withholding of all or part of internal documents generated in the course of agency consideration of some issue and which contain "advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated." National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1974). In addition, in the Sixth Circuit (of which Ohio is a part), the courts look at "the effect of the material's release, with the key question being whether disclosure of materials would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." Concrete Constr. Co. v. Department of Labor, 748 F. Supp. 562, 567 (S.D. Ohio 1990) (paraphrasing Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). This inquiry is similar to the one required by the Memorandum issued by Attorney General Janet Reno in October 1993, which mandates agencies to identify a reasonably specific, foreseeable harm to an interest protected by a FOIA exemption before withholding any information.

Under this privilege, an agency may withhold the text of the deliberative material (assuming the agency correctly identifies and applies a protectable FOIA interest). See, e.g., Schell v. Department of Health and Human Services, 843 F.2d 933, 940-42 (6th Cir. 1988); Mehta Tech, Inc., 15 DOE ¶ 80,108 at 80,516-17 (1986) (engineer's evaluation comments may be withheld under privilege); Dr. Ping-Wha Lin, 13 DOE ¶ 80,130 at 80,607 n. 33 (1986) (names of evaluators/recommenders may only be withheld under deliberative process privilege in clear cases of possible coercion or to vindicate policy of Exemption). This material may be withheld because persons advising or making recommendations on proposed actions "should not be limited in thought or expression to just those preliminary views which they [are] prepared to defend in the public prints." Tennessean Newspapers, Inc. v. Federal Housing Admin., 464 F.2d 657, 660 (6th Cir. 1972). See also Dr. Ping-Wha Lin, 13 DOE at 80,602 ("predecisional" privilege protects against misleading public, premature release of material, and "open, uninhibited and robust debate of various options so that the final decision-maker has the benefit of thoroughly evaluated options by eliminating the fear of disclosure of preliminary viewpoints").

In addition, when necessary to protect a policy protected by the privilege, an agency may withhold the names of government employees who authored deliberative material. Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Cofield v. City of LaGrange, 913 F. Supp. 608, 616 (D.D.C. 1996); Tax Reform Research Group v. Internal Revenue Serv., 419 F. Supp. 415, 423-24 (D.D.C. 1976). However, the agency need not withhold both the name of the evaluator and the associated comments even if material otherwise falls within the scope of the privilege. The agency acts in the spirit of the FOIA when, as the Ohio Field Office did in this case, it releases much responsive material. Thus, we have long held that where an office releases internal, predecisional, deliberative material, it may

withhold the names of persons making those remarks. See, e.g., Eugene S. Post, 17 DOE ¶ 80,142 at 80,603 (1988). Although this may not always be sufficient to vindicate the policies of the privilege, VECTRA Gov't Services, Inc., 25 DOE ¶ 80,160 at 80,653-54 (1996), we believe this is an excellent way to balance the FOIA goal of maximum disclosure of relevant information with the need to insure that government employees evaluating options can enjoy "mutual consultation and full debate on a decision." Accordingly, we will remand this matter to allow the Ohio Field Office to determine whether Exemption 5 covers the withheld names as part of internal, pre-decisional, deliberative documents. In addition, that Office must have a reasonably specific and articulable reason why release in this case could chill future evaluations or recommendations. Finally, as we indicated above, the Ohio Field Office may make a discretionary release of the names even if Exemption 5 is applicable.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of The Cincinnati Enquirer, OHA Case No. VFA-0169 is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Ohio Field Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 25, 1996

Case No. VFA-0170, 27 DOE ¶ 80,115

March 3, 1998

` DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Glen Milner

Date of Filing: May 23, 1996

Case Number: VFA-0170

Glen Milner filed an appeal from a determination issued to him on April 22, 1996, by the Department of Energy's Albuquerque Operations Office (Albuquerque). In that determination, Albuquerque denied in part a request for information that Mr. Milner filed on June 15, 1987, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the documents released to Mr. Milner in that determination was withheld after a review of the documents had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This appeal, if granted, would require Albuquerque to release the information that it withheld in its April 22, 1996 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 15, 1987, Mr. Milner submitted a request to Albuquerque under the FOIA for all information maintained by the Department of Energy pertaining to several named peace and justice organizations and specifically to James Wilson Douglass and Shelley Mae Douglass of the Ground Zero Center for Nonviolent Action.

Albuquerque located only two responsive documents, which consisted of six pages in total and concerned the shipment of W-76 warheads. Because it determined that the documents contained classified information, Albuquerque forwarded them to the DOE's Office of Declassification for review. On April 22, 1996, after the Office of Declassification completed its review, Albuquerque released to Mr. Milner a copy of each responsive document. From each document, Albuquerque withheld information it claimed to be classified on either of the following two grounds: (1) the information was determined to be Restricted Data under the Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3 of the FOIA, or (2) the information was defined as National Security Information in Executive Order 12958, and is therefore exempt from mandatory disclosure under Exemption 1 of the FOIA.

The present appeal seeks the disclosure of the withheld portions of the documents that Albuquerque

provided to Mr. Milner. In his appeal, Mr. Milner states that “there will never be warhead shipments of this nature in the future.” On the basis of that assumption, he contends that release of information concerning past shipments relates to no current program, is of merely historical value, and therefore does not present a threat to national security. (1)

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to the Office of Declassification, the portions that the DOE deleted from the responsive documents under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

The Director of SA considered the concerns Mr. Milner specifically raised in his appeal, and performed as well a general review of the material under the current classification guidance. Based on the review that the Director of SA performed, the DOE has determined that the Atomic Energy Act requires the continued withholding of small portions of those passages of the documents previously identified as classified information. Specifically, the Director of SA has determined that the routes of weapons shipments must continue to be withheld from disclosure because information about routes used in the past could reveal routes that might be used in the future when the weapons need to be returned for modification or disassembly. In addition, he determined that the number of warheads in each shipment must continue to be withheld from disclosure because this information could reveal the amount of special nuclear material contained in specific weapons as well as production rates and stockpile numbers of specific weapons. Under current classification guidance, these categories of information concern nuclear weapons design or military utilization, which is classified as Restricted Data under the Atomic Energy Act. Consequently, this information is being withheld pursuant to Exemption 3 of the FOIA. (2) The remainder of the previously withheld information may now be released, as discussed below.

A finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information. Nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the responsive documents that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. However, on review the Director of SA was able to perform more precise deletions within passages that were previously excised in their entirety, and as a result we can now release much of the information that had previously been withheld. Newly redacted versions of the two responsive documents will be provided to Mr. Milner under separate cover. Accordingly, Mr. Milner’s appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The appeal that Glen Milner filed on May 23, 1996, Case No. VFA-0170, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the two documents that the Department of Energy's Albuquerque Operations Office determined to be responsive to Mr. Milner's June 15, 1987 request under the Freedom of Information Act, in which additional information is now released, will be provided to Mr. Milner under separate cover.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 3, 1998

(1)In his appeal, Mr. Milner also questions whether the search for responsive documents was conducted for documents in existence as of the date of his request (June 15, 1987) or as of the date of Albuquerque's response (April 22, 1996). We have verified that, although the search was conducted in 1988, if it had been conducted in 1996, the results would have been the same. Memorandum of Telephone Conversation between Elva Barfield, FOI Officer, Albuquerque Operations Office and William Schwartz, Staff Attorney, Office of Hearings and Appeals (February 10, 1998).

(2)Although the initial determination withheld information contained in these documents under both Exemption 1 and Exemption 3 of the FOIA, the Director of SA now relies on Exemption 3 alone as justification to withhold the information.

Case No. VFA-0171, 25 DOE ¶ 80,207

June 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Anibal L. Taboas

Case Number: VFA-0171

Date of Filing: May 28, 1996

Anibal L. Taboas (Taboas) files this appeal from a determination letter issued by the manager of Chicago Operations Office (the Authorizing Official). The determination letter responded to Taboas' request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In the determination letter, the Authorizing Official released some documents and withheld all or parts of others. Taboas's appeal, if granted, would require the Chicago Operations Office to release portions of withheld documents and to undertake a search for additional documents.

Background

The FOIA generally provides that any person has a right of access to federal agency records, except to the extent that the records (or portions of them) are protected from disclosure by one of nine exemptions or three special law enforcement exclusions. In his request, Taboas asked the Chicago Operations Office for records about complaints, investigations, allegations, reports, and external correspondence that directly or indirectly involved him.<1> The resulting search found responsive documents that can be grouped into three categories: records of open Equal Employment Opportunity (EEO) cases; records of closed EEO cases; and records involving what the Authorizing Official termed "workplace violence" issues.

At issue in this case are three FOIA exemptions invoked by the Authorizing Official: 5, 6, and 7(A). In addition, Taboas has questioned whether the Chicago Operations Office performed an

adequate search for some documents, and whether it has properly applied the provisions of the Privacy Act, 5 U.S.C. § 552a, to his request.

Analysis

As an initial matter, it is important to note that a FOIA requester's rights to access are neither increased nor decreased because he has a greater interest in the records than a member of the general public has. Thus, although Taboas has requested material concerning himself, his rights under the FOIA are no greater than those of any other requester. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 143 n.10 (1975) (*NLRB*).<2>

Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available

by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB* at 149.

Courts have recognized several categories of records protected by Exemption 5. One such category consists of records subject to the "deliberative process privilege." To fall within the ambit of the deliberative process privilege, a document must be: (1) predecisional, that is, antecedent to the adoption of an agency policy; and (2) deliberative, that is, recommending or expressing an opinion on legal or policy matters. *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Pursuant to Exemption 5, the Authorizing Official withheld certain documents in their entirety. These documents, listed as item 5(c) in the determination letter, concern workplace violence issues. Although the documents in this group are not individually specified in the determination letter, the Chicago Operations Office informed us that the group consists of drafts of correspondence and settlement or mediation agreements. Draft documents are, by their nature, predecisional and deliberative. *Exxon Corp. v. Dept. of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983).

Nevertheless, not all draft documents may be withheld under Exemption 5. The Attorney General's Memorandum of October 24, 1993 established a standard that promotes discretionary disclosure of records under the FOIA. In accordance with the Memorandum, it is necessary to determine whether disclosure of the requested information would cause foreseeable harm to the deliberative process.

We find several factors that point to foreseeable harm resulting from releasing the draft documents in their entirety. The subject matter of the documents is highly sensitive, involving charges of serious misconduct by various employees. The process of resolving those charges requires total confidentiality. Moreover, since these matters are still pending, disclosing draft letters and settlement documents could have a chilling effect on the DOE's investigative, deliberative, and decision-making processes.

In applying any FOIA exemption, however, any reasonably segregable portion of a record must be provided to the requester after deletion of the portions that are exempt. 5 U.S.C. § 552(b). We find that these documents may contain sections of segregable material. For example, a draft letter we examined includes factual, non-deliberative sections that could be easily segregated. No foreseeable harm would result from releasing these segregable portions. We will therefore remand this matter as to Exemption 5 for release of segregable material or further justification for withholding.

Exemption 6

Exemption 6 allows the agency to withhold all information about individuals "in personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Authorizing Official withheld certain documents in their entirety based on Exemption 6, asserting the privacy interests of individuals who had filed complaints against Taboas. These documents, like those discussed under Exemption 5, are characterized by the Authorizing Official as dealing with workplace violence issues. They form, however, a group of documents separate from those withheld under Exemption 5.

As an initial requirement, information protected by Exemption 6 must fall within the category of "personnel and medical and similar files." It is generally clear what constitutes a personnel or medical file. The term "similar file" is not defined in the FOIA, but has been construed in this context to include all information that "applies to a particular individual."*United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

The analysis of a claim under Exemption 6, however, does not end with the identification of a file as

falling within its ambit. As with any exemption, any reasonably segregable portions of the record must be provided to the requester. Nevertheless, for some documents subject to Exemption 6, the deletion of personal identifying information is inadequate to protect personal privacy. *Department of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976). This may be the case if the requested documents concern a small group of individuals who are known to each other and easily identifiable from information in the documents. For example, the deletion of names and other identifying data concerning a small group of coworkers would be inadequate to protect them from embarrassment or reprisals if the requester could still possibly identify the individuals. *Alirez v. NLRB*, 676 F.2d 423, 428 (10th Cir. 1982). Moreover, if deletion of personal information would "leave only essentially meaningless words and phrases," the entire record may be withheld. *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981) (*Neufeld*).

We reviewed a sample of the documents withheld under Exemption 6 by the Authorizing Official. Our review included both the applicability of Exemption 6 to the documents, and the possibility of redacting the documents to delete personal information. Some of these documents consist of allegations against other employees for their response to acts of purported misconduct by Taboas. Other documents consist primarily of information relating to persons alleging misconduct by Taboas. Since the persons referred to in the documents form a small, tightly-knit group of coworkers, we believe that deleting names alone would not protect their privacy interest. If all information identifying these individuals were deleted from the documents, the remaining portions would not be meaningful. *See Neufeld* at 663. We therefore find that the Authorizing Official properly withheld these documents pursuant to Exemption 6.

Other documents in this group, however, contain identifying information that apparently can be easily deleted. Information pertaining to a single individual whose identity cannot be determined after deletion of his name from the records does not qualify for Exemption 6 protection. *Citizens for Environmental Quality v. USDA*, 602 F. Supp. 534, 538-39 (D.D.C. 1984).

For example, one document in this category is a letter from a U.S. Congressman to the Secretary of Energy that mentions a meeting with some employees of Chicago Operations Office without specifying their names or concerns. That document can safely be made public. Another document in this category is a letter from the regional manager of DOE's Office of Economic Impact and Diversity, forwarding a complaint to the field manager. After the deletion of the addressee's name and address, there does not seem to be anything in the letter that would qualify for protection under Exemption 6. We will therefore remand this matter as to Exemption 6 for release of segregable material or further justification for withholding.

Exemption 7(A)

Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The Authorizing Official withheld under Exemption 7(A) documents dealing with an ongoing investigation of Taboas by the Chicago Operations Office's Equal Employment Opportunity (EEO) Office. These documents are designated 1(a) through 1(h) in the determination letter.

Taboas requests the additional release of the official complaints (Document 1(c)), notices of acceptance or dismissal of complaints (Document 1(e)), investigators' notes (Document 1(g)), correspondence from the complainants to the Office of Civil Rights (Document 1(h)), and any document containing an inventory of the allegations against him.

The threshold requirement for withholding records under Exemption 7(A) is that they have been compiled for law enforcement purposes. Taboas challenges the application of Exemption 7(A) to these documents. He argues in his appeal that "the use of an exclusion for ?law enforcement purposes' assumes a significant leap from the role of the agency in an ongoing EEO investigation, and the relevant known facts in this case."

There is no support for Taboas' argument that EEO records are not compiled for "law enforcement purposes." In the context of the FOIA, law enforcement proceedings have been interpreted to mean not only criminal actions, but regulatory proceedings as well. *Injex Indus. v. NLRB*, 699 F. Supp. 1417, 1420 (N.D. Cal. 1986); *Fedders Corp. v. FTC*, 494 F. Supp. 325, 327-28 (S.D.N.Y. 1980), *aff'd* 646 F.2d 560 (2d Cir. 1980). Thus, records of an EEO investigation are considered as records compiled for law enforcement purposes within the context of the FOIA. *Raytheon Company*, 25 DOE ¶80,156 (1996).

To warrant protection under Exemption 7(A), however, it is not enough that records have been compiled for law enforcement purposes. It must also be shown that the release of the records could reasonably be expected to interfere with enforcement proceedings. The interference need not be established on a document-by-document basis, but can be shown generically as to the types of documents involved. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Of the documents specifically requested by Taboas, release of the official complaints (1(c)), investigators' notes (1(g)), and correspondence between the complainants and the DOE's Office of Civil Rights (1(h)) could clearly interfere with the ongoing EEO investigation by affecting the testimony of witnesses, subjecting witnesses to potential reprisals, and detering other witnesses from providing information. *See Dow Jones & Co. v. United States Dep't of Justice*, 880 F. Supp. 145, 150 (S.D.N.Y. 1995); *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309, 311 (D.C. Cir. 1988).

In contrast, the release of documents designated 1(e) -- notices of acceptance or dismissal of complaints -- does not seem to pose a threat of interference with the ongoing EEO investigations. These documents appear to be form letters containing easily segregable identifying information. We will therefore remand this matter as to Exemption 7(A) for release of segregable material or further justification for withholding.

Adequacy of Search

The Authorizing Official released certain documents, and withheld certain others, concerning two closed EEO cases involving Taboas. These documents are designated 3(a) through 3(u) and 4(a) through 4(c) in the determination letter.

Taboas does not raise any issues about the documents in this group that were withheld. He asserts that he was told, however, in informal office conversations, that there were other EEO cases involving him.

If a requester has reasonably described the information he is seeking and has complied with the DOE's FOIA regulations, 10 C.F.R. Part 1004, the DOE must conduct a thorough and conscientious search for responsive documents. In responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). Accordingly, we will remand a case where a search was inadequate. *E.g., Petrucelly & Nadler, P.C.*, 25 DOE ¶ 80,187 (1996); *Dennis McQuade*, 25 DOE ¶ 80,158 (1996).

We talked with Sarah Brunson, manager of the EEO Office at Chicago Operations Office, to ascertain the adequacy of the search for these records. Brunson acknowledged that records concerning complaints involving Taboas were stored in her office. She also stated that she received Taboas' request, and that she herself performed a thorough manual search of the EEO files. In addition, she called the EEO Office at DOE headquarters to ascertain whether any complaints about Taboas were stored there. She states that the EEO Office at Chicago found all closed EEO cases involving Taboas. Based on Brunson's statements, we conclude that a thorough and conscientious search was performed for closed EEO files.

Privacy Act Request

The Privacy Act requires each federal agency to permit an individual to gain access to information pertaining to him or her which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). A "system of records" is defined as a "group of any records under the

control of any agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5); 10 C.F.R. § 1008.2(m).

Because Taboas had requested information about himself, the Chicago Operations Office processed his request under the Privacy Act as well as the FOIA. After a preliminary search, Taboas was informed that the information he requested was contained in the records of other individuals, not in his own.<3> Under the Privacy Act, a search would be conducted only of records filed by Taboas' name or particular identifier. In view of the facts of this case, Taboas' request was properly processed under the more expansive provisions of the FOIA instead of the Privacy Act.

In his appeal, Taboas argues that "It appears … that all information has been cataloged by complaint, and that therefore there is no system [of records] in my name. I believe that judicial review would find the filing convenience to be irrelevant…"

In responding to Taboas' argument, it is important to note that administrative convenience is not being claimed by Chicago Operations Office. The Privacy Act prohibits the disclosure of personally identifiable records to a third party without the consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b).<4> In addition, the Privacy Act does not require an agency to create records that do not exist. *DeBold v. Stimson*, 735 F.2d 1037, 1041 (7th Cir. 1984). Thus, the Chicago Operations Office was precluded from releasing to Taboas records identified by others' names, and under no obligation to rearrange the records to create a file in Taboas' name. We therefore reject Taboas' argument concerning the Privacy Act.

Waiver

Finally, Taboas claims that "some of the material declined is in the public domain … For example, many individuals have [a] copy of covered correspondence." Taboas implies that DOE has waived the application of exemptions to some documents because it has previously disclosed them.

The extent to which the DOE has waived FOIA exemptions depends on the circumstances of the disclosure. *Carson v. United States Dep't of Justice*, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980). It does not appear that the documents referred to in this case by Taboas were disclosed by official departmental action. It is possible that departmental employees may have made unauthorized disclosure of certain documents. Such unauthorized disclosures, however, would not constitute a waiver of exemption by the DOE. *Simmons v. United States Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986). Furthermore, official disclosure of additional records could exacerbate the harm created by the unauthorized disclosures. *Murphy v. FBI*, 409 F. Supp. 1138, 1142 (D.D.C. 1980). We therefore reject Taboas' argument that the Department has waived any exemptions.

Conclusion

We shall remand this matter to the Chicago Operations Office for further review of its determination under Exemptions 5, 6 and 7(A), in accordance with the discussion set forth above. After review, the Chicago Operations Office will either release reasonably segregable portions of the documents identified in the above discussion, or provide adequate justification for withholding them. We will deny Taboas' appeal in all other respects.

It Is Therefore Ordered That:

(1) The appeal filed by Anibal L. Taboas, Case No. VFA-0171, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Chicago Operations Office for processing in accordance with the

instructions provided in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 26, 1996

<1>Letter to Taboas from Cherri J. Langenfeld, Manager, Chicago Operations Office, dated May 17, 1996.

<2>In fact, Taboas' rights to this material are different from the rights of other FOIA requesters in one respect. An agency cannot invoke a FOIA exemption in order to protect a requester's own privacy interest against release to himself. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). None of the documents in this case, however, was withheld to protect Taboas' privacy interest.

<3>Letter from Kim McMahon, Chicago Operations Office, to Taboas, dated May 21, 1996.

<4>There are twelve exceptions to this prohibition. 5 U.S.C. 552a(b)(1) - (b)(12). None of them is relevant to the present case.

Case No. VFA-0172, 25 DOE ¶ 80,208

June 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Bradley S. Tice

Date of Filing: May 29, 1996

Case Number: VFA-0172

On May 29, 1996, Bradley S. Tice filed an Appeal from a determination issued to him on May 8, 1996, by the Department of Energy's Albuquerque Operations Office (AO). That determination was issued in response to a request for information that Mr. Tice submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Tice challenges the adequacy of the search conducted by AO.

I. Background

On October 11, 1995, Mr. Tice filed a request for information in which he sought information regarding "aspects of nuclear propulsion for aircraft as well as Richard Feynman's patented design for a nuclear reactor to heat air for a jet engine." See October 11, 1995 FOIA Request. On May 8, 1996, AO issued a determination which stated that the Los Alamos National Laboratory (LANL) conducted a search and reported that a patent application was filed on behalf of Richard P. Feynman on August 13, 1948, entitled "Method and Apparatus for Releasing Nuclear Energy." See Determination Letter at 1. The AO further stated that this patent application was abandoned because there was insufficient information available to make a practical device. Id. In addition, the LANL advised that there was a notation in their records that the patent application described a "rocket motor" and that some documents were declassified. Consequently, the LANL searched their patent files and located no responsive documents. However, the LANL did provide Mr. Tice with "a copy of a portion of the Patent Application File listing subject patents pertaining to Mr. Feynman". Id.

On May 29, 1996, Mr. Tice filed the present appeal with the Office of Hearings and Appeals. In his Appeal, Mr. Tice requests the following: (1) more information than was sent to him by the LANL; (2) a review of classified information that pertains to the subject of his request and (3) a search conducted at the U.S. Patent Office in Washington, DC.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether

any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

As an initial matter, Mr. Tice requested in his Appeal that AO conduct a search at the U.S. Patent Office in Washington, D.C. The DOE cannot conduct a search of another agency's records. However, Mr. Tice may submit a FOIA request directly to the U.S. Patent Office.

In reviewing the present Appeal, we contacted officials at AO to ascertain the extent of the search that had been performed. Upon receiving Mr. Tice's Request for Information, AO instituted a search

at the LANL. The LANL indicated that it searched its computer database concerning the subject of nuclear propulsion and related topics and found no responsive documents. In addition, the LANL manually searched its classified and unclassified patent files in the Laboratory Archives and found no documents relating to Mr. Tice's request other than the information provided to him in AO's Determination Letter. Given the facts presented to us, we find that AO conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Tice's Request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Bradley S. Tice on May 29, 1996, is denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 26, 1996

Case No. VFA-0173, 25 DOE ¶ 80,209

June 27, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David W. Smith

Date of Filing: June 4, 1996

Case Number: VFA-0173

On June 4, 1996, David W. Smith, on behalf of his mother Hettie L. Smith, filed an Appeal from a determination issued under the Freedom of Information Act (FOIA) on April 1, 1996, by the Department of Energy's Albuquerque Operations Office (AO). In his Appeal, Mr. Smith asserts that AO failed to provide his mother with all of the responsive documents in its possession regarding a Request for Information she made on January 20, 1994.

I. Background

On January 20, 1994, Mrs. Smith filed a FOIA request with AO seeking records relating to her late husband's exposure to radiation while he worked for the Atomic Energy Commission from 1948 to 1956. In its May 9, 1996 Determination Letter, AO stated that it had conducted a search of its records at AO's Occupational Safety and Health Division (OSHD) and at the Los Alamos National Laboratory (LANL). Along with the Determination Letter, AO provided Mrs. Smith with a copy of the radiation dosimetry records it discovered at LANL.

In his Appeal, Mr. Smith implicitly argues that AO conducted an inadequate search for records relating to his father. However, Mr. Smith does not state any specific reasons why he considers the search made by AO to be inadequate.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether

the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095,1100-01 (D.C. Cir. 1983), modified in part on

rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted officials at AO to ascertain the extent of the search that had been performed. Upon receiving Mrs. Smith's Request for Information, AO instituted searches at the only two facilities that possess radiation exposure records, OSHD and LANL. See Memorandum of telephone conversation between Terry Apodaca, AO, and Steven Goering, OHA Staff Attorney (June 17, 1996). With regard to the search conducted at LANL, we were informed that a LANL official manually searched through the binders containing LANL's radiation exposure records using the name of Vincent L. Smith. Id. All of the radiation exposure records LANL discovered pertaining to Vincent Smith were provided to Mrs. Smith. Id. In addition, AO requested that a search of the radiation exposure records at OSHD be conducted. Id. OSHD officials conducted a search of their computer database of radiation exposure records and found no responsive records. Id. Given the facts presented to us, we find that AO conducted an adequate search which was reasonably calculated to discover documents responsive to Mrs. Smith's Request. Consequently, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by David W. Smith on June 4, 1996, is denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 27, 1996

Case No. VFA-0174, 26 DOE ¶ 80,103

August 1, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Association of Public Agency Customers

Date of Filing: July 8, 1996

Case Number: VFA-0174

On June 4, 1996, the Association of Public Agency Customers (Appellant) filed an Appeal from a determination issued on May 21, 1996, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). On July 8, 1996, the Appellant modified its Appeal by filing further documents. In its determination, BPA notified the Appellant that it was discontinuing processing of the Appellant's February 15, 1996 request under the Freedom of Information Act (FOIA) due to non-payment of $2,421.54 for search and review costs. This Appeal, if granted, would require the DOE to reinstate the request and reduce the amount which was billed to the Appellant.

I. Background

On February 15, 1996, the Appellant submitted a thirteen-item FOIA request to BPA seeking information regarding business transactions between BPA and its direct service industrial customers (DSIs). Letter from Melinda J. Horgan, Attorney for the Appellant, to Gene Tollefson, Freedom of Information Act Officer, BPA, (February 15, 1996) (Request Letter). On March 1, 1996, BPA sent a letter to the Appellant requesting advance payment of $2,582.00 for search and review costs. Although the Appellant believed that this amount was excessive, it sent a check to BPA in the amount of $1,200.00. In the course of several installment responses, BPA released to the Appellant 1,870 pages of material, and billed the Appellant a total of $3,621.54. The Appellant subsequently notified BPA that it would not authorize any further charges associated with the request, and asked that BPA stop processing the request until the Appellant's counsel and BPA's counsel could meet. In a May 21, 1996 letter, BPA notified the Appellant that, in compliance with the Appellant's request, it was discontinuing processing of the

FOIA request. Although the requested meeting never took place, see Record of Telephone Conversation between Carol Jacobson, Paralegal, BPA, and Dawn Koren, Staff Attorney, OHA (July 30, 1996), APAC filed the present Appeal.

II. Appeal

The Appellant makes several arguments regarding the fees BPA assessed and the manner in which BPA processed the request. First, the Appellant argues that BPA violated the FOIA when it did not fully respond to its request within ten working days, as required by 10 C.F.R. 1004.5(d)(1), and further violated the FOIA by responding in installments. Second, the Appellant claims that the charges for search and review time are exorbitant. In connection with this claim, the Appellant asserts that the amount of search time must have been due to BPA's lack of an organized filing system, and that the Appellant should not

be penalized for this lack of organization. Third, the Appellant argues that lower-paid employees should have been used to conduct the search, review and photocopying of material.<1> Fourth, the Appellant notes that it had amended its request to state that it did not wish to receive any responsive documents which were already in the administrative record of six ongoing legal cases involving BPA. Because 750 pages of the released documents were, in the Appellant's view, duplicative of public record documents, the Appellant argues that BPA's charges should be reduced. Fifth, the Appellant lists three reasons why it believes many of the documents released were non-responsive to its request. Finally, the Appellant notes that it never received a "privilege log," i.e, an index of withheld documents, listing the reasons for withholding certain documents.<2>

III. Analysis

The FOIA authorizes the promulgation of regulations "specifying the schedule of fees applicable to the processing of requests." 5 U.S.C. § 552(a)(4)(A)(i). DOE regulations provide for fees to be assessed to cover the "full allowable direct costs incurred" of responding to requests for information. 10 C.F.R. § 1004.9(a). Under this fee schedule, the DOE charges for manual searches at the salary rate(s) (i.e., basic pay plus 16 percent) of the employees making the search. 10 C.F.R. § 1004.9(a)(1). In addition, "[t]he DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure." 10 C.F.R. § 1004.9(a)(3).

We have examined each of the Appellant's arguments carefully and make the following determinations. First, failure to respond within the ten-day statutory deadline for processing the request is not a matter that is subject to administrative appeal. We note, however, that the FOIA regulations permit a ten-day extension of the initial time limit because of the voluminous amount of records required by this request. See 5 U.S.C. § 552(a)(6)(B); 10 C.F.R. § 1004.5(d)(2)(ii). Once this ten day extension expired, the Appellant acquired the right to file a complaint with the appropriate federal district court. See Duquesne Light Company, 1 DOE ¶ 80,206 at 81,087 (1978); 5 U.S.C. § 552(a)(4)(B), (6)(C); 10 C.F.R. § 1004.5(d)(4).

Further, it was reasonable for BPA to believe that the Appellant would rather receive responses to this voluminous request as they became available, rather than have to wait until BPA completed the entire response. In the interests of timely disclosure, partial responses are appropriate when responding to such a large request. Cf. David K. Hackett, 25 DOE ¶ 80,107 (1995) (each office searching for responsive records may issue its own determination letter).

We reject the Appellant's contention that the amounts of search time, 49.5 hours, and review time, 70.5 hours, expended so far in this case were unreasonably high. The Appellant made an extremely broad request for documents. The projects on which it sought information are complex, technical, and staffed by many employees. BPA's search required the services of twenty-five employees and the large number of responsive documents required BPA to assign ten people to review them. See Records of Telephone Conversations between Carol Jacobson and Dawn Koren (June 6, 1996 and July 12, 1996). Moreover, the Appellant itself defined "document" in more than 50 ways, see Attachment 1 of Request Letter, thus widening the search. Furthermore, aside from the 1,870 pages sent to the Appellant as responsive, BPA identified approximately 4,500 other

pages, 1,500 of which it finished reviewing by the time it stopped processing the request. Thus, we believe that the expended amount of search and (partially completed) review time for approximately 6,370 technically complex pages is appropriate in this case.

We also find that it was not unreasonable to primarily have highly-paid employees conduct the search and review.<3> In BPA's view, it was most efficient to have the attorneys and salespeople who possessed the documents and were most familiar with the technical terminology used in those documents search their own offices. See Record of Telephone Conversation between Carol Jacobson and Dawn Koren (June 5, 1996). Because the documents at issue were so technologically complex, we do not fault BPA for using

employees familiar with these matters to review the material for the applicability of FOIA exemptions. Thus, we find that BPA reasonably allocated personnel to find responsive material quickly, review it, and redact it correctly. Association of Public Agency Customers, 25 DOE ¶ 80,200 (1996) (APAC); see also Marlene Flor, 25 DOE ¶ 80,211 (1996).<4>

However, we have discovered one incorrect cost in BPA's bills, the $352.94 charged for photocopying time. Although the FOIA regulations permit BPA to charge five cents a page for the photocopies themselves (and BPA did so), these regulations do not permit BPA to charge, in addition to the per-page rate, the salary of the photocopier operator. See 10 C.F.R. § 1004.9(a)(4); APAC. Thus, we will require BPA to reduce the Appellant's charges by the amount of $352.94.

We further find that BPA did not disregard the Appellant's request that BPA not send documents duplicative of the administrative record. The majority of the documents released were without question non-duplicative from the Appellant's perspective. However, in its responses to the Appellant, BPA released 750 pages of actual power sale contracts. In the Appellant's view, these actual contracts were virtually the same as a sample power sale contract located in the administrative record, and thus BPA disregarded the scope of the Appellant's request. See Record of Telephone Conversation between Melinda J. Horgan, Attorney, Appellant, and Dawn Koren (June 5, 1996). We do not accept this argument. BPA should not be faulted for adhering to the precise language of the Appellant's request. The fact is that these contracts were not in the administrative record. BPA should not have to guess at and interpret what documents the Appellant would consider similar enough to administrative record documents as to be beyond the scope of the request. Aside from these contracts, only about six pages released by BPA were duplicative of the administrative record. Id. This amount, when considered within the context of 1,870 released pages, is de minimis. Therefore, we find that BPA may charge for the search and review of the power sale contracts as well as the half dozen duplicated pages.

We have also determined that BPA's response was properly within the scope of the Appellant's request. The Appellant lists three arguments to the contrary: (i) many of the released pages are unrelated to its February 15, 1996 Request; (ii) some pages are photocopies of other pages; and (iii) it received fax cover sheets attached to many of the documents. First, we note that BPA need not eliminate the fax cover sheets from its response. These cover sheets were attached to the documents requested and serve to show how the requested documents were disseminated.<5> Thus, these documents are within the scope of the request. Second, although approximately 25 pages of documents located turned out to be copies of other documents, we agree with BPA that to have searched 1,870 pages looking for duplicates would most likely have increased the amount of review time unnecessarily. See Record of Telephone Conversation between Brian Altman, Staff Attorney, BPA and Dawn Koren (July 9, 1996).

After examining the remaining specific documents which the Appellant asserts are non-responsive, we find that they are responsive to its broadly worded request. We find that a 60-page power transmission contract between BPA and a DSI, Intalco, is responsive to item 2 of the Appellant's request, which seeks "all documents reflecting or relating to power supplies, power supply proposals, or any power sale agreements for providing power or related services to DSI's from BPA or third parties." The Intalco contract concerns BPA's arrangement with Intalco to send power to the DSI whenever circumstances force BPA to divert Intalco's normal supply. This document is clearly responsive to item 2. We also find that several pieces of Congressional correspondence are responsive to item 2 since they also relate to power supply to the DSIs. In addition, we believe that a large amount of the technical analysis papers are responsive to the request. According to BPA, these are documents prepared by BPA's engineering department in order to develop and complete various attachments to power and transmission contracts with the DSIs. BPA therefore believes that these documents are responsive to items 2, 3, 6, and 7. See Record of Telephone Conversation between Brian Altman and Dawn Koren (July 9, 1996).<6> We find that documents used in preparing the contracts referred to in the Appellant's request must be considered responsive.

Finally, we note that because the Appellant has refused either to pay the advance fee or to assure BPA that

all fees would be paid in accordance with 10 C.F.R. § 1004.9(b)(8)(i), the FOIA regulations permit BPA to stop working on the FOIA request. Although BPA had informed the Appellant in its May 21, 1996 discontinuation of processing letter that it would send an index of withheld documents upon its completion, BPA stated that it was doing so based on its belief that preparation of the index is not chargeable. However, upon learning of this Office's judgment that preparation of the index involves analysis and is therefore chargeable, see Record of Telephone Conversation between Carol Jacobson and Dawn Koren (June 6, 1996), BPA permissibly chose to not incur additional non-recoverable costs. Moreover, until completion of the document review, the preparation of such an index would be premature.

In conclusion, we find that BPA properly stopped processing the Appellant's request, given the Appellant's refusal to pay reasonable charges for search and review. We grant this Appeal in part based solely on the improper charges for the salaries of the photocopier operators.

It Is Therefore Ordered That:

(1) The Appeal filed by the Association of Public Agency Customers on July 8, 1996, Case Number VFA-0174, is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Bonneville Power Administration, which shall reduce its fees in this case by the amount of $352.94.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 1, 1996

<1>The Appellant has improperly requested in its Appeal the titles of the personnel executing the searches. If the Appellant wishes documents listing these titles, the Appellant should file a new request for that information.

<2>The Appellant asserts that these withheld documents must exist because the released documents reference them. BPA agrees that many other responsive documents have been identified, but explains that no determination can be made regarding these documents until BPA completes the review following the Appellant's payment. See Record of Telephone Conversation between Carol Jacobson and Dawn Koren (June 5, 1996).

<3>We note that a small portion of the search and most of the photocopying was conducted by lower-paid employees. But, as explained below, the charges for the salary of the photocopier operators were impermissable.

<4>In response to the Appellant's comment regarding BPA's alleged lack of an organized filing system, we note that the FOIA does not require agencies to maintain their files in order to make the files easily accessible to requesters. As long as the files are organized in a way that is functional for the office using them, the FOIA does not dictate a "better" filing system.

<5>Further, even if BPA had taken the time to remove all the fax cover sheets after it located the responsive documents, this would not have decreased its search time to find these documents.

<6>Items 3, 6, and 7 request documents "reflecting or relating to" the provision of transmission or ancillary services to the DSIs by BPA, the five- and fifteen-year transmission contracts between DSIs and BPA and BPA's decision to enter into such contracts.

Case No. VFA-0175, 25 DOE ¶ 80,211

July 2, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marlene Flor

Date of Filing: June 5, 1996

Case Number: VFA-0175

On June 5, 1996, the Office of Hearings and Appeals (OHA) received an Appeal filed by Marlene Flor pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In her appeal, Ms. Flor contests the dismissal of a request for information that she submitted to the DOE's Albuquerque Operations Office (DOE/AL). Her request was dismissed by the DOE/AL's FOIA Officer because Ms. Flor did not agree to pay the estimated costs associated with searching for, identifying and providing copies of documents responsive to her request. In her appeal, Ms. Flor contends that her request should be reinstated and that the estimate of costs associated with processing her request should be lowered significantly.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In her FOIA request, Ms. Flor sought copies of "all contracts, contractual material, material related to the expenditure of federal funds, correspondence of all types regardless of the point

of origin, and all memoranda for the record and notes, between the [DOE] and those providing psychiatric and psychological services to the [DOE/AL] from May 1994" to the date of the request. She stated that she would pay "all fees involved" in processing her request, but that she wished to be notified in advance if the fees exceeded $25.

Ms. Flor's request was referred to three divisions of DOE/AL: Contracts and Procurement (CPD), Personnel Security (PSD) and Financial Management (FMD). Each division was asked to prepare an estimate of costs associated with searching for and providing documents responsive to the request. In a letter dated February 8, 1996, DOE/AL provided Ms. Flor with estimates from CPD and PSD.<1>

PSD provided an estimated cost of $50. This estimate, which is not at issue here, consisted of one half hour of search time billed at $15 per hour for a total of $7.50, two hours for review of any responsive documents for portions exempt from mandatory disclosure under the FOIA at $20 per hour, for a total of

$40, and a copying fee of $0.05 for each of an estimated 50 pages of responsive documents, for a total of $2.50.

CPD submitted an estimated cost for search and production of responsive documents of $1,100. This estimate consisted of 24 hours of search time billed at an hourly rate of $10 for a total of $240, an additional 24 hours of search time billed at $25 per hour for a total of $600, four hours for review of responsive documents for exempt material at $40 per hour for a total of $160, and $0.05 per page for copying expenses for an estimated 2,000 pages of responsive documents, for a total of $100.

In her appeal, Ms. Flor contends that CPD's estimate is unreasonably high. As an initial matter, she claims that the $25 hourly rate used by CPD to compute a portion of its estimated search costs, and the $40 per hour review rate, are too high. She states that these hourly rates indicate that CPD intends to use employees who are compensated at the level of a GS-12 or GS-13 to conduct the search and review, when lower salaried employees could just as readily be used. Furthermore, Ms. Flor states that the estimated search time of 48 hours is too high given the nature of the computer and automated filing systems in use at CPD. Finally, Ms. Flor contests the CPD's estimate that 2,000 pages of responsive documents will be identified. In this regard, she claims that in response to an earlier, broader FOIA request, CPD was able to identify only 1,888 pages of responsive documents.

II. Analysis

Pursuant to the FOIA, the DOE has issued regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. § 552(a)(4)(A)(I). These regulations provide for the assessing of fees to recover the "full allowable direct costs incurred" of responding to requests for information. 10 C.F.R. § 1004.9. In so doing, the DOE must "use the most efficient and least costly methods to comply with requests for documents made under the FOIA." Id. In calculating fees, the DOE may include charges for manual searches at the salary rate(s) (i.e. basic pay plus 16 percent) of the employees making the search, and for the paper copy reproduction of documents at the rate of $0.05 per page. 10 C.F.R. § 1004.9(a)(1),(4). However, with the exception of requesters seeking documents for a commercial use, the DOE will provide the first 100 pages of reproduction and the first two hours of search time without charge. 10 C.F.R. § 1004.9(a)(6).

For purposes of determining the appropriate fees to be charged, the DOE regulations set forth four categories of FOIA requesters: those who seek documents for a commercial use, educational and non-commercial scientific institution requesters, requesters who are representatives of the news media, and all other requesters. 10 C.F.R. § 1004.9(b)(1)-(4). The fees for requesters in the fourth, "catch-all" category are limited to the reasonable direct cost of searching for and reproducing responsive documents, minus the costs associated with the first 100 pages of reproduction and the first two hours of search time. 10 C.F.R. § 1004.9(b)(4).

Based on the record before us, it does not appear that Ms. Flor is seeking the requested documents for a commercial use, or on behalf of an educational, scientific, or media-related entity. Ms. Flor should therefore properly be included in the category of "all other requesters." See memorandum of June 12, 1996 telephone conversation between Ms. Barfield and Robert Palmer, OHA Staff Attorney. Because we conclude that DOE/AL's estimate includes costs that may not charged to requesters in Ms. Flor's category, we will remand this matter to DOE/AL for the preparation of a new estimate.

As we previously stated, Ms. Flor's estimates from PSD and CPD included $40 and $160 respectively for the review of responsive documents for portions exempt from mandatory disclosure under the FOIA. However, pursuant to the DOE regulations, such review costs may not be charged to individuals in the "all other requesters" category. See 10 C.F.R. § 1004.9(b)(4). See also Seehuus Associates, 23 DOE ¶ 80,123 at 80,552 (1993) (Seehuus); Glen Milner, 21 DOE ¶ 80,116 at 80,553 (1991) (Milner). We therefore need not address Ms. Flor's contention that the $40 per hour review rate set forth in the CPD estimate is excessive.

Ms. Flor further claims that the $600 estimate for the 24 hours of search time billed at $25 per hour is inflated. In order to determine the manner in which this estimate was calculated, we contacted DOE/AL. We were told that the reason for CPD's proposed use of GS-12 and GS-13 contracting specialists to conduct this portion of the search rather than lower-salaried contracting technicians was because the specialists were needed to identify and delete information pertaining to the personal privacy of individuals mentioned in the responsive documents. See memorandum of June 12, 1996 telephone conversation between Ms. Barfield and Mr. Palmer.

Based upon its knowledge of the records involved and the abilities of its personnel, DOE/AL has determined that the most efficient use of its resources would be to use contracting specialists to conduct a portion of its search, and for those specialists to review the documents that they identify as responsive for information that is exempt from mandatory disclosure under the FOIA. There is nothing in the record that would lead us to believe that this determination is unreasonable. See Association of Public Agency Customers, 25 DOE ¶ 80,200 (1996)(use of higher-salaried employees to conduct search for responsive documents upheld for reasons of efficiency and because of complexity of records to be searched). However, to the extent that "search time" is spent by the specialists in identifying and deleting information that is exempt from mandatory disclosure, this in reality constitutes a review function for which Ms. Flor may not be charged. See Seehuus; Milner. Consequently, upon remand DOE/AL should subtract from its estimated search time any time estimated to be spent by these specialists in reviewing documents for exempt material.

Finally, Ms. Flor contends that CPD's estimate of the number of pages of responsive documents is inflated. In this regard, we emphasize that CPD's figures are estimates, and that Ms. Flor will only be charged for the number of pages of responsive documents actually provided. <2>

III. Conclusion

For the reasons set forth above, we will remand this matter to the DOE/AL for the provision of a new estimate to Ms. Flor. In calculating this estimate, DOE/AL should delete any costs associated with the review of responsive documents for exempt material.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Marlene Flor on June 5, 1996 is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to DOE/AL for the calculation of a new estimate in accordance with the guidelines set forth in this Decision and Order.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 2, 1996

<1>FMD did not provide an estimate. According to DOE/AL, FMD was waiting for the contract numbers of the contracts that were deemed responsive by CPD. FMD believed that obtaining these numbers from

CPD would reduce the costs of search and production. See April 12, 1996 letter from Elva Ann Barfield, FOI Officer, DOE/AL to Ms. Flor.

<2>In addition, we note that the estimate provided to Ms. Flor did not factor in the two hours of free search time and the 100 pages of free document reproduction provided for in the DOE regulations. DOE/AL will adjust its calculation accordingly upon remand.

Case No. VFA-0176, 25 DOE ¶ 80,212

July 2, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tenaska Washington Partners II, L.P.

Date of Filing: June 10, 1996

Case Number: VFA-0176

Tenaska Washington Partners II, L.P. (TWP) filed an Appeal of a May 21, 1996 determination issued to it by the Office of Inspector General of the Department of Energy (DOE). In that determination, the Deputy Inspector General for Audit Services of the Office of Inspector General (IG) partially denied a request for information that TWP filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

Background

In its original October 6, 1995 request, TWP sought:

1) All documents and records reviewed or relied upon by the IG's office in preparing its Report of Audit of BPA's [Bonneville Power Administration] Energy Resource Programs, DOE/IG-0379 (Report).

2) All communications between any IG's office representative and any BPA Representative on the subject of the Report, including but not limited to all BPA comments on or relating to the Report.

3) Any other IG's office report commenting upon or evaluating BPA energy resource or energy acquisition programs or practices.

On March 8, 1996, the IG released most of the records it identified as responsive, but withheld one document and portions of several other documents pursuant to Exemption 5. In addition, the IG redacted information from several documents pursuant to Exemptions 6 and 7(C). On April 2, 1996, TWP filed an Appeal with the Office of Hearings and Appeals of the DOE (OHA) contending that the DOE improperly withheld information. The OHA issued a determination regarding TWP's Appeal on April 29, 1996. Stoel Rives, LLP, 25 DOE ¶ 80,189 (1996). In that Decision, the OHA remanded the Appeal to the IG for a further review of the material withheld pursuant to Exemption 5, but denied the Appeal in all other respects.

On May 21, 1996, the IG issued a new determination regarding the Exemption 5 material. In that determination, the IG released some information, but continued to withhold material pursuant to Exemption 5. Specifically, the IG stated that the withheld material is predecisional and that public

disclosure would likely inhibit frank and open discussion of the matter within the agency and hinder the government's ability to reach sound and well-reasoned resolutions to problems.

In its June 6, 1996 Appeal, TWP requests that the DOE release the withheld material. TWP contends that the IG improperly withheld "underlying facts" concerning its policy making decisions. Specifically, TWP argues that the IG cannot withhold "technical evaluation[s]" regarding "the economics of BPA's resource acquisitions" because these evaluations are factual in nature. Furthermore, TWP states that IG "cannot unilaterally decide that the ?public interest' justifies its continuing refusal to open its files to the public." Finally, TWP contends that the IG may not rely on Exemptions 6 and 7 to withhold a document referred to as Document No. 7. Specifically, TWP states that the DOE "waived" its ability to claim these exemptions when it "voluntarily" disclosed the name of an individual in Document No. 7. TWP argues that since the IG has now released the individual's name, he will not suffer any increase to the invasion of his privacy if DOE releases Document No. 7 in its entirety. Thus, TWP contends that the FOIA requires the DOE to release the entire document.

Analysis

As an initial matter, we note that the IG inadvertently released the individual's name in a header of one page of Document No. 7. Regarding this fact, we find that an individual's privacy rights do not evaporate simply because an agency may have inadvertently released his name to a requester. Furthermore, there is no doubt that the individual could suffer an increase to the invasion of his privacy if the IG released Document No. 7 because statements made in the document could then be directly attributable to him. The IG's inadvertent release currently reveals only that the individual was a participant in an interview that also involved others. Thus, there is no merit to TWP's argument that the FOIA requires that the DOE now release Document No. 7 in its entirety.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

In the present case, we have reviewed the redacted information and find it is clearly both predecisional

and deliberative pursuant to Exemption 5. In fact, we have confirmed that the redacted information contains opinions, recommendations and interpretations from various DOE and BPA employees, the disclosure of which would discourage open, frank discussions between these individuals. Finally, we have verified that the redacted information does not contain any "underlying facts" regarding "technical evaluation[s]" of "the economics of BPA's resource acquisitions." Thus, we conclude that the IG made a correct determination consistent with the principles outlined above. Accordingly, the IG properly withheld the redacted information pursuant to Exemption 5.

The Public Interest in Disclosure

Notwithstanding our finding that the IG properly applied Exemption 5 to the requested information, we must consider another factor. The DOE regulations state that the agency should release a document to a requester if disclosure is consistent with other laws, and is in the public interest. 10 C.F.R § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested information consists of the opinions of individuals during various meetings. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion during these meetings. Employees and managers would be less likely to communicate their opinions during such meetings if they knew or suspected that an agency would release their opinions to the public. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the requested documents would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by Tenaska Washington Partners II, L.P. on June 10, 1996, Case No. VFA-0176, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 2, 1996

Case No. VFA-0177, 25 DOE ¶ 80,213

July 9, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burlin McKinney

Date of Filing: June 10, 1996

Case Number: VFA-0177

On June 10, 1996, Burlin McKinney (McKinney) filed an Appeal from a determination issued to him on May 20, 1996 by the Deputy General Counsel of the Office of General Counsel (OGC) of the Department of Energy (DOE). This determination concerned a request for information submitted by McKinney pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the OGC to release the information requested by McKinney.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552; 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In 1995, McKinney wrote to the DOE regarding possible personal exposure to radiation from beryllium while employed at Oak Ridge Laboratories. That request was referred to the Office of Human Radiation Experiments (OHRE), which determined that the experiences described in the letter involved occupational, not experimental, exposure to radiation. OHRE then transferred his inquiry to the Oak Ridge Operations Office. See Letter from Special Counsel and Director, OHRE, to Burlin McKinney (July 28, 1995). The Oak Ridge Operations Office released to McKinney a memorandum in which the Assistant Secretary for Environment, Safety and Health recommended that the Under Secretary approve a policy for notification of former beryllium plant workers concerning potential exposure to beryllium. See Memorandum from Assistant Secretary for Environment, Safety and Health to Under Secretary (October 6, 1986).

In 1996, McKinney filed a request for access under the Freedom of Information Act to Enclosure 2 to this memorandum. Enclosure 2 is a three page legal memorandum from then-General Counsel Michael Farrell to the Assistant Secretary recommending that the DOE not initiate such a notification program based on the legal analysis contained in the memorandum. See Memorandum from J. Michael Farrell, General Counsel, to Mary L. Walker, Assistant Secretary for Environment, Safety and Health (October 1, 1986) (Farrell Memorandum). The OGC determined to withhold this document from McKinney, labeling the document "an attorney-client, attorney work-product document which is exempt from disclosure under Exemption 5 of the FOIA . . . ." See Letter from Deputy General Counsel to McKinney (May 20, 1996)

(Determination Letter). In addition, the OGC stated that "discretionary disclosure would not be in the public interest because it could adversely impact currently pending and possibly future litigation in which the agency is involved." See Determination Letter at 2.

On June 10, 1996, McKinney filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, McKinney challenges the OGC determination. This Appeal, if granted, would require that OGC release to McKinney the withheld memorandum.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work-product privilege, and the "deliberative process" privilege. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, the OGC relied upon the first two privileges of Exemption 5.

The Attorney-Client Privilege

The attorney-client privilege exists to protect confidential communications, including facts, (a) from a client to an attorney, if for the purpose of securing legal advice and (b) from an attorney to a client, if the communication is based on confidential information provided by the client. Sears, 421 U.S. at 154. Not all communications between attorney and client are privileged, however. Clarke v. American Commerce National Bank, 974 F.2d 127, 129 (9th Cir. 1992) (Clarke). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. Fisher v. United States, 425 U.S. 391, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. Government Accountability Project, 24 DOE ¶ 80,129 at 80,570 (1994). Correspondence which reveals the motive of the client in seeking legal advice, litigation strategy or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege. Clarke, 974 F.2d at 129.

We have reviewed the Farrell Memorandum, and find that it is a communication between an agency attorney and his client "concerning a legal and policy matter on which the [client] sought professional advice." See Determination Letter. The matter involved was the creation of agency policy regarding notification of beryllium workers concerning the possibility of toxic exposures. Farrell, in his capacity as legal counsel to the agency, recommended a specific legal course of action to his client. Thus, the Farrell Memorandum is protected from disclosure by the attorney-client privilege of Exemption 5.

The Attorney Work-Product Privilege

The attorney work-product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947).This privilege does not extend to every written document generated by an attorney, but only to those prepared either for trial or in anticipation of litigation. See e.g. Coastal States, 617 F.2d at 865. So long as there is "some articulable claim likely to lead to litigation," id., or potential litigation has become "identifiable," the work-product privilege will attach. See William Hyde, 17 DOE ¶ 80,130 at 80,570 (1988) (citing Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976)).

The Determination Letter states that the memorandum concerns a key issue in "fairly foreseeable"

litigation. At the time the Farrell Memorandum was written, there was much concern about possible litigation by beryllium workers seeking remedies for occupational exposure to beryllium. We find that this meets the standard of "identifiable potential litigation." In recent conversations, the OGC has informed us that there is pending beryllium exposure litigation and the possibility exists of future suits in this area. Therefore, based upon our review of the Farrell Memorandum and the Determination Letter, and upon our conversations with the OGC, we find that the withheld document was in 1986, and continues to be today, protected from disclosure by the attorney work-product privilege of Exemption 5.

Discretionary Disclosure

Under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. The OGC concluded that discretionary disclosure would not be in the public interest because such release could adversely impact currently pending and possibly future litigation in which the agency is involved. See Determination Letter. In response, McKinney asserts broadly that the public has a right to know that "DOE lawyers do not have our health and safety in mind." See Appeal Letter at 1. He presents as support a 1949 Atomic Energy Commission (AEC) document that contains references to moral issues, moral responsibility, public relations, and the public health. Id.

As stated previously, we agree with the OGC that the withheld document is privileged. However, both DOE's openness policy and the Attorney General's presumption that the public interest lies with disclosure in the absence of a reasonably foreseeable harm to an agency interest protected by an exemption require that we further examine the agency determination within the framework of both policies. McKinney is already privy to the final recommendation of the Farrell Memorandum (that the DOE should not initiate a notification program for beryllium plant workers because the agency has no legal duty to warn) through a previous disclosure. He now seeks disclosure of the entire memorandum, which sets forth the legal analysis used by agency counsel in arriving at this result. The OGC has stated clearly that DOE could be harmed in current and future litigation were this document, containing the legal advice, theories and opinions of its attorneys, to be released to the public.

Assuming, arguendo, that disclosure of the entire memorandum might be consistent with the public interest in knowledge of the operations of the government, we must balance this interest with the potentially chilling effect that full disclosure could have on future attorney-client communications, especially those made in anticipation of litigation. We recognize that there is also a substantial public interest in impartial litigation. Thus, we conclude that release of the Farrell Memorandum could cause foreseeable harm to the agency in ongoing and future litigation, and is not in the public interest. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Burlin McKinney on June 10, 1996, Case Number VFA-0177, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 9, 1996

Case No. VFA-0178, 25 DOE ¶ 80,214

July 10, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: June 11, 1996

Case Number: VFA-0178

On June 11, 1996, William H. Payne filed an Appeal from a determination issued to him under the Freedom of Information Act (FOIA) on June 3, 1996, by the Department of Energy's Albuquerque Operations Office (AO). In his Appeal, Mr. Payne asserts that AO failed to provide him with all of the responsive documents in its possession regarding a Request for Information he made on November 14, 1995 (November FOIA Request).

I. Background

In the November FOIA Request, Mr. Payne requested from Sandia National Laboratory (SNL) copies of documents relating to four specified categories of information regarding various complaints he had filed while he was an employee at SNL. <1> AO, in its Determination Letter dated June 3, 1996, informed Mr. Payne that it had conducted a search of the files at SNL and at the Kirtland Area Office and that it could find no documents responsive to his request.

In his Appeal, Mr. Payne argues that responsive documents must exist regarding the categories of information he requested in his FOIA Request. Specifically, Mr. Payne asserts that in January 1992 he contacted the SNL Ombudsman regarding his allegation that he was improperly ordered to

"reverse engineer" the software for a Hirsch Scramblepad electronic lock.<2> After he was fired by his employer at SNL in July 1992, Mr. Payne discovered material he says substantiates his belief that SNL possesses documents of the type described in the November FOIA Request. He refers to an August 1993 affidavit prepared by an SNL patent attorney in which the attorney stated that reverse engineering of copyrighted software for various purposes was permissible under U.S. copyright laws. In the affidavit, the attorney cited two U.S. Court of Appeal cases decided in September and October 1992 as support for his conclusion. <3> Mr. Payne alleges that these cases declared reverse engineering of copyrighted software legal only as of September 1992, and thus the reverse engineering practices he complained of were in fact illegal at the time he submitted his complaints to SNL and at the time he was subsequently fired. He therefore maintains that, because his complaint concerned illegal practices, it is likely that SNL created and retained investigatory documents which would be responsive to his November FOIA Request.<4>

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive

documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095,1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

As an initial matter, we decline to accept Mr. Payne's argument regarding the reason additional documents must exist. After reviewing the two cited cases in the affidavit, we find no evidence that either court opined that the software reverse engineering practices at issue were illegal prior to the court's decision. Thus, there is no indication that the practices Mr. Payne allegedly complained about were illegal or that SNL would necessarily have created investigatory documents regarding his complaint. Consequently, the assertions in the affidavit provide no evidence as to whether SNL ever possessed documents responsive to Mr. Payne's request.

We did, however, contact officials at AO to ascertain the extent of the search that had been performed. We were informed that AO undertook a search at the SNL offices and other AO facilities most likely to possess responsive documents. Specifically, AO searched the files at SNL's Staffing Organization (personnel department), Personnel Security Organization, System Research Center and the Legal Department, but found no responsive documents.<5> AO also inquired of the SNL Ombudsman who informed AO officials that he retained no records regarding Mr. Payne and does not retain any written records regarding individuals who may come to his office. Additionally, AO also searched its files at the Kirtland Area Office, the area office which supervises SNL and found no responsive documents. Given the facts presented to us, we find that AO conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Payne's November FOIA Request. Consequently, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on June 11, 1996, is denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 10, 1996

<1>Specifically, Mr. Payne requested from SNL copies of all investigatory reports regarding his allegations that the National Security Agency attempted to sabotage a DOE/SNL cryptographic project and that he was illegally requested to "reverse engineer" the software for a Hirsch Scramblepad electronic

lock. Additionally, Mr. Payne requested copies of all investigation reports relating to his complaints regarding two SNL supervisors, Preston Herrington and Thomas Wright. Mr. Payne also requested copies of all investigation reports regarding his complaints regarding a SNL manager, Tommy Sellers.

<2>In this Decision, the term "reverse engineering" refers to the practice of obtaining a copy of a copyrighted software product and then deciphering the software to ascertain the actual computer program contained in the software. For a more complete description of the process of reverse engineering of software, see the cases cited in footnote 3 infra.

<3>The two cases cited in the affidavit were Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) and Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832 (Fed. Cir. 1992).

<4>Additionally, Mr. Payne apparently argues that AO may have responded to the wrong FOIA Request. Mr. Payne notes that the Determination Letter states that it is responding to a March 18, 1996 FOIA Request and not his November FOIA Request. The explanation provided below should clarify matters. AO informed us that Mr. Payne sent his November FOIA Request to an official at SNL but the official failed to forward the request to AO. Subsequently, Mr. Payne sent a letter dated March 18, 1996 to AO inquiring as to why he had not received a response to his November FOIA Request. In this letter, he enclosed a copy of the November FOIA Request. Subsequently, AO processed his November FOIA Request but dated the request as of March 18, 1996, the date AO received a copy of the November FOIA Request. See Memorandum of telephone conversation between Ms. Carolyn Becknell, FOIA Officer, AO, and Richard Cronin, OHA Staff Attorney (June 24, 1996).

<5>During the time Mr. Payne worked there, SNL lacked a central office to handle complaints of the type described in the November FOIA Request. See Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, AO and Richard Cronin, OHA Staff Attorney (July 1, 1996).

Case No. VFA-0179, 25 DOE ¶ 80,215

July 16, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Milner

Date of Filing: June 14, 1996

Case Number: VFA-0179

On June 14, 1996, Glen Milner filed an Appeal from a determination issued to him on May 29, 1996, by the Freedom of Information Act/Privacy Act Division (FOI/PA) of the Department of Energy (DOE). That determination concerned a request for information submitted by Mr. Milner pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, FOI/PA would be required to conduct a further search for responsive material.

I. Background

In his March 22, 1996 request to Albuquerque, Mr. Milner sought information regarding "the decision in 1992 to send specially fitted railcars to Russia to transport nuclear weapons and the present use and condition of these railcars." Request Letter dated March 22, 1996 from Glen Milner to Freedom of Information Officer, Albuquerque Operations Office. (Request Letter). Mr. Milner sent a copy of this request to Secretary O'Leary and it was forwarded to the FOI/PA Division for a response. FOI/PA asked the Office of Defense Programs (DP) to search DOE Headquarters records for information regarding this request. DP conducted a search of the Office of Nuclear Weapons Management and the Surety Office. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, Office of Hearings and Appeals (OHA) and Joan Ogbazghi, FOI/PA, July 2, 1996. On May 29, 1996, FOI/PA issued its determination stating that it could find nothing responsive to Mr. Milner's request. At the present time, the Albuquerque Operations Office is still processing Mr. Milner's request.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where

it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we contacted Joan Ogbazghi in the FOI/PA Division to ascertain the

extent of the search that had been performed and to determine whether any documents responsive to Mr. Milner's request might exist. We were informed by Ms Ogbazghi that DP conducted a search of the Office of Nuclear Weapons Management and the Surety Office at Headquarters for information regarding a 1992 decision to send the railcars to Russia. Memorandum of Telephone Conversation between Janet R. H. Fishman, and Joan Ogbazghi, July 2, 1996. In our conversation with DP, we determined that information about the "White Train," as it is also known, is maintained in Albuquerque. Memorandum of Telephone Conversation between Janet R. H. Fishman, and Joe Hobbs, DP, July 3, 1996 (Memorandum of July 3, 1996 Telephone Conversation). DP searched the two offices at Headquarters that would be most likely to have any information on a 1992 decision about the White Train and did not find anything responsive to Mr. Milner's request.

In his Appeal, Mr. Milner states that he was requesting "all documents on record since 1985 concerning the specially fitted railcars used for the transport of nuclear weapons." Appeal Letter dated June 8, 1996, from Glen Milner to Director, OHA. (Appeal Letter). However, FOI/PA and DP quite properly believed that, as stated in the first sentence of his letters to both Albuquerque and Secretary O'Leary, Mr. Milner was requesting information on a decision to send the White Train to Russia. In the letter to Albuquerque, he requests information on a 1992 decision in the first paragraph and does not broaden his request until later in the letter. Request Letter. In his letter to Secretary O'Leary, he never broadens the request but merely states that he is "requesting information on the decision in 1992 to send specially fitted railcars to Russia." Letter dated March 25, 1996, from Glen Milner to Secretary Hazel O'Leary, DOE. Therefore, we believe that it was reasonable for DP to limit its search to information on a decision made in 1992.<1>

We are convinced that the interpretation accorded his letter was reasonable and that FOI/PA followed procedures which were reasonably calculated to uncover the material requested by Mr. Milner. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Mr. Milner asserts that DOE must have additional documents. However, the fact that the search did not uncover documents Mr. Milner believed may be in the possession of DOE does not mean that the search was inadequate. In addition, Mr. Milner has not provided any evidence, beyond his personal belief, that any additional documents

exist in Headquarters' files. Finally, DP has informed us that the DOE never considered sending specially fitted railcars to Russia. Memorandum of Telephone Conversation between Janet R. H. Fishman and Joe Hobbs, July 15, 1996. Therefore, under the circumstances of this case, we find that FOI/PA's search for responsive documents was adequate and that no documents responsive to Mr. Milner's request for information on a 1992 decision concerning the White Train exist at Headquarters. Accordingly, Mr. Milner's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on June 14, 1996, by Glen Milner, Case No. VFA-0179, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 16, 1996

<1>Further, Albuquerque, where the information on the White Train is maintained, is working on Mr. Milner's request. July 2, 1996 Telephone Memorandum. In our discussion with DP, we ascertained that

although DP may have some information on the train, most of the information is in Albuquerque. DP has assured us that any information retained at Headquarters would be duplicated there. Memorandum of July 3, 1996 Telephone Conversation.

Case No. VFA-0180, 26 DOE ¶ 80,102

July 31, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: U.S. Solar Roof

Date of Filing: June 19, 1996

Case Numbers: VFA-0180

VFA-0181

On June 19, 1996, U.S. Solar Roof of Bothell, Washington filed two Appeals from a determination issued on June 5, 1996 by the Acting Deputy Assistant Secretary of the Office of Utility Technologies, Office of Energy Efficiency and Renewable Energy (Utility Technologies) of the Department of Energy (DOE). That determination denied in part U.S. Solar Roof's requests for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the requested information.

Background

On April 2, 1996, U.S. Solar Roof filed two FOIA requests with the Freedom of Information and Privacy Acts Division of the DOE in Washington, D.C. The first request, which was given FOIA Control No. 9604080004, consists of two parts. In the first part, U.S. Solar Roof sought information dealing with the DOE PV:BONUS program. PV:BONUS is a DOE initiative intended to promote the development of cost-effective photovoltaic products and infra-structure for practical use in domestic, residential, commercial, and institutional construction and buildings. In particular, U.S. Solar Roof sought minutes from PV:BONUS "program meetings" that it stated were held in Washington, D.C., between November 16, 1992 and January 27, 1993. U.S. Solar Roof also listed potential meeting attendees, the applicable DOE Program Office (Office of Solar Electric Conversion) and potential DOE points of contact. The second part of U.S. Solar Roof's first request asked for "trip reports" resulting from those "program meetings." U.S. Solar Roof's second FOIA request, denominated FOIA Control No. 9604080005, seeks statements and non-disclosure certifications made between August 16, 1994 and March 31, 1995 by persons outside the agency who reviewed

U.S. Solar Roof's unsolicited proposal to demonstrate and validate solar roofing tile technologies.

These requests were forwarded to Utility Technologies, which responded in a letter to U.S. Solar Roof on May 20, 1996. That letter, which referenced both FOIA Control Numbers, informed U.S. Solar Roof that there had been no meetings in Washington, D.C., on the matters it specified during the requested period. Utility Technologies stated that all relevant meetings had taken place in Golden, Colorado, at the DOE's Golden Field Office. Thus, Utility Technologies concluded that its search had not revealed any documents directly responsive to U.S. Solar Roof's specific request. Utility Technologies also stated that there were no "trip reports" for the meetings in Golden, Colorado or for the alleged meetings in Washington, D.C. Utility Technologies made no mention of the request for the material on U.S. Solar Roof's unsolicited

proposal.

U.S. Solar Roof wrote a response to Utility Technologies on May 31, 1996, in which it attempted to clarify its request. The clarification was in fact an expansion of the original request from "program meetings" to include "other meetings (formal or informal) between DOE Golden Field Office personnel and DOE Headquarters personnel [where] the PV:BONUS program was discussed." Utility Technologies responded to this second letter on June 5, 1996, again referencing both FOIA Control Numbers. For the purposes of this Appeal, this second letter was identical to the first letter. U.S. Solar Roof then filed this Appeal challenging the adequacy of Utility Technologies' search.

Analysis

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information which it has created or obtained at the time of the request. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein); Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983); Martha L. Powers, 24 DOE ¶ 80,147 at 80,618 (1994); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Safecard Services, Inc. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (and cases cited therein); Meeropol v. Meese, 790 F.2d 942, 950-51 (D.C. Cir. 1986); Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); William H. Payne, 24 DOE ¶ 80,145 at 80,615 (1994); Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)). This Office will remand a case for further action if it is evident that an inadequate search was conducted, or if evidence reveals that other documents that were not identified during the initial search exist. Id. See also Linda J. Carlisle, 24 DOE ¶ 80,124 at 80,560 (1994); McGraw-Hill Nuclear Publications, 22 DOE ¶ 80,157 at 80,627 (1992); James L. Schwab, 21 DOE ¶ 80,153 at 80,658 (1991).

In its Appeal of the matters covered by its first FOIA request, FOIA Control Number 9604080004, OHA Case Number VFA-0180, U.S. Solar Roof claims that Utility Technologies' response is insufficient because it does not provide documents from meetings allegedly held in Washington, D.C. It claims that it knows at least one such meeting took place because it was told about the meeting by the Golden Field Office contract specialist who worked on the PV:BONUS program.

To test U.S. Solar Roof's contentions in its Appeal, we contacted the contract specialist at the Golden Field Office. He informs us that he remembers the conversation with U.S. Solar Roof's president but that there appears to be an unfortunate misunderstanding by U.S. Solar Roof. The contract specialist states that he did not personally participate in any meetings with DOE Headquarters personnel. However, he thinks that telephonic discussions between DOE Headquarters and the Golden Field Office regarding funding matters may have taken place. There were, to the best of his knowledge, no meetings held in Washington, D.C., or any meetings with DOE Headquarters personnel regarding the substance of the PV:BONUS program or any particular PV:BONUS grant proposal. All substantive work on the PV:BONUS program, he informed us, was done at the Golden Field Office.

The contract specialist also referred us to a member of the Technical Development Division of the Golden Field Office who was involved in the determination of the PV:BONUS awards. This individual was also one of the persons that U.S. Solar Roof believed attended the PV:BONUS meetings allegedly held in Washington, D.C. Our conversation with this gentleman, who was chairman of the PV:BONUS evaluation

board and who reported to the selection official at the Golden Field Office, substantially confirmed what the contract specialist told us. He stated that there were no meetings held with Golden Field Office personnel at DOE Headquarters in Washington, D.C. concerning the PV:BONUS program and that he had checked his files for responsive documents and found none. He also confirmed that all of the PV:BONUS work was done at the Golden Field Office. He states that there was no discussion of specific proposals submitted to the PV:BONUS program with DOE Headquarters personnel during the time specified in U.S. Solar Roof's FOIA request.

We also checked with the other Golden, Colorado-based person who U.S. Solar Roof claims attended the alleged Washington, D.C. meetings. Like his colleague at the Golden Field Office, this consultant with the National Renewable Energy Laboratory states that all PV:BONUS review meetings were held in Golden. He informs us that there were no programmatic meetings held in Washington, D.C. or with DOE Headquarters personnel during the time period specified by U.S. Solar Roof. He had confirmed this at the time of the original request by checking his records for such meetings and found no responsive documents.

In addition to the two persons at the Golden Field Office and the consultant at the National Renewable Energy Laboratory, we spoke to the Director of the Photovoltaic Technology Division at DOE Headquarters. U.S. Solar Roof also listed this individual as being at the alleged Washington, D.C. meetings. He told us that he had checked his records and calendar and determined that he had no meetings on the PV:BONUS program in Washington, D.C. with Golden Field Office personnel during the requested time period. He also reaffirmed that all PV:BONUS grant selection work had been done at the Golden Field Office.

Finally, we interviewed the manager of the PV:BONUS program at DOE Headquarters who had performed the FOIA search in this case. Like the other people we spoke with, he told us that all PV:BONUS meetings and selections were made at the Golden Field Office. He also informed us that he had double-checked his calendars and files and found that there were no PV:BONUS meetings during the time and of the type described by U.S. Solar Roof in its FOIA request. In addition, he had asked the chairman of the PV:BONUS evaluation board at the Golden Field Office and the consultant from the National Renewable Energy Laboratory, both of whom are referred to above, to search for records. They both informed him that there were no responsive documents and that all programmatic work on PV:BONUS was done in Golden.

We have contacted every person U.S. Solar Roof named in either its FOIA request or its FOIA Appeal. Every person related the same information, viz., that all substantive PV:BONUS work was done at Golden, that no substantive meetings on PV:BONUS were held in Washington, D.C. or with DOE Headquarters personnel during the specified time frame, and that U.S. Solar Roof has received all the information the agency has concerning its PV:BONUS application. Given all of these facts, we are unable to conclude that any meetings matching a reasonable construction of the language in U.S. Solar Roof's FOIA request took place. Thus, there are no documents memorializing discussions at such meetings or travel reports for them. Accordingly, we find no flaw with Utility Technologies' search and response to U.S. Solar Roof on FOIA Control Number 960408004.

We reach a different conclusion on U.S. Solar Roof's second FOIA request, FOIA Control Number 9604080005, which was assigned OHA Case Number VFA-0181. U.S. Solar Roof states that it has received no response to this request and that this constitutes constructive denial of its request. This Office has consistently found that it has no jurisdiction to consider an Appeal until a determination is issued by a DOE office. See Suffolk County, Long Island, New York, 17 DOE ¶ 80,111 at 80,524-25 (1988). Although we lack jurisdiction to offer U.S. Solar Roof a remedy on this Appeal, we have contacted Utility Technologies on this matter. It appears that its lack of a response was due to an inadvertent omission. Once the oversight was discovered, Utility Technologies agreed to undertake an expeditious search for responsive documents and will respond directly to U.S. Solar Roof. Accordingly, this portion of the U.S. Solar Roof Appeal will be dismissed.

It Is Therefore Ordered That:

(1) The Appeal filed by U.S. Solar Roof, OHA Case No. VFA-0180, is hereby denied.

(2) The Appeal filed by U.S. Solar Roof, OHA Case No. VFA-0181, is hereby dismissed.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 31, 1996

Case No. VFA-0182, 26 DOE ¶ 80,143

December 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burns Concrete, Inc.

Date of Filing: June 17, 1996

Case Number: VFA-0182

On June 17, 1996, Burns Concrete, Inc., filed an Appeal from a determination issued on April 26, 1996, by the DOE's Pittsburgh Naval Reactors Office (PNR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 20, 1995, Burns filed a request under the FOIA for documents submitted by Walters Ready Mix, Inc. (Walters) in connection with a purchase order for concrete supplied for the Expanded Core Facility Dry Cell Project at DOE's Bettis Atomic Power Laboratory, Naval Reactors Facility (NRF). This project was terminated in 1993 and Walters submitted the documents sought by Burns as part of a settlement proposal to recover its costs associated with the project. The project was rebid in early 1996, and the DOE again chose Walters to fill the purchase order.

Because Burns sought information submitted by a third party, PNR sought and received comments on Burns' request from Walters. Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen (representing Walters), to James S. Carey, Jr. (April 2, 1996); see Exec. Order No. 12,600, 3 C.F.R. 235 (1988) (requiring notice to submitters). PNR issued a final determination on April 26, 1996. Letter from H.A. Cardinali, Manager, PNR, to Linda Szimhardt, Office Manager, Burns (April 26, 1996). In its determinations PNR released documents to Burns, but withheld certain responsive documents and portions of other responsive documents under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Id. The present Appeal was filed on June 17, 1996. Letter from Linda Szimhardt, Burns, to Director, OHA (June 7, 1996). In its Appeal, Burns objects to the withholding of information in many of the documents responsive to its request. Id. We received comments from PNR in response to the Appeal on July 16, 1996. Memorandum from James S. Carey, Jr., Chief Counsel, PNR, to Steve Goering, OHA (July 9, 1996). Finally, Burns requested an opportunity to submit additional information in support of its appeal, the last of which was received by the OHA on November 7, 1996. Letter from Linda Szimhardt, Burns, to OHA (November 1, 1996); Letter from Linda Szimhardt to OHA (October 29, 1996); Letter from Linda Szimhardt to OHA

(September 18, 1996).

II. Analysis

A. Applicability of Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). The United States Court of Appeals for the District of Columbia Circuit has found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879.

Clearly, documents submitted by a company to the DOE in connection with a proposal for reimbursement of costs it incurred are "commercial" within the meaning of Exemption 4 because of the vendor's commercial interest in receiving compensation. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)) (records are commercial so long as the submitter has a "commercial interest" in them). In addition, the information was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of that Exemption. See Allnet Communications Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also Ronson Management Corp., 19 DOE ¶ 80,117 (1989).

Regarding whether the documents at issue are "confidential," we consistently have held that information submitted in connection with a Request for Proposal is not submitted voluntarily and is therefore to be considered confidential only if it meets the test set out in National Parks. E.g., Glen M. Jameson, 25 DOE ¶ 80,191 (1996). The federal courts have reasoned that even though such submissions are voluntary in the sense that no company is forced to do business with the government, information required by the terms of a Request for Proposal must be submitted if "contractors want to win lucrative government contracts . . . ." McDonnell Douglas Corp v. NASA, No. 91-3134, slip op. at 4 (D.D.C. June 30, 1995).

Similarly in the present case, the documents submitted by Walters were required to be submitted in order for the company to do business in connection with a government project, and specifically in order to receive reimbursement once that project was terminated. Indeed, Walters did not argue, nor did PNR conclude, that the documents at issue were submitted voluntarily. Accordingly, we will find the information at issue to be "confidential" only to the extent that its disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the submitter, Walters.

B. Information Withheld from the Appellant

1. Concrete Mix Design Test Data

Some of the information withheld from Burns concerned a mix design, High Density Concrete Mix Design

3500 psi (Trial Batch NX145-1), submitted by Walters for concrete that was to be used in the Dry Cell Project. Burns was provided with the mix design for this specialty concrete, but data from tests performed on the mix design was withheld. This information is located at Tab C(1) (six pages withheld in their entirety) and Tab K (p. 122).

Where there is competition in a given industry, the courts have reasoned that release of "proprietary technical information ?would seriously undermine a company's competitive advantage by allowing competitors to have access to ideas and design details that they would not have had or would have had to spend considerable funds to develop on their own.'" SMS Data Prods. Group, Inc. v. Department of the Air Force, No. 88-0481-LFO, slip op. at 3 (D.D.C. March 31, 1989) (citation omitted). The submitter argues that there is competition in its local concrete market. We agree with Walters that there is such competition, as demonstrated by the fact that the Burns competed with Walters on the Dry Cell Project. See Gulf & W. Indus., Inc. v. United States, 615 F. 2d 527, 530 (D.C. Cir. 1979) (Gulf & Western). However, Walters must also demonstrate that there is a "likelihood of substantial competitive harm" in order for the information to be exempt from release. Id. at 530. For the most part, we find that Walters has not made this showing with regard to the testing data, but as we explain below, we do find that some of this data may be withholdable under Exemption 4.

a. Competitive Harm Based on the Cost of Running Tests if there is a Rebid of the Dry Cell Project

First, Walters argues that the test data in the present case should be withheld because

[a] competitor intending to use the mix design furnished the Government by Walters would still be expected to run tests and produce supporting data, comparable to that for which Walters seeks protection. Release of Walters' data to Burns would allow Burns to do so without incurring the cost which Walters has borne, without reimbursement by the Government.

Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen, to James S. Carey, Jr. (April 2, 1996) at 3.

Walters admits that "the information in question relates to a special mix which was developed by Walters for a particular project . . . ." Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen, to James S. Carey, Jr. (April 2, 1996) at 3. Nonetheless, Walters contends that "Burns intends to use the information to try to affect the project for which the special mix was developed to force a recompetition of the requirement." Id. at 3-4.(2) At present, this prospect seems extremely unlikely. Though Walters correctly points out that this project has been terminated and rebid once before, the project has now proceeded to the point where it would likely be economically impractical to terminate it. Memorandum of telephone conversation between James Carey, PNR, and Steve Goering, OHA (October 28, 1996).(3) Therefore, we cannot find that Walters may suffer substantial competitive harm based on unfounded speculation that there will be another rebid of this project.

b. Competitive Harm in Future Procurements

Walters further argues that "[e]ven if Burns is unable to displace Walters from the current requirement, Walters would be injured by the release, since it would give Burns an improved position in future competitions. Although DOE may not have current plans for a project which would require use of the special mix design for this project, it is possible that there will be a future need by DOE or another customer." Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen, to James S. Carey, Jr. (April 2, 1996) at 4. See Affidavit of Cary W. Sargent, Walters at 4 ("It is likely that other projects will arise in the future which would be appropriate for use of the special mix design designed for this project, or for a very similar mix.").

We agree with Walters that release of the testing data could reveal information regarding the properties and characteristics of the special mix beyond that which is revealed by the mix design alone. Data on the

performance of a product design under testing conditions can reveal the strengths and weaknesses of that design. Such information could help Walter's competitors to improve upon the mix design and market a better product or to develop a comparable product at a lower cost. Even if Walters was reimbursed for the testing of the specialty mix design on the current project, this would not compensate Walters for the competitive harm it could suffer in the future as a result of the release of this information.(4)

However, we do not believe that the likelihood of this type of competitive harm exempts all of the testing data withheld from Burns from release under the FOIA,(5) especially considering the fact that Burns has already obtained the actual mix design in question. Therefore, we are remanding the testing data portion of the determination to PNR for the segregation and release of non-exempt material. We believe that PNR is in the best position to make a determination as to whether the release of the specific information at issue would cause substantial harm of this type to the competitive position of Walters. Finally, we have found that there was information withheld from Burns at Tab K, p. 122, that is contained in the mix design released to Burns. On remand, this information should be released.

2. Company Names

From four of the pages released to Burns, PNR redacted "Walters' letterhead . . . ." Letter from H.A. Cardinali, Manager, PNR, to Linda Szimhardt, Office Manager, Burns (April 26, 1996) at 3. PNR stated that release of the Walters name on the test results performed on two aggregates "will enable Burns to use the mix designs on Walters' letterhead as comparison documents to present to potential customers in attempting to market particular characteristics of its own designs. This will give Burns an advantage over Walters greater than it would have against other competitors and cause competitive harm to Walters." Id. Burns was already informed in PNR's determination that it is Walters' name that was redacted from the test results in question (located at Tab B, pp. 33, 35; and Tab C, pp. 40, 42). Moreover, the redacted information in these pages sought by Burns consists not of "letterhead," but merely the typewritten name of the company appearing near the top of the document in the same typeface as the rest of the document. Because release of this redacted information would provide no more information to Burns than it already possesses, we fail to see how release of the information would make the pages any more useful to Burns in competing with Walters, and as a result cause substantial harm to Walters' competitive position. Therefore, we believe this information should be released.

PNR also redacted "points of contact for aggregates used by Walters" from another page released to Burns. Id. This document (Tab B, p. 32) is a letter from the President of Nuclear Shielding Supplies and Service, a producer of aggregates, which lists the names of companies that have used certain of its products. The company names, contacts, phone numbers, and the projects in which the aggregates were used were redacted from the document. In addition, the name of the recipient of the letter was redacted from the document. The courts have found in certain cases that information which reveals the customers and suppliers of a company is protected under Exemption 4. See, e.g., Braintree Elec. Light Dept. v. Department of Energy, 494 F. Supp. 287 (D.D.C. 1980) (customers and suppliers); Goldstein v. ICC, No. 82-1511, slip op. at (D.D.C. July 20, 1984) (customers). However, none of the companies that would be revealed by a release of the names in the letter in this case is either a customer or a supplier of Walters. Rather, all of these companies are, like Walters, manufacturers of concrete. Because we cannot conclude that release of the identity of these companies would likely cause substantial harm to the competitive position of Walters, this information should also be released. In addition, company names which have been revealed in the documents already released to Burns are redacted at Tab K, pp. 146-51. These names should also be released.

3. Cost, Profit, and Overhead Data

The vast majority of the data withheld from Burns concerned costs incurred by Walters prior to the termination of the Dry Cell Project in 1993. This information was submitted by Walters as part of a settlement proposal to recover its costs associated with the project. From our review of the documents, we

find that Walters' profit, actual costs and historic overhead rate are contained in many of them. Specifically, such information is contained at Tab E (pp. 51- 52), Tab F (p. 54), Tab G (pp. 56-67, 70, 73-78, 82, 84-91), Tab H (pp. 94-102, 104-06, 108), Tab I (pp. 111-14, 116-18), Tab J (p. 120), and Tab K (pp. 124, 128, 138-143, 145-175).

The United States Court of Appeals for the District of Columbia has held that, in a competitive market, information that would reveal the profit rates, general and administrative rates, and actual costs of a competitor company is exempt from release under the FOIA. Gulf & W. Indus., Inc. v. United States, 615 F. 2d 527 (D.C. Cir. 1979) (Gulf & Western). In Gulf & Western, the court found that with such information, the company's "competitors would be able to accurately calculate [the company's] future bids and its pricing structure from the withheld information. The deleted information, if released, would likely cause substantial harm to [the company's] competitive position in that it would allow competitors to estimate, and undercut, its bids." Id. at 530.

Burns makes the following arguments in support of its position that this cost data should be released: (1) much of the cost information redacted is "composite" data, and thus its release would not reveal the cost of individual items; (2) many of the costs incurred by Walters were specific to the Dry Cell Project, and therefore would not be predictive of future costs; (3) some of the costs are quotes Walters received from other firms, which include profit, overhead, and depreciation, and therefore their release would not reveal Walters' direct costs; (4) certain costs are described by Walters as "value, not out of pocket costs." The appellant argues that the decisions in General Dynamics Corp., Space Sys. Div. v. Department of the Air Force, 822 F. Supp. 804 (D.D.C. 1992), and Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) should be applied to the present case.

However, in actuality the cases cited by the appellant indirectly support the withholding of the cost information that Burns argues should be released. In these cases, the information at issue was unit prices or option prices. Key to the courts' decisions to uphold the release of the information was the fact that "competitively sensitive information such as cost, overhead, or profit identifiers would not be revealed." General Dynamics, 822 F. Supp. at 807; see Acumenics, 843 F.2d at 802, 806 (release of unit prices would not reveal Acumenics' "profit multiplier," the "product of a company's overhead, general and administrative costs (G & A), and profit, (overhead rate x G & A rate x profit)"). By contrast, release of the cost information submitted by Walters *would* reveal the company's general and administrative expense and profit. This can be easily illustrated by reference to one of the documents released to Burns (Tab K, p. 175). The document contains a final tabulation of all the costs for which Walters sought reimbursement, plus its general and administrative expenses and profit. At the bottom of the page is the total of all these figures, which PNR released to Burns. If the costs claimed by Walters were released, Burns or anyone else could simply subtract the costs from the total, and arrive at the amount apportioned to Walters' general and administrative expenses and profit.

Profit, general and administrative expenses, and overhead have been recognized by the courts as "competitively sensitive information" which is protected under Exemption 4. General Dynamics, 822 F. Supp. at. 806; see Gulf &Western, 615 F.2d at 530 (general and administrative expenses and profit); Braintree, 494 F. Supp. at 287, 290 (profit and overhead); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974) (profit margin); cf. North Carolina Network for Animals v. Department of Agric., No. 90-1443, slip op. at 2 (4th Cir. Feb. 5, 1991) (information not protected by Exemption 4 because it does not reveal, inter alia, profit margin); Pacific Architects and Eng'rs Inc. v. Department of State, 906 F.2d 1345, 1347-48 (9th Cir. 1990) (upholding disclosure because competitor would not be able to calculate submitter's profit margin); Brownstein Zeidman and Schomer v. Department of the Air Force, 7821 F. Supp. 31, 33 (D.D.C. 1991) (ordering disclosure because claim that profit margin could be deduced from withheld information was "speculative"). Though Burns' arguments accurately characterize much of the withheld cost information in the present case, these characterizations do not change the fact that release of the information would reveal Walters' profit and general and administrative expenses.(6) We therefore agree with PNR's withholding of this information.

Nonetheless, there is also information that was withheld from Burns that we believe should be released. The release of this information, described below, would be unlikely to cause substantial harm to the competitive position of Walters:

Page Information to be released

51: two words at the bottom of the page under the word "Melment- Superplasticizer"

52: dollar figure in the middle of the page below the body of the letter (does not appear to related to any other item on the page, and would therefore not identify an actual cost to Walters)

57: number of hours listed next to the name "Cary Sargent" (is revealed elsewhere in the documents released to Burns)

58: number of years under the column "Estimated Useful Life" (revealed elsewhere in documents); number of months on line "Suspension period"

59: first five words in Note 1

62: volume of melment superplasticizer (revealed elsewhere in documents); last two words of the first line of Note 6

63: last two words of the first sentence in Note 1

64: cost of item 3 (is revealed by volume and price on same line)

66: % of quantity required under column 6

67: submittal preparation time (revealed elsewhere in documents); remaining project to complete

74: three handwritten words at the bottom of page

76: number of months on line "Suspension period"

86: quantities in footnote at bottom of page

87: all information other than dollar amounts

90: absorption rate (revealed in mix design already released)

97: quantity under 1(a), "stockpiling;" number of tons/trip in Note 3

98: number of hours of labor in Note 5

104: number of units and tons

105: number of miles and tons

112: information under column 5, lines "Advance, Progress and Partial Payments" and "Net Payment Requested"

113: information under column 4, lines "Advance, Progress and Partial Payments" and "Net Payment Requested"

115: number of miles

116: number of miles, months; usage credit; information on last two lines of paragraph (c)

117: number of months, trucks

120: any dollar amounts that do not directly reflect costs claimed by Walters

In addition, many of the documents withheld from Burns contain handwritten numbers in the form of "##-#.#" (e.g., Tab G, p. 61). Because these numbers do not appear to reveal any information regarding Walters cost, profit, or overhead, they should also be released.

Finally, there are three pages of information that were inadvertently not released to Burns. Two of these pages appear to be the documentation referred to as "Tab J" on p. 99, n. 10. On remand, PNR should release any non-exempt information on these pages in accordance with the guidance set forth above.(7)

C. Adequacy of PNR's Search for Responsive Documents

Burns also asserts that there should be additional documentation in the possession of PNR concerning aggregates submitted for use in the Dry Cell Project. See Letter from Linda Szimhardt, Burns, to OHA (September 18, 1996) at 2-5. In the event we were to agree, we would order an additional search. A FOIA request deserves a thorough and conscientious search for responsive documents, and the OHA has remanded cases where it was evident that the search conducted was inadequate. See, e.g., James L. Schwab, 21 DOE ¶ 80,138 (1991); Glen Milner, 17 DOE ¶ 80,102 (1988). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

We have contacted PNR, and they have informed us that any documents sought by Burns concerning the aggregates submitted by Walters would have been kept in the same location as the documents already released to Burns. PNR also has confirmed with the personnel who conducted the search that no additional documents exist which are responsive to its request. We therefore conclude that PNR conducted a search reasonably calculated to uncover responsive documents. However, on remand, Burns may provide any additional information to PNR that it thinks might help identify additional locations where responsive documents may be located. The FOIA and DOE regulations encourage the requester and agency to communicate and work together to resolve difficulties in providing responsive documents. This type of cooperation assists the agency in fulfilling the intent of the FOIA to make agency records accessible to the public, and it increases administrative efficiency in handling these requests. See 10 C.F.R. § 1004.4(c)(2); see also Douglas L. Parker, 20 DOE ¶ 80,107 (1989); Hartford Courant, 15 DOE ¶ 80,133 (1987).

III. Conclusion

For the reasons explained above, we will remand this case to PNR, which should promptly issue a new determination releasing the non-exempt information to the appellant in accordance with this decision, or shall explain in detail its reasons for withholding any of this information. In all other respects, the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Burns Concrete, Inc., Case No. VFA-0182, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE's Pittsburgh Naval Reactors Office, which shall promptly issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 6, 1996

(1) The responsive documents provided to Burns in PNR's January 16, 1996 determination were organized under Tabs labeled A through J. The documents provided to Burns under Tabs A and D are not at issue in the present case. Letter from Linda Szimhardt, Burns, to Director, OHA (June 7, 1996); Memorandum of telephone conversation between Linda Szimhardt, Burns, and Steven Goering, OHA (October 16, 1996).

(2) Burns disputes Walters' contention that Walters was not reimbursed by the government for the costs incurred in running tests on the specialty mix design. Although it appears from our review of the relevant documents that Walters was in fact reimbursed for the cost of testing, PNR assures us that Walters was reimbursed for the costs incurred in preparing the test results for submittal, but not for the costs of running the tests. Memorandum of telephone conversation between James Carey, PNR, and Steve Goering, OHA (October 24, 1996).

(3) Walters cites Gulf & Western as support for the position that its rather speculative claim of harm is sufficient to warrant Exemption 4 protection. However, the court in Gulf & Western was informed that future bids were going to be solicited on the same product at issue in that case. Gulf & Western, 615 F.2d at 530.

(4) Burns argues that the test data is not protected by Exemption 4 because ownership of the information passed to the government upon the termination of the project. See Letter from Linda Szimhardt, Burns Concrete, to OHA (November 1, 1996); Letter from Linda Szimhardt to OHA (October 29, 1996). However, the fact that the Government has ownership of information does not in itself preclude its withholding under Exemption 4 if its release would cause competitive harm to the submitter of the information. Cf. Critical Mass, 975 F.2d at 877-79 (competitive harm prong of Exemption 4 protects the interest of both the government and the submitter).

(5) We note that the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979). Such segregation was performed by PNR on all the documents at issue other than the six pages containing testing data, which were withheld in their entirety.

(6) The "value engineering markup" withheld from Burns (Tab G, pp. 70, 84, 85) was derived solely from the overhead and profit figures which we have found to be protected under Exemption 4.

(7) Burns also contends that it was not provided "Tab L" referred to on p. 99 and the "Supplemental File" referred to on p. 94. PNR has informed us that "Tab L" refers to the documents at pp. 156-60, and that the "Supplemental File" refers to the documents at pp. 97-110. Memorandum of telephone conversation

between James Carey, PNR, and Steve Goering, OHA (July 17, 1996).

Case No. VFA-0183, 26 DOE ¶ 80,101

July 22, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Richard Joslin

Case Number: VFA-0183

Date of Filing: June 21, 1996

Richard Joslin (Joslin) files this appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Pursuant to the FOIA, Joslin had requested a copy of an investigative report written by the audit staff at the Bonneville Power Administration (BPA). In response, BPA informed Joslin that it found a responsive document, but would withhold it in its entirety. Joslin's appeal, if granted, would require BPA to release all or part of the responsive document.

Background

The FOIA generally provides that any person has a right of access to federal agency records, except to the extent that the records (or portions of them) are protected from disclosure by one of nine exemptions or three special law enforcement exclusions.

The report requested by Joslin investigated allegations of impropriety by an official at a BPA site. BPA responded to Joslin's request in a Determination Letter dated June 12, 1996. In the letter, BPA informed Joslin that it would withhold the document under the provisions of Exemption 5 of the FOIA, 5 U.S.C. Section 552(b)(5). BPA further explained that it was asserting the deliberative process privilege of Exemption 5 to withhold the report.

Analysis

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Courts have recognized several privileges incorporated into Exemption 5, including the deliberative process privilege which is asserted here by BPA. To fall within the scope of the deliberative process privilege, a document must be: (1) predecisional, that is, antecedent to the adoption of an agency policy; and (2) deliberative, that is, recommending or expressing an opinion on legal or policy matters. *Mapother v. Department of Justice*, 3 F. 3d 1533, 1537 (D.C. Cir. 1993); *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Joslin's position is that the deliberative process privilege does not apply because the report is not

predecisional. In his Appeal Letter, he contends that "there has been no communication on [the] part of the Agency that this report is not final or that another report (final report) will be issued in the future."

Contrary to Joslin's assertion, BPA clearly claims in its Determination Letter that the report is "a predecisional document that … provides information to BPA management… While this report presents an analysis, it does not reflect any final decision by BPA." We confirmed by telephone that the report was compiled to assist BPA management in deciding what action to take regarding the allegations of impropriety. Moreover, the BPA management has not reached that decision, and may require further investigation. We therefore conclude that the report is predecisional.

To qualify for protection under Exemption 5, the report must be deliberative as well as predecisional. In the determination letter, BPA implied that the report is deliberative, explaining that "BPA management will determine how it will use this report in any future decisions." We examined a copy of the report to assess the validity of BPA's claim.

The report consists of three parts: a brief background section, summaries of statements by witnesses, and a conclusion. The witness statements reflect the recollections, opinions, and interpretations of the employees. The report makes no finding of fact. Such unsworn statements of witnesses, in which they give personal opinions and speculations, have been found to be deliberative.*Cooper v. Dep't of Navy*, 558 F. 2d 274 (5th Cir. 1977); *aff'd on reh'g*, 594 F. 2d 484 (1979); *cert. denied*, 444 U.S. 926 (1979). We conclude that the summaries of witness statements are deliberative and fall within the scope of Exemption 5. Moreover, the conclusion of the report summarizes the witness statements and suggests a possible course of action for the management of BPA. The conclusion is therefore also predecisional and deliberative.

We find therefore that the report requested by Joslin is a draft document, portions of which are predecisional and deliberative. It thus meets the threshold requirements for the deliberative process privilege. Nevertheless, not all documents falling within the scope of the deliberative process privilege may be withheld. The Attorney General's Memorandum of October 24, 1993 established a standard that promotes discretionary disclosure of records under the FOIA. To comply with the Memorandum, we must decide whether disclosure of the requested information would cause foreseeable harm to the deliberative process.

BPA's Determination Letter did not address the question of foreseeable harm resulting from release of the report. Nevertheless, Carol Jacobson of BPA's Legal Department supplemented the Determination by relating BPA's foreseeable harm analysis in a telephone statement to the OHA on July 3, 1996. As a result of Jacobson's statement and our examination of the report, we find several factors that point to foreseeable harm resulting from releasing the draft report in its entirety.

The subject matter of the documents is highly sensitive, involving charges of serious misconduct by a BPA employee. The process of resolving those charges requires total confidentiality on the part of BPA. Since further investigation may be required, releasing witnesses' statements at this time may influence future testimony. Furthermore, since the witnesses comprise a small group of coworkers, release of their testimony at this time could discourage some of them from testifying candidly in future investigations. Moreover, release of the witnesses' versions of events could give the false impression that the DOE has made a finding that their versions are facts. We conclude that release now could cause foreseeable harm to the DOE's investigative, deliberative, and decision-making processes.

In applying any FOIA exemption, however, any reasonably segregable portion of a record must be provided to the requester after deletion of the portions that are exempt. 5 U.S.C. § 552(b). We find some passages in the report, particularly in the introductory section, that are recitations of fact. There does not appear to be deliberative content in these passages. Consequently, these segregable passages do not qualify for protection under Exemption 5. Consequently, BPA must either release these segregable factual passages or provide another ground for withholding them.

As an additional argument for release of the report, Joslin says that he had "been told by the Agency that

the report cannot be obtained since it contains possible incriminating information about a Department of Energy manager." He argues that this is not a valid ground to withhold material under the FOIA.

We are unable to respond to Joslin's argument, because there is no claim in the determination letter that the report is being withheld because it contains incriminating information. There is no general FOIA protection for material that is "incriminating." Some exemptions, however, such as Exemption 6, which protects personal privacy interests, and Exemption 7, which protects law enforcement records, could conceivably be construed to cover certain material that contains incriminating information. BPA, however, did not claim either Exemption 6 or Exemption 7. The only protection that BPA asserts in the determination letter is Exemption 5. We have therefore confined our analysis to Exemption 5, which provides for no consideration of whether the requested material is incriminating.

Conclusion

We have determined that the report requested by Joslin is predecisional and deliberative, and its release in its entirety would cause foreseeable harm to the DOE's deliberative process. We also found, however, segregable portions of the report that are recitations of fact and do not fall within the scope of the deliberative process privilege. We will therefore remand this matter to BPA for release of segregable material or further justification for withholding.

It Is Therefore Ordered That:

(1) The appeal filed by Richard Joslin, Case No. VFA-0183, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration for processing in accordance with the instructions provided in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 22, 11996

Case No. VFA-0184, 26 DOE ¶ 80,104

August 5, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marlene Flor

Date of Filing: June 24, 1996

Case Number: VFA-0184

On June 24, 1996, Marlene Flor (Flor) filed an Appeal from a determination issued to her on May 16, 1996 by the Department of Energy's Albuquerque Operations Office (AO). In that determination, AO denied in part a request for information filed by the Appellant on January 7, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 7, 1996, Flor filed a FOIA request for the time and attendance sheets for each employee of the Kirtland Area Office Contracts and Business Management Organization (CBMO) for the 1995 leave year. On May 16, 1996, AO released redacted copies of the requested records from which the leave codes and description of the type of leave were deleted. AO had determined, pursuant to Exemption 6 of the FOIA, that disclosure of this information would violate the privacy of the employees and would not be in the public interest. On June 24, 1996, Flor filed the present Appeal contending that the "type of leave one takes is not personal in the same sense as one's date of birth, employment history, etc., as AL claims . . ." See Appeal Letter at 2. Flor further contends, inter alia, that release of the requested information would further the public interest because it would reveal how AL treats its whistleblowers. Id. In addition, Flor states that she did not want the names of the employees at CBMO, but that AO provided this information to her despite her request. Flor asks that the Office of Hearings and Appeals direct AO to provide the requested information to her.

II. Analysis

Exemption 6 allows an agency to shield from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."

Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Housing and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of Housing and Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991) (Hopkins); FLRA v. Department of Treasury Fin. Management Service, 884 F.2d 1446, 1451 (Cir. 1989), cert. denied, 110 S. Ct. 864 (1990) (FLRA). Finally, the agency must weigh the privacy interests it has identified against the public interest to be served in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

A. The Privacy Interest

In order to determine whether there is a privacy interest in the withheld time and attendance information, we must determine whether release of this information might reveal something personal about the people involved. See News Tribune, 25 DOE ¶ 80,180 (1996). Thus, it is only when the release of some personal information about an individual would cause a "clearly unwarranted invasion of privacy" that the information may be exempt from mandatory release under the FOIA.

In support of withholding the information in this case, AO compared the withheld information to more personal information such as place or date of birth and employment history. We do not consider this to be an appropriate comparison. However, we have identified two possible privacy interests present in this case which might be impacted by release of the withheld information on the time and attendance reports. First, there is a privacy interest in not disclosing health issues such as the illness of an employee or the illness of an employee's family member. This kind of information could be revealed by the disclosure of a person's sick leave. The second possible privacy interest present in this case is that one might infer that an employee is looking for another job if one observes how much annual leave the employee took at any given time. We must note that Flor has already been provided with the names of the employees in CBMO. An invasion of privacy can occur when a name is linked with some other information that reveals something personal about an individual. News Tribune, 25 DOE at 80,700; Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1354 (9th Cir. 1994). Therefore, we must examine the withheld information in the context with which it is associated, i.e. what release of the information would specifically reveal about those particular persons. See News Tribune, 25 DOE at 80,699; see also National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876 (D.C. Cir. 1989), cert. denied sub nom. National Ass'n of Retired Fed. Employees v. Newman, 494 U.S. 1078 (1990) (NARFE).

As stated above, release of the withheld information could possibly disclose health information about an employee or disclose an employee's future employment plans. We have stated in the past that material which is not strictly personal, but is nonetheless identifying, can be protected if release could cause interference with personal privacy. See Southwest Resource Development, 24 DOE ¶ 80,164 (1995) (individuals involved in Inspector General's investigations protected under Exemptions 6 and 7(c)). However, the nature of the withheld information in this case is not the type of strictly personal information usually protected by Exemption 6. See Department of Defense v. Federal Labor Relations Auth., 114 S. Ct. 1006 (1994) (home addresses); Sangre de Cristo Animal Protection, Inc,, 25 DOE ¶ 80,121 (1995) (Social Security numbers); Foundation for Fair Contracting, 21 DOE ¶ 80,169 (1991) (names and home addresses redacted from payroll records); Robert E. Caddell, 20 DOE ¶ 80,164 (1990) (selected SF-171 information). The information withheld here would reveal an individual's use of annual leave and sick leave. While federal employees do not have a legitimate expectation of privacy with respect to leave use, they do, however, have an expectation of privacy with respect to the manner in which they choose to use their leave. Although this information is not as significantly private as other personal information such as

home addresses and social security numbers, the public release of this information will nevertheless result in, at the least, a minimal invasion of privacy.

B. The Privacy Interest/Public Interest Balance

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Comm., 489 U.S. at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987).

In her Appeal, Flor contends that the release of the leave codes and the description of leave on the time and attendance reports would reveal how AO treats its whistleblowers and states that release of this information would have "a deterrent effect on AO repeating its retaliation action against other employees." Appeal at 3. In a July 29, 1996 letter, Flor further explains that she is a whistleblower and argues that her supervisor at AO has justified low performance ratings of her by citing her high leave usage. See Letter from Marlene Flor to Office of Hearings and Appeals (July 29, 1996). Even if Flor could use the requested information to support her contention that she has been treated unfairly, we fail to see how this information would establish that her treatment is the result of her status as a whistleblower. Moreover, we fail to see how the release of the withheld information would aid the public in understanding that AL allegedly has a policy of retaliating against its federal whistleblowers in general. Flor has advanced no other justification in support of her argument that release of this information could further the public interest, and we can discern none.

It is well established that even a "minimal" privacy interest should prevail over no "public interest" in disclosure. See e.g., NARFE 879 F.2d at 879 ("something, even a modest privacy interest, outweighs nothing every time"). In view of the fact that there is no apparent public interest to balance against the minimal invasion of personal privacy here, we find that AO properly withheld from disclosure the time and attendance information at issue.

C. Waiver

In her July 29, 1996 Submission, Flor contends that the withheld information has already been shared with the twelve federal employees in her branch. Id. Specifically, Flor states that at least once every pay period her branch Secretary "brings the T&A sheet fully completed with names and leave information to each branch member who has taken leave or accrued compensatory leave during the pay period." Id. Flor implies that DOE has waived the application of Exemption 6 to the withheld information because it has previously been disclosed.

The extent to which the DOE has waived FOIA exemptions depends on the circumstances of the disclosure. Carson v. United States Department of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980). It does not appear that the information referred to in this case by Flor was disclosed by official departmental action. It is possible that departmental employees may have made unauthorized disclosure of certain information. Such unauthorized disclosure, however, would not constitute a waiver of exemption by the DOE. Simmons v. United States Department of Justice, 796 F.2d 709, 712 (4th Cir. 1986). We therefore reject Flor's argument that the Department has waived Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Marlene Flor on June 24, 1996 (Case Number VFA-0184) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 5, 1996

Case No. VFA-0185, 27 DOE ¶ 80,176

December 22, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners:Vernon J. Brechin

Paul McGinnis

Dates of Filings:June 26, 1996

July 17, 1996

Case Numbers:VFA-0185

VFA-0194

Vernon J. Brechin and Paul McGinnis filed appeals from determinations issued to them on June 10, 1996 and June 17, 1996 respectively, by the Nevada Operations Office (Nevada) of the Department of Energy. In those determinations, Nevada stated that it could neither confirm nor deny the existence of the records that Mr. Brechin and Mr. McGinnis sought in their respective requests for information. These requests were filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and dated February 20, 1996 and March 6, 1996.

I. Background

In his request, Mr. Brechin sought a copy of a document describing the delegation of management responsibilities from the Atomic Energy Commission or from the Department of Energy to the U.S. Air Force for a portion of land in Nevada known as "Area 51" or "the United States Air Force's operating location near Groom Lake, Nevada (Groom Lake)." In his request, Mr. McGinnis sought,inter alia, "[a]ny memorandums of understanding between the U.S. Department of Energy and the U.S. Air Force (or any other descriptive material) concerning the Air Force's facility at Groom Lake, Nevada." In its June 10 and June 17, 1996 responses, Nevada replied to each requester that, “[t]his office can neither confirm nor deny the existence of any documents responsive to your request.” The basis for Nevada's response appears to be that the existence or non-existence of the requested documents is itself a classified fact.

The requesters make several arguments regarding these appeals. Mr. Brechin argues that Nevada's response is not in compliance with 10 C.F.R. § 1004.5(b)(1) and similarly, Mr. McGinnis argues that

the response does not comply with 10 C.F.R. § 1004.7(b)(1).(2) Mr. McGinnis further argues that neither the FOIA nor the DOE regulations provides for the type of response which Nevada made. Next, Mr. McGinnis claims that Nevada's response that it cannot confirm the existence of the requested documents is untenable because he already received one of the requested documents from a non-DOE source, which he submitted with this appeal. Finally, Mr. McGinnis argues that if any requested documents exist, they should be released because release would serve the public interest. He bases his public interest claim on

his belief that the requested documents could provide relevant evidence in several ongoing lawsuits alleging that employees have been exposed to toxic chemicals at the Groom Lake facility. None of these arguments affects the OHA's determination in these appeals, as explained below.

II. Analysis

Although the Department rarely responds to requests for information in this manner, Nevada's statement that it will neither confirm nor deny the existence of records is not without precedent. This type of response is commonly called a Glomar response, which refers to the first instance in which the adequacy of such a response was upheld by a Federal court. In Phillippi v. CIA, the agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Agencies have typically used this response where the existence or non-existence of requested documents is itself a classified fact exempt from disclosure under Exemptions 1 and 3 of the Freedom of Information Act, see, e.g., id. at 1012, or where admission that documents exist would indicate that the agency was involved in a certain issue, Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982), or that an individual is the target of investigation or surveillance, Marrera v. Department of Justice, 622 F. Supp. 51 (D.D.C. 1985). Thus, the FOIA does not bar a Glomar response. In addition, this Office has upheld the adequacy of the DOE's Glomar response where, as here, the existence or non-existence of requested documents is classified. A. Victorian, 25 DOE ¶ 80,188 (1996). The DOE regulation Mr. McGinnis cited, 10 C.F.R. § 1004.7(b)(1), does not apply in this instance since the Glomar response is not a denial. Further, although the DOE regulation Mr. Brechin cited, 10 C.F.R. § 1004.5(b), does not appear to contemplate a Glomar response, nevertheless, the courts permit this type of response in appropriate circumstances.

Mr. McGinnis has also raised arguments in his appeals specifically related to his request. He argues that the public interest requires the release of the requested documents because they could lead to relevant evidence in an ongoing civil suit concerning exposure of employees to toxic chemicals at the facility. We do not agree. Public interest considerations are not a factor in the FOIA matter where the existence or non-existence of requested documents is classified. Cf. Ferenc M. Szasz, 25 DOE ¶ 80,117 (1995) (public interest considerations not a factor in applying FOIA Exemptions 5 U.S.C. §§ 552(b)(1) and (3)).

Mr. McGinnis further argues that his possession of one of these documents shows the untenableness of Nevada's Glomar response that it cannot confirm the existence of the documents. Although Mr. McGinnis did not elaborate on this argument, we infer that he believes that FOIA protection of one of the documents he seeks has been waived; that is, because he has produced what he alleges to be a copy of one of the document he seeks, the DOE may no longer refuse to confirm or deny its existence. We disagree. Mr. McGinnis has not made the necessary showing that the document he possesses meets the latter two of the three requirements for waiving FOIA protection laid out by the D.C. Circuit in Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755 (D.C. Cir. 1990). These criteria are the following: (1) the information requested is as specific as the information previously released; (2) the information matches the information previously disclosed; and (3) the information requested was already made public through an official and documented disclosure. Id. at 765 (citing Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983)). Since he has requested any "memorandums of understanding" about the Groom Lake Facility between the DOE and the U.S. Air Force, and has submitted what he has alleged to be such a memorandum of understanding, he appears to have met the first criterion and requested a document as specific as the one he possesses. We cannot make a determination regarding the second criterion because we cannot answer whether requested documents exist or not. But regarding the third criterion, Mr. McGinnis said only that he received the submitted document from "another source." He has therefore not met his burden of showing that the document was released in an official and documented disclosure. See Davis v. Department of Justice, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992). Therefore, no FOIA protection has been waived.

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). OHA referred both of these appeals to the DOE Office of Declassification (OD), to which SA has delegated the duty to prepare SA's determinations on FOIA appeals involving classified matters. The Director, Policy and Quality Management Division, OD, further referred them to the Office of the Secretary of Defense (Public Affairs) (OSD(PA)) because the Groom Lake facility at issue is now an Air Force facility. The OSD(PA) referred the appeals to the Director, Security and Special Program Oversight (SSPO), within the Department of the Air Force, for supplementary review. The Director, SSPO, Eugene F. Boesch, Jr., concluded that the Air Force can neither confirm nor deny the existence of documents responsive to the requests at issue. This position was concurred with by OSD(PA). Because of the Air Force's exclusive responsibility for the Groom Lake facility, SA stated that it defers to their judgment. Accordingly, Mr. McGinnis' and Mr. Brechin's appeals must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Vernon J. Brechin on June 26, 1996, Case No. VFA-0185, is hereby denied.

(2) The Appeal filed by Paul McGinnis on July 17, 1996, Case No. VFA-0194, is hereby denied.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 22, 1998

(1)1/ "The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official will prepare a written response (1) granting the request, (2) denying the request, (3) granting/denying it in part, (4) replying that the request has been referred to another agency under Section 1004.4(f) or Section 1004.6(e), (5) informing the requester that responsive records cannot be located or do not exist."

(2)2/ "Form of denial. A reply denying a request for a record will be in writing. It will name the Denying Official pursuant to Section 1004.5(b) or (c) and will include: (1) Reason for denial. A statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption(s) applies to the record withheld, and a statement of why a discretionary release is not appropriate."

Case No. VFA-0186, 26 DOE ¶ 80,106

August 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Greenpeace

Date of Filing: July 16, 1996

Case Number: VFA-0186

On July 16, 1996 Greenpeace filed an Appeal from a determination issued to it by the Deputy Secretary for Military Applications and Stockpile Management (hereinafter referred to as "the Deputy Secretary"). This determination was issued on June 5, 1996 in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the release of documents that were withheld by the Deputy Secretary pursuant to the FOIA.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, Greenpeace sought access to a copy of all documents relating to the rationale for the modification of the B61-11 gravity bomb. In response to this request, the Deputy Secretary identified 6 documents and 24 pages of printouts from electronic mail (e-mail) as being responsive to Greenpeace's request. The six documents were provided to Greenpeace in their entirety, but portions of the e-mail printouts were withheld pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency

memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

In its Appeal, Greenpeace contests the Deputy Secretary's application of Exemption 5 in this matter. Specifically, Greenpeace argues that the subject matter of its request suggests that the withheld portions of the e-mail messages contain segregable factual material that is not exempt from mandatory disclosure under the FOIA.

II. Analysis

A. Applicability of Exemption 5

Exemption 5 is generally recognized as encompassing the attorney-client, attorney work-product and governmental deliberative process privileges. See, e.g., Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). In withholding portions of the e-mail messages from Greenpeace, the Deputy Secretary relied upon the "deliberative process" privilege of Exemption 5. That privilege shields from mandatory disclosure documents which were created during agency consideration of a proposed action and which were part of a decision making process. Darci L. Rock, 13 DOE ¶ 80,102 (1985); Texaco, Inc., 1 DOE ¶ 80,242 (1978). The privilege serves to insure open, uninhibited and robust debate of various options by eliminating the fear of disclosure of preliminary viewpoints. See, e.g., Lewis, King, Krieg & Waldrop 21 DOE ¶ 80,103 (1991). Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions is enhanced. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149-51 (1975) (Sears).

In order to properly evaluate the Deputy Secretary's application of Exemption 5, we conducted a de novo review of the withheld material. The e-mail items in question are communications between employees of the DOE's Defense Programs office concerning budget matters and the obtaining of Congressional approval for the replacement of the B53 gravity bomb with the B61-11 gravity bomb. These e-mail items consist of the opinions and recommendations of their authors and responses to those opinions and recommendations. As such, they clearly reflect the "give-and-take" of the consultative process, and they set forth the personal opinions of the authors rather than the final position of the DOE. Coastal States, 617 F.2d at 866. For these reasons, we find that the withheld material is precisely the sort of record of the deliberative and "group thinking" processes that Exemption 5 is designed to protect. Sears, 421 U.S. at 153 (quoting Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967)). We therefore agree with the Deputy Secretary that the withheld material falls within the scope of Exemption 5.

B. Segregability

The fact that a document contains material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, segregation and release of non-exempt material is not necessary when it is inextricably intertwined with the exempt material, such that release of the non-exempt material would compromise the confidentiality of the withheld material. See, e.g., Canyon Consultants, 21 DOE ¶ 80,114 at 80,548 (1991).

Based on our review of the e-mail items, we find that the Deputy Secretary has already provided Greenpeace with all the segregable factual information contained in these communications. The redacted copy of the e-mail communications provided to the Appellant includes the names of the authors and recipients of the messages, and the dates, times, and subjects of the messages. Some of the messages contain no exempt material, and were provided to Greenpeace in their entirety. The segregable factual portions of other messages were included in the material provided to Greenpeace. Although the withheld portions of the e-mail communications contain some factual matter, we conclude that it is inextricably intertwined with exempt material, such that release of the factual material would expose the particular deliberative processes of which these e-mail communications are a part. Accordingly, we find that the withheld portions of the e-mail communications contain no segregable factual material.

C. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does

have a general interest in learning about the manner in which its government operates, we find that interest to be attenuated by the fact that the withheld portions of these communications are composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would result in forseeable harm to the interests that are protected by the deliberative process privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would forseeably harm basic institutional interests that underlie the deliberative process privilege).

D. Conclusion

For the reasons set forth above, we find that the Deputy Secretary properly redacted the e-mail communications provided to Greenpeace pursuant to the FOIA, and that release of the withheld material would not be in the public interest. We will therefore deny Greenpeace's FOIA appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Greenpeace on July 16, 1996 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 12, 1996

Case No. VFA-0188, 27 DOE ¶ 80,148

June 22, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Michael J. Ravnitzky

Date of Filing: July 2, 1996

Case Number: VFA-0188

Michael J. Ravnitzky filed an appeal from a determination that the Albuquerque Operations Office issued to him on June 12, 1996. In that determination, the DOE denied in part a request for information that Mr. Ravnitzky filed on August 8, 1992, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. At that time, Albuquerque provided Mr. Ravnitzky with a copy of the document he sought, with certain information deleted. The withheld information was deleted from Mr. Ravnitzky's copy after a review of the document had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This appeal, if granted, would require the Department of Energy (DOE) to release much of the information that it withheld in its June 12, 1996 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 8, 1992, Mr. Ravnitzky submitted a request under the FOIA for a copy of Volume 0 (Zero) of the Los Alamos Technical Series, entitled "Relation Between the

Various Activities of the Laboratory" and written by S.K. Allison and dated December 23, 1946. The Los Alamos National Laboratory located that document and the DOE's Office of Declassification noted, upon review, that it contained classified Restricted Data and Unclassified Controlled Nuclear Information (UCNI). As a result of its review, the Office of Declassification provided Albuquerque with a redacted version of the document. On June 12, 1996, Albuquerque released that version to Mr. Ravnitzky. In its determination letter accompanying the released document, Albuquerque informed Mr. Ravnitzky that the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., prohibited the disclosure of restricted data (sections 141-146) and UCNI (section 148). As a result, the information was withheld under Exemption 3 of the FOIA.

The present appeal seeks the disclosure of the portions of the document that the DOE withheld from Mr. Ravnitzky. In his appeal, Mr. Ravnitzky contends that the deletion made were overly broad and that, in any event, the great age of the requested report has trivialized the information contained therein and

eliminated the need for protecting that information from disclosure.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., The National Security Archive, 27 DOE ¶ 80,130 (1998); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992).

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

The Director of SA considered the specific concerns that Mr. Ravnitzky raised in his appeal, and performed as well a general review of the material under the current classification guidance. Based on the review that the Director of SA performed, the DOE has determined that the Atomic Energy Act requires the continued withholding of all information regarding the design details of nuclear devices, despite its age. Although Mr. Ravnitzky has argued that the public has a right to know what the government did at Los Alamos, the nuclear weapons design information contained in the report remains classified for reasons of national security and nonproliferation, because it would provide those with access to it the necessary knowledge to build such weapons. Under current classification guidance, this category of information is classified as Restricted Data under the Atomic Energy Act. Consequently, this information is being withheld pursuant to Exemption 3 of the FOIA.

The Director of SA has also determined, however, that a great deal of information that was deleted from the copy of the document provided to Mr. Ravnitzky may now be released. To maximize efficiency, the initial deletions were made on a sentence-by-sentence basis. In doing so, some unclassified information was excised along with classified information. On appeal, only those words that reveal or infer classified information have been deleted. In addition, information initially withheld because it was considered to be UCNI may now be released. The considerable amount of initially withheld information that may now be released should help Mr. Ravnitzky understand the general nature of the deleted portions without revealing classified information.

A finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information. Nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, the portion of the responsive document that the Director of SA has determined to be properly classified must continue to be withheld from disclosure without considering the public interest issue. A newly redacted version of the responsive document will be provided to Mr. Ravnitzky under separate cover. Accordingly, Mr. Ravnitzky’s appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal that Michael J. Ravnitzky filed on July 2, 1996, Case No. VFA-0188, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the text of Volume 0 (Zero) of the Los Alamos Technical Series, entitled “Relation Between the Various Activities of the Laboratory” and written by S.K. Allison and dated December 23, 1946, in which additional information is now released, will be provided to Mr. Ravnitzky

under separate cover.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 22, 1998

Case No. VFA-0189, 37 DOE ¶ 80,163

September 25, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing: July 12, 1996

Case Number: VFA-0189

On July 12, 1996, the National Security Archive filed an appeal from a determination that the Department of Energy's Office of Energy Intelligence issued in response to a request the National Security Archive filed on March 17, 1988, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In its determination, Energy Intelligence identified two responsive documents and released one of them after withholding portions of it. This appeal, if granted, would require Energy Intelligence to release the information that it withheld from that document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On March 17, 1988, the National Security Archive submitted a request to the DOE under the FOIA for records pertaining to "July 1984 reports that China provided Pakistan with a nuclear weapon design and the decision to halt for one year the U.S. approval of a nuclear trade pact with China." The Office of Energy Intelligence identified two documents that were responsive to the request. It referred one of the documents, entitled "Pakistan: Nuclear Decision Makers-- Unanimous Opinion," to the Central Intelligence Agency (CIA) for review, and the CIA provided that document to the appellant. This document is not at issue in the present appeal. Energy Intelligence provided the second responsive document, a March 6, 1985 "Intelligence Note" from John B. Stewart to James C. McAvoy, to the appellant after deleting most of its content. The information was withheld as the result of a review of the document by the DOE's Office of Declassification, which determined that

it contained information classified as National Security Information (NSI) and therefore exempt from mandatory disclosure under Exemption 1 of the FOIA.

On June 12, 1996, the National Security Archive appealed Energy Intelligence's determination to the Office of Hearings and Appeals. The present appeal seeks the disclosure of some, if not all, of the withheld portions of the "Intelligence Note." In its appeal, the National Security Archive states that a great deal of information has been revealed to the public about Pakistan's nuclear program through extensive media

coverage and unclassified Congressional hearings. It contends that, given the level of public knowledge, "it seems unlikely that national security would be harmed by release of additional information from this document."

II. Analysis

Although Energy Intelligence's determination withheld information from the requester only under Exemption 1 of the Freedom of Information Act, both Exemption 1 and Exemption 3 have been considered in this appellate review. Exemption 1 provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure by Exemption 1. See National Security Archive, 26 DOE ¶ 80,118 (1996); Keith E. Loomis, 25 DOE ¶ 80,183 (1996); A. Victorian, 25 DOE ¶ 80,166 (1996).

Exemption 3 provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). The statutes underlying the claim of Exemption 3 in this case are the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. The federal courts have found each of these statutes to be a statute on which withholdings under Exemption 3 may be supported. See, e.g., CIA v. Sims, 471 U.S. 159, 167 (1985) (section 102(d)(3) of the National Security Act, 50 U.S.C. § 403(d)(3), precursor of current 50 U.S.C. § 403-3(c)(5)); Minier v. Sims, 88 F.3d 796, 801 (9th Cir. 1996) (section 6 of the Central Intelligence Agency Act, 50 U.S.C. § 403g).

The Director of Security Affairs (SA) has been designated as the official who makes the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document that the DOE withheld under Exemption 1, and determined that they do not contain any DOE classified information.

However, because the document under consideration contains intelligence information, the Director of SA referred it to the CIA for supplementary review. The CIA concluded that several small portions of the document consist of information regarding intelligence activities, sources or methods and foreign relations or activities, which have been classified as NSI under Section 1.5(c) and (d) of Executive Order 12958, and must continue to be protected from public disclosure under Exemption 1 of the FOIA. The CIA also determined that one additional passage in the document was withheld under Exemption 3 of the FOIA on the grounds that it contains intelligence sources and methods (protected under section 102(d)(3) of the National Security Act) and the organization, names and functions of CIA personnel (protected under section 6 of the Central Intelligence Agency Act).

The Denying Officer for the CIA is Mr. Lee S. Strickland, Information and Privacy Coordinator. Because we only have jurisdiction to review FOIA determinations made by DOE officials, we cannot review the determination that the CIA made in this case.

Based on the CIA's review we have determined that the March 6, 1985 "Intelligence Note" from John B. Stewart to James C. McAvoy, redacted to withhold those portions the CIA protected under Exemptions 1 and 3 of the FOIA, may be released to the appellant. Accordingly, the National Security Archive's appeal will be granted in part and denied in part. A copy of that document that contains the information now determined to be releasable will be delivered to the National Security Archive.

It Is Therefore Ordered That:

(1) The appeal filed by the National Security Archive on July 12, 1996, Case No. VFA-0189, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The March 6, 1985 “Intelligence Note” from John B. Stewart to James C. McAvoy, redacted to withhold from disclosure information that the Central Intelligence Agency has determined to be classified, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 25, 1998

Case No. VFA-0193, 26 DOE ¶ 80,146

December 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael A. Grosche

Date of Filing: November 26, 1996

Case Number: VFA-0193

On November 26, 1996, Michael A. Grosche of Norwalk, Connecticut completed the filing of an Appeal from a determination issued on June 7, 1996, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). That determination denied in part Mr. Grosche's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records held by a covered branch of the federal government, and that have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). The FOIA also lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

In April of 1992, OIG received information from the Defense Contract Audit Agency regarding alleged labor mischarging on DOE projects from August 1990 to April 1991 at Ebasco Services, Inc. These allegations were made by Mr. Grosche. OIG investigated the allegations for possible criminal violations under 18 U.S.C. § 287 (dealing with making and presenting false claims) and for possible violations of 31 U.S.C. § 3729 (The False Claims Act). The OIG examination did not substantiate the allegations for some of the persons it investigated. For the other persons investigated, the OIG found that section 31.202 of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 31.202 (dealing with direct costs) may have been violated by

incorrect and inaccurate allocation of time to various accounts. However, OIG determined that there was no loss or overcharge to the DOE, and that the net effect of making the accounting adjustments would be a credit to Ebasco Services, Inc. That is to say, the misbilling resulted in a lower cost to the government than if the hours had been correctly billed. The OIG then closed its investigation of this matter.

Mr. Grosche requested documents dealing with the OIG investigation and findings. OIG identified three responsive documents: (1) a memorandum summarizing findings and recommending closure of the case; (2) a memorandum from the Chief Financial Officer at the Savannah River Operations Office; and (3) an

Administrative Report on the investigation to the Manager of the Savannah River Operations Office. Portions of all three documents were withheld because "[n]ames and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C)." Mr. Grosche appeals all of the withholdings.

ANALYSIS

Both Exemptions 6 and 7(C) allow the withholding of information dealing with personal privacy. The former permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Exemption 7(C) applies to a much narrower class of cases, but has a less exacting standard that gives it somewhat more expansive coverage. Under Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both of these exemptions require a balance of the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7 (C), the information must have been compiled for law enforcement purposes. In addition, because information may be withheld where there is only a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6 where the balance calls for a "clearly unwarranted invasion of privacy" (emphasis added). Because, as we find below, the documents at issue in this case meet Exemption 7's threshold test, we need only examine the withholding under the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124 at 80,550 (1992).

Applying these standards to the records in this case, we find that the records sought by the appellant were compiled for a law enforcement purpose. The courts have held that where Inspectors General are investigating potentially criminal activity, they are engaged in law enforcement activities for the purposes of Exemption 7(C) even if they conclude there was no criminal wrongdoing. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (and cases collected therein), cert. denied, ___ U.S. ___, 134 L.Ed.2d 546, 116 S.Ct. 1422 (1996). We also have made extensive examinations of the Inspector General's activities in this area and found that they are law enforcement activities. See, e.g., Stoel Rives, LLP, 25 DOE ¶ 80,189 at 80,723 (1996); Robert Burns, 19 DOE ¶ 80,134 at 80,596-97 (1989). In this case, the investigation into potential criminal activities clearly demonstrates the relation "to the enforcement of federal law and ... a rational connection between the investigative activities and the agency's law enforcement duties" that meets the Exemption 7 threshold test. Western Journalism Center v. Office of the Independent Counsel, 926 F. Supp. 189, 191 (D.D.C. 1996).

Once the material qualifies for Exemption 7 treatment, we consider whether release of the withheld material would result in one of the harms listed in Exemption 7. Ferguson v. Federal Bureau of Investigation, 957 F.2d 1059, 1065 (2d Cir. 1992). In this case, OIG believes release would harm the personal privacy of certain individuals and invoked Exemptions 6 and 7(C). Thus, the agency must perform the balancing test noted above. The OIG Determination Letter divided the withheld material into two categories: (1) names and (2) other information which might disclose individual identity. We will follow OIG's categories in this examination.

1. Names

In Documents 1 and 3, OIG withheld the names of persons it investigated who allegedly misbilled their time on DOE projects. In addition, in Document 3 OIG withheld the names of persons it interviewed in the course of its investigation. As we have stated previously, a name by itself does not create a protectable privacy interest for the purposes of FOIA exemption analysis. The News Tribune, 25 DOE ¶ 80,181 at

80,700 (1996). Rather, the privacy interest exists when a name is linked with information which reveals something personal or private about an individual. Id. at 80,699.

In this case, the names are linked with an OIG investigation into possible criminal conduct. Both this office and the courts have held time and again that a person has a strong privacy interest in the fact that he or she was subject to an investigation with potential criminal consequences especially where, as here, the investigation uncovered no criminal act. Stern v. Federal Bureau of Investigation, 737 F.2d 84, 91-92 (D.C. Cir. 1984); Abramson v. Federal Bureau of Investigation, 566 F. Supp. 1371, (D.D.C. 1983); Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); James E. Phelps, 20 DOE ¶ 80,169 at 80,702 (1990). The reason for this is simple and obvious. Linking a person with a potential criminal investigation could result in harassment and certainly would involve considerable embarrassment. Manna v. Department of Justice, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, ___ U.S. ___, 133 L.Ed.2d 405, 116 S.Ct. 477 (1995); Wichlacz v. Department of the Interior, 938 F. Supp. 325, 333 (E.D. Va. 1996). The same is true for those who were interviewed during the investigation. Id.; McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993); Jon Berg, 22 DOE ¶ 80,140 at 80,587 (1992).

Conversely, the public interest in this information in this case is minimal. In the case of Exemption 7(C), the Supreme Court has constructed a narrow public interest standard. Information falls within the public interest for the purposes of the FOIA only if release of the information is likely to contribute "'significantly to public understanding of the operations of the government.'" Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). See also Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 494-95 (1994). Release of the names in this case would add little to the public's knowledge about governmental activity. Rather, it is the information dealing with what happened, the government's investigation and conclusions which serve the public need for insight into the workings of government. James L. Schwab, 21 DOE ¶ 80,117 at 80,557 (1991). Thus, under the circumstances of this case, release of the names of the private citizens who OIG concluded did not mischarge the government would not advance the public's understanding of government. Similarly, knowing the names of those who were interviewed would not appreciably assist the public understanding of government. In fact, both this office and the courts have found that withholding the names of witnesses better serves the public interest by allowing those witnesses to speak freely to government investigators without fear that their identities will be disclosed and that they will be subject to possible harassment. Kiraly v. Federal Bureau of Investigation, 728 F.2d 273, 278-79 (7th Cir. 1984); Holy Spirit Ass'n for the Unification of World Christianity v. Federal Bureau of Investigation, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (per curiam); Lloyd R. Makey, 20 DOE ¶ 80,109 at 80,523-24 (1990); The Die-Gem Co., 19 DOE ¶ 80,124 at 80,569 (1989).

Turning to the balancing test on these names, we find that in the present case there is little or no public interest in the additional information to be gained by release of the names. On the other side of the scale there is a considerable privacy interest in not being linked with allegations of potential criminal conduct (particularly when OIG has determined there was no criminal act). There is also a strong privacy interest in not being identified as a person interviewed in a criminal investigation. Thus, on balancing these facts, we find that the privacy interest of these individuals outweigh the public interest and that release of the names would pose an unacceptable breach of personal privacy. See, e.g., Fund for Constitutional Gov't v. National Archives and Record Admin., 656 F.2d 856, 866 (D.C. Cir. 1981) (where person investigated but not charged for potential criminal act, release of name is "a severe intrusion on the privacy interests of the individual and should yield only where exceptional circumstances militate in favor of disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 922-23 (11th Cir. 1984) (witnesses); Southwest Resource Development, 24 DOE ¶ 80,164 at 80,654 (1995). Accordingly, we find that OIG properly withheld these names under Exemption 7(C).

Notwithstanding these factors, Mr. Grosche contends that there is a strong public interest that outweighs any intrusion into the privacy of the persons whose names were withheld. In particular, he states he is seeking the names of those who defrauded and committed a crime against the government. He states that release of this information would deter future criminal acts and that other government agencies should

have this knowledge about these individuals before hiring them to manage financial accounts. He also states he needs this information to pursue a Qui Tam action under the False Claims Act as well as to seek reconsideration of a whistleblower complaint he filed with the DOE's Office of Contractor Employee Protection.

Each of Mr. Grosche's claims can be simply answered. First, although the report does make clear that there was inaccurate billing of time and a possible violation of the FAR, the report also makes clear that there was no loss to the government. Thus, contrary to Mr. Grosche's assertion, there is no evidence of fraud in the record of this FOIA appeal. Absent some special circumstance not apparent in this case, where the OIG finds no fraud or criminal violation, the privacy interest outweighs the public interest in the release of the names of persons investigated, and the public interest is satisfied by release of the facts and conclusions of the investigation. Robert E. Caddell, 20 DOE ¶ 80,103 at 80,508-09 (1990).

In regard to the other two claims, even if we were to assume that pursuing his Qui Tam and whistleblower complaints constitute a public interest for the purposes of the FOIA, Mr. Grosche has not explained how the withheld information would aid his pursuit of these suits and thus aid the public understanding of some governmental operation. Mr. Grosche informed us he already knows all of the names OIG withheld. Given the imposition on personal privacy, it is difficult to see how release of information already in his possession would advance his suit and aid the public interest. Indeed, if Mr. Grosche were to bring this suit in the Second Circuit where he resides or in the Third Circuit where the misbilling apparently occurred, release of the names might in fact impair his suit. See United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 322-23 (2d Cir. 1992) (public availability of information in report makes the False Claims Act action publicly known and limits the class of people who may bring suit); United States ex rel. Stinson v. Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1155-60 (3d Cir. 1991) (same). In addition, the potential invasion of personal privacy on these grounds also seems unwarranted in this case because the statute of limitations may have expired for at least some of Mr. Grosche's claims. 31 U.S.C. § 3731(b)(1) (6 year statute of limitation from date of violation). Similarly, in seeking reconsideration of his whistleblower claim, Mr. Grosche has not explained how release of the names would contribute to public understanding of government operations. Again, we find that release to the public of these names for these reasons seems unreasonable given the fact that OIG now has authority for initial consideration of all DOE contractor employee whistleblower cases. See H.R. Conf. Rep. No. 104-782 at 83 (1996). Because Mr. Grosche knows the withheld names and because OIG has access to its own files, we can see nothing that can be added by release of names that would justify the intrusion into those persons' privacy.

Although we find that OIG properly withheld the names of persons investigated and the names of witnesses it contacted in the course of its investigation, there is another set of withheld names that do not appear to belong in either of these two classes. In Document Number 2, OIG withheld the names of two persons who are apparently federal auditors. The first person works for the Defense Contract Audit Agency. The second person works for the Savannah River Operations Office of Procurement and Contractor Human Resources. Document Number 2 memorializes a conversation between these two persons concerning future checks on time billing. We have previously held that federal employees carrying out their official duties have no privacy interest in having their names linked with their work-product unless it reveals something personal or private about that individual or there are other special circumstances (such as a reasonable, articulable belief of potential harassment). The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 80,769 (1996); William H. Payne, 25 DOE ¶ 80,190 at 80,727 (1996). Document Number 2 seems to deal only with official business. Although the persons in this document do not appear to be sources or subjects of investigation and no other special factors appear to be present, we believe the best avenue is to allow OIG, which is most familiar with the overall file and with the circumstances surrounding this document, to focus on this document in particular and to determine whether these names may be released.

2. Other Information

OIG also withheld small amounts of a wide variety of other information. This includes, but is not limited to, general job titles, report and document titles, cost codes, accounts which were billed, subcontract numbers, pronouns, and contract types. None of this material has an inherent privacy interest. Nor does it appear to reveal anything personal or private about an individual. Conversely, much of this material seems to have a high level of public interest. For example, the public surely has an interest in learning which subcontracts are well or poorly managed. Also, the OIG determined that although there was no overbilling of the government, some of the billing did violate the FAR. The public has an interest in knowing all the pertinent facts of what constitutes compliance or a violation of the FAR. Cost codes and accounts billed for particular types of actions seem essential to complete the picture of activity. Even if this material might somehow reveal an identity of a person when coupled with other information, we have held that Exemption 7(C) may not be used to withhold information if there is sufficient public interest. See, e.g., Valley Times, 23 DOE ¶ 80,154 at 80,633 (1993). As we have done in similar cases considering nearly identical Determination Letter language and material which does not appear to have any privacy interest, we will remand the withheld material in this category to the OIG for further consideration. See, e.g., James L. Schwab, 23 DOE ¶ 80,146 at 80,614, 80,615-16 (1993).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Michael A. Grosche of Norwalk, Connecticut, OHA Case No. VFA-0193, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General which shall either release the information previously withheld on which the foregoing Decision did not reach a final conclusion, or issue a new determination in accordance with the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 23, 1996

Case No. VFA-0195, 26 DOE ¶ 80,108

August 19, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Southwest Research and Information Center

Date of Filing: July 22, 1996

Case Number: VFA-0195

On July 22, 1996, the Southwest Research and Information Center (SRIC) filed an Appeal from a determination issued to it under the Freedom of Information Act (FOIA) on June 14, 1996, by the Department of Energy (DOE) Headquarters' Office of the Executive Secretariat (ES). In its Appeal, SRIC asserts that ES failed to provide it with all of the responsive documents in the possession of DOE Headquarters regarding a May 16, 1996 Request for Information (FOIA Request).

I. Background

In the FOIA Request, SRIC requested from Sandia National Laboratory (SNL) copies of documents relating to meetings and conference calls held on December 12, 13 and 15, 1995 and January 4, 5, 11, 16 and 19, 1996, that involved representatives of DOE and the Environmental Protection Agency (EPA) and/or the Office of Management and Budget (OMB) regarding compliance criteria for the Waste Isolation Pilot Plant (WIPP). <1> ES, in its Determination Letter dated June 14, 1996, informed SRIC that it conducted a search of the files of the Office of Environmental Management (EM) at DOE Headquarters and that it did not find documents responsive to SRIC's FOIA Request at EM.

In its Appeal, SRIC argues that responsive documents must exist regarding its FOIA Request. Specifically, SRIC has submitted copies of documents apparently obtained from EPA that summarize meetings EPA officials had with DOE and OMB officials during the dates specified in the FOIA Request (EPA Summaries).<2> According to the EPA Summaries, two DOE officials, Rich Guimond and Scott Van Camp, participated in the meetings and SRIC argues that it is inconceivable that neither individual received documents pertaining to those meetings or that documents were not created by DOE regarding those meetings.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To ascertain the extent of the search conducted for documents responsive to SRIC's FOIA Request, we contacted an official at ES. ES informed us that during the pendency of this Appeal, officials at EM discovered documents that may be responsive to SRIC's request. See Memorandum of telephone conversation between Tonya Griffith, ES, and Richard Cronin, OHA Staff Attorney (August 9, 1996). Consequently, we will remand this matter to ES so that it may issue a determination regarding the newly discovered documents. SRIC may, if it wishes, appeal the new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Southwest Research and Information Center on June 22, 1996, is granted as specified in paragraph (2).

(2) This matter is remanded to the Department of Energy Headquarters' Office of the Executive Secretariat so that it may issue a determination regarding any documents that may be responsive to the Southwest Research and Information Center's FOIA Request dated May 16, 1996.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 19, 1996

<1>/ SRIC stated in the FOIA Request that it was also making an identical request to the DOE's Carlsbad Area Office.

<2>/ Four of the summaries submitted by SRIC list names of participants from each governmental agency.

Case No. VFA-0196, 27 DOE ¶ 80,130

April 16, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing: July 24, 1996

Case Number: VFA-0196

The National Security Archive filed an appeal from a determination that the Secretary of the Air Force issued to it on June 14, 1996. In that determination, the Air Force denied in part a request for information that the National Security Archive filed on November 1, 1993, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Air Force's determination was a partial response to the organization's FOIA request, in which it identified and released, with material deleted, one of the requested documents. The withheld information was deleted from the version of the document released to the National Security Archive after a review of the document had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This appeal, if granted, would require the Department of Energy (DOE) to release the information that it directed the Air Force to withhold in its June 14, 1996 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 1, 1993, the National Security Archive submitted a request to the Air Force under the FOIA for, among other information, the text of a January 27, 1954 lecture on atomic and thermonuclear weapons that Major General James McCormack, Jr., delivered at the National War College. The Air Force located that document and noted that it was marked "Restricted Data," which requires review by the DOE before it can be declassified and released to the public. As a result of its review, the Office of Declassification provided the Air Force with a redacted version of the document, which deleted twelve portions of the lecture on seven pages. On June 14, 1996, the Air Force released that version to the National Security Archive. In its determination letter accompanying the released document, the Air Force informed the National Security Archive that "much of the content [of the lecture] falls under the provisions of the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.) and thus it has been reviewed by the [DOE], which determined the exemptions" under the FOIA pursuant to which the information was withheld.

The present appeal seeks the disclosure of the portions of the document that were withheld from the National Security Archive. In its appeal, the National Security Archive states that the lecture is "on such a

general theoretical level that further declassification would not involve any risk [to the national security]."

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

The Director of SA considered the concerns that the National Security Archive specifically raised in its appeal, and performed as well a general review of the material under the current classification guidance. Based on the review that the Director of SA performed, the DOE has determined that the Atomic Energy Act requires the continued withholding of one page of the lecture, page 7, which consists of a chart entitled “Yield vs. Size.” The Director of SA has determined that the data plotted on the chart are related to nuclear weapon design. Under current classification guidance, this category of information is classified as Restricted Data under the Atomic Energy Act. Consequently, this information is being withheld pursuant to Exemption 3 of the FOIA. The Director of SA has also determined that the remainder of the previously withheld information may now be released.

A finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information. Nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, the portion of the responsive document that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. A newly redacted version of the responsive document will be provided to the National Security Archive under separate cover. Accordingly, the National Security Archive’s appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal that the National Security Archive filed on July 24, 1996, Case No. VFA-0196, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the text of a January 27, 1954 lecture that Major General James McCormack, Jr., delivered at the National War College, in which additional information is now released, will be provided to the National Security Archive under separate cover.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 16, 1998

Case No. VFA-0197, 26 DOE ¶ 80,109

August 20, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David L. Anderson

Date of Filing: July 25, 1996

Case Number: VFA-0197

On July 25, 1996, David L. Anderson filed an Appeal from a determination issued on June 27, 1996, by the Bonneville Power Administration (BPA). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On May 29, 1996, Mr. Anderson filed a request under the FOIA for information relied upon by BPA official Fred Johnson "as a basis for the Personnel Action taken against me, . . . [on] November 27, 1995, of my Directed Permanent Reassignment from Snohomish, WA, Substation Maintenance District to Pasco, WA, Substation Maintenance District." Letter from David L. Anderson to Gene Tollefson, BPA (May 29, 1996). The Appellant specifically requested "copies of the officially written statements, complaints and depositions from January 1, 1995 through November 27, 1995" about him made by 13 persons named in his request. Id. BPA issued a decision on June 27, 1996, in which it denied under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), Mr. Anderson's "request for the written statements of several people interviewed in conjunction with factfinding conducted at Snohomish, Washington . . . ." Letter from Richard A. Nelson, Employee Relations Manager, to David L. Anderson (June 27, 1996). BPA forwarded to this office a copy of the document that it withheld from Mr. Anderson, a report of an investigation conducted on behalf of the BPA Office of General Counsel by an outside investigator between September 14, 1995, and November 20, 1995. Included with the report are 16 witness statements and 23 exhibits consisting of intra-agency documents collected by the investigator.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery

context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work product privilege, and the "deliberative process" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, BPA relied upon the attorney work product privilege of Exemption 5.

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947) (Hickman). This privilege does not extend to every written document generated by an attorney, but only to those prepared either for trial or in anticipation of litigation. Coastal States, 617 F.2d at 865. So long as there is "some articulable claim likely to lead to litigation," id., or potential litigation has become "identifiable," the work product privilege will attach. See William Hyde, 17 DOE ¶ 80,130 at 80,570 (1988) (citing Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976)).

Although the report identified by BPA as responsive was generated by an outside investigator, this fact does not place the document outside the "inter-agency or intra-agency" scope of Exemption 5. Documents created by outside parties at the behest of an agency have been held to fall within the scope of the exemption. See, e.g., Badhwar v. Department of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5 to document generated by contractor). Moreover, there is no question that there was potential for litigation in September through November 1995, when the report of investigation was generated. In his Appeal, Mr. Anderson states that he has filed a whistleblower complaint with the Office of Special Counsel, a federal agency which investigates allegations of prohibited personnel actions and litigates before the Merit Systems Protection Board. Clearly, this action was identifiable as potential litigation at the time the report was compiled. See Williams v. McCausland, No. 90-Civ-7563, slip op. at 29 (S.D.N.Y. Jan. 18, 1994) (documents generated in connection with litigation before MSPB). In fact, the report states that the investigation involved the Appellant's claims of retaliation and a hostile work environment.

It is also clear that the report in question is precisely the type of document meant to be protected by the work product privilege.<1> In the seminal case of Hickman v. Taylor, the Supreme Court set forth the rationale behind the privilege. "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." Hickman, 329 U.S. at 510-11. In this case, the investigator sifted relevant from irrelevant facts on behalf of the attorney, and presented his findings in the report that was withheld from the Appellant. Therefore, based on our review of the report and the circumstances present, we agree with BPA that the body of the report, the witness statements, and the exhibits are protected from disclosure by the attorney work product privilege of Exemption 5. See Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (witness statements); Exxon Corp. v. FTC, 466 F. Supp. 771, 772-73 (D.D.C. 1978) (economist's report), aff'd, 663 F.2d 120 (D.C. Cir. 1980); Wilson v. Department of Energy, No. 84-3163, slip op. at 8 (D.D.C. Jan. 28, 1995) (consultant's report).

As explained earlier, under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. We find that the public interest is best served by non-disclosure in order to insure that government attorneys are able to prepare their clients' cases free from the kind of "undue and needless interference" cited by the Supreme Court in Hickman v. Taylor. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." Hickman, 329 U.S. at 510-11. Without the protection of the privilege, government attorneys would be handicapped from providing effective representation to agencies. Therefore, we find that the public interest does not mandate release of the material withheld under Exemption 5.

We further find that the existence of tangible risks to the interests protected by the work product privilege satisfies the reasonably foreseeable harm standard set forth by the Attorney General in 1993. This standard applies a presumption in favor of disclosure which, unless an "agency reasonably foresees that disclosure would be harmful to an interest protected" by an Exemption, should result in a determination by the agency that the public interest lies with disclosure. Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies (October 4, 1993). Because the documents in question were created in response to the Appellant's allegations of retaliation, and the Appellant's whistleblower complaint is currently pending before the Office of Special Counsel, we can reasonably foresee that release of the document will give the Appellant "the benefit of the agency's legal and factual research and reasoning, enabling him to litigate ?on wits borrowed from the adversary.'" FTC v. Grolier Inc. 462 U.S. 19, 30 (1983) (Brennan, J., concurring) (quoting Hickman, 329 U.S. at 516 (Jackson, J., concurring)). Accordingly, the DOE cannot responsibly make a discretionary disclosure of the report of investigation.

However, from our review of the exhibits to the report, consisting of various intra-agency documents, it appears that there exist other documents responsive to the Appellant's request for "officially written statements" of certain persons named in his request. Although this request was understandably interpreted by BPA to be only for the report of the investigation conducted from September through November 1995 (the phrasing of the request makes it susceptible to this interpretation), the Appellant requested written statements made "from January 1, 1995 through November 27, 1995." If the request is read literally, its scope also includes intra-agency documents other than the report of investigation. Unless otherwise exempt, these other documents should be located and released, even if some of them eventually became exhibits to the report of investigation. This does not mean that the documents should be released to the Appellant and identified as exhibits to the report. Such a release would obviously reveal which documents were considered relevant by the investigator, and would therefore defeat the purpose of the work product privilege as discussed above. But to identify and, if not otherwise exempt, release intra-agency documents responsive to the request without indicating which of those documents were exhibits to the report will not violate the work product privilege. We will therefore remand this matter to BPA to conduct a search for any documents dated from January 1, 1995, through November 27, 1995, concerning the appellant and authored by the individuals named in his request. Upon completion of this search, BPA must issue a new determination either releasing the documents located or explaining the reasons for withholding the information.<2>

For the reasons explained above, the present Appeal will be granted as specified in this Decision. In all other respects, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by David L. Anderson on July 25, 1996, Case Number VFA-0197, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 20, 1996

<1>/ Though the report was generated by an investigator for an attorney, the Federal Rules of Civil Procedure extend the privilege to documents prepared "by or for" a litigant. Fed. R. Civ. P. 26(b)(3).

<2>/ It is quite possible that information in these documents may be withheld under the Exemption 5 deliberative process privilege.

Case No. VFA-0199, 26 DOE ¶ 80,112

September 9, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Diane C. Larson

Date of Filing: August 9, 1996

Case Number: VFA-0199

On August 9, 1996, Diane C. Larson (the Appellant) filed an Appeal from a determination issued to her on July 25, 1996, by the Director, Office of External Affairs, Richland Operations Office (DOE/RL). That determination denied in part a request for information which the Appellant filed on May 13, 1996, pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the DOE would be ordered to release in its entirety information that was withheld in the July 25, 1996 determination.

I. Background

In her May 13, 1996 FOIA and Privacy Act Request, the Appellant, an employee of a DOE contractor, Westinghouse Hanford Company (WHC), sought, inter alia, the following four categories of information: (i) her DOE and WHC employee concerns records,<1> (ii) reports written by WHC employees concerning investigations of alleged misconduct by the WHC safeguards and security manager, (iii) other documents which were part of WHC's investigative file in this matter and (iv) copies of any records relating to the criteria used to determine layoffs within the WHC safeguards and security department. In the July 25, 1996 determination, DOE/RL released

the Appellant's DOE employee concerns file and a "Westinghouse Force Report," <2> but deleted the dates of employment of WHC employees contained within the latter document under Exemption 6 of the FOIA. The DOE/RL also found that the remaining requested records were not in the possession of DOE but were owned exclusively by WHC and therefore were not "agency records" subject to the provisions of the Privacy Act or the FOIA. The Appellant is challenging each determination.

II. Analysis

As an initial matter, we note that we must consider the Appeal under the provisions of both the Privacy Act and the FOIA, because requested material must be released if it is disclosable under either act. James E. Davies, 11 DOE ¶ 80,151 (1983). Our threshold inquiry in this case is whether the WHC-owned materials which were not possessed by DOE are subject to either the FOIA or the Privacy Act. Only organizations meeting the definition of "agency" under the Privacy Act are subject to its access provisions. See 5 U.S.C. § 552a(d). Documents are subject to the FOIA if they meet the criteria set out by the courts for determining "agency records." See 5 U.S.C. § 552(f). Further, if the documents are not "agency records," they may still be subject to release under 10 C.F.R. § 1004.3(e).

A. Privacy Act

The Privacy Act, like the FOIA, defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f) and 5 U.S.C. § 552a(1). A private organization will be considered a federal agency only where its organizational structure and daily operations are subject to substantial government control. See United States v. Orleans, 425 U.S. 807, 815-816 (1976) (FOIA case); Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977) (FOIA case); see also Forsham v. Harris, 445 U.S. 169 (1980) (FOIA case).

We have held previously that WHC is not an "agency" for FOIA purposes because DOE does not supervise WHC's day-to-day operations. Government Accountability Project, 22 DOE ¶ 80,103 (1992). We find that to be the case for Privacy Act purposes as well. Therefore, the remaining question is whether the Appellant can gain access to the WHC-owned documents under the FOIA.

B. "Agency Records"

The statutory language of the FOIA does not define the essential attributes of "agency records" but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, this Office has applied a two-stage analysis fashioned by courts for determining whether documents created by nonfederal organizations are subject to the FOIA. See, e.g., Cowles Publishing Co., 24 DOE ¶ 80,111 (1994); Concord Oil Co., 24 DOE ¶ 80,109 (1994); International Brotherhood of Electrical Workers, 22 DOE ¶ 80,101 (1992); B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1987). That analysis involves a determination first whether the organization is an "agency" for purposes of the FOIA. Since that is not the case here, we must determine whether the requested material is nonetheless an "agency record." See Judith M. Gibbs, 16 DOE ¶ 80,133 (1987). A document is an "agency record" if it was (i) either created or obtained by an agency, and (ii) under agency control at the time of the FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (Tax Analysts). For purposes of analysis, the term "obtain" means that the agency must have possession of the material at the time of the request in order for the material to qualify as an agency record. Id.

After speaking with DOE/RL, we learned that all responsive documents obtained by DOE/RL were turned over to the Appellant (with the deletions discussed below). See Record of Telephone Conversation between Angela Ward and Dawn Koren (August 9, 1996). There were no other responsive documents that had been created or obtained by DOE or that were under DOE control at the time of the request. Under these circumstances, the documents which were named as belonging to WHC do not meet the "agency records" test set forth in the Tax Analysts case.

C. 10 C.F.R. § 1004.3(e)

Under this Office's previous case law, see, e.g., Vista Control Systems, 24 DOE ¶ 80,104 at 80,510 (1994); John Lohrenz, 23 DOE ¶ 80,116 (1993); Government Accountability Project, 22 DOE ¶ 80,103 (1992), and as set forth in 10 C.F.R. § 1004.3(e)(1), even if a contractor-acquired or contractor-generated document fails to qualify as an "agency record," it may still be subject to release under 10 C.F.R. § 1004.3(e) if the contract between the DOE and that contractor provides that the document in question is the property of the agency. We must determine whether the relevant contract makes any of the documents at issue the property of the agency.

Section (b) of Article H-8 of the current contract between WHC and DOE provides in pertinent part that the following records are not the property of the government:

(1) Personnel records and files maintained on individual employees and applicants;

(2) . . . Employee Concerns Program records and files maintained on individual employees;

. . .

(4) Employee relations records and files such as records and files pertaining to:

(i) Qualifications or suitability for employment of any employee, applicant, or former employee, subcontractor or subcontractor employee records;

(ii) Allegations, investigation and resolution of employee misconduct;

. . .

(iv) Employee charges of discrimination;

. . . .

(5) Records and files pertaining to wages, salaries, and benefits and wage, salary and benefit administration.

. . . .

All of the records at issue in this Appeal which were not already released to the Appellant fall within these provisions. First, the Appellant's WHC employee concerns file clearly falls under the provision of Section (b)(2) above. Second, the reports written by WHC employees concerning the investigations of the WHC safeguards and security manager's alleged misconduct, and other documents which were part of WHC's investigative file in this matter, clearly fall under Section (b)(4)(ii) and may also fall under Section (b)(4)(iv) of that contract.<3> We also find that DOE/RL's interpretation of the contract term "personnel records" to include documents setting forth general criteria for any WHC layoff is reasonable.<4> We therefore uphold DOE/RL's determination that these categories of records are exclusively the property of WHC and do not fall within the reach of 10 C.F.R. § 1004.3. Therefore, the requested records at issue in this Appeal are not subject to disclosure under the FOIA.

D. Exemption 6

The Appellant has also challenged the deletions made under Exemption 6 of WHC employees' dates of service listed in the Westinghouse Force Report. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Thus, there is no doubt that the Westinghouse Force Report qualifies as a "similar file" under Exemption 6. See Jeffrey R. Leist, 25 DOE ¶ 80,159 at 80,651 (1996).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a substantial privacy interest would be invaded by the disclosure of the record. If no privacy interest exists or if only a de minimis privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has

identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

In this case, DOE/RL redacted names, job titles and service dates of all WHC employees listed in the Westinghouse Force Report. According to the Determination Letter, disclosure would constitute a clearly unwarranted invasion of privacy. See Determination Letter at 1. In her Appeal, the Appellant has requested that the names and service dates (not job titles) be released to her. In response, DOE/RL argues that the persons named in the report have a protectible privacy interest in their names, and further, that to release the names connected to service dates would betray the employees' ages. This release of age, in DOE/RL's view, would also invade a privacy interest. Record of Telephone Conversation between Angela Ward and Dawn Koren (August 12, 1996).

1. The Privacy Interest

In order to determine whether there is a privacy interest in the withheld information, we must determine whether release of this information might reveal something personal about the people involved. See News Tribune, 25 DOE ¶ 80,180 (1996).<5> Thus, it is only when the release of some personal information about an individual would cause an invasion of a substantial privacy interest that the information may be exempt from mandatory release under the FOIA.

We note first that there is no privacy interest in the names of these individuals, in and of themselves. News Tribune, 25 DOE at 80,700; Payne. An invasion of privacy can become recognizable when a name is linked with some other information that reveals something personal about an individual. Department of State v. Ray, 502 U.S. 164, 176 & n.12 (1991) (Ray); Reporters Committee, 489 U.S. at 762; Professional Programs Group v. Department of Commerce, 29 F.3d 1349, 1354 (9th Cir. 1994); Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1415 (9th Cir. 1987). Therefore, we must examine the withheld information in the context with which it is associated; i.e., what release of this information would specifically reveal about those particular persons. See News Tribune, 25 DOE at 80,699; see also Horner, 879 F.2d at 876.

In this case, the employees listed in the Force Report are linked with having worked a certain number of years at WHC. We have first considered DOE/RL's argument that the length of service may betray the employee's age, which could be considered a protectible privacy interest. We have also considered whether there is a privacy interest in the length of time worked for WHC. We do not find a protectible privacy interest in either case, for the following reasons.

Although there may a privacy interest in a person's exact age or birth date, that information is not being disclosed here, since there is no direct correlation between years of service and age. At most, it is possible that length of service may in some cases disclose a person's general age. We find neither a person's general age, nor their length of service, to be the type of strictly personal information protected by Exemption 6. See Department of Defense v. Federal Labor Relations Auth., 114 S. Ct. 1006 (1994) (home addresses); Ray (marital and familial status); Sangre de Cristo Animal Protection, Inc., 25 DOE ¶ 80,121 (1995) (Social Security numbers); A. Victorian, 25 DOE ¶ 80,111 (1995) (autopsy pictures); Foundation for Fair Contracting, 21 DOE ¶ 80,169 (1991) (names and home addresses redacted from payroll records). In the cases cited, the information protected is by its nature easily hidden and therefore corresponds with the aim of Exemption 6, the guarding against unnecessary disclosure of files "which would contain ? intimate details' of a ?highly personal' nature." New York Times Co. v. National Aeronautics and Space Administration, 782 F. Supp. 628, 631 (D.D.C. 1991) (citations omitted). The acts of advancing through life stages and of going to work are carried out in the public realm and we therefore find no recognizable privacy interest in either case. Thus, we are unable to find that a privacy interest exists in the withheld information in this case.

2. The Privacy Interest/Public Interest Balance

In this case, we have been unable to discern any privacy interest in withholding any of the material redacted by DOE/RL. If there is no identifiable privacy interest, then information may not be withheld under Exemption 6. Ripskis, 746 F.2d at 3; J/R/A Associates, 24 DOE ¶ 80,165 at 80,655 (1995); William D. Lawrence, 24 DOE ¶ 80,139 at 80,600 (1994); Virginia Johnson, 23 DOE ¶ 80,168 at 80,664-65 (1993). Accordingly, we will remand this matter to DOE/RL to either release the withheld information or issue a new determination identifying some other privacy interest that justifies the continued withholding of this information.

III. Conclusion

For the reasons set forth above, we find that none of the requested information held solely by WHC is an agency record or is subject to the FOIA under 10 C.F.R. § 1004.3. However, we have found that with respect to a document in DOE/RL's possession, the Westinghouse Force Report, the deletions made under Exemption 6 were incorrect. Accordingly, we shall grant the Appellant's FOIA Appeal in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Diane C. Larson on August 9, 1996, Case Number VFA-0199, is hereby granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Department of Energy's Richland Operations Office, which shall release the names and service dates of the WHC employees withheld pursuant to Exemption 6 described above or issue a new determination justifying any withholding of this information in accordance with the above Decision.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 9, 1996

<1>An employee concerns file is the record of any complaint brought by an employee to an Employee Concerns office, including such matters as discrimination claims, waste, fraud, abuse, health, and safety. See Electronic Mail Message from Angela Ward, FOIA Specialist, DOE/RL, to Dawn Koren, Staff Attorney, OHA (August 16, 1996).

<2>This document is a listing of the names, job titles, job descriptions and service dates of all WHC safeguards and security employees.

<3>The employee misconduct at issue involved a sexual harassment allegation of a hostile work environment. See Telephone Conversation between Diane C. Larson, Appellant, and Dawn Koren (August 9, 1996).

<4>/ The Appellant also requests in her Appeal the salaries of WHC employees who were not subject to a recent layoff. DOE/RL believes that this is a new request, see Records of Telephone Conversation between Angela Ward and Dawn Koren (August 9, 1996), and is not properly the subject of an Appeal. In any case, such salary information would clearly fall under Section (b)(5) of the contract as the property of WHC.

<5>/ Further, material which is not strictly personal, but is nonetheless identifying, can be protected if there is a substantial probability that release would cause interference with personal privacy. See National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989) (Horner); William H. Payne, 25 DOE ¶ 80,190 at 80,727 (1996) (Payne); Southwest Resource Development, 24 DOE ¶ 80,164 (1995) (individuals involved in Inspector General's investigations protected under Exemptions 6 and 7(c)). DOE/RL has not invoked this provision.

Case No. VFA-0200, 26 DOE ¶ 80,113

September 9, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dennis J. McQuade

Date of Filing: August 9, 1996

Case Number: VFA-0200

On August 9, 1996, Dennis J. McQuade filed an Appeal from a determination issued to him on July 29, 1996, by the Department of Energy's Oak Ridge Operations Office (OR). That determination was issued in response to a request for information submitted by Mr. McQuade under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. McQuade asserts that OR failed to provide him with responsive documents in its possession regarding a Request for Information he made on July 24, 1996.

I. Background

On July 24, 1996, Mr. McQuade filed a request for information in which he sought the following information:

1. The identity of the person who furnished Rufus Smith, OR's Diversity Program Manager, with a copy of an anonymous survey response. A written statement from Jim Hall and Steve Richardson as to what disciplinary measures will be utilized to punish the perpetrators of this gross breach of confidentiality/anonymity.
2. A copy of the letter referring the anonymous response to the FBI, and any attachments thereto. The identities of all signatories to the referral letter.
3. Copies of any and all responses, communications from the FBI, including written, verbal, E-mail, or any other type of correspondence, to include any conclusions they may have reached and any recommendations made.

July 24, 1996 FOIA Request.

On July 29, 1996, OR issued a determination which stated that it conducted a search of its files which included the Office of Assistant Manager for Defense Programs, the Quality and Reliability

Division, the Safeguards and Security Division, and the Office of Chief Counsel. See Determination Letter at 1. OR stated that the only record which could be located was a record which responded to item 2 of Mr. McQuade's request. OR provided that record, a memo dated May 28, 1996 to Harry Franz transmitting a copy of the survey response, to Mr. McQuade in its entirety. Id. OR further stated that no documents could be located in response to item 1 and item 3 of Mr. McQuade's Request. Id.

On August 9, 1996, Mr. McQuade filed the present Appeal with the Office of Hearings and Appeals. In

his Appeal, Mr. McQuade challenges the adequacy of the search conducted by OR. Specifically, Mr. McQuade makes the following contentions: (1) the Determination Letter did not indicate whether Rufus Smith was contacted regarding the identity of the person who provided him with a copy of the anonymous survey; (2) the Determination Letter did not provide the identity of Harry Franz and (3) OR did not provide the full 13 pages of material described in the memo dated May 28, 1996.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at OR to ascertain the extent of the search that had been performed. Upon receiving Mr. McQuade's Request for Information, OR instituted a manual search of its files in the Office of Assistant Manager for Defense Programs, the Quality and Reliability Division, the Safeguards and Security Division, and the Office of Chief Counsel. The OR indicated that it located the only responsive document to Mr. McQuade's request, which consisted of a copy of the subject survey response and record of its transmittal to Harry Franz on May 28, 1996. OR indicated that it found no documents in response to items 1 and 3 of Mr. McQuade's request. However, since that time OR has supplemented its Determination by providing the following information to Mr. McQuade: (1) the remaining seven of the 13 pages attached to the memo dated May 28, 1996, to Harry Franz; (2) the identity of Harry Franz and (3) a confirmation that an additional manual search for responsive documents was conducted by Rufus Smith in the Office of Diversity Programs. See Supplemental Letters from Amy L. Rothrock, FOIA Officer to Dennis J. McQuade (August 12, 13, and 15, 1996). With regard to the additional search conducted by Rufus Smith, OR informed Mr. McQuade that no additional responsive documents could be located. OR has now responded to each of the contentions Mr. McQuade made in his Appeal. Given the facts presented to us, we find that OR conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. McQuade's Request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Dennis J. McQuade, OHA Case No. VFA-0200, on August 9, 1996, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 9, 1996

Case No. VFA-0201, 26 DOE ¶ 80,114

September 9, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Mary Towles Taylor

Date of Filing: August 12, 1996

Case Number: VFA-0201

On August 12, 1996 , Mary Towles Taylor filled an Appeal from a determination that denied a request for information filed under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Taylor appeals from a July 19, 1996 determination issued by the FOIA/Privacy Act Division at DOE Headquarters (Headquarters' FOIA Office). This Appeal, if granted, would require the DOE to conduct a further search for documents responsive to Ms. Taylor's request. (1)

I. Background

On July 1, 1996, Ms. Taylor filed a FOIA request seeking documents that relate to her father's exposure to radiation during his employment at Oak Ridge. The Headquarters' FOIA Office determination indicated that the Department's Office of Human Radiation

Experiments (OHRE) and Oak Ridge Operations Office (Oak Ridge) searched for documents responsive to this request, but that no responsive documents were found.(2)

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing this Appeal, we contacted employees at OHRE and Oak Ridge to discuss the search conducted by these offices for documents concerning Arcellus Towles' exposure to radiation. We were informed that OHRE and Oak Ridge had searched for records that might show that Mr. Towles had experienced an occupational exposure to radiation. However, neither office had conducted a search for records that might show exposure to radiation for experimental purposes. Both OHRE and Oak Ridge have requested that Ms. Taylor's FOIA request be remanded so that these offices may conduct an additional search to determine whether records exist which would show whether Mr. Towles had been exposed to radiation for experimental purposes. See Memorandum of Telephone Conversation between Amy

Rothrock, Freedom of Information Act/Privacy Act Officer at Oak Ridge, and Linda Lazarus, OHA Staff Attorney (August 30, 1996); Memorandum of Telephone Conversation between Robert Zielinski, Case Manager, OHRE, and Linda Lazarus (August 30, 1996).

In view of the foregoing, we shall grant the present Appeal to the extent that DOE will be required to conduct a further search for documents. This matter will be remanded to the Headquarters' FOIA Office for a new determination with instructions to seek additional documents from OHRE and Oak Ridge.

It Is Therefore Ordered That:

(1) The Appeal filed by Mary Towles Taylor on August 12, 1996, is hereby granted as set forth in Paragraphs (2) below, and is in all other respects denied.

(2) This matter is remanded to the Headquarters' FOIA Office which is instructed to request that OHRE and Oak Ridge conduct a further search for documents that relate to any human radiation experiments which might have involved Arcellus Towles during the time that he was employed at Oak Ridge. After OHRE and Oak Ridge inform the Headquarters' FOIA Office of the results of these searches, the Headquarters' FOIA Office shall issue a new determination in this matter.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 9, 1996

(1)In her Appeal, Ms. Taylor indicates that she believes that her father was a participant in the Manhattan Project. Her conclusion is based on the fact that the Manhattan Project involved a black male employee of Oak Ridge. However, from the documents submitted by Ms. Taylor, it is clear that this employee was not Ms. Taylor's father. The employee involved in the Manhattan Project died in 1952 at age 60. According to the death certificate that Ms. Taylor provided, her father died in 1960 at age 72.

(2)In her Appeal, Ms. Taylor indicates that she believes that her father was a participant in the Manhattan Project. Her conclusion is based on the fact that the Manhattan Project involved a black male employee of Oak Ridge. However, from the documents submitted by Ms. Taylor, it is clear that this employee was not Ms. Taylor's father. The employee involved in the Manhattan Project died in 1952 at age 60. According to the death certificate that Ms. Taylor provided, her father died in 1960 at age 72.

(3)Ms. Taylor indicates that she believes that her father was a participant in a study of plutonium injections related to the Manhattan Project. Her conclusion is based on the fact that the study involved an unnamed black male employed at the Oak Ridge site. However, from the documents submitted by Ms. Taylor, it is clear that this employee was not Ms. Taylor's father. The employee involved in that study died in 1952 at the age of 60. According to the death certificate provided by Ms. Taylor, her father died in 1960 at the age of 72.

Case No. VFA-0202, 26 DOE ¶ 80,115

September 11, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William Donnelly

Date of Filing: August 13, 1996

Case Number: VFA-0202

On August 13, 1996, the Office of Hearings and Appeals (OHA) received an Appeal filed by William Donnelly from a determination issued to him by the Freedom of Information Officer at the Department of Energy's (DOE) Pittsburgh Energy Technology Center (hereinafter referred to as "the Officer"). The Officer's determination was issued in response to a request for information processed in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Officer to conduct a further search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his request, Mr. Donnelly sought access to documents concerning his arrest and 1987 conviction of various federal offenses that occurred during his employment with the DOE. Specifically, he requested copies of log books that he maintained as a part of his duties with the DOE, records of all purchases of steel by the DOE and its subcontractors at the Bruceton Research Center in Pittsburgh prior to 1987, and records of any investigations of employee theft of government property at the Bruceton Research Center.

In her determination, the Officer informed Mr. Donnelly that no documents responsive to his request could be located. The Officer stated that because the DOE's procurement office is only required to maintain purchase records for three years, no records exist for steel purchases made prior to 1992. The Officer further stated that the log books could not be found and that no records satisfying the parameters set forth in Mr. Donnelly's request existed concerning investigations of employee thefts.

II. Analysis

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably

calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In order to evaluate the scope of the search, we contacted the Officer. In particular, we inquired about the statements she made in the determination letter concerning the log books that Mr. Donnelly requested. In the determination, the Officer stated that the Inspector General's (IG) Office conducted an investigation of Mr. Donnelly, "and may have taken possession of any evidence incidental to that investigation." In a telephone conversation on September 4, 1996, she stated that a colleague who was a DOE employee at the time of Mr. Donnelly's arrest told her that the IG's Office had conducted an investigation of Mr. Donnelly. However, she has since that time consulted with the IG's Offices in Pittsburgh and at DOE Headquarters in Washington. She now says that her statement in the determination letter was in error, that there had been no investigation of Mr. Donnelly by the IG's Office, and that neither the IG's Office in Pittsburgh nor the Headquarters IG's Office has any documents that are responsive to Mr. Donnelly's request. The Officer further informed us that the DOE's personnel, procurement and security offices had also been searched, and that no responsive documents had been located. See Memorandum of August 26, 1996 telephone conversation between the Officer and Robert Palmer, OHA Staff Attorney.

Based on our conversations with the Officer and with the Headquarters IG's Office, we are satisfied that there was no DOE investigation of Mr. Donnelly, and that the search for responsive documents conducted by the Officer was comprehensive. See also memoranda of August 29, 1996 and September 4, 1996 telephone conversations between Mr. Palmer and Jayne Payne, Headquarters IG's Office. We will therefore deny Mr. Donnelly's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William Donnelly on August 13, 1996, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 11, 1996

Case No. VFA-0203, 26 DOE ¶ 80,117

September 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: US Solar Roof

Date of Filing: August 15, 1996

Case Number: VFA-0203

On August 15, 1996, US Solar Roof (USSR) filed an Appeal from a determination issued to it on August 1, 1996, by the Manager of the Golden Field Office (Manager) of the Department of Energy (DOE). In that determination, the Manager denied a request for information filed by USSR on July 11, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, USSR sought all electronic mail from October 12, 1992 through May 14, 1993, and from September 5, 1994 through January 31, 1995, sent to and received by either Roger Taylor of the National Renewable Energy Laboratory (NREL), or John W. Meeker of the Golden Field Office. On August 1, 1996, the Manager informed USSR that his search revealed no hard copies of responsive documents. In addition, the Manager found no responsive electronic mail files or backup electronic mail files for the years 1992 and 1993. The Manager stated that the Golden Field Office does have archived electronic files on tape for the years 1994 and 1995, but that Mr. Taylor and NREL do not have backup electronic mail files or hard copies for the time periods specified. The Manager could not immediately determine

whether the Golden Field Office tapes contain responsive electronic mail messages. The computer system currently used in the Golden Field Office has hardware and software different from the system used in 1994 and 1995, and determining whether responsive electronic mail exists would require locating and reinstalling the old software and hardware, determining if the hardware still operates, searching the files, and then copying any responsive messages to a disk. The Manager informed USSR that he estimated the cost of this search to be between $2,000 and $3,000. The FOIA regulations do not require the Manager to undertake this type of costly search unless USSR agrees to pay for it. In its written Appeal, USSR requested that the DOE search its current electronic mail backup of one year's worth of files because these files may contain older files that predate the creation date of the file on backup, thus possibly containing

responsive information.

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In its Appeal, USSR did not provide any evidence that responsive information from prior years exists in last year's backup files. USSR only speculates that responsive information exists in those files. Accordingly, we contacted the Golden Field Office to ascertain the feasibility of USSR's contention.<1> Officials at the Golden Field Office informed us that, based on their experience, it is highly unlikely that the past year's backup electronic files contain any responsive information from prior years. The Golden Field Office officials informed us that short of searching the actual 1994 and 1995 files, the most likely place to find electronic mail communications from earlier years is in the hard copy files. For example, Mr. Meeker prints out any communication dealing with source selection information that arrives via electronic mail and places the hard copy into the relevant file. Since the Manager's search included a review of Mr. Meeker's hard copy files and that search did not come up with any responsive information, we find that the Golden Field Office searched all of the areas that might reasonably contain responsive information. As stated above, a determination on whether an agency's search was adequate does not require an absolutely exhaustive search of all files. Accordingly, we find that the Golden Field Office conducted a search reasonably calculated to uncover responsive information.

It Is Therefore Ordered That:

(1) The Appeal filed by US Solar Roof on August 15, 1996, Case Number VFA-0203, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 12, 1996

<1>/ See memoranda of telephone conversations between Leonard M. Tao, Office of Hearings and

Appeals Staff Attorney, and various Golden Field Office personnel (Case No. VFA-0203).

Case No. VFA-0204, 26 DOE ¶ 80,116

September 12, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cindy David

Date of Filing: July 31, 1996

Case Number: VFA-0204

On July 31, 1996, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received an Appeal filed by Cindy David from a determination issued to her by the Western Area Power Administration (WAPA). That determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require WAPA to release in their entirety several documents which were provided to Ms. David in redacted form.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b). Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 17, 1996, Ms. David filed a request for "a copy of the contract between Western Area Power Administration and Salazar Associates International, Inc. (Contract #DE-AC65-86WK08385), awarded to them in November 1990." Letter from Cindy David to Contracting Officer, WAPA (June 17, 1996). Ms. David specifically requested "any documentation that refers to fringe benefits for the employees and any reference to severance pay" and a copy of the entire contract. Id. Prior to responding to Ms. David, WAPA solicited comments from Salazar Associates International (Salazar) on the request. Salazar sent WAPA copies of responsive material with what Salazar considered the appropriate redactions of proprietary information. Letter from Vice President, Salazar, to FOIA Officer, WAPA (July 10, 1996). On July 18, 1996, WAPA released responsive documents to Ms. David, after withholding information that WAPA identified as proprietary and thus exempt from disclosure under Exemption 4. Letter from Administrator, WAPA, to Cindy David (July 18, 1996) (Determination Letter).

On July 31, 1996, Ms. David filed an Appeal with the Office of Hearings and Appeals (OHA). <1> In her Appeal, Ms. David maintains that the information contained in the Expense Categories of Exhibit F.1 (Summary of Labor Overhead Expenses) and Exhibit F.2 (Summary of General and Administrative Expenses) should not be considered proprietary information. She also requests a copy of the Salazar proposal, the opportunity to review the entire contract file under appropriate supervision and permission to copy relevant information. Letter from Cindy David to Director, OHA (July 31, 1996) (Appeal Letter). This Appeal, if granted, would release this information to Ms. David.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have held consistently that information submitted in response to a request for proposals is submitted involuntarily and therefore is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

DOE regulations also provide that DOE must solicit the submitter's views regarding the impact of release of the information. 10 C.F.R. § 1004.11(c). WAPA obtained comments from Salazar in this case, and then did a de novo review of the requested information, releasing some items claimed by Salazar to be confidential which WAPA did not find exempt from disclosure. See Record of Telephone Conversation between Deputy General Counsel, WAPA, and Valerie Vance Adeyeye, OHA Staff Attorney (August 29, 1996).

We find that the withheld materials at issue are commercial within the meaning of Exemption 4 since the material was developed and submitted specifically for the purpose of acquiring a contract. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996) (Industrial); Tri-City Herald, 16 DOE ¶ 80,114 (1987). This material was obtained from a "person" as required by Exemption 4, since corporate entities are deemed persons for purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). We also conclude that the information withheld, labor and general and administrative expense data, is confidential because its release would substantially harm Salazar's competitive position. We have stated in the past that release of cost and financial information of this type could be used by a competitor to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See Industrial; International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, were Salazar to release, for example, its direct costs, indirect costs, and overhead rates, any competitor could easily determine how to adjust its own costs to arrive at a lower contract price and ultimately beat Salazar's best price in a future bid process.

Ms. David maintains that the withheld information should be disclosed because of the public interest in the manner in which tax dollars were used in a government contract. The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. See Painters District Council No. 55, 24 DOE ¶ 80,149 (1994). Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the expense and overhead information properly withheld under Exemption 4.

Finally, we find that allowing the requester an opportunity to view and copy the withheld material is equivalent to releasing the information to the requester. Although Ms. David may not be a competitor

herself, releasing the information to her would be the same as releasing the information to the public, including any potential competitor. Since release of this information in any form would harm Salazar's competitiveness, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Cindy David on July 31, 1996, OHA Case No. VFA-0204, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 12, 1996

<1>Unfortunately, the Appeal was received at another location, and did not arrive in this office until August 15, 1996. In a telephone conversation, Ms. David agreed to an extension of the due date for the Appeal, due to the time lost in the mail. See Memorandum of Telephone Conversation between William Schwartz, OHA Staff Attorney, and Cindy David (August 16, 1996).

Case No. VFA-0205, 26 DOE ¶ 80,119

September 17, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Malcolm Parvey

Date of Filing: August 19, 1996

Case Number: VFA-0205

On August 19, 1996, Malcolm Parvey filed an Appeal from two determinations issued to him on August 7, 1996, by the Department of Energy's (DOE) Western Area Power Administration (WAPA). In those determinations, WAPA released several documents to Mr. Parvey and found that a total of four documents requested by Mr. Parvey under the Freedom of Information Act (FOIA)<1> did not exist. WAPA also assessed Mr. Parvey fees totaling of $96.25. If Mr. Parvey's Appeal were to be granted, the fees would not be assessed and new searches for responsive documents would be conducted.

I. Background

In two requests for information, Mr. Parvey sought copies of the most recent abstracts and bidders lists for two contract solicitations conducted by WAPA. On August 7, 1996, WAPA issued two determinations in which it: (1) informed Mr. Parvey that the abstracts he requested did not exist; (2) released copies of all bid requests it had received for both of the solicitations at the time of the request; and (3) assessed Mr. Parvey for search, review and duplication fees totaling $96.25 for the two requests. On Appeal, Mr. Parvey contends:

(1) WAPA's search for responsive documents was inadequate;

(2) WAPA used an excessive number of hours to review the documents it released to him;

(3) WAPA used managerial and professional employees to conduct the review, when it could have used clerical employees; and,

(4) WAPA failed to notify him in advance that it was going to assess him fees.

II. Analysis

A. Adequacy of the Search

We turn first to Mr. Parvey's allegations that the searches for responsive documents conducted by WAPA were inadequate. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶

80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). We review the adequacy of an agency's search under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

Mr. Parvey has expressed concern about WAPA's failure to locate bid abstracts for the two solicitations. According to Mr. Parvey, federal agencies are required to generate bid abstracts (or past procurement histories) for most solicitations. However, we contacted WAPA and were assured that it was not required to produce abstracts for the particular solicitations at issue in the present case and that it did not do so. We therefore find that the searches for responsive documents were adequate.

B. Assessment of Fees

Pursuant to the FOIA, the DOE has issued regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. § 552(a)(4)(A)(i). These regulations provide for the assessing of fees to recover the "full allowable direct costs incurred" in responding to requests for information. 10 C.F.R. § 1004.9. In so doing, the DOE is to "use the most efficient and least costly methods to comply with requests for documents made under the FOIA." Id.

For purposes of determining the appropriate fees to be charged, the DOE regulations set forth four categories of FOIA requesters: those who seek documents for a commercial use, educational and non-commercial scientific institution requesters, requesters who are representatives of the news media, and all other requesters. 10 C.F.R. § 1004.9(b)(1)-(4). Mr. Parvey was seeking documents for a commercial use and therefore may properly be assessed fees for "document search, duplication, and review..." 5 U.S.C. § 552(a)(4)(A)(ii)(I).

WAPA has assessed Mr. Parvey a total of $96.25 in search, review and duplication fees for WAPA's response to two commercial FOIA requests. After reviewing the facts and circumstances of this case, we find that WAPA's assessment of fees was appropriate and reasonable.

We do not find merit in Mr. Parvey's contention that WAPA's use of managerial and professional employees to conduct the processing of his requests was improper. Neither the FOIA or the DOE regulations prevent WAPA's use of managerial or professional employees to process FOIA requests. In fact, the FOIA's legislative history indicates that Congress intended that agencies would use professional employees to process FOIA requests. See H. Rep. No. 93-876 93rd Cong. 2d Sess. 6 (1974) as cited in Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (finding that a FOIA request would be sufficiently descriptive "if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort").

Nor do we find that Mr. Parvey's contention that WAPA failed to notify him in advance that it was going to assess him fees to be persuasive. The DOE's FOIA regulations state in pertinent part:

If the DOE determines or estimates that the fees to be assessed . . . may amount to more than $25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency.

10 C.F.R. § 1004.9(a)(7). Both of Mr. Parvey's requests specifically indicate his intention to "pay any fees assessed." Accordingly, we find that WAPA was not required to notify him in advance of assessing fees under the FOIA.

For the reasons set forth above, we find that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Malcolm Parvey on August 19, 1996, Case Number VFA-0205, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 17, 1996

<1>5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

Case No. VFA-0206, 26 DOE ¶ 80,121

September 20, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James D. Hunsberger

Date of Filing: August 22, 1996

Case Number: VFA-0206

On August 22, 1996, James D. Hunsberger of Berlin, Germany filed an Appeal from a determination issued on July 22, 1996 by the Acting Director of the Office of Human Radiation Experiments of the Department of Energy (DOE). That determination denied in part a request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would result in release of further requested information.

Background

On December 12, 1995 Mr. Hunsberger wrote to the Department of Energy requesting information under the Freedom of Information and Privacy Acts. The Freedom of Information and Privacy Group (FOIA Office) of the Office of the Executive Secretariat forwarded this request on February 20, 1996 to the Office of Environment, Safety and Health. Mr. Hunsberger's lengthy, twelve-part request is not easily summarized. Mr. Hunsberger apparently believes he has been the subject of human experimentation over part or all of the last twenty years. During this time he has resided in Riverside, California, North Wales, Pennsylvania, and various locations in Germany, most notably Berlin (before and after reunification) and the Bad Oldesloe home for asylum near Hamburg. Generally, he seeks all available information on human experiments, including any of those of which he may have been a part. In his request, Mr. Hunsberger particularly seeks information on experiments on the behavioral, psychological, and physical effects on humans of the beaming or the use of abnormal amounts of microwaves, electromagnetic waves, laser radiation and other radiation or wavelengths. He is also interested in learning what information was shared with other agencies and foreign governments (particularly in Germany). Mr. Hunsberger also made a series of broad

requests for financial information, information dealing with violations of various laws and regulations, as well as some other matters.

The Acting Director of the Office of Human Radiation Experiments (a part of the Office of Environment, Safety and Health) responded to Mr. Hunsberger on July 22, 1996. In that letter, she states that her staff searched the documents available in the DOE's human radiation experimentation database and that they found no responsive documents. Likewise, they checked with the office that is responsible for electric and magnetic power field (EMF) research. That office stated that it has no responsive documents. Her letter also describes in general terms some EMF matters including inter-agency contacts (or lack thereof). In addition, the Acting Director sent Mr. Hunsberger two DOE publications on human radiation experiments. The first publication describes the record groups available. The second publication describes particular

experiments. The letter cites the Internet browser address on the World Wide Web for the human radiation experiment documents the DOE has made public and invites him to write to the Coordination and Information Center (CIC) in Nevada for copies of any document. It also states that Mr. Hunsberger should contact other agencies directly for any documents they might have.

Mr. Hunsberger appeals this determination. He contends that the search was inadequate. In particular, he states that his request was far broader than EMF studies and that the DOE publications do not adequately address his request. He also doubts the accuracy of several of the statements in the determination letter, especially those dealing with ongoing research and inter-governmental agreements. In addition, he states that he lacks Internet access.(1)

Analysis

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information that it has created or obtained at the time of the request. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); Martha Julian, 25 DOE ¶ 80,192 at 80,731 (1996); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein); Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Martha L. Powers, 24 DOE ¶ 80,147 at 80,618 (1994); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Safecard Services, Inc. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (and cases cited therein); William H. Payne, 24 DOE ¶ 80,145 at 80,615 (1994); Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)). This Office will remand a case for more research if it is evident that an inadequate search was conducted, or if evidence reveals that other documents that were not identified during the initial search exist. Id. See also Linda J. Carlisle, 24 DOE ¶ 80,124 at 80,560 (1994); McGraw-Hill Nuclear Publications, 22 DOE ¶ 80,157 at 80,627 (1992); James L. Schwab, 21 DOE ¶ 80,153 at 80,658 (1991).

In this case, we believe the search performed by the Office of Human Radiation Experiments in DOE Headquarters was adequate. That Office informs us that any potentially responsive records to which they have access would appear in the DOE's human radiation experimentation database on the World Wide Web. In searching that database, that Office searched by Mr. Hunsberger's name as well as various combinations using the words "Berlin," "Germany," "radiation," human," "laser," "electromagnetic," "microwave," "beam," "North," "Riverside," "Wales," and "California." None of these many combinations produced documents responsive to Mr. Hunsberger's request. We believe this search was well-conceived, well-conducted, and highly conscientious. As such, the search easily meets the standards for the adequacy of a FOIA records inquiry.

Although the search performed by the Headquarters Office of Human Radiation Experiments was adequate, this does not mean that the agency search as a whole was adequate. We have reviewed Mr. Hunsberger's original request, and we believe that it is possible that there are other parts of the DOE that could contain records he seeks. For example, Mr. Hunsberger clearly seeks, inter alia, human experiment records about himself. The documents in the database that the Office of Human Radiation Experiments searched have had all personal identifiers removed. The unredacted originals reside at the CIC in Nevada. We contacted the Nevada Operations Office (which is responsible for the CIC) sua sponte, and it confirmed that the records on the World Wide Web can be searched at the CIC by name. In addition, it appears from his request that Mr. Hunsberger was incarcerated or otherwise associated with a penal institution for at least part of the period for which he seeks documents. The Nevada Operations Office informs us that, although the process is far from complete, it is now reviewing and cataloging records

connected to prisoner experimentation. Clearly an adequate DOE search would encompass a name search of the CIC unredacted versions of the records contained in the World Wide Web site and a search of those prisoner experimentation records for which review and cataloging is complete. Similarly, Mr. Hunsberger seeks information on the sharing of human experimentation data with other governments or agencies. This type of information would not necessarily be encompassed within the DOE World Wide Web database site, but may exist in other parts of the DOE.

In this case, we believe the best course of action is to remand this matter to the FOIA Office. The FOIA Office has the broadest overview of the DOE records systems and is best able to determine the appropriate place(s) for any further search on Mr. Hunsberger's request. However, although we are remanding this matter for a further search, we do not believe all of Mr. Hunsberger's request is susceptible to reasonable investigation. For example, Request (5) seeks "[a]ll information on just who did what. On the role of anyone, including the Department of Energy in providing assistance, participating in said research, Human Experimentation, etc." This request is so broad as to defy any attempt at a reasonable search. Similarly, Mr. Hunsberger's eighth request seeks all information on concealment of violations of law or violations of Department of Health and Human Services regulations or laws or regulations of the Federal Republic of Germany. There is nothing in the FOIA which requires agency personnel to familiarize themselves with all of the laws and regulations of another federal department, let alone of a different sovereign nation employing an entirely different legal system, in order to start a FOIA search. Because we are remanding this matter to the FOIA Office, that Office should determine which portions of his request may be subject to a reasonable search, whether the agency might have responsive documents, and the appropriate place(s) to search for documents.

It Is Therefore Ordered That:

(1) The Appeal filed on August 22, 1996 by James D. Hunsberger of Berlin, Germany, OHA Case No. VFA-0206, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information and Privacy Group of the Office of the Executive Secretariat for further action in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 20, 1996

(1)In his submissions, Mr. Hunsberger relies on two Executive Orders. He first relies on sections 1.13 and 3.4 of Executive Order 12333, 46 Fed. Reg. 59941 (1981). This Order deals with United States Intelligence Activities, in particular the structure and relationship of foreign intelligence agencies and domestic departments (such as the DOE) as well as some collection and dissemination responsibilities of enumerated branches of government. Contrary to Mr. Hunsberger's apparent assumption, this general Executive Order does not demonstrate that the DOE has documents responsive to his request or that any documents on human experimentation were shared with other governments or parts of the Federal Government. Similarly, Mr. Hunsberger attempts to invoke sections 1.6, 3.2, 3.4, 6.1, and 6.2 of Executive Order 12356, 47 Fed. Reg. 14874 (1982). We note that this Order was revoked by Executive Order 12958, 60 Fed. Reg. 19824 (1995). Both of these Executive Orders deal with national security information.

However, there is no indication in the record that any of the information Mr. Hunsberger seeks has ever been classified as national security information. Like the first Executive Order cited, these two Executive Orders have no bearing whatsoever on Mr. Hunsberger's FOIA request.

Case No. VFA-0208, 26 DOE ¶ 80,120

September 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: FOIA Group Inc.

Date of Filing: August 27, 1996

Case Number: VFA-0208

On August 27, 1996, FOIA Group Inc. (Appellant) filed an Appeal from a determination issued on July 16, 1996 by the Department of Energy's Schenectady Naval Reactors Office (Schenectady). In its determination, Schenectady stated that it was unable to find any documents responsive to the Appellant's March 19, 1996 request under the Freedom of Information Act (FOIA). This Appeal, if granted, would require an additional search for responsive documents.

I. Background

On March 19, 1996, the Appellant submitted a FOIA request to DOE Headquarters (DOE/HQ) seeking copies of a contract between DOE and Gilbert Commonwealth (now named Parsons Power Inc. (Parsons)) and any modifications of that contract, as well as a related contract (and relevant winning proposals) between Parsons and Westinghouse Electric Corp. DOE/HQ believed that this information was located at Schenectady. Schenectady then conducted a search for documents responsive to the Appellant's Request. On July 16, 1996, Schenectady issued its determination, stating that it could not locate any responsive documents. On August 27, 1996, the Appellant filed the present Appeal in which it contends that DOE's search for documents was inadequate.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search

procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

We contacted DOE/HQ and Schenectady to determine the extent of the search which had been performed. We discovered that the documents the Appellant seeks are under the jurisdiction of DOE's Richland Operations Office (Richland).<1>Consequently, we shall direct this case to Richland. Upon receiving this case, Richland shall identify all documents responsive to the Appellant's request and either release them or provide adequate justification for withholding any portion of them.

It Is Therefore Ordered That:

(1) The Appeal filed by FOIA Group Inc. on August 27, 1996, Case Number VFA-0208, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to Richland Operations Office, which shall conduct a search for documents responsive to the Appellant's request as described in the above Decision and Order, and shall promptly issue a determination regarding those documents.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 18, 1996

<1>We note that this request was misdirected due to the Appellant's inaccurate description of the items sought. The Appellant provided what it described as the Request for Proposal number for this contract. The Request for Proposal number listed by the Appellant in its Request was misnamed - the number listed is an internal Parsons number, not a Request for Proposal number. Further, the contract the Appellant seeks is a Battelle Memorial Institute/Parsons contract, not a DOE/Parsons contract.

Case No. VFA-0209, 26 DOE ¶ 80,122

September 27, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dirk T. Hummer

Date of Filing: August 29, 1996

Case Number: VFA-0209

On August 29, 1996, Dirk T. Hummer filed an Appeal from a determination issued to him by the Director of the Office of External Affairs at the Department of Energy's Richland Operations Office (hereinafter referred to as "the Director"). The Director issued that determination in response to a request for information submitted by Mr. Hummer under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Director to release the requested information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall release documents that are exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and that such disclosure is in the public interest. 10 C.F.R. § 1004.1.

Background

Mr. Hummer was an employee of ICF-Kaiser Hanford (ICF), which is a sub-contractor of Westinghouse Hanford Company (WHC). WHC has operated the DOE's Hanford facilities pursuant to its contract with the DOE. In his FOIA request, Mr. Hummer sought copies of WHC Excel Idea number 94-0926, and of all "Employee Concerns" submitted by Mr. Hummer to ICF, with the exception of four enumerated Concerns.(1)

In response to this request, the Director provided Mr. Hummer with a copy of a document pertaining to WHC Excel Idea number 94-0926. However, in her determination, the Director stated that the Employee Concerns documents requested by Mr. Hummer could not be provided because they are the property of ICF and are therefore not subject to the provisions of the FOIA. In his Appeal, Mr. Hummer requests that we review the Director's determination that the Employee Concerns documents are not "agency records," and are therefore not subject to the provisions of the FOIA. See 5 U.S.C. § 552(f).

Analysis

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for

determining whether documents that did not originate with the federal government are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination of (I) whether the entity that is in possession of the documents is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the WHC, ICF is responsible for certain duties pertaining to WHC's contract with the DOE. While the DOE exercises general control over the contract work, it does not supervise ICF's day-to-day operations. We therefore conclude that ICF is not an "agency" subject to the FOIA.

Although ICF is not an agency for the purposes of the FOIA, the Employee Concerns documents sought by Mr. Hummer could become agency records if the DOE obtained them and they were within the DOE's control at the time that Mr. Hummer made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that the DOE never obtained the documents, and the documents were not in the agency's control at the time of the appellant's request. See memorandum of September 18, 1996 telephone conversation between Angela Ward, Richland Operations Office, and Robert Palmer, OHA Staff Attorney. Based on these facts, the Employee Concerns documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even though the Employee Concerns documents are not agency records, they may still be subject to release if the contract between WHC and ICF provides that the documents in question are the property of the DOE. 10 C.F.R. 1004.3(e)(1). We must therefore look to the contract between WHC and ICF to determine the status of these records. That contract states that "[e]xcept as is provided in paragraph (b) below, all documents generated under this contract shall be the property of DOE. . . ." Paragraph (b) sets forth nine categories of records that are the property of ICF, including "Employee Assistance Program and Employee Concerns Program records and files maintained on individual employees. . . ." Contract WHC-380393, Section H. Thus, because Employee Concerns documents are specified in the contract as belonging to ICF, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the Employee Concerns documents sought by Mr. Hummer are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny his Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Dirk T. Hummer on August 29, 1996, Case Number VFA-0209, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 27, 1996

(1)Excel Ideas are suggestions made by employees to WHC for cutting costs or improving job performance. Employee Concerns are statements or questions regarding work-related issues submitted to ICF by its employees.

Case No. VFA-0210, 26 DOE ¶ 80,123

September 27, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Local Union No. 701, I.B.E.W.

Date of Filing: August 30, 1996

Case Number: VFA-0210

On August 30, 1996, Local Union No. 701, I.B.E.W. (IBEW) filed an Appeal from a determination issued to it on August 22, 1996, by the Department of Energy's Fermi Group (Fermi). Fermi issued that determination in response to a request for information submitted by IBEW under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Fermi to release the requested information.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and that it is in the public interest. 10 C.F.R. § 1004.1.

Background

On August 8, 1996, IBEW filed a request under the FOIA in which it sought copies of certified payroll records of COMNet Midwest Inc., a subcontractor at Fermi National Accelerator Laboratory (Fermilab), for fiber cable installation at Fermilab that started on June 10, 1996 and the fiber cable Wilson Hall Project underway as of August 8, 1996, also at Fermilab. Fermi issued a determination on August 22, 1996, in which it stated that it was unable to locate any records responsive to the IBEW request. However, Fermi stated that Fermilab has ownership of responsive records pursuant to the DOE's Prime Contract with Fermilab, Article 104 "Ownership of Records." In actuality, the DOE's Prime Contract to manage and operate Fermilab is not with Fermilab, but with the Universities Research Association, Inc. (URA). In its Appeal, IBEW requests that the OHA direct Fermi to release the requested information.

Analysis

Our threshold inquiry in this case is whether the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf., 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884

(December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as URA, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at ¶ 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, URA is the contractor responsible for maintaining and operating Fermilab. While the DOE obtained URA's services and exercises general control over the contract work, it does not supervise URA's day-to-day operations. We therefore conclude that URA is not an "agency" subject to the FOIA.

Although URA is not an agency for the purposes of the FOIA, its records relevant to the IBEW request could become "agency records" if DOE obtained them and they were within the DOE's control at the time IBEW made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we determined that COMNet Midwest Inc. created the documents in question, the DOE never obtained the documents, and the documents were not in the agency's control at the time of the appellant's request.(1) Based on these facts, the payroll documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1). (2)

We therefore next look to the contract between DOE and URA to determine the status of these records. That contract generally states,

Except as is provided in paragraph (b) below, all documents generated under this contract shall be the property of the Government (hereinafter referred to as "Government-owned Records") and subject to

rights of the Association given in (c) below, shall be delivered to the Government. . . .

Contract DE-AC02-76CH03000. Paragraph (b) states that the excluded category of Contractor's records includes "[r]ecords and files pertaining to wages, salaries, and benefits and wage, salary and benefit administration. . . ." Thus, because records pertaining to wages, salaries, and benefits are not among the records that are property of the Government under the DOE's contract with URA, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the certified payroll records sought by the appellant are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny IBEW's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Local Union No. 701, I.B.E.W., on August 30, 1996, Case Number VFA-0210, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 27, 1996

(1)See September 17, 1996 Record of Telephone Conversation between Leonard M.Tao, OHA Staff Attorney, and John Chapman, Fermi Group.

(2)We note that there is no recordkeeping contract provision between URA and COMNet Midwest, Inc. nor is there a "flow down clause" in the contract between the DOE and URA requiring DOE sub-contractors to apply recordkeeping provisions outlined in the prime contract. Thus, COMNet Midwest, Inc.'s records are not directly subject to the provisions of 10 C.F.R. § 1004.3(e)(1).

Case No. VFA-0211, 26 DOE ¶ 80,124

September 30, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James H. Stebbings

Date of Filing: August 30, 1996

Case Number: VFA-0211

On August 30, 1996, James H. Stebbings (Stebbings) filed an Appeal from a determination issued to him in response to a request for documents submitted by Stebbings under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on August 19, 1996, by the Argonne Group, a component of the Department of Energy's Chicago Operations Office (Argonne). This Appeal, if granted, would require that we order Argonne to conduct an additional search for responsive documents.

I. Background

On January 16, 1996, Stebbings filed a request with Argonne for information pursuant to the FOIA. In his request, Stebbings sought information related to a project of the Argonne National Laboratory (ANL) entitled "Lung Cancer Risks from Radon Daughters in Domestic Environments (Contractor No. 63305/004617)." See Letter from James Stebbings to FOIA Officer, DOE Chicago Operations Office (January 16, 1996). Stebbings served as Epidemiology Group Leader of this project from the mid-1980's until he left ANL in 1990. See Letter from James Stebbings, ANL, to New York State Department of Health (October 18, 1985); Letter from J. Rundo, ANL, to Dr. Zhonghua Liang (October 29, 1991).

Argonne forwarded the request to ANL on April 22, 1996. See Letter from Manager, Argonne Group, to Director, ANL (April 22, 1996). ANL searched its offices and identified 15 responsive pages. Four additional responsive pages were identified and material redacted which would reveal information about individuals. See Letter from Director, Information and Publishing Division, ANL, to Manager, Argonne Group (July 19, 1996). Argonne released these pages to Stebbings, along with a determination letter. On August 30, 1996, Stebbings filed this Appeal. Stebbings alleges that a former colleague told him that a team from the Environmental Protection Agency (EPA) visited ANL within the last year and copied extensive records of the radon study there. Thus, he contends that additional responsive material exists but was not released to him. See Appeal Letter. He goes on to

say that additional relevant records may be in the possession of an employee of the Office of Health and Environmental Research (DOE/OHER) located in Germantown, Maryland. This Appeal requests that OHA direct DOE to conduct another, more detailed search of its files. Id.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search

for responsive documents. See W. R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing, Inc., 6 DOE ¶ 80,156 (1980). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In conversations with Argonne, OHA learned that, in addition to the search of ANL's offices in Chicago, an ANL employee contacted DOE/OHER to determine if any responsive records could be found there. The former Radon Program Manager searched her location but found no responsive material. OHA then contacted the requester to ascertain why he alleged that records could still exist in Germantown. He maintains that there is correspondence between EPA and DOE/OHER regarding the copying of radon study records. According to the requester, because the former Radon Program Manager was one of the top managers working on the study, she should have records related to the project or know where they could be located. See Memorandum of Telephone Conversation Between James Stebbings and Valerie Vance Adeyeye, OHA Staff Attorney (September 20, 1996). We contacted the former Radon Program Manager in Germantown, who explained that she could not find any correspondence of the type requested or any other records related to the project. She said that, to her knowledge, the EPA never contacted or visited DOE for any information about the study. She stated that, according to the Research Contract Assistant who maintains records at that location, records are retained for 6 and one-half years. Because the radon project began in the mid-1980s, its data fell outside of the retention limit and would likely have been destroyed. The Radon Program Manager was the most knowledgeable person about the radon project who we contacted, and we have no reason to question the veracity of her statements. For example, the requester has not provided any copy of any correspondence with EPA that he maintains exists.

III. Conclusion

In view of the available information, we agree that the DOE has conducted a search reasonably calculated to uncover the documents requested. Searches were performed at ANL, where the requester alleged that additional records existed and were recently copied by another agency, and at DOE/OHER where the former program manager currently is assigned. It is likely that any responsive material in addition to what was provided to the requester was destroyed in the normal course of business due to the age of the project. Accordingly, the Appeal filed by Stebbings should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by James H. Stebbings on August 30, 1996, Case No. VFA-0211, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 30, 1996

Case No. VFA-0212, 26 DOE ¶ 80,125

October 4, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Harold Bibeau

Date of Filing: September 3, 1996

Case Number: VFA-0212

On September 3, 1996, Harold Bibeau filed an Appeal from a determination issued to him under the Freedom of Information Act (FOIA) on July 25, 1996, by the Oak Ridge Operations Office (DOE/OR) of the Department of Energy (DOE). (1) In his Appeal, Mr. Bibeau asserts that DOE/OR failed to provide him with all of the responsive documents in its possession regarding his Request for Information (FOIA Request) dated May 28, 1996.

I. Background

In his FOIA Request, Mr. Bibeau requested from DOE/OR copies of documents relating to radiation or "drug-hormone" experiments conducted within the confines of the Oregon or Washington State Penitentiaries. (2) Mr. Bibeau included a list of three researchers, Dr. Carl Heller, C.A. Paulsen and Mavis Rowley, who he states were associated with these studies. Also included in Mr. Bibeau's FOIA Request was a list of individuals he claims served on various review boards, individuals who were connected with various DOE facilities during the period the experiments were being conducted,

and individuals who worked for the AEC. DOE/OR, in its Determination Letter dated July 25, 1996, informed Mr. Bibeau that it had conducted a search of its files but could not find any documents responsive to his FOIA Request. However, because responsive documents might exist at DOE Headquarters, DOE/OR referred his request to DOE Headquarters.

In his Appeal, Mr. Bibeau argues that given the level of DOE/OR personnel involvement in the Washington and Oregon studies, responsive documents must exist. Specifically, he asserts that one physician, Dr. Eugene Oakberg, a researcher at the Oak Ridge National Laboratory (ORNL), was involved with the studies and that Dr. Oakberg was a member of the AEC Advisory Committee which conducted oversight of the Oregon experiments. Further, Mr. Bibeau maintains that Ms. Rowley, the assistant to the investigator for the Oregon studies, Dr. Heller, visited ORNL on two occasions to work in Dr. Oakberg's laboratory. Mr. Bibeau also asserts that Dr. Michael Bender of ORNL attended meetings in which the Washington and Oregon experiments were discussed. Mr. Bibeau argues that there must be correspondence between the above mentioned parties and a Mr. Paul Henshaw of the AEC.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive

documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To ascertain the extent of the search conducted for documents responsive to Mr. Bibeau's request, we contacted the FOIA Officer at Oak Ridge. See Memoranda of telephone conversations between Amy Rothrock, FOIA Officer, DOE/OR, and Richard Cronin, OHA Staff Attorney (September 11 and 17, 1996). She informed us that DOE/OR conducted a search using two computer data bases which indexed the two areas where responsive documents would be most likely to exist. The first was a database which contained information (such as document title and author) relating to documents stored at DOE/OR's records holding area. The second was the DOE Human Radiation Experiment database which accesses all of DOE/OR's documents in its human radiation experiment collection (as well as other DOE documents held outside of DOE/OR). This database searches the text of the documents contained in the database. Both databases were searched using the words "Oregon," "Washington," "Prisoner," "Drug-Hormone Experiment," "Experiment and Washington or Oregon" "Hormone and Washington or Oregon" and "Penitentiary." No responsive documents were discovered with these searches. After Mr. Bibeau's Appeal was filed, DOE/OR searched the databases using the names of the researchers associated with the experiments as listed in the Roadmap Document.(3)This search did not uncover any responsive documents. However, DOE/OR subsequently discovered documents potentially responsive to Mr. Bibeau's FOIA Request. See Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, DOE/OR, and Richard Cronin, OHA Staff Attorney (September 19, 1996). Consequently, we will remand this matter to DOE/OR so that it may issue a modified determination discussing the newly discovered documents.(4)Mr. Bibeau may, if he wishes, appeal the new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Harold Bibeau on September 3, 1996, is granted as specified in paragraph (2).

(2) This matter is remanded to the Oak Ridge Operations Office of the Department of Energy so that it may issue a determination regarding any documents that may be responsive to Harold Bibeau's FOIA Request dated May 28, 1996.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 4, 1996

(1)Mr. Bibeau's FOIA Appeal was made complete by our receipt of the determination letter at issue on September 5, 1996.

(2)From 1963 to 1973, the University of Washington, Seattle, conducted studies on the effects of radiation on human testicular function of inmate volunteers at the Washington State Prison. Tissue samples from this study were analyzed at the Oak Ridge National Laboratory. During the period August 1963 to May 1971 the Pacific Northwest Research Foundation conducted similar studies on inmate volunteers at the

Oregon State Prison in Salem, Oregon. Both studies were supported by the Atomic Energy Commission (AEC), a predecessor agency of the DOE. See Department of Energy, HUMAN RADIATION EXPERIMENTS: The Department of Energy Roadmap to the Story and the Records (1995) (Roadmap Document) (description of experiments catalogued as OT-14 (Washington) and OT-21 (Oregon)).

(3)OR searched the databases using the names of Dr. Heller, Ms. Rowley, William Latz, C.A. Paulsen and T.W. Thorsland. The Roadmap Document can be found in the DOE Internet site at http://www.ohre.doe.gov. This site also contains the Human Radiation Experiment database which the public can use to search for and retrieve documents. DOE also maintains the Opennet database, http://www.doe.gov/html/osti/opennet/opennet1.html, which can be searched for documents regarding human radiation experiments.

(4)DOE Headquarters has also discovered potentially responsive documents and is in the process of responding to Mr. Bibeau. See Memorandum of telephone conversation between Verlette Moore, DOE Headquarters, and Richard Cronin, OHA Staff Attorney (September 17, 1996).

Case No. VFA-0215, 26 DOE ¶ 80,131

November 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant: Thomas P. Koenigs

Case Number: VFA-0215

Date of Filing: October 7, 1996

On October 7, 1996, Thomas P. Koenigs of Raleigh, North Carolina completed his filing of an Appeal from a determination issued on August 2, 1996 by the Savannah River Operations Office of the Department of Energy (DOE). That determination denied in part Mr. Koenigs's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

In February of 1994 and again in July of 1994, Mr. Koenigs wrote to the Savannah River Operations Office seeking information regarding DOE Account 89X6090. That account contains monies (including employee wages) owed by certain DOE contractors to non-Federal creditors that are unclaimed after one year or at the end of an entire contract. Funds in that account and accompanying information are transferred by the

contractor to the appropriate DOE field office and are then transferred to the DOE Office of Headquarters Accounting Operations. In his request letters, he

sought, for the period January 1986 to the present, the names, addresses, check numbers, dates, and check amounts for monies in, inter alia, Account 89X6090, for Savannah River Operations Office's Working Fund Account Check Reconciliation and/or General Disbursement Check Reconciliation accounts.

The Savannah River Operations Office responded to Mr. Koenigs on August 2, 1996. It identified lists of information relating to the accounts Mr. Koenigs enumerated as responsive to the request. The lists cover the nine year period March 1985 through June 1994. At the top of each of the lists are a title, an "as of" date of the list, and an account number. At the bottom there is summary information. In the middle, and

making up the bulk of the lists, are column headings and corresponding information that vary somewhat among the many lists identified. Most of the lists have columns and listings for "check number," "payee" (or "vendor" or "name"), "date issued," and "check amount." In addition, some of the lists have columns and listings for "payroll" or "payee," "employee," or "social security" numbers. Others have additional information such as "bank account number."

The Savannah River Operations Office released all of the information on the lists except for the names of individuals and corresponding payroll/payee, employee, or social security numbers. It determined that this information is exempt from mandatory disclosure under the FOIA by Exemption 6, which shields personal privacy. Mr. Koenigs also was informed that the addresses he sought were "not part of the subsidiary records maintained on Appropriation No. 89X6090." The Savannah River Operations Office's determination letter further stated on this point that under the relevant contract, contractor personnel records are owned by the contractor and thus are not subject to the FOIA. The Savannah River Operations Office informs us (although its determination letter does not so state) that it considers any records that would contain responsive addresses to be personnel records. Mr. Koenigs appeals the withholding of the material he sought. Mr. Koenigs also appeals the lack of responsive information for the period June 1994 to August 1996.

ANALYSIS

Exemption 6 permits an agency to make a discretionary withholding of information which must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered by Exemption 6, an agency must balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991).

In considering the first part of the Exemption 6 test, we find that the financial records identified here meet the threshold for Exemption 6 protection. Although these lists are not "personnel and medical files," the Supreme Court has placed a broad definition on the term "similar files" in Exemption 6. In Department of State v. Washington Post Co., the Court said that Exemption 6 is "'intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" 456 U.S. 595, 602 (quoting H.R. Rep. No. 89-1497, at 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428). Thus, Exemption 6 applies whenever "disclosure of information which applies to a particular individual is sought from Government records." 456 U.S. at 602. In this case, the withheld information would link sums owed to particular persons. This easily passes the Exemption 6 threshold. See Farnum v. Department of Hous. & Urban Dev., 710 F. Supp. 1129, 1134 (E.D. Mich. 1988) (Farnum) (list of names and addresses of persons owed money on mortgage insurance found subject to Exemption 6).

After determining that this is the type of information to which Exemption 6 applies, we advance to the second part of the Exemption 6 test. This second part has three prongs. For each type of information withheld, we must identify the relevant privacy interest(s) for the concerned individual, and the relevant public interest(s) in release, and then balance these two competing interests.

Two types of information are involved in this case: withheld names and identifying numbers. As we have stated on a number of occasions, there is no Exemption 6 privacy interest in a person's name as such. Rather, the privacy interest depends on what information that name is linked with and how that would reveal something personal or private about that individual. The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 80,768-69 (1996); William H. Payne, 25 DOE ¶ 80,190 at 80,726-27 (1996); The News Tribune, 25 DOE ¶ 80,181 at 80,699-700 (1996). See also Raymond T. Nimmer & Patricia Ann Krauthaus, Information as a Commodity: New Imperatives of Commercial Law, 55 Law & Contemp. Probs., Spring 1992, at 103, 124

(under FOIA law, a person has an interest in "information about himself if the information is personally sensitive, if it is private, and if it is to be used or disclosed in a form related specifically to the individual.").

The individuals' names in this case are linked with unclaimed money owed them by the DOE contractor. The courts have considered similar situations. Under the Reporters Committee standard, there is little doubt that individuals have "a significant privacy interest" in avoiding disclosure where "the names and addresses would be coupled with personal financial information." Hopkins v. Department of Hous. & Urban Dev., 929 F.2d 81, 87 (2d Cir. 1991); National Assoc. of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989). In applying this standard, the courts have found that lists of people connected to money due them raises important privacy interests. This is true because "[w]hen it becomes a matter of public knowledge that someone is owed a substantial amount of money, that individual may become a target for those who would like to secure a share of that sum by means scrupulous or otherwise." Aronson v. Department of Hous. & Urban Dev.. 822 F.2d 182, 186 (1st Cir. 1987) (names and addresses of persons owed reimbursement on mortgage insurance properly withheld while HUD attempting to locate those persons). See also Schoettle v. Kemp, 733 F. Supp. 1395, 1397-98 (D. Haw. 1990) (same) (Schoettle); Farnum, 710 F. Supp. at 1134 (same).

There is a similar, substantial privacy interest in the social security numbers withheld by the Savannah River Operations Office. In our society, social security numbers are the gateway to a wide spectrum of personal information held by both governments and private organizations. Congress has expressed its special concern about the privacy implications of this use of social security numbers. See S. Rep. No. 93-1183, at 181-84 (1974), reprinted in 1974 U.S.C.A.A.N. 6916, 6943-6946 (recognizing widespread use of social security numbers as identifiers in both public and private record system and discussing the serious privacy concerns arising from this use). For these reasons, both the courts and this Office have found a substantial privacy interest in an individual's social security number. See, e.g., International Bhd. of Elec. Workers Local Union No. 5 v. Department of Hous. & Urban Dev., 852 F.2d 87, 89 (3d Cir. 1988); Aronson v. Internal Revenue Serv., 767 F. Supp. 378, 388 (D. Mass. 1991), aff'd on other grounds, 973 F.2d 962 (1st Cir. 1992); International Bhd. of Elec. Workers Local Union 1579, 23 DOE ¶ 80,108 at 80,514 (1993); Southwest Contract Compliance Found., 22 DOE ¶ 80,126 at 80,556 (1992).

In addition to the social security numbers, the Savannah River Operations Office also withheld payee and employee numbers. It asserts that with these numbers, a person with access to the appropriate corporate computer system or a computer hacker could find the names of individuals and from there gain access to private information. For the employee number, we agree that there is a privacy interest involved, although less than with a social security number. Cf. Small v. Internal Revenue Serv., 820 F. Supp. 163, 168 (D.N.J. 1992) (Internal Revenue Service agent numbers properly withheld under lower privacy standard of Exemption 7(C)). A person armed with numbers keyed to particular individuals could gain access to the many private facts that are contained in any of the records an employer maintains on its employees. In addition, this concern extends beyond the central corporate computer records identified by the Savannah River Operations Office in this case. Employee numbers may be used on all sorts of private information in other media maintained in work locations (for example, on vacation and sick leave slips).

Even further down the privacy continuum lies the payee/payroll number. It is true that someone misusing computer access or illegally breaking into a computer system could eventually use this number to gain access to a name and, through the name, to private information. However, this information is fairly far removed from actual personal information. It appears one would only use the payee/payroll number to get to some other identifier (such as a name) which might then be used to view or acquire personal information. Thus, although there may be some privacy interest associated with such a number, it is so attenuated from private information about an individual, that we believe it to be small relative to a person's social security or employee number.

Ordinarily at this point we would attempt to determine whether this information would reveal something about the activities or operations of the government as required by the Supreme Court's Reporters

Committee public interest standard and then balance the privacy and public interests. 489 U.S. at 773. Unfortunately, despite our numerous inquiries and the diligent efforts of the Savannah River Operations Office FOIA contact person, the precise scope and nature of these lists is still not clear. Important matters such as how they were created, why they are so important that they are contractually required to be turned over to the DOE, how the DOE uses them, or for how long the agency uses them have not been satisfactorily explained. This information is necessary to identify and balance the public interest in this information.

For example, in the cases we cited above involving names and money owed on federal mortgage insurance (the closest factual analogy we found), the courts determined that the privacy interest outweighed the public interest only for the period the agency or its surrogates were actively seeking the persons owed the money. Aronson, 822 F.2d at 187-88; Schoettle, 733 F. Supp. at 1398; Farnum, 710 F. Supp. at 1135-36. See also Aronson v. Internal Revenue Serv., 973 F.2d 962, 963 (1st Cir. 1992) (although IRS has specific statute which allows withholding of taxpayer information, IRS releases names, cities, states, and zip codes of persons due unclaimed refunds as part of effort to find taxpayers). Without better information about these matters, it would be premature for this Office to attempt the balancing test. Thus, the proper course is to return this aspect of this case to the Savannah River Operations Office for further consideration.

Similarly, we cannot reach a conclusion on Savannah River Operations Office's determination that the requested addresses are (1) "not part of the subsidiary records maintained on Appropriation 89X6090" and (2) personnel records owned and maintained by the contractor. The problem with the first statement is that the very material Savannah River Operations Office sent to us explaining Account 89X6090 states that the last known address for each creditor is part of the information that is supposed to be transmitted to the DOE. It may be that the agency does not have any addresses associated with the creditors on the lists. However, Savannah River Operations Office should explain this apparent anomaly with greater precision in its determination letter. In addition, based on the record before us, we cannot agree with Savannah River Operations Office's assertion that addresses are contractor personnel records. The Savannah River Operations Office apparently concluded that only personnel records would contain responsive addresses because it believed that only employee addresses corresponded to the names on the lists. However, as noted above, the relevant lists contain the names of non-federal agency creditors owed unclaimed funds, not just employees. Because the Savannah River Operations Office limited its search based on this misapprehension, further inquiry is necessary. We believe the most prudent course is to remand this matter to that Office to undertake a further search for potentially responsive records.

Finally, on Mr. Koenigs's last claim, the matter of the lack of responsive records for June 1994 to present, it appears that the Savannah River Operations Office searched only to the approximate date it received Mr. Koenigs's request. Under ordinary circumstances this would be an acceptable search methodology. Typically an agency which replies within the statutory time-limit is legally required only to search up to the date it receives the request. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995). This rule exists to further administrative efficiency and to bring closure to the FOIA search process. Church of Scientology of Texas v. Internal Revenue Serv., 816 F. Supp. 1138, 1148 (W.D. Tex. 1993). As a general rule, we agree that this is a proper manner of processing FOIA request. However, as the D.C. Circuit has pointed out, "neither the terms of the statute nor the case law interpreting them supports a claim that the use of a time-of-request cut-off is always proper." McGehee v. Central Intelligence Agency, 697 F.2d 1095, 1103 (D.C. Cir.) (emphasis in original), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983). Rather, the period for which any agency should reasonably search can vary based on the facts involved. Id. In this connection, we note President Clinton's directive that "[f]ederal departments and agencies should handle requests for information in a customer-friendly manner. The use of the [FOIA] by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation." Presidential Memorandum For Heads of Departments and Agencies on the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993). When a requester seeks current data and the agency's response is substantially delayed, based on the case law and prevailing policy, we believe a responding office ought to search for records reasonably close to the date of the search and/or the response (depending on when the delay

occurred). This view is most in harmony with the basic purposes of the FOIA and furthers the President's customer-friendly FOIA initiative. Accordingly, we shall direct the Savannah River Operations Office also to search for responsive records from June 1994 to the date it starts work on this matter on remand.

In summary, we are remanding this matter to the Savannah River Operations Office to (i) make further inquiries into the nature and use of the relevant lists, (ii) identify any pertinent public interests in release, and (iii) balance the public interest with the privacy interest identified above. Further, the Savannah River Operations Office should (iv) re-examine its response to Mr. Koenigs concerning his request for addresses. Finally, the Savannah River Operations Office should (v) search for responsive records that meet the time frame guidance we outlined above.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of Thomas P. Koenigs of Raleigh, North Carolina, OHA Case No. VFA-0215 is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is remanded to the Savannah Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 6, 1996

Case No. VFA-0217, 27 DOE ¶ 80,107

February 2, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Hanford Education Action League

Date of Filing: September 24, 1996

Case Number: VFA-0217

The Hanford Education Action League (HEAL) filed an Appeal from a determination that the Department of Energy's Richland Operations Office (Richland) issued to it on August 6, 1996. In that determination, Richland denied in part a request for information that HEAL filed on February 28, 1992, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Appeal, if granted, would require the DOE to release the information that was withheld in the August 6, 1996 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request, HEAL sought a copy of Document Number HW-69237, entitled "Operation of the Reactor Complex at Production Levels Less Than Full Predicted 1965 Capacity." In its August 6, 1996 response, Richland provided HEAL with a copy of the document from which it had deleted information that had been classified Secret Restricted Data and which it withheld from HEAL under Exemption 3 of the FOIA. Richland stated that the withheld information

concerned nuclear materials production, the disclosure of which could jeopardize the common defense and the security of the nation.

In its Appeal, HEAL contends that the withheld information, which concerns two plutonium valuation scenarios, is more than 35 years old and is in the public interest, and therefore "cannot be justifiably considered as jeopardizing the common defense or the security of the nation." HEAL argues that the information should be released or, if the DOE maintains that it must remain classified, better justification for its withholding must be provided.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a

manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). The controlling statutory provision in this case is the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., which prohibits the disclosure of information concerning atomic energy defense programs that is classified as Restricted Data under the Act. We have previously determined that the Atomic Energy Act is a statute to which Exemption 3 is applicable. See, e.g., National Security Archive, 25 DOE ¶ 80,103 at 80,504 (1995). The information that the DOE deleted from the requested document under Exemption 3 was withheld on the grounds that it concerned nuclear materials production and had been classified as Restricted Data under the Atomic Energy Act. If correctly classified, the information would therefore be exempt from mandatory disclosure.

Upon referral of the appeal from the Office of Hearings and Appeals, the DOE Office of Declassification reviewed the withheld information. That Office has now concluded that the document no longer contains any information that needs to remain classified by the DOE. The withheld information was based on a hypothetical scenario for operating the reactors at Richland. Specifically, the figures withheld were the estimated values for the plutonium produced by the reactors if two of the reactors were temporarily shut down. The withheld figures were derived by multiplying the estimated amount of plutonium that would be produced under this scenario by the per-gram value of the plutonium, estimated for purposes of this calculation at $30 and $50 per gram. Therefore, the two values for plutonium differed by a factor of nearly two. Moreover, information already released permitted the calculation of these values by simple arithmetic. Because the disclosure of the two withheld values would not impact upon national security, there is no basis for classifying that information. Accordingly, HEAL’s appeal will be granted and the withheld information will be provided to the appellant under separate cover.

It Is Therefore Ordered That:

(1) The Appeal filed by the Hanford Education Action League on September 24, 1996, Case No. VFA-0217, is hereby granted.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 2, 1998

Case No. VFA-0220, 26 DOE ¶ 80,126

October 21, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Radian International

Date of Filing: September 23, 1996

Case Number: VFA-0220

On September 23, 1996, Radian International (Radian) filed an Appeal from a determination issued to it by the Manager of the Oak Ridge Operations Office (the Manager). The Manager issued that determination in response to a request for information submitted by Radian under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Manager to release the requested information.

Background

Radian submitted an unsuccessful bid in response to a Request for Proposals issued by Lockheed Martin Energy Systems (LMES). LMES instituted the procurement to obtain services needed in order to satisfy its obligations as a DOE contractor. In its FOIA request, Radian sought access to documents concerning LMES' procurement procedure. Specifically, Radian requested information pertaining to the ratings of its proposal and of other proposals submitted, the manner in which the proposals were evaluated and the names and job titles of the evaluators, and the costs incurred by LMES as a result of the procurement proceeding.

In his determination, the Manager stated that all files under the control of the Oak Ridge Operations Office were searched for responsive documents, but that no such documents were found. The Manager further stated that the search did not extend to LMES' files, and that under the contract between the DOE and LMES, all procurement records of the type requested by Radian are the property of LMES. The Manager concluded that because the requested

records are not in the possession of the DOE, they are not "agency records" and are therefore not subject to the FOIA.

In its Appeal, Radian concedes that, under the terms of the contract, all procurement records are the property of LMES. Nevertheless, Radian requests that we review the Manager's determination that the requested documents are not subject to the FOIA. In addition, Radian has included in its Appeal a request for information that is not within the scope of its original request. Specifically, Radian seeks access to a copy of the minutes and notes of any meeting in which recommendations of the LMES evaluation team concerning the procurement in question were presented to DOE personnel.

Analysis

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents that did not originate with the federal government are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination of (i) whether the entity that is in possession of the documents is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

LMES is a privately owned and operated company. While the DOE exercises general control over the contract work performed by LMES, it does not supervise the company's day-to-day operations. We therefore conclude that LMES is not an "agency" subject to the FOIA.

Although LMES is not an agency for the purposes of the FOIA, the documents sought by Radian could become agency records if the DOE obtained them and they were within the DOE's control at the time that Radian made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham,

445 U.S. at 182. In this case, the Manager has stated that the DOE was not in possession of the records at the time of the request, and we have since confirmed that the records have never been in the DOE's possession or control. See Memorandum of October 8, 1996 telephone conversation between Amy Rothrock, Oak Ridge Operations Office, and Robert Palmer, OHA Staff Attorney. Based on these facts, the documents requested by Radian clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86. Therefore, the records requested by Radian are not subject to the FOIA. (1)

Finally, we note that Radian's Appeal includes a request for information that was not sought in the firm's original FOIA request. We have previously held that a FOIA appeal is not an appropriate venue for the consideration of new requests for information. See, e.g., Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529-30 (1992); Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992). Consequently, on October 3, 1996, we referred Radian's request for documents relating to any meeting between LMES' evaluation team and DOE personnel to the Oak Ridge Operations Office for processing under the FOIA.

For the reasons set forth above, we find that the Manager correctly determined that the documents requested by Radian are not subject to release under the FOIA. We must therefore deny Radian's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Radian International on September 23, 1996, Case Number VFA-0220, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 21, 1996

(1)/ Because the records are the property of LMES pursuant to its contract with the DOE, the provisions of 10 C.F.R. § 1004.3(e) do not apply. Under that regulation, documents that are produced or acquired by a contractor during the performance of its contract with the DOE are subject to disclosure if the contract between the DOE and the contractor provides that the documents are the property of the DOE.

Case No. VFA-0221, 26 DOE ¶ 80,127

October 25, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Perkins Coie

Date of Filing: September 24, 1996

Case Number: VFA-0221

On September 24, 1996, the law firm of Perkins Coie filed an Appeal from a determination issued to it on August 20, 1996 by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). That determination concerned a request for information submitted by Perkins Coie pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, BPA would be required to release the information requested by Perkins Coie.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 28, 1996, Perkins Coie filed a FOIA request seeking a number of contract and engineering documents in the possession of BPA. On August 20, 1996, BPA issued a determination in which it identified a number of responsive documents. However, it concluded that eight documents were exempt from mandatory disclosure pursuant to Exemption 5. The BPA specifically asserted that these documents were exempt pursuant to the attorney-client privilege and the deliberative process privilege of Exemption 5.

On September 24, 1996, Perkins Coie filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Perkins

Coie challenges BPA's August 20, 1996 determination with respect to documents numbered 3, 4 and 5 on the appendix attached to BPA's determination. BPA withheld these documents under the deliberative process privilege of Exemption 5. Perkins Coie asserts that these three documents "reflect merely the preparations for a deposition of BPA employees." See Appeal Letter. Further, Perkins Coie contends that the documents "do not relate to any upcoming decision on BPA's part and thus it is entirely unclear how their decision could chill deliberations or undermine the integrity of the decision-making process." Id. For these reasons, Perkins Coie requests that the OHA direct BPA to release the three documents in dispute.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding the three documents in dispute from Perkins Coie, BPA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

After reviewing the three documents in dispute, we have concluded that the determination made by BPA in applying Exemption 5 was correct and consistent with the principles outlined above. The three documents at issue consist of possible questions and answers relating to a dispute that Puget Sound Power and Light Company has with the Montana Power Company. BPA has informed our office that these documents were not developed in preparation for a deposition, as Perkins Coie contends. These questions and answers were written by DOE employees and were used only for internal DOE purposes. Therefore, these documents are "intra-agency memoranda." In addition, the questions and answers are clearly predecisional and deliberative. They were created before the DOE adopted a final position or document and consist of personal opinions which reflect the consultative process. Furthermore, we note that the release of these potential questions and answers could inhibit employees from expressing their candid views if they believed that those views could become public knowledge. As such, the potential questions and answers contained in the withheld documents are precisely the sort of records of the deliberative and "group thinking" processes which Exemption 5 is designed to protect. Sears, 421 U.S. at 153 (quoting Davis, The Information Act: A Preliminary pnppnppnppnpAnalysis, 34 U. Chi. L. Rev. 761, 797 (1967)). Accordingly, we hold that the withheld documents meet all the requirements for withholding material under the Exemption 5 deliberative process privilege.

However, both the FOIA and the implementing DOE regulations require that non-exempt material which may be reasonably segregated from withheld material be released to a requester. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(c). See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1972); Boulder Scientific Company, 19 DOE ¶ 80,126 at 80,577 n.3 (1989). Exemption 5 only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material or the non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. See Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971); Lead Industries Association, Inc. v. Occupational Safety and Health Administration, 610 F.2d 70, 85 (2d Cir. 1979). There is no indication in BPA's determination letter that it considered this step before withholding the withheld documents in full. Furthermore, after reviewing the documents, it appears that there may be some factual material which is non-exempt and reasonably segregable. Thus, it is appropriate to remand this case to BPA to review the three documents at issue and to release any reasonably

segregable factual material or to issue a new determination explaining why this material should not be released.

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. No public interest would be served by release of the potential questions and answers which consist solely of the preliminary views and recommendations of DOE employees. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. Fulbright & Jaworski, 15 DOE ¶ 80,122 at 80,560 (1987). Consequently, we find that the disclosure of the non-factual portions of the three documents at issue would cause reasonably forseeable harm to the interests the agency is protecting under Exemption 5 and therefore is not in the public interest.

IV. Conclusion

For the reasons stated above, the OHA finds that BPA properly applied the threshold requirements pnppnpof Exemption 5 to the withheld documents, and that there is no public interest in their release. However, we are remanding this matter to BPA to issue a new determination, either releasing reasonably segregable factual material or explaining the reasons for withholding any factual material contained in the documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Perkins Coie on September 24, 1996, Case Number VFA-0221, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 25, 1996

Case No. VFA-0222, 26 DOE ¶ 80,134

November 18, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Energy Market & Policy Analysis, Inc.

Date of Filing: October 18, 1996

Case Number: VFA-0222

On October 18, 1996, Energy Market & Policy Analysis, Inc. filed an Appeal from a determination issued to it on October 9, 1996, by the Principal Deputy Assistant Secretary for Energy Efficiency & Renewable Energy of the Department of Energy (DOE). In that determination, the Principal Deputy Assistant Secretary granted a request for information filed by Energy Market & Policy Analysis, Inc. on June 29, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, Energy Market & Policy Analysis, Inc. sought copies of

documents containing information used in calculating the estimates of energy savings, cost savings, pollution prevention, and job creation claimed by the Department in "Budget-in-Brief Fiscal Year 1997," published by the DOE's Office of Energy Efficiency & Renewable Energy, and in pages 249-251 of Volume 4 of "FY 1997 Congressional Budget Request," DOE/CR-0037, March 1996. On October 9, 1996 the Principal Deputy Assistant Secretary released four documents: (1) an explanatory note that summarized Energy Efficiency's method of program benefits estimation; (2) the final report of the peer review process for the FY 1997 budget estimates; (3) documentation of the IDEAS model; and (4) a description of the AMIGA model.

The last two items are models used to derive integrated estimates underlying the budget projection.

In its Appeal, Energy Market & Policy Analysis, Inc. argues that the information it received on October 9, 1996 is not all of the information responsive to its FOIA request. Specifically, Energy Market & Policy Analysis, Inc. states that additional information must exist to backup the calculations outlined in the budget documents. It believes the documents Energy Efficiency provided to it could not have been the only documents used to supply the inputs to the models.

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100- 01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted Energy Efficiency to ascertain the validity of Energy Market & Policy Analysis, Inc.'s contention that other responsive documents must exist.(1) An official at Energy Efficiency informed us that additional reports directly responsive to the Energy Market and Policy Analysis, Inc. request do not exist. However, the same official informed us that additional responsive information probably exists in widely scattered memos, files and communications in the hands of numerous individual program managers and their contractors. The Energy Efficiency official estimated the cost of searching for additional responsive material to be in the range of $60,000 to $70,000. Moreover, the Energy Efficiency official stated that it would require at least two months to search for all of the responsive material.

Since the Energy Efficiency official has confirmed it is likely that additional responsive documents exist, we must remand the case to the Principal Deputy Assistant Secretary for a search of the individual program managers' files, memos and communications, subject to a fee agreement between the DOE FOIA Office and Energy Market & Policy Analysis, Inc. We note that Energy Efficiency has indicated to us its willingness to confer with Energy Market & Policy Analysis, Inc. to reformulate the scope of its request to reduce the estimated costs of the DOE's response on remand. C.f. 10 C.F.R. § 1004.4(c)(2) (DOE should offer assistance in reformulating a non-conforming request).

It Is Therefore Ordered That:

(1) The Appeal filed by Energy Market & Policy Analysis, Inc. on October 18, 1996, Case Number VFA-0222, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Principal Deputy Assistant Secretary for Energy Efficiency & Renewable Energy of the Department of Energy for a search of individual program managers' files, memos and communications for any documents responsive to the Freedom of Information Act request filed by Energy Market & Policy Analysis, Inc. on October 18, 1996, or as subsequently modified, subject to a fee agreement between the Department of Energy Freedom of Information Act Office and Energy Market & Policy Analysis, Inc.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 18, 1996

(1) */ See memoranda of telephone conversations between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and various Energy Efficiency personnel (Case No. VFA- 0222).

Case No. VFA-0223, 26 DOE ¶ 80,129

October 28, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Harold Bibeau

Date of Filing: September 27, 1996

Case Number: VFA-0223

On September 27, 1996, Harold Bibeau (Bibeau) filed an Appeal from a determination issued to him in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on September 12, 1996, by DOE's Office of Human Radiation Experiments (OHRE). This Appeal, if granted, would require that OHRE conduct an additional search for responsive documents.

I. Background

On February 19, 1996 and May 10, 1996, Bibeau filed requests with DOE's FOIA/Privacy Acts Branch (DOE/HQ) for all documents related to the testicular irradiation experiments conducted by Dr. Carl Heller (Heller) and Dr. C. A. Paulsen in the Oregon and Washington State Penitentiaries. See Letters from Bibeau to DOE/HQ (February 19, 1996 and May 10, 1996). In the latter request, Bibeau advised DOE that he had not received any materials from any of DOE's Washington, D.C. or Germantown, Maryland headquarters offices, and again requested all documents related to the Oregon and Washington State prison experiments.(1) The letter also included the names of people who had contact with Heller and/or sat on Atomic Energy Commission (AEC) bodies that, according to Bibeau, reviewed the prison experiments. See Letter from Bibeau to DOE/HQ (May 10, 1996) (May 10th Request).

OHRE, located in Washington, D.C., responded to both requests. On September 12, 1996, OHRE released some responsive material to Bibeau, including a copy of a memo mentioned in a scientific

journal and some documents related to the requester's participation in the Oregon State Penitentiary experiments. See Letter from Director, OHRE, to Bibeau (September 12, 1996) (Determination Letter). The OHRE search had uncovered records regarding some individuals named on the list in the May 10th Request; these records were being reviewed to determine if any responsive material existed. On September 27, 1996, Bibeau filed this Appeal, alleging that records of AEC Commissioners' meetings and records of still more individuals alleged to have had some relationship with Heller or his work exist in headquarters files. See Letter from Bibeau to Director, Office of Hearings and Appeals (OHA) (September 27, 1996) (Appeal Letter). In his Appeal, he requests that OHA order DOE to conduct another search of its files.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents. See W. R. Thomason, Inc., 10 DOE ¶ 80,150 (1983); Crude Oil Purchasing,

Inc., 6 DOE ¶ 80,156 (1980). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In reviewing this Appeal, we reviewed the Determination Letter and contacted OHRE to determine the scope of its search. We found many answers to our questions in the Determination Letter. The Letter informed Bibeau that all "historically relevant records" of DOE were screened in 1994, at the request of the President, for documents related to the human radiation experiments. See Determination Letter at 2. These documents were provided to the Coordination and Information Center (CIC) in Las Vegas, which serves as a document dissemination service and public reading room for human radiation experiment material. Bibeau has received documents from CIC using the results of a database search provided by DOE/HQ. OHRE also secured additional documents for the requester with the help of Heller's widow. Id. Finally, OHRE searched the record series descriptions of the human radiation experiment database for names mentioned in the May 10th Request. They found documents with references to two named individuals, and are currently reviewing this material to determine if it can be released to the requester. See Memorandum from Director, OHRE, to Valerie Vance Adeyeye, OHA Staff Attorney (October 16, 1996). OHRE also released some relevant information it discovered that had been released to the requester in 1994 by DOE's Richland Operations Office in Richland, Washington (DOE/RL).

In his Appeal, the requester alleges that because many of the people who had contact with Dr. Heller worked in the AEC or Energy Research and Development Administration (ERDA) offices in Washington, D.C., some records must exist there. See Appeal Letter at 2. He specifically mentions minutes of the meetings of the Advisory Committee of the Division of Biology and Medicine (DBM), which reviewed Heller's work four times. Id. He alleges that DBM and the Office of the General Counsel should possess relevant documents, but provides no documentation in support of his claim.

In his Appeal, Bibeau said that he requested all documents related to the prisoner experiments, not only those in which he was a participant. OHRE was aware of this aspect of Bibeau's request and searched its files accordingly. In December 1994, DOE/RL sent Bibeau copies of all of its records related to the prisoner experiments--approximately 4400 pages. This material included experiments in which Bibeau was not a participant. See Memorandum of Telephone Conversation Between Yvonne Sherman, DOE/RL, and Valerie Vance Adeyeye, OHA Staff Attorney (October 21, 1996). These records were then released to the DOE/RL public reading room. In September 1996, DOE/RL made another release--this time of a small quantity of a variety of records to the public reading room. The records released in 1996 are currently under review for information relating to the prisoner experiments, and any responsive records will be sent to Bibeau as before. See Memorandum of Telephone Conversation Between Yvonne Sherman, DOE/RL, and Valerie Vance Adeyeye, OHA Staff Attorney (October 23, 1996). In addition, OHRE has stated, and we find no reason to question its veracity, that all records of Oregon and Washington State penitentiary experiments were maintained at DOE/RL. See Memorandum of Telephone Conversation Between Director, OHRE, and Valerie Vance Adeyeye, OHA Staff Attorney (October 7, 1996). Thus, we find that Bibeau will soon receive all responsive Oregon and Washington State prisoner experiment records from DOE/RL, and it is highly unlikely that additional responsive material would be found at DOE headquarters.(2)

We note that Mr. Bibeau made two new requests in his appeal. First, he requested minutes of AEC Commissioners' meetings. Although this is a new request, OHRE has agreed to search for these records, in keeping with DOE's policy of openness. OHRE also agreed to search for any references to two individuals who did follow-up studies on Heller's work (Liverman and Marks), even though they were not mentioned in the original FOIA requests and OHRE could not have known otherwise that Bibeau was interested in

their studies.

III. Conclusion

We find that OHRE has conducted a search reasonably calculated to uncover material responsive to Mr. Bibeau's request. See Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). In the spirit of openness, OHRE has also agreed to search again using new information provided by Bibeau in his Appeal. Thus, we will remand this request to OHRE for a new search for documents responsive to Bibeau's new request. Accordingly, the Appeal filed by Bibeau is granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Harold Bibeau on September 27, 1996, Case No. VFA-0223, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Human Radiation Experiments for further processing in accordance with the instructions set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 28, 1996

(1)Bibeau also requested a fee waiver, but this request is not ripe for appeal because he has not yet been charged for any searches.

(2)DOE's Office of Worker Protection and Hazards Management announced on October 24, 1996 the availability to the public of statistical information on occupational radiation exposure. The office has published an Annual Report, available in hard copy or on a new Internet web site, with comprehensive exposure data. We have provided this information to the requester.

Case No. VFA-0224, 26 DOE ¶ 80,128

October 28, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Action and Associates, Inc.

Date of Filing: September 30, 1996

Case Number: VFA-0224

On September 27, 1996, Action and Associates, Inc. (Appellant) filed an Appeal from a determination issued to it under the Freedom of Information Act (FOIA) on August 30, 1996, by the Savannah River Operations Office (DOE/SR) of the Department of Energy (DOE). (1) In its Appeal, the Appellant asserts that DOE/SR failed to provide it with all of the responsive documents in its possession regarding its Request for Information (FOIA Request) dated March 21, 1996.

I. Background

In its FOIA Request, the Appellant requested from DOE/SR copies of "all proposals, documents, notes, and minutes of meetings (excluding Aiken and Action, Inc.)" pertaining to Subcontract CC001050K, Indefinite Delivery/Indefinite Quantity Subcontract for Scaffolding Services at the Savannah River Site (Subcontract). (2) DOE/SR, in its Determination Letter dated August 30, 1996, provided the Appellant with redacted copies of 30 documents and billed the Appellant $96.26 for expenses related to the processing of its FOIA Request.

In its Appeal, the Appellant argues that DOE/SR failed to provide it with all responsive documents related to its FOIA Request. Specifically, the Appellant asserts that as part of the bidding process for the Subcontract it and all other bidders attended pre-bid and pre-award meetings. However, the Appellant claims it was not provided any documents or minutes pertaining to the meetings that contracting officials had with one of the bidders, Allied Fabricators and Constructors, Inc. (Allied). The Appellant also challenges the amount it was charged for the documents it obtained pursuant to its FOIA Request.

II. Analysis

A. Adequacy of the Search

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive

documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To ascertain the extent of the search conducted for documents responsive to the Appellant's request, we contacted the FOIA Officer at DOE/SR. See Memoranda of telephone conversations between Pauline Conner, FOIA Officer, DOE/SR, and Richard Cronin, OHA Staff Attorney (October 17, 1996). She informed us that the search was performed by officials at Westinghouse Savannah River Company (Westinghouse), the Management and Operating contractor at the DOE's Savannah River facility. A procurement official at Westinghouse informed us that the only file which Westinghouse officials believed would contain responsive documents was the Purchase Order file for Subcontract CC001050K and that they conducted a search of that file. All responsive documents were provided in full or in redacted form to the Appellant. See Memorandum of telephone conversation between Mike Cox, Procurement Department, Westinghouse Savannah River Company, and Richard Cronin, OHA Staff Attorney (October 21, 1996). In light of the facts before us, we believe that the search conducted was reasonable. (3)

B. Assessment of Fees

Pursuant to the FOIA, the DOE has issued regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. § 552(a)(4)(A)(i). These regulations provide for the assessing of fees to recover the "full allowable direct costs incurred" in responding to requests for information. 10 C.F.R. § 1004.9. In so doing, the DOE is to "use the most efficient and least costly methods to comply with requests for documents made under the FOIA." Id.

For purposes of determining the appropriate fees to be charged, the DOE regulations set forth four categories of FOIA requesters: those who seek documents for a commercial use, educational and non-commercial scientific institution requesters, requesters who are representatives of the news media, and all other requesters. 10 C.F.R. § 1004.9(b)(1)-(4). The Appellant is seeking documents for a commercial use and therefore may properly be assessed fees for "document search, duplication, and review...." 5 U.S.C. § 552(a)(4)(A)(ii)(I).

DOE/SR has assessed the Appellant a total of $96.25 in search, review and duplication fees for its response to its commercial FOIA request. This charge is based on 4 hours of searching by non-clerical personnel, ½ hour spent reviewing the documents, and copying costs for the documents provided to the Appellant. In light of the search that was conducted, and after reviewing copies of the documents which were provided to the Appellant, we find that DOE/SR's assessment of fees was appropriate and reasonable.

In sum, we find that DOE-SR conducted a reasonable search for responsive documents and that the fees assessed the Appellant were appropriate. Consequently, we find that the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Action and Associates, Inc. on September 30, 1996, is denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 28, 1996

(1)The Appellant's FOIA Appeal was made complete by our receipt of the determination letter at issue on September 30, 1996.

(2)Aiken and Action, Inc. was one of the firms bidding for the Subcontract.

(3)Officials at Westinghouse did find minutes from a meeting regarding the Subcontract at which Aiken and Action, Inc. attended. Westinghouse determined these minutes to be non-responsive since the Appellant's FOIA Request expressly excluded minutes of meetings in which Aiken and Action, Inc. participated. See Memorandum of telephone conversation between Mike Cox, Westinghouse Savannah River Company and Richard Cronin, OHA Staff Attorney (October 21, 1996). Westinghouse, however, has agreed to provide to the Appellant a copy of those minutes. Id. The procurement official at Westinghouse stated that he had no knowledge of any meeting which was held with Allied alone since pre-bid meetings are usually held with all potential bidders present and pre-award meetings are held only with the winning bidder, in this case, Aiken and Action, Inc. Id.

Case No. VFA-0226, 26 DOE ¶ 80,130

November 1, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Malcolm Parvey

Date of Filing: October 4, 1996

Case Number: VFA-0226

On October 4, 1996, Malcolm Parvey filed a Motion for Reconsideration of a Decision and Order issued to him by the Office of Hearings and Appeals (OHA) on September 17, 1996. Malcolm Parvey, 26 DOE § 80,119 (1996). In that Decision, we denied an Appeal of two August 7, 1996 determinations issued to Mr. Parvey by the Western Area Power Administration (WAPA) of the Department of Energy (DOE). In those determinations, WAPA released several documents to Mr. Parvey and found that a total of four documents did not exist that Mr. Parvey requested pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. WAPA also assessed Mr. Parvey fees totaling $96.25. If the present Motion were granted, the fees would not be assessed or would be reduced, and a new search for responsive documents would be conducted.

The documents which Mr. Parvey seeks are copies of the most recent abstracts for two contract solicitations conducted by WAPA. In his FOIA request, Mr. Parvey asked the Western Area Power Administration to provide him with the relevant "pricing history." Request Postcard from Malcolm Parvey to Cheryl Arndt, WAPA. Specifically, he requested copies of the most recent abstract and bidders' list. He also agreed to pay any fees assessed. In response, on August 7, 1996, WAPA released copies of documents used as the bidders' list. These documents were basically the postcards and letters from various companies requesting the bid package. WAPA also indicated there was no bid abstract. In his Appeal, Mr. Parvey alleged that (1) WAPA's search for documents was inadequate and (2) the number of hours and level of employees used to review the documents was excessive. After looking into the matter, we found that WAPA's search was adequate because no bid abstract existed and WAPA was not required to generate one. In addition, we determined that the assessment of fees was appropriate and reasonable. Mr. Parvey's Appeal was therefore denied. See Malcolm Parvey, 26 DOE § 80,119 (1996).

We have thoroughly reviewed this Motion for Reconsideration, and have found no new material or circumstances that would lead us to alter our prior Decision.(1) In his Motion, Mr. Parvey reiterates the arguments made in his original Appeal. The first issue he raised in his Motion concerns his contention that a record must exist that shows the successful bidders on each previous contract. In response to Mr Parvey's Appeal, the OHA contacted WAPA to determine if the record he sought was maintained, and if not, why it was not preserved. We ascertained that these were both simplified solicitations, because they were for a small dollar amount, and the material Mr. Parvey continues to seek in his Motion is not generated for a simplified solicitation. The second issue raised in Mr. Parvey's Motion regarded the assessment of fees. In our Decision, we found that the fees are in compliance with the DOE regulations and the legislative history of the Freedom of Information Act. Mr. Parvey has not presented any new evidence or arguments on this issue. We will, therefore, deny this Motion for Reconsideration.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed on October 4, 1996, by Malcolm Parvey, Case No. VFA-0226, is hereby denied.

(2) This is a final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 1, 1996

(1)We will modify a prior Decision and Order in an FOIA proceeding where an applicant persuasively demonstrates that (1) the prior determination was incorrect because we did not consider all material facts or we misapplied the law or (2) the prior determination, though correct when issued, is no longer correct because of a change in the applicable law or the circumstances of the case. See 10 C.F.R. § 1003.55(b).

Case No. VFA-0227, 26 DOE ¶ 80,132

November 7, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: F.A.C.T.S.

Date of Filing: October 11, 1996

Case Number: VFA-0227

On October 11, 1996, F.A.C.T.S. (For A Clean Tonawanda Site), a public interest group, filed an Appeal from a determination issued on September 9, 1996 by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE). That determination denied in part F.A.C.T.S.' Freedom of Information Act (FOIA) request. 5 U.S.C. § 552; 10 C.F.R. Part 1004 (DOE FOIA Regulations). F.A.C.T.S. appeals the adequacy of the search and requests additional documents.

F.A.C.T.S. seeks information on the Tonawanda, New York Formerly Utilized Site Remedial Action Program site. Oak Ridge released a number of documents. However, it found no material for parts 2 and 6 of the request. F.A.C.T.S. asserts there are documents responsive to parts 2 and 6, additional documents for part 3, and pages missing from items 15 and 16 of the released material.

We contacted Oak Ridge several times on this matter. In the interest of administrative efficiency, Oak Ridge agreed to perform a new search for documents responsive to this request in conjunction with other FOIA searches on behalf of F.A.C.T.S. Thus, we will remand this matter to Oak Ridge for a new search and determination on this F.A.C.T.S. FOIA request. However, we will not rule on F.A.C.T.S.' request for new documents because an appellant may not expand the scope of a request on appeal. See, e.g., Energy Research Found., 22 DOE ¶ 80,114 at 80,529-30 (1992).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of F.A.C.T.S., OHA Case No. VFA-0227, is hereby granted in part, remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions set forth above, and is denied in all other respects.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Brezany

Director

Office of Hearings and Appeals

Date: November 7, 1996

Case No. VFA-0228, 26 DOE ¶ 80,136

November 26, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ashok K. Kaushal

Date of Filing: October 15, 1996

Case Number: VFA-0228

On October 15, 1996, Ashok K. Kaushal filed an Appeal from a determination issued to him on September 26, 1996, by the Department of Energy's Office of the Inspector General (IG). That determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 12, 1995, Kaushal filed a request under the FOIA in which he sought a copy of documents related to a whistleblower complaint he has filed with the DOE. Specifically, Kaushal requested: (1) the response to his complaint filed by his employer Sandia Corporation (Sandia), a DOE contractor which operates the Sandia National Laboratories (SNL); (2) an audit report conducted for Sandia by Lockheed Martin Company; and (3) costs of the audit and legal costs incurred by Sandia related to his whistleblower complaint. Letter from A.K. Kaushal to Elva Barfield, DOE (July 4, 1995).

The IG issued a determination on September 26, 1996, denying Kaushal's request. Letter from Michael W. Conley, Deputy Inspector General for Inspections, IG, to A.K. Kaushal (September 26, 1996). The IG stated that the documents responsive to Kaushal's request were being withheld in their entirety pursuant to FOIA Exemption 7(A). Id. In invoking Exemption 7(A), the IG stated that it has not reached a final resolution of its investigation of Kaushal's whistleblower complaint; therefore, release "could prematurely reveal evidence and interfere with the ongoing enforcement proceeding." Id. The IG also stated that "it is not in the public interest to release inspection information when, as in this case, release could tend to prematurely disclose inspection efforts, or

provide individuals involved in the inspection an opportunity to impede an appropriate resolution of the inspection." Id.

In his Appeal, Kaushal states that

the information I requested is not part of the law enforcement proceeding. Therefore, the exemption is incorrectly applied. It is in the public interest to know how much money Sandia has spent on legal fees and costs and at the same time paying $2 million dollars [sic] extra to the [New Mexico] State Taxation and Revenue Department.

Appeal at 1.

Subsequent to the filing of Kaushal's Appeal, the IG informed us that it has no documents in its possession which would reflect the costs incurred by Sandia related to Kaushal's whistleblower complaint. Memorandum of telephone conversation between Richard Fein, IG, and Steve Goering, Office of Hearings and Appeals (OHA) (November 6, 1996). The DOE's Albuquerque Operations Office (DOE/AL) informed us that Sandia had not submitted documentation of costs related to this matter to the DOE. Memorandum of telephone conversation between Sharon E. Klafke, DOE/AL, and Steve Goering, OHA (November 14, 1996).

II. Analysis

A. Documents Withheld from the Appellant

Regarding the documents withheld from the appellant, we find that Kaushal's request for documents should have been processed by the IG under both the FOIA and the Privacy Act, 5 U.S.C. § 552a. The Privacy Act requires each federal agency to permit an individual to gain access to information which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). A "system of records" is defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5); 10 C.F.R. § 1008.2(m). An individual is entitled under the Privacy Act "to gain access to his record or to any information pertaining to him which is contained in the system." 5 U.S.C. § 552a(d)(1).

The documents withheld by the IG in this case are contained in a group of records from which information is retrieved by the names of individuals or other identifying particulars, i.e. a "system of records" as defined under the Privacy Act, and are specifically contained in Kaushal's record. Therefore, subject to the exemptions set forth in the Privacy Act, Kaushal is entitled to gain access to this record.(1) Accordingly, we will remand the Kaushal request to the IG for processing under the Privacy Act.

B. Documentation of Sandia's Costs

Because, as we discussed above, no documents revealing Sandia's cost related to Kaushal's whistleblower complaint have been submitted to the DOE, we must determine whether any responsive records in the possession of Sandia, if such records exist, are subject to the FOIA. First, we must determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). After reviewing this matter, for the reasons stated below we conclude that the Sandia records would not be "agency records" nor would they be subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as a DOE contractor, are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii)

whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Sandia is the prime contractor responsible for maintaining and operating SNL. While the DOE obtained Sandia's services and exercises general control over the contract work, it does not supervise Sandia's day-to-day operations. We therefore conclude that Sandia is not an "agency" subject to the FOIA.

Although Sandia is not an agency for the purposes of the FOIA, records in its possession responsive to Kaushal's request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the appellant's request. Thus, the records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between the DOE and Sandia to determine the status of such records. That contract states:

H-18 OWNERSHIP OF RECORDS RELATING TO THIS CONTRACT

(a) Government's Records. Except as is provided in paragraph (b) of this provision and as may be otherwise agreed upon by the Government and the Contractor, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the progress of the work, or in any event, as the Contracting Officer shall direct upon completion or termination of the contract.

(b) Contractor's Records. The following records acquired or generated by the Contractor in its

performance of this contract (to the extent not listed and maintained as a Privacy Act record pursuant to the Section H provision entitled "Privacy Act System of Records")(2) are the property of the Contractor and are not within the scope of paragraph (a), above.

. . .

(4) Employee relations records and files such as records and files pertaining to:

. . .

(ii) Allegations, investigations, and resolution of employee misconduct;

. . .

(iv) Employee charges of discrimination;

. . .

(7) Internal legal files;

. . . .

Contract No. DE-AC04-94AL85000, Clause H-18. We find that any documents in Sandia's possession which would reflect the costs incurred by Sandia related to Kaushal's whistleblower complaint would fall within the categories described in subsections (b)(4)(ii) and (b)(4)(iv) or (b)(7) of Clause H-18 of the contract between the DOE and Sandia. Therefore, until such time as these documents would be submitted to the DOE, they would be contractor's records, which are not subject to release under the DOE regulations. Accordingly, we find that the records relating to Sandia's costs sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under DOE regulations.

III. Conclusion

For the reasons stated above, we will remand the appellant's request to the IG for processing under the Privacy Act. In all other respects, the Kaushal Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ashok K. Kaushal on October 15, 1996, Case Number VFA-0228, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 26, 1996

(1)Although Kaushal's request cited only the FOIA, it is the general practice of the DOE to process a request for an individual's own record maintained in a Privacy Act system of records under both the Privacy Act and the FOIA, regardless of the statute(s) cited. Telephone conversation between GayLa Sessoms, Chief FOI and Privacy Group, DOE, and William Schwartz, Staff Attorney, OHA (November 21, 1996). See Freeman v. Department of Justice (FBI), 822 F. Supp. 1064, 1066 (S.D.N.Y. 1993) (implicitly accepting defendant's rationale that "because documents releasable pursuant to FOIA may not be withheld as exempt under the Privacy Act," it is proper for agency not to distinguish between FOIA and Privacy Act requests when assigning numbers to establish order of processing, and quoting Report of House Committee on Government Operations, H.R. Rep. No. 726, as mandating such practice); cf. Wren v. Harris, 675 F.2d 1144, 1146 & n.5 (10th Cir. 1982) (per curiam) (construing pro se complaint to seek information under either Privacy Act or FOIA even though only FOIA was referenced by name); Pearson v. DEA, No. 84-2740, slip op. at 2 (D.D.C. Jan. 31,1986) (same).

(2)Clause H-15, entitled "Privacy Act Systems of Records," lists the following systems of records, none of which would contain the documents reflecting Sandia's cost which are sought by Kaushal.

DOE System No. Title

DOE-5 Personnel Records of Former Contractor Employees

DOE-31 Firearms Qualifications Records

DOE-35 Personnel Radiation Exposure Records

DOE-38 Occupational and Industrial Accident Records

DOE-42 Personnel Security Clearance Index

DOE-44 Special Access Authorization for Categories of Classified Information

DOE-45 Weapon Data Access Control System

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DOE-50 Personnel Assurance Program Records

DOE-51 Employee and Visitor Access Control Records

DOE-52 Alien Visits and Participation

Contract No. DE-AC04-94AL85000, Clause H-15.

Case No. VFA-0229, 26 DOE ¶ 80,133

November 13, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Nathaniel Hendricks

Case Number: VFA-0229

Date of Filing: October 22, 1996

Nathaniel Hendricks files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Under the FOIA, Hendricks requested information from the Department of Energy's Chicago Operations Office. The Chicago Office replied by sending Hendricks responsive documents. Hendricks contends that the Chicago Office's search for responsive documents was inadequate. In his Appeal, he asks us to remand the request to the Chicago Office for a new search. As explained below, we will deny Hendricks' Appeal.

The information sought by Hendricks concerns the Manhattan Project, the United States' effort during World War II to produce the atomic bomb. The project was named for the Manhattan Engineer District of the Army Corps of Engineers, but much of the later work was conducted at sites outside Manhattan. One important site was Stagg Field, a stadium on the campus of the University of Chicago. Under the stands of Stagg Field, Enrico Fermi and his colleagues built the first working nuclear reactor in late 1942.(1)

Hendricks filed an FOIA request with the Presidential Advisory Committee on Human Radiation in July 1994, seeking information on accidental or planned releases of radiation from Stagg Field or other Chicago locations between 1940 and 1946. A copy of the request was referred to the Chicago Office and the Department's Office of Human Radiation Experiments (OHRE). The Chicago Office responded with one responsive document, and OHRE responded with two responsive documents.

This case marks the third time that Hendricks has appealed the adequacy of the search that led to those three responsive documents. On his first appeal, he raised eight issues, which he identified by the letters "a" through "h" in his appeal letter. We contacted the Chicago Office and OHRE to evaluate the adequacy of their searches considering these eight issues.

When we contacted the Chicago Office about the previous appeal, we learned that it possessed several thousand scientific notebooks compiled during the Manhattan Project. The Chicago Office did not examine these notebooks as part of its search, because there was no reason to believe that the notebooks contained material responsive to Hendricks' request, and the notebooks themselves were contaminated with radioactivity. We concluded that the high costs of equipping personnel to search through thousands of pages of radioactive materials outweighed the small possibility that the information in these notebooks would be responsive to Hendricks' request. We found then that the search performed by the Chicago Office was reasonable and adequate.

When we contacted OHRE, we learned that its search had included a check of its computerized data base. We discovered that OHRE had failed to include several likely query terms in its computer search. Therefore, we remanded the search to OHRE for a search based on these query terms. *Nathaniel*

Hendricks, 25 DOE ¶ 80,164 (1996).

While OHRE was still conducting the remanded search, Hendricks filed a Motion for Reconsideration of our Decision and Order. He restated his claim that the search was inadequate and not responsive to his request. In the Motion, Hendricks repeated items "a" through "h" of his first appeal, and added some new items, which he identified by the letters "i" through "p." After considering the issues, we rejected "a" through "j" and "p," and remanded the search to the Chicago Office based on items "k" through "o." *Nathaniel Hendricks*, 25 DOE ¶ 80,173 (1996).

As the result of the new search, Timothy S. Crawford, manager of the Argonne Group at the Chicago Office, issued a determination letter on September 3, 1996. Crawford stated that the Chicago Office had not found any additional documents from the remand on items "k" through "o." In addition, he informed Hendricks that the Chicago Office had contacted the University of Chicago Laboratory School, where Hendricks had been a student during the Manhattan Project era. The Chicago Office found out that the school had medical records pertaining to Hendricks. Crawford informed Hendricks that he would have to make a written request to the school to obtain his medical records. Hendricks has made a request for these records by letter through the Chicago Office.

In the present appeal, Hendricks again claims that the search was inadequate. As grounds for his claim, he has resubmitted arguments identified by the letters "a" through "p." He has reproduced verbatim these arguments from the Motion for Reconsideration that we dealt with previously. Hendricks has not provided any new material to support these arguments. Since we have already dealt with items "a" through "j" and "p" in our previous decision, which was a final order of the Department, we will not revisit the issues raised in these items. Instead, we will confine our review to examining the results of the remand of items "k" through "o" to the Chicago Office. In summary and paraphrased form, these arguments are:

k: Hendricks lived near Stagg Field during the Manhattan Project era. During that era, he observed what looked like groups of men taking measurements near the field. In the same area he saw balloons being released. Hendricks says he was told at the time that this activity related to "sub chasers" that were under construction in Gary, Indiana.(2)

l: He also observed colored smoke being released from an area of Stagg Field.

m: He also observed men marching on the field when the balloons and smoke were released. He seldom saw men marching on the field at other times.

n: While a student at a school near Stagg Field, Hendricks was given physical examinations. He requests records of the examinations.

o: The Chicago Office failed to search for data on radiation levels found in Stagg Field and its neighborhood.

We contacted staff members of the Chicago Office to find out whether the search in response to these items had been adequate. The search had uncovered no responsive documents. Moreover, the Chicago Office found no records from the Manhattan Project era except the contaminated books. A scientist who was on the staff of the Manhattan project was asked about Hendricks' observations of colored smoke, balloons, and marching men. He was unfamiliar with these events, and knew of no records that might be associated with them. He was also unaware of any records held by the Chicago Office that related to radiation levels near Stagg Field. Thus, the Chicago Office concluded that there was no additional information responsive to Hendricks' request. As for item "n," we again point out that the University of Chicago Laboratory School is not a federal agency, nor is there any evidence that it was operating as a federal contractor of a predecessor agency of the Department while Hendricks was a student there. Any request for records from the University of Chicago Laboratory School, therefore, must be made to the School itself. We note, however, that the Chicago Office has voluntarily contacted the Laboratory School to verify that it holds Hendricks' records, and provided Hendricks with a form to obtain records from the

Laboratory School.

The FOIA generally requires federal agencies to release agency records to the public upon request. If a requester has reasonably described the information he is seeking and has complied with the Department's FOIA regulations, the Department must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). If we find that a search was inadequate, we will remand it to the appropriate office of the Department for a new search. *E.g., Petrucelly & Nadler, P.C.*, 25 DOE ¶ 80,187 (1996);*Dennis McQuade*, 25 DOE ¶ 80,158 (1996). It is important to note, however, that "the standard of reasonableness … does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dept. of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

There is no corroboration for the events that Hendricks allegedly witnessed at Stagg Field. If they did occur, there is no indication that they relate to the measurement of radioactive contamination, or that they generated records that still exist in the possession of the Department of Energy. We are mindful that "mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *SafeCard Services v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). With respect to Hendricks' statements "k," "l," "m," and "o," therefore, we find that the Chicago Office has conducted an adequate search for records related to them.

We believe that the Chicago Office has conducted a search reasonably calculated to uncover the requested information. Consequently, we find that the search was adequate. We will therefore deny Hendricks' Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Nathaniel Hendricks, Case No. VFA-0229, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 13, 1996

(1) See *The Manhattan Project: Making the Atomic Bomb*, DOE Publication HR-0096, 1994.

(2) The term "sub chaser" presumably referred to a boat or ship equipped to attack submarines.

Case No. VFA-0232, 26 DOE ¶ 80,141

December 4, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Future Technology Intelligence Report

Date of Filing: October 22, 1996

Case Number: VFA-0232

On October 22, 1996, the Future Technology Intelligence Report (FTIR) filed an Appeal from a determination issued to it by the Deputy Manager of the Oakland Operations Office (the Deputy Manager). The Deputy Manager issued that determination in response to a request for information submitted by FTIR under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Manager to release the requested information.

Background

In its FOIA request, FTIR requested "a copy of the report made by the DOE" concerning a demonstration conducted by Professor Yull Brown on August 6, 1992 in Ontario, California. This demonstration, which was witnessed by a team of DOE representatives, involved a means of allegedly reducing the radioactivity of certain waste materials. In the DOE's initial response, the Deputy Manager informed FTIR that no documents responsive its request could be located. In its Appeal, FTIR challenged the sufficiency of the Deputy Manager's search for responsive documents. Based on information contained in the Appeal, the Deputy Manager was able to locate responsive documents, and a copy of those documents was provided to FTIR. These documents include a report made by Mike Schoonover, an employee of the University of California, to the DOE's Office of Environmental Restoration and Waste Management, an intra-agency memorandum, and a letter from a DOE employee to a representative of the facility at which the demonstration was conducted. These documents consist of discussions of the demonstration and its results.

On November 14, 1996 FTIR submitted an amendment to its FOIA Appeal. In this submission, FTIR continues to claim that the Deputy Manager has failed to locate and identify all responsive documents. Specifically, FTIR contends that Mr. Schoonover's notes containing the measurements upon which his report was based should have been

provided. FTIR points out that although the report contains references to several measurements that were taken by Mr. Schoonover, some of these measurements are not included in the report.

Analysis

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents."Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably

calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In order to evaluate the scope of the search, we contacted the Oakland Office. We were informed that files belonging to each employee who might have been involved in some manner with the subject matter of FTIR's request were searched. The search included files located in the DOE's Environmental Restoration and Weapons Research Divisions, and in the Lawrence Livermore Laboratories. In letters to FTIR dated August 15 and August 16, the Oakland Office requested further information concerning the demonstration in order to conduct a more effective search. Finally, information included in FTIR's Appeal enabled the Oakland Office to identify a current DOE employee who was directly involved in sending the DOE representatives to the demonstration. This employee's files were searched, and all documents relating in any way to the demonstration were provided to FTIR. See memoranda of November 25, 1996 telephone conversations between Roseanne Pelzner and Richard Vergas, Oakland Operations Office, and Robert Palmer, OHA Staff Attorney.

Based on the record before us, we conclude that the Oakland Operations Office's search was reasonably calculated to uncover all responsive documents, and was therefore sufficient. As an initial matter, FTIR received an unredacted copy of the only document that it requested, along with two other related documents. Moreover, even if we were to assume that FTIR's request is broad enough to encompass Mr. Schoonover's notes, those notes, if they exist are the property of Mr. Schoonover and are not in the DOE's possession. The absence of measurement data cited by FTIR is not evidence of an inadequate search. We will therefore deny FTIR's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Future Technology Intelligence Report, Case Number VFA-0232, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 4, 1996

Case No. VFA-0233, 26 DOE ¶ 80,135

November 20, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen M. Jameson

Date of Filing: October 22, 1996

Case Number: VFA-0233

On October 22, 1996, Glen M. Jameson filed an Appeal from a determination dated April 22, 1996 (but not received by him until October 1996), by the Freedom of Information Act/Privacy Act Officer of the Rocky Flats Office (FOIA Officer) of the Department of Energy (DOE). In that determination, the FOIA Officer denied a request for information filed by Mr. Jameson on November 21, 1995, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In his request for information, Mr. Jameson sought copies of the invoices for pension plan costs attributable to Scientific Applications International Corporation (SAIC) employees working at the Rocky Flats Field Office for a twelve-month period ending with the most recent and available invoices submitted by SAIC. In an April 22, 1996 letter, the FOIA Officer informed Mr. Jameson that her search revealed "no specific invoice line item pension costs." In addition, the FOIA Officer stated that SAIC "invoices pension costs" as part of its indirect rates and that the

DOE Rocky Flats Field Office does not have knowledge of SAIC's rates for pension costs. Finally, the FOIA Officer advised Mr. Jameson to contact the Defense Contract Audit Agency (DCAA), an office that is a part of the Department of Defense, and thus, subject to the FOIA. Specifically, the FOIA Officer believes that DCAA, as the auditor of the contract, may have responsive information.

II. Analysis

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles

Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In his Appeal, Mr. Jameson did not provide any evidence that responsive information exists. Mr. Jameson only speculates that responsive information exists in the form of: (1) the underlying contract that defined what overhead charges were allowable; (2) the actual invoices for overhead charges and credits; or (3) the copies of audits that DCAA may have provided to the DOE. Accordingly, we contacted the Rocky Flats Office to ascertain the validity of Mr. Jameson's contention.(1) Officials at the Rocky Flats Office informed us that: (1) the underlying contract does not have information concerning pension plan costs attributable to SAIC employees; (2) the DOE does not have any actual invoices for overhead charges and credits; and (3) audits provided by DCAA to Rocky Flats do not contain any responsive information.

A Rocky Flats Official informed us that the underlying contract does not have responsive information because pension plan costs are only a small portion of a much larger "indirect" rate in the contract. The FOIA Officer has informed us that she has forwarded a copy of Mr. Jameson's request to the DCAA, but that Mr. Jameson should make a new FOIA request directly to the DCAA to ensure that they will respond directly to him. Since we find that the FOIA Officer searched all of the areas that might have reasonably contained responsive information, including those areas suggested by Mr. Jameson, and she has verified that no responsive documents exist, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen M. Jameson on October 22, 1996, Case Number VFA- 0233, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 20, 1996

(1) */ See memoranda of telephone conversations between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and various Rocky Flats Office personnel (Case No. VFA-0233).

Case No. VFA-0235, 26 DOE ¶ 80,139

November 27, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Research Information Services, Inc.

Date of Filing: October 29, 1996

Case Number: VFA-0235

On October 25, 1996, Research Information Services, Inc. (RIS) filed an Appeal from a determination issued on September 25, 1996, by the Department of Energy's (DOE) Office of Arms Control and Nonproliferation (OACN). In that determination, OACN responded to a request for information filed by RIS on July 26, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA generally requires that federal agencies release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. BACKGROUND

In its request, RIS sought information pertaining to determinations by the Secretary of Energy under 10 C.F.R. Part 810 concerning the People's Republic of China (PRC). Part 810 consisted of a series of regulations promulgated by the DOE in order to implement section 57b of the Atomic Energy Act. That section empowers the Secretary of Energy to authorize U.S. persons to engage directly or indirectly in the production of special nuclear material outside the United States.

On September 25, 1996, OACN issued a determination responding to RIS's request

in which it explained:

During the past year, we have had other FOIA inquiries for records similar to that which you have requested. As a result, we have placed, with some exceptions, in the Freedom of Information Reading Room all records pertaining to specific determinations made by the Secretary of Energy authorizing U.S. firms, such as Westinghouse and Stone & Webster, to engage in specifically authorized activities in the PRC.

Determination Letter at 1. The determination letter further informed RIS that: (1) records that had originated with other Executive Branch agencies were not among those records kept in the DOE Reading Room; (2) OACN had forwarded RIS's request to those agencies at which responsive documents had

originated; (3) several responsive documents have not been placed in the DOE Reading Room because they are classified; and (4) information was withheld under Exemption 4 from "[r]ecords pertaining to Part 810 authorizations granted to Stone & Webster to conduct activities in the PRC . . ." Id. at 1-2.

On October 29, 1996, RIS filed the present Appeal contending that the absence of several categories of responsive documents from the DOE Reading Room is evidence that OACN's search for responsive documents was inadequate. RIS also contends that OACN improperly withheld information under Exemption 4.

II. ANALYSIS

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). We review the adequacy of an agency's search under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. Burlin McKinney, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. Id.

While the determination letter issued to RIS clearly indicates that responsive documents were placed in the DOE Reading Room, withheld under Exemption 4, withheld because of classification concerns, or forwarded to other executive branch agencies where they had originated, it did not indicate which responsive documents fit into each of these categories. Most importantly, the determination letter does not identify the documents it considers to be responsive to RIS. As a result, the determination letter issued to RIS is inadequate. We are left without information that we need in order to determine whether OACN's search for responsive documents was adequate. Without knowing which information OACN determined to be responsive to RIS's request we are unable to assess the propriety of OACN's response. Moreover, since the determination letter failed to: (1) distinguish between the information that was withheld and the information that is subject to further processing; and (2) indicate the specific exemption(s) under which each document was withheld, we are unable to assess the propriety of OACN's withholdings and referral of information to other agencies.

Accordingly, we shall remand this matter to the OACN with instructions to issue a new determination letter. The new determination letter should specifically identify each document in the DOE's possession

that is responsive to RIS's request and indicate whether the document is available in the DOE Reading Room, withheld under Exemption 1 or 3 as classified (or undergoing classification review), withheld under Exemption 4, or referred to the executive branch agency where the document had originated. For each responsive document the OACN has found to have originated with another agency, the new determination letter should indicate the name of the agency and the date on which RIS's request was forwarded to that agency.

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to the Office of Arms Control and Nonproliferation with instructions promptly to issue a new determination letter that complies with the requirements discussed above.

It Is Therefore Ordered That:

(1) The Appeal filed by Research Information Systems, Inc. on October 29, 1996, Case Number VFA-0235, is hereby granted and remanded to the Office of Arms Control and Nonproliferation for further processing in accordance with the instructions set forth above.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 27, 1996

Case No. VFA-0236, 27 DOE ¶80,147

June 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Lee M. Graham

Date of Filing: October 30, 1996

Case Number: VFA-0236

Lee M. Graham filed an appeal from a determination issued to him on October 18, 1996, by the Albuquerque Operations Office (Albuquerque) of the Department of Energy. In that determination, Albuquerque stated that it could neither confirm nor deny the existence of the records that Mr. Graham sought in the request for information that he filed on August 29, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. In this Decision we review the nature of Albuquerque's response and reach a determination that the response was proper.

I. Background

In his request, Mr. Graham sought copies of documents that related to information described in a specified, published news article concerning instrumentation aboard a specified satellite. In its October 18, 1996 response, Albuquerque stated, "We can neither confirm nor deny the existence of the documents you have requested."

In his Appeal, Mr. Graham limits his request by stating that he seeks information about the satellite's instrumentation only if the "instrumentation is being used to detect the UFO phenomena."

II. Analysis

Although the Department rarely responds to requests for information in this manner, Albuquerque's statement that it will neither confirm nor deny the existence of records is not without precedent. This type of response is commonly called a Glomar response, which refers to the first instance in which the adequacy of such a response was upheld by a Federal court. In Phillippi v. CIA, the agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Agencies have typically used this response where the existence or non-existence of requested documents is itself a classified fact exempt from disclosure under Exemptions 1 and 3 of the Freedom of Information Act, see, e.g., id. at 1012, or where admission that documents exist would indicate that the agency was involved in a certain issue, Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982), or that an individual is the target of investigation or surveillance, Marrera v. Department of Justice, 622 F. Supp. 51

(D.D.C. 1985). In addition, this Office has upheld the DOE's Glomar response where, as here, the existence or non-existence of requested documents is classified. A. Victorian, 25 DOE ¶ 80,188 (1996).

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed the circumstances surrounding Mr. Graham's request and Albuquerque's determination, and considered Mr. Graham's attempt, in his appeal, to limit the scope of his request. Based on the review that the Director of SA performed, the DOE has determined that Albuquerque's response was correct and that the DOE's response must continue to be that it can neither confirm nor deny the existence of documents responsive to Mr. Graham's request, even as modified in his appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Lee M. Graham on October 30, 1996, Case No. VFA- 0236, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 17, 1998

Case No. VFA-0237, 26 DOE ¶ 80,137

November 27, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: XXXXX

Date of Filing: October 31, 1996

Case Number: VFA-0237

On October 31, 1996, XXXXX filed an Appeal from a determination issued to him on October 4, 1996, by the Western Area Power Administration (WAPA) of the Department of Energy (DOE). That determination concerned a request for information submitted by Mr. XXXXX pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, WAPA would be required to conduct a further search for responsive material.

I. Background

In his September 19, 1996 request, Mr. XXXXX, a former employee at the WAPA, sought information concerning his application for the position of electronic equipment mechanic at Brush, Colorado, part of the Loveland, Colorado, Area Office of WAPA. Mr. XXXXX claims that he was told by Mel Callen, the selecting official for the position, that all his references had reservations about Mr. XXXXX's conduct. Therefore, Mr. XXXXX requested the following information:

(1) the names of all people contacted who volunteered opinions on his possible employment;

(2) the questions they were asked;

(3) the responses and additional comments they gave;

(4) the conclusions derived from these responses and comments by the selecting official; and

(5) WAPA's official policy or guidelines for selecting officials.

Request Letter dated September 19, 1996, from XXXXX to WAPA's Freedom of Information Officer. He also maintained that his character and integrity were being

compromised to justify the hiring of non-government employees in a time of government downsizing, and he asked if WAPA was allowing this to happen. On October 4, 1996, WAPA issued its determination, releasing documents responsive to the fifth item in Mr. XXXXX's request. WAPA also stated that no documents responsive to items 1 through 4 were found and that it is not required to create documents or to respond to questions. On October 31, 1996, Mr. XXXXX filed an Appeal with the Office of Hearings and Appeals of the DOE, contending that WAPA's search for documents was inadequate.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we contacted John D. Bremer, an attorney at WAPA, to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. XXXXX's request might exist. Mr. Bremer informed us that Mr. Callen, the selecting official for the position, had been contacted. Mr. Callen indicated that the information regarding applicants for the position Mr. XXXXX was seeking had been discarded shortly after the position was filled. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and John D. Bremer, Attorney, WAPA, November 14, 1996; Electronic Mail Message from John D. Bremer to Janet R. H. Fishman, November 18, 1996. Mr. Callen's statement is consistent with what we know of WAPA's practices. WAPA maintains that it was under no obligation to retain the discarded documents, and in fact, it instructs its selecting officials to destroy their notes. Telephone Memorandum between Janet R. H. Fishman and John D. Bremer, November 18, 1996; Electronic Mail Message from John D. Bremer to Janet R. H. Fishman, November 19, 1996.

We are convinced that WAPA followed procedures which were reasonably calculated to uncover the material Mr. XXXXX sought in his request. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that the search did not uncover documents Mr. XXXXX believed may be in the possession of DOE does not mean that the search was inadequate. In addition, Mr. XXXXX has not provided any evidence, beyond his personal belief, that any additional documents exist in the WAPA's files. Mere personal belief is not a sufficient basis to support a finding that a search was inadequate. Glen Milner, 25 DOE ¶ 80,215 (1996); cf. Ron Vader, 23 DOE ¶ 80,183 (1994) (finding an inadequate search where the Appellant remembered an event that ought to have triggered the creation of documents); Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). Therefore, under the circumstances of this case, we find that WAPA's search for responsive documents was adequate and that no further documents responsive to Mr. XXXXX's request exist at WAPA. Accordingly, Mr. XXXXX's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on October 31, 1996, by XXXXX, Case No. VFA-0237, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 27, 1996

Case No. VFA-0238 , 26 DOE ¶ 80,147

December 23, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Milner

Date of Filing: December 2, 1996

Case Number: VFA-0238

On December 2, 1996, Glen Milner (Appellant) completed the filing of an Appeal from determinations issued to him by the Albuquerque Operations Office (AO) of the Department of Energy (DOE) on May 8, 1996 and October 7, 1996.(1) In each determination, AO denied a request for a waiver of fees in connection with a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, the Appellant asks that we reverse AO's determinations and grant him a fee waiver, either unconditionally or until such time as he fails to publish an article based on information contained in the requested documents.

I. Background

In a submission dated March 22, 1996, the Appellant filed a Request for Information under the FOIA (March 22 Request) requesting from AO all documents on record since 1985 concerning specially fitted railcars for the transport of nuclear weapons. In his FOIA Request, the Appellant also requested a fee waiver for the costs associated with processing his FOIA Request. In support of this request, he stated that he intended to write a newspaper article concerning the requested information and submit the article to various newspapers. He also asserted that the requested information would contribute significantly to the public's understanding of the operations of government by illustrating that the DOE had not followed through on plans announced in 1992 to send the specially fitted

railcars to Russia for use in that country's disarmament. The Appellant described these plans in his March 22 Request as a "public relations effort" on the part of DOE.(2)

In its May 8, 1996 determination letter (Determination Letter), AO denied the Appellant's fee waiver request. AO concluded that the Appellant did not have the qualifications to "extract, synthesize, and the means to effectively convey to the public the information contained in the records."

In subsequent letters to AO, the Appellant argued that he had already received a commitment from one newspaper, Ground Zero, to publish his intended article. He also proposed that AO grant him a fee waiver, but if he did not succeed in publishing an article, he would then pay the fees associated with his FOIA request. He also argued that because he had succeeded in publishing an article in the Seattle Times in 1989 and the Seattle Post-Intelligencer in 1990 on the topic of nuclear weapons and their transportation, he had shown the ability to disseminate the information to the general public. AO determined on October 7, 1996, that the FOIA regulations did not provide for a conditional fee waiver. Therefore, it stated that in the absence of a commitment from the Appellant to pay fees, AO considered the Appellant's FOIA request as

withdrawn. On November 26, 1996, the Appellant submitted his Appeal to this Office.

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (Larson). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors that an agency must consider to determine whether the requester has met the first statutory fee waiver condition, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) the subject of the request; whether the subject of the requested records concerns "the operations or activities of the government";

(B) the informative value of the information to be disclosed; whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) the contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) the significance of the contribution to public understanding; whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). If the DOE finds that a request satisfies these four factors, it must also determine whether disclosure of the information is primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii).

We note initially that there is no provision in the DOE FOIA regulations for the type of conditional fee waiver that the Appellant has proposed.(3) Therefore, we have performed a de novo review of the merits of the Appellant's request for an unconditional fee waiver and find that the Appellant should be granted a fee waiver for the reasons described below.

Factor A

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is appropriate only where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." See Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1481-83 (1989); U.A. Plumbers and Pipefitters Local 36, 24 DOE ¶ 80,148 at 80,621 (1994) (Local 36). The requested documents concern DOE's operation of railcars used for the transport of nuclear weapons, clearly a government activity, and thus, we find this request meets the conditions outlined in Factor A.

Factor B

Factor B requires a consideration of whether the disclosure of information is "likely to contribute" to the

public's understanding of government operations and activities. See Local 36; Seehuus Associates, 23 DOE ¶ 80,180 (1994) (Seehuus). The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general population. Seehuus, 23 DOE at 80,694. If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate. The information at issue is not in the public domain and could contribute to the public's understanding of government operations. We therefore find that the requested information meets this criterion.

Factor C

Factor C requires us to consider whether the requested documents would contribute to the understanding of the subject by the general public. To meet this test, the requester must have the ability and intention to disseminate this information to the public. James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992). In the present case, the Appellant has, since filing his Appeal, contacted one of the New York Times reporters, William J. Broad, who wrote one of the stories cited in Footnote 2. In a telephone conversation with an OHA attorney, Mr. Broad confirmed his belief that information contained in the documents would be newsworthy, because it might explain why DOE has apparently failed to follow through on the publicized 1992 plans. See Memorandum of Telephone Conversation between Dawn L. Goldstein, OHA Attorney, and William J. Broad, Reporter, New York Times (December 4, 1996). The Appellant has also demonstrated the ability to summarize complex information into understandable articles, as shown by two articles he has published in major Seattle papers, albeit approximately seven years ago. Given the facts that have recently come to light, we find that the Appellant has now demonstrated that he has the ability to disseminate information to the general public. We also find that the Appellant has demonstrated the intention to disseminate information he obtains from the requested documents to the public and thus improve its understanding of government operations. See Eugene Maples, 23 DOE ¶ 80,111 at 80,522 (1993).

Factor D

In order to satisfy the requirements of Factor D the requested documents must contribute significantly to the public understanding of government operations or activities. The Department of Justice has suggested the following test for this factor:

To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.

1995 Justice Department Guide to the Freedom of Information Act 381 (1995); See Local 36; Seehuus.

In the present case, the Appellant asserts that the requested documents will enable him to determine whether DOE failed to follow through on stated intentions to send specially fitted railcars to Russia for disarmament purposes and thus will contribute significantly to the public's understanding of government operations and activities. If the requested documents do in fact contain such information, we believe that the public's understanding of this matter would likely be enhanced to a significant extent by disclosure. However, we note that the public interest aspect of the Appellant's request relates only to documents generated between the time of DOE's publicized plans for the railcars in 1992 and the present time, because the newsworthy issue, in the context of this Appeal, is whether the railcars were ever sent to Russia as planned. Therefore, we will grant a fee waiver only for documents relating to that time period.

In view of our evaluation of the foregoing factors, we find that the Appellant has, with respect to the documents relating to the period above, satisfied the four factors that an agency must weigh to determine whether the requester has met the first statutory fee waiver condition. In other words, the Appellant has shown that disclosure of some of the requested documents is in the public interest because this disclosure

is likely to contribute significantly to the public understanding of government operations or activities. We further note that AO did not determine whether the Appellant's interest is commercial, but there is no basis in the record for finding that it is.

Having determined that the Appellant has satisfied the regulatory fee waiver requirements discussed above, we find that his Appeal should be granted in part and that he should be granted a fee waiver for his March 22, 1996 FOIA Request.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen Milner on December 2, 1996, is hereby granted in part as set forth in Paragraph (2) below and denied in all other respects.

(2) The fees assessed for complying with Glen Milner's March 22, 1996 FOIA request shall be waived in full with regard to documents generated from 1992 until the completion of the search that concern specially fitted railcars for the transport of nuclear weapons.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 23, 1996

(1)The Appellant initially filed a submission with the OHA on November 1, 1996, but did not make any arguments asserting why AO's determination should be reversed. The OHA held the submission in abeyance until we received his arguments and the May 8, 1996 determination. We have accepted the Appellant's Appeal of the May 8, 1996 determination, despite its lack of timeliness, because the Appellant and AO continued to communicate regarding the fee waiver issue until AO's October 7, 1996 determination.

(2)These railcars were part of what was known popularly as the "White Train" or the "Nuclear Train." This train transported nuclear weapons in the 1980s, and was a source of much public protest. In 1992, several newspaper articles reported that the railcars would be sent to Russia to aid in disarmament. See Thomas L. Friedman, Baker and Yeltsin Agree on U.S. Aid in Scrapping Arms, N.Y. Times, February 18, 1992 at A1; Lloyd Pritchett, White Train May Travel in Russia, Bremerton Sun, February 13, 1992 at A1; see also William J. Broad, Moving A-Arms by Rail: Can Terrorists Be Foiled?, N.Y. Times, February 18, 1992 at A8. The Appellant has submitted a decision by this Office noting that an employee of DOE's Defense Programs stated that there never were any such plans. Glen Milner, 25 DOE ¶ 80,215 at 80,791 (1996). According to the Appellant, this statement is erroneous and contradicted by the newspaper articles.

(3)The Appellant argues that the DOE may start processing cases based merely on "an agreement to pay." While it is true that under certain circumstances, DOE can process a large request based on a "satisfactory assurance of full payment," 10 C.F.R. § 1004.9(b)(8)(i), the Appellant has been unwilling to make such an assurance here. He is only willing to pay the fees if he fails to publish an article, which is not a "satisfactory assurance of full payment."

Case No. VFA-0239, 26 DOE ¶ 80,140

November 29, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant: Thomas Stampahar

Case Number: VFA-0239

Date of Filing: October 31, 1996

On October 31, 1996, Thomas Stampahar of Henderson, Nevada filed an Appeal from a determination issued on October 3, 1996 by the Nevada Operations Office of the Department of Energy (DOE). That determination denied Mr. Stampahar's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that agency records held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). This Appeal, if granted, would require the DOE to release the withheld information.

BACKGROUND

Mr. Stampahar, a former employee of the prime contractor at the Nevada Operations Office, Bechtel Nevada, filed a FOIA and Privacy Act request for his personnel, training, and medical records. He also sought a copy of a Bechtel Nevada interoffice memorandum which contained allegations of his suspected malfeasance during a work assignment in Atlanta. In addition he requested a copy of any documents prepared in connection with the Bechtel Nevada investigation into those allegations. Finally, he also sought Bechtel Nevada documents related to a shoving incident between him and another employee. The Nevada Operations Office responded on October 3, 1996 under both the FOIA and the Privacy Act. In its letter, that Office informed Mr. Stampahar that the DOE had no documents responsive to his request. It further informed him

that any documents that might be responsive were the property of Bechtel Nevada. It also informed him that certain personnel records could be obtained directly from Bechtel Nevada. Mr. Stampahar appeals the Nevada Operations Office determination letter regarding the interoffice memorandum dealing with the alleged wrongdoing in Atlanta and corresponding investigatory material, as well as the documents dealing with the shoving incident.

ANALYSIS

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information which it has created or obtained at the time of the request. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein);

Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Martha L. Powers, 24 DOE ¶ 80,147 at 80,618 (1994); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Safecard Services, Inc. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (and cases cited therein); Meeropol v. Meese, 790 F.2d 942, 950-51 (D.C. Cir. 1986); Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); U.S. Solar Roof, 26 DOE ¶ 80,102 at 80,504 (1996); William H. Payne, 24 DOE ¶ 80,145 at 80,615 (1994); Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)). This Office will remand a case for further action if it is evident that an inadequate search was conducted, or if evidence reveals that other documents that were not identified during the initial search exist. Id. See also Linda J. Carlisle, 24 DOE ¶ 80,124 at 80,560 (1994); McGraw-Hill Nuclear Publications, 22 DOE ¶ 80,157 at 80,627 (1992); James L. Schwab, 21 DOE ¶ 80,153 at 80,658 (1991). Generally, a FOIA search is a broad, all-encompassing search that would identify any documents also subject to Privacy Act analysis. Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,775 (1996). Thus, because this appeal only involves the adequacy of a search and falls under the general rule, we analyze this case under FOIA principles.

To determine if a proper search was performed, we contacted the Nevada Operations Office FOIA Officer. She informed us that, in the ordinary course of business, the Nevada Operations Office would not have records of this type dealing with Bechtel Nevada employees. She stated that the Nevada Operations Office would only receive such material if Mr. Stampahar had filed a whistleblower complaint, a complaint with the Office of the Inspector General or a complaint with the DOE legal staff. The Nevada Operations Office FOIA Officer checked for all of these possibilities and found no responsive documents. At our request, she rechecked all of these places and again found no responsive documents. Mr. Stampahar later confirmed that he has not filed any complaint with the DOE. Under these circumstances, we find that the Nevada Operations Office has undertaken a reasonable search and that it has no responsive documents. Cf. Archie M. LeGrand, Jr., 25 DOE ¶ 80,171 at 80,681 (1996).

Although the Nevada Operations Office does not have responsive documents, Bechtel Nevada may have the information Mr. Stampahar seeks. In his Appeal letter, Mr. Stampahar does not claim that Bechtel Nevada is an agency of the federal government subject to the FOIA. Instead, he specifically asserts that the records he requests fall within the scope of 10 C.F.R. § 1004.3(e). Under that regulation, the DOE will, to the maximum extent possible, make available in response to a FOIA request contractor records which are acquired or generated by the contractor in the course of the contract and which are owned by the DOE even if not in the possession of the agency. 10 C.F.R. § 1004.3(e)(1), (e)(3)(ii).

The contract between the DOE and Bechtel Nevada, provides that all records acquired or generated by Bechtel Nevada in the course of the contract are the property of the United States Government. Contract No. DE-AC08-96NV11718, ¶ H.32(a). However, the contract contains some exclusions to this general rule. In particular, the contract states that:

3. Employee relation records and files such as records and files pertaining to:

(A) Qualifications or suitability for employment of any employee, applicant or former employee

(B) Employee and union grievances...

(D) Allegations, investigations, and resolution of employee misconduct

(E) Employee discipline.

Id. at ¶ H.32(b)(3).

We believe that the requested documents fall into one of these categories of exclusion. The interoffice memorandum alleging misfeasance and the associated investigation clearly fall into clause (B) and perhaps into clauses (A) and (D). Similarly, the shoving incident clearly falls into Clause (E) and perhaps into the other clauses as well. Cf. Diane C. Larson, 26 DOE ¶ 80,112 at 80,538 (1996). We have reviewed matters of this type before in connection with our FOIA appeal jurisdiction. Our previous determinations on these types of matters reach a similar conclusion. See, e.g., William H. Payne, 25 DOE ¶ 80,184 at 80,712 (1996) (records on alleged contractor employee "double-dipping" are contractor personnel documents not subject to section 1004.3(e)); Dr. J.C. Laul, 22 DOE ¶ 80,129 at 80,562 (1992) (matters related to contractor employee misconduct and dismissal are internal contractor personnel records not subject to FOIA); Government Accountability Project, 22 DOE ¶ 80,103 at 80,505-06 (1992) (depositions concerning alleged contractor retaliation against employee are internal personnel records not subject to FOIA). Accordingly, we find that the records Mr. Stampahar seeks are not subject to release under 10 C.F.R. § 1004.3(e). Because the requested documents are neither in the possession of the DOE nor subject to the FOIA as agency records and do not fall under the criteria for FOIA treatment for DOE- owned, contractor-held records under section 1004.3(e), Mr. Stampahar's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas Stampahar of Henderson, Nevada, OHA Case No. VFA-0239, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 29, 1996

Case No. VFA-0240, 26 DOE ¶ 80,138

November 27, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Douglas A. Holman

Date of Filing: November 4, 1996

Case Number: VFA-0240

On September 16, 1995, Douglas A. Holman filed a request with the Department of Energy's Oak Ridge Operations Office (DOE/OR) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Holman requested documents related to an investigation of his role as a union steward conducted by his employer, Lockheed Martin Energy Systems (LMES). Letter from Doug A. Holman to Amy Rothrock, DOE/OR (September 16, 1995). Under a contract with the DOE, LMES operates the Y- 12 plant at DOE's Oak Ridge National Laboratory (ORNL). DOE/OR issued a determination on October 17, 1996, in which it stated that its search of files in the possession of DOE/OR did not reveal responsive records, but adding that its search did not extend to records which are the property of LMES. Letter from Amy L. Rothrock to Doug Holman (October 17, 1996). On November 4, 1996, Douglas A. Holman filed an Appeal from that determination. In his Appeal, Holman requests that the Office of Hearings and Appeals (OHA) "take whatever steps are necessary to acquire from [LMES] the information I requested . . . ." Letter from Doug A. Holman to Director, OHA (October 30, 1996).

Our threshold inquiry in this case is whether the records requested by the appellant are subject to the FOIA. First, we must determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). After reviewing this matter, for the reasons stated below we conclude that the records in question are not "agency records" and are not subject to release under DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as a DOE contractor, are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of

federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, LMES is the prime contractor responsible for maintaining and operating ORNL. While the DOE obtained LMES's services and exercises general control over the contract work, it does not supervise LMES's day-to-day operations. We therefore conclude that LMES is not an "agency" subject to the FOIA.

Although LMES is not an agency for the purposes of the FOIA, its records responsive to Holman's request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the appellant's request. Thus, the records do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between the DOE and LMES to determine the status of these records. That contract states:

H.30 DEAR 970.5204-AL 92-84 OWNERSHIP OF RECORDS (NOV 1992)

(a) Government's Records. Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the progress of the work, or in any event as the Contracting Officer shall direct upon completion or termination of the contract.

(b) Contractor's Own Records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) above.

(1) Personnel files (excluding personnel radiation exposure records) maintained on individual employees, applicants, and former employees;

. . .

(4) Employee relations records and files such as records and files pertaining to:

(i) Qualifications or suitability for employment of any employee, applicant or former employee,

(ii) Internal complaints, grievance records,

(iii)Arbitration proceedings pursuant to the provisions of any labor contract,

(iv) Allegations, investigations and resolution of employee misconduct,

(v) Employee discipline,

(vi) Employee charges of discrimination,

(vii)Negotiation with any labor organization in connection with any labor contract,

. . . .

Contract No. DE-AC05-84OR21400, Clause H.30.

The documents Holman seeks, pertaining to an internal investigation by LMES of an employee relations matter, would fall within the categories described in subsections (b)(1) and (b)(4) of Clause H.30 of the contract between the DOE and LMES. They are therefore the contractor's own records, which are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to the FOIA under DOE regulations. Accordingly, we shall deny the present FOIA Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Douglas A. Holman on November 4, 1996, Case Number VFA-0240, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 27, 1996

Case No. VFA-0241, 26 DOE ¶ 80,142

December 6, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Bechtel National, Inc.

Case Number: VFA-0241

Bechtel National, Inc., (Bechtel) files this appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Pursuant to the FOIA, Bechtel had requested a copy of a contract between the Department of Energy and Fluor Daniel Hanford (FDH). Bechtel's request was processed by the Department's Richland Operations Office (Richland). In response, Richland released the text of the entire contract except for substantial portions of one clause, identified in the contract as "Clause H.52." Bechtel's appeal, if granted, would require Richland to release the full text of Clause H.52.

Background

The FOIA generally provides that any person has a right of access to federal agency records, except to the extent that the records (or portions of them) are protected from disclosure by one of nine exemptions or three special law enforcement exclusions. Only one of these exemptions, Exemption 4, is at issue in this case. Exemption 4 protects from mandatory disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4).

The Department announced it had awarded FDH the contract to manage the Department's Hanford site on August 6, 1996. The contract includes a "contractor-controlled insurance program" ("CCIP"). The Department publicized the CCIP in a fact sheet, describing the program as having the contractor "assume third-party liability for

[the] first $50 million.(1) Details of the CCIP are set out in Clause H.52.

Richland received the request from Bechtel for a copy of the contract on September 3, 1996.(2) The portion of Clause H.52 released by Richland is as follows:

H.52 CONTRACTOR CONTROLLED INSURANCE PROGRAM

A. The Contractor shall procure, at no cost to the DOE, a Contractor Controlled Insurance program (CCIP), as set forth in the Contractor's proposal dated [DELETED] to the extent available on a commercially reasonable basis. Generally the coverage will include [DELETED]. The Contractor supports the DOE's effort to improve their insurance program by the collection of insurance claim statistics and information. They will assist the DOE by complying with the insurance reporting requirements as defined by DOE's new draft Order 350.1.

B. [DELETED]

C. [DELETED]

D. This clause does not apply to liabilities covered by the Nuclear Hazards Indemnity Agreement.

Richland's determination letter on Bechtel's request was issued by Karen K. Randolph, Director of Richland's Office of External Affairs. In the determination letter, Randolph informed Bechtel that FDH had been given an opportunity, pursuant to 10 C.F.R. § 1004.11(c), to identify parts of the contract that it believed to be protected from disclosure under the FOIA, and to provide a basis for any such claim. Randolph stated that she and her staff had reviewed FDH's claims, and concluded that portions of Clause H.52 should be deleted from the released copy pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Randolph explained that:

Exemption 4 of the FOIA was meant to protect the disclosure of proprietary information. If the deleted portions were released it would reveal FDH's proposed insurance program. This program is currently being negotiated with underwriters.(3)

Analysis

The analysis of whether material can be withheld under Exemption 4 is a complex task, in which we must consider judicial precedents and Departmental regulations. *See Industrial Constructors Corporation*, 25 DOE ¶ 80,196 (1996). For example, the Departmental regulations provide the following criteria for deciding if material can be withheld under Exemption 4:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether the disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

10 C.F.R. § 1004.11(f).

The determination letter from Richland, cited above, claims that the full text of Clause H.52 is "proprietary" and that disclosure of the withheld portions would reveal FDH's proposed insurance program while negotiations with underwriters are in progress. This explanation does not address the criteria we must consider under case law and Departmental regulations. In addition, although we have discussed this matter with personnel at Richland, we have not received any further justification for withholding.

Both the FOIA and DOE regulations require reasonably specific justification for withholding documents or portions of documents. *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). Richland's determination, however, is not sufficiently specific for us to make a reasoned finding whether Clause H.52 merits protection under Exemption 4. *Cf. Larson Associated*, 25 DOE ¶ 80,204 (1996); *Association of Public Agency Customers*, 25 DOE ¶ 80,200 (1996). We will therefore remand this matter to Richland for a new determination, either releasing the text of Clause H.52 or providing adequate justification for withholding it in whole or in part.

It Is Therefore Ordered That:

(1) The appeal filed by Bechtel National, Inc., Case No. VFA-0241, is hereby granted as set forth in Paragraph (2).

(2) This matter is hereby remanded to the Richland Operations Office for processing in accordance with the instructions provided in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 6, 1996

(1) "Project Hanford Management Fact Sheet," available on the World Wide Web at http://www.hanford.gov/phmc/fact-2.htm.

(2) Bechtel also requested a copy of notes made by a Bechtel representative during contract debriefing. Richland did not release the notes, stating they had been destroyed immediately after the debriefing. Bechtel has not raised the issue of the notes in this appeal.

(3) Determination letter from Randolph to Sandra P. Ogden, Bechtel National, Inc., dated October 1, 1996.

Case No. VFA-0243, 26 DOE ¶ 80,144

December 16, 1996

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: William H. Payne

Date of Filing: November 15, 1996

Case Number: VFA-0243

On November 15, 1996, William H. Payne (Payne or the Appellant) filed an Appeal from a determination issued on October 10, 1996, by the Department of Energy (DOE) in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. §552a, as implemented by the DOE in 10 C.F.R. Part 1008. In this Decision and Order, we will determine whether the DOE must release or identify materials withheld under FOIA Exemption 7(C), 5 U.S.C. §552(b)(7)(C), and conduct a further search for documents responsive to the Appellant's FOIA and Privacy Act requests.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

In a FOIA and Privacy Act request dated November 27, 1995, the Appellant sought copies of reports of investigations of misconduct by a named individual made by the DOE's Office of Inspector General (OIG) or other offices, and reports containing the Appellant's name.

By letter dated December 12, 1995, the Director of the FOIA/Privacy Act Division of the Office of the Executive Secretariat (Headquarters' FOIA Office) informed the Appellant that they had sent his FOIA and Privacy Act requests to OIG for a direct response. The

Headquarters' FOIA and Privacy Office did not request that any other DOE office search for responsive documents.

On October 10, 1996, OIG issued a determination in response to the Appellant's FOIA request. It responded to the request for reports of investigation of misconduct by a named individual by stating:

[T]he Office of Inspector General neither confirms nor denies the existence of records responsive to your request. Lacking an individual's consent, an official acknowledgment of an investigation, or an overriding public interest, even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy.

ANALYSIS

This Decision and Order will focus on the adequacy of DOE's search for records responsive to the Appellant's FOIA and Privacy requests and the propriety of OIG's refusal to confirm or deny the existence of enforcement records concerning a third person.(1) As detailed below, we will remand this matter to the Headquarters' FOIA Office to conduct an additional search for responsive records and uphold OIG's refusal to confirm or deny the existence of records.

I. Adequacy of the Search

Generally, a FOIA search is a broad, all-encompassing search that would identify any documents also subject to a Privacy Act analysis. Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,775 (1996). Thus, we will analyze this case under FOIA principles. We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing this Appeal, we contacted employees of the Headquarters' FOIA Office to discuss the search conducted for the requested documents. A FOIA/Privacy Act Specialist informed us that the Headquarters' FOIA Office had requested that only OIG, and no other DOE office, search for responsive records. The FOIA/Privacy Act Specialist asked that we remand Payne's FOIA and Privacy Act requests to the Headquarters' FOIA Office so that it may seek additional documents from other DOE offices. See Memorandum of Telephone Conversation between Joan Ogbazghi, FOIA/Privacy Act Specialist, and Linda Lazarus, OHA Staff Attorney (December 4, 1996).

In view of the foregoing, we shall grant the present Appeal to the extent that we will require that DOE conduct a further search for documents. We will remand this matter to the Headquarters' FOIA Office for a new determination with instructions to search other DOE offices for additional documents.

II. OIG's Refusal to Confirm or Deny the Existence of Records

An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(2) A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under the FOIA, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983). As detailed below, these circumstances exist here, and OIG correctly refused to admit or deny the existence of enforcement records involving a third person.

A. The Appellant's Contentions

In his Appeal, Payne alleges that the OIG's refusal to confirm or deny the existence of records concerning reports of misconduct by a named individual was improper because the individual's misconduct was public, acknowledged by an employee of the Equal Employment Opportunity Commission (EEOC), and financed by taxpayer money.

In support of this position, the Appellant made the following contentions: (1) that the named individual was a high level official at Sandia National Laboratory (Sandia) and is currently a high level official with another DOE contractor; (2) that the named individual had sexual relations with his subordinate at Sandia,

who may have been promoted in exchange for these sexual favors; (3) that Sandia security discovered the named individual having sexual relations with women in his office; (4) that the named individual has been the subject of many complaints of sexual harassment; and (5) that the named individual is married to a woman employed at Sandia who is overcompensated for the work that she does. The Appellant further contends that an EEOC employee has confirmed that these incidents occurred.

The Appellant has not substantiated any of these allegations. Moreover, the Appellant has not alleged that the named individual is the target of a public OIG investigation, or that charges arising from an OIG investigation have been filed against the named individual.

B. The OIG Response

In reviewing this Appeal, we contacted employees of OIG to discuss the Glomar response to the Appellant's FOIA request. An OIG staff attorney stated that OIG has a consistent policy of refusing to confirm or deny the existence of records in response to a FOIA request when the following circumstances exist:

1. The request is made by a third party.
2. The request is for information about a person identified by name.
3. The requested records, if they exist, would be contained in an enforcement file.
4. The named individual is not deceased.
5. The individual has not given the requester a waiver of his privacy right.
6. There has been no official confirmation that an enforcement file or proceeding

exists.

In this case, OIG determined that the six factors existed and then issued a Glomar response to the Appellant's FOIA request. See Memorandum from Jackie Becker, Attorney, Office of the Inspector General to Linda Lazarus (November 27, 1996).

C. Exemption 7(C)

1. In general

Exemption 7(C) of FOIA, 5 U.S.C.§ 552(b)(7)(C), allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

The threshold test for withholding information under Exemption 7(C) is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). Amendments to the FOIA in 1986 extended the protection of Exemption 7 to all records compiled for "law enforcement purposes." See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987).

OIG is an investigative, law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that OIG compiles reports involving official misconduct for law enforcement purposes within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995).

2. The balancing test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980).

a. The privacy interest

The subject of an OIG investigation has a strong privacy interest in remaining anonymous because of the stigma associated with being investigated. See Fund for Constitutional Government v. National Archives & Records Service, 656 F.2d 856, 865 (D.C. Cir. 1981); James L. Schwab, 21 DOE ¶ 80,117 (1991). The D.C. Circuit has acknowledged that investigation subjects possess substantial privacy interests because they may be embarrased and suffer harm to their reputations if others learn that they are the target of a law enforcement investigation. Safecard, 926 F.2d at 1205.

The Appellant argues that the named individual waived his privacy right because he was a high-level official of a government contractor and allegedly committed misdeeds on government time. This position is without merit. A person does not forfeit his or her right to privacy simply by accepting employment as an official of a government contractor. See Baez v. Department of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Bast v. Department of Justice, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (government officials do not surrender right to personal privacy although individuals' position may increase the public interest in disclosure).

The Appellant further contends that the named individual has no privacy right in the non- disclosure of OIG enforcement records because of the public nature of his alleged misconduct and the alleged verification of such misconduct by an employee of the EEOC. This argument is also without merit. The named individual's privacy interest is not destroyed because the requester may have some knowledge of the facts contained in the requested records. Weisberg v. Department of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); L & C Marine Transp. Ltd. v. United States, 740 F.2d 919, 922(11th Cir. 1984) (privacy interest is not lost because information may be discovered through other means.) Moreover, even assuming that an employee of the EEOC has confirmed the Appellant's allegations, such confirmation does not abrogate the individual's right to privacy on the issue of whether he is the target of an OIG investigation. See Davis v. Department of Justice, 968 F.2d 1276 (D.C. Cir. 1992) (requester has burden of proving that the specific material he seeks has been officially acknowledged or is in the public domain).

b. The public interest in disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. We have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). The Supreme Court has held that information that does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." Reporters Committee, 489 U.S. at 775.

Here, the Appellant claims that the public interest in disclosure relates to the fact that the named individual was formerly a high official at Sandia and is currently a high level official with another DOE contractor. The Appellant claims that the named individual financed his alleged misdeeds with government money.

We agree that there is a strong public interest in the disclosure of official misconduct. Here, however, there has been no proof of official misconduct. The Appellant's allegations concerning the named individual are unsubstantiated. The Appellant has failed to demonstrate (or even allege) the existence of a

formal OIG enforcement proceeding or criminal case arising from an OIG investigation. Courts have held that unsubstantiated allegations of official misconduct do not establish a public interest in disclosure. See McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993) (no public interest absent evidence of employee wrongdoing or public investigation); Triestman v. Department of Justice, 878 F. Supp. 667 (S.D.N.Y. 1995) (no substantial public interest in disclosure of information concerning possible investigation of law enforcement agent).

c. Weighing the public interest against the privacy interest

When an individual who has not been formally charged with a crime or other mis-conduct would be exposed as a target of a law enforcement investigation, the public interest in disclosure must be very strong to overcome the invasion of privacy. Fund for Constitutional Government, 656 F.2d at 866. Here, as detailed above, the public interest in disclosure of unsubstantiated allegations of official misconduct is weak. Thus, the public interest in disclosure of these records does not outweigh the privacy right of the individual. Accordingly, if OIG enforcement records involving the named individual exist, these records may be withheld under Exemption 7(C).(3)

D. Disclosure of the Existence of Records Would Reveal Exempt Information

OIG has correctly refused to confirm or deny the existence of records that would reflect whether it has investigated misconduct by the named individual. As detailed below, a consistent Glomar response to such FOIA requests is necessary to protect the privacy rights of individuals who have been the subject of an OIG investigation.

If OIG had admitted that documents responsive to the Appellant's FOIA request exist, but claimed that the documents themselves were exempt from disclosure under Exemption 7(C), it would have revealed the existence of a law enforcement investigation involving the named individual. If OIG had responded that there were no records of an investigation concerning the named individual, then FOIA requesters could infer that OIG only refuses to confirm or deny the existence of enforcement records when such records actually exist. FOIA requesters could then properly infer that a Glomar response from OIG means that a law enforcement file involving a named individual exists. This could compromise the privacy rights of individuals who may be the subjects of third-party FOIA requests in the future.

E. The Glomar Response Was Appropriate

We find that OIG was justified in providing a Glomar response to the Appellant's FOIA request because the records sought, if they exist, would be exempt from disclosure under the FOIA and the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny the portion of the Appeal that relates to OIG's refusal to confirm or deny the existence of enforcement records concerning a third person.

CONCLUSION

We shall grant the present Appeal to the extent that we will require that DOE conduct a further search for documents. We will remand this matter to the Headquarters' FOIA Office for a new determination with instructions to conduct a search for additional documents in other DOE offices. We will deny the portion of the Appeal that relates to the OIG's refusal to confirm or deny the existence of enforcement records concerning a third person.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on November 15, 1996, is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2) This matter is remanded to the FOIA/Privacy Act Division of the Office of the Executive Secretariat which shall request that other DOE offices search for documents responsive to the Appellant's November 27, 1995 FOIA and Privacy Act request. The FOIA/Privacy Act Division of the Office of the Executive Secretariat shall issue a new determination which reflects the results of this additional search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 16, 1996

(1)The OIG responded to the Appellant's request for records containing his name by stating that it will provide these records in response to another FOIA request. As the OIG has not provided a final response to this portion of the Appellant's request for records, this portion of the determination is not yet appealable. 10 C.F.R. §1008.11(a). See also Suffolk County, L.I., 17 DOE ¶ 80,111 at 80,524 (1988) (OHA can assume jurisdiction over a FOIA matter only after a DOE authorizing official has rendered an initial determination).

(2)"Glomar" refers to the first instance in which a Federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents).

(3)It is important to note that we could reach the same result by relying on those cases that hold that names of private individuals appearing in an agency's law enforcement files are "categorically" exempt from disclosure under Exemption 7(C). Safecard, 926 F.2d at 1205-06.

Case No. VFA-0244, 26 DOE ¶ 80,152

January 15, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James L. Hecht

Date of Filing: December 16, 1996

Case Number: VFA-0244

On December 16, 1996, James L. Hecht completed the filing of an Appeal with the Office of Hearings and Appeals (OHA) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In his appeal, Mr. Hecht contests the adequacy of the search for responsive documents that was coordinated by the DOE's Office of Energy Efficiency and Renewable Energy (EE) pursuant to his FOIA request.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C.§ 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his FOIA request, Mr. Hecht sought copies of "all documents related to the implementation of the energy conservation part of the Memorandum of Cooperation (MOC) with Russia which was signed by Secretary O'Leary in 1993....including, but not limited to, contracts, memoranda, notes, electronic mail records, minutes of meetings and other records concerning the allegations that conflicts of interest existed." FOIA request at 1. Mr. Hecht went on to specify three sub-categories of documents that were of particular interest to him: (i) contracts signed with either of two specified firms and subcontracts to those contracts; (ii) documents

detailing why the specified firms were chosen as contractors; and (iii) reports on the results of those contracts.

In response to Mr. Hecht's request, the EE coordinated a search for responsive documents that included its files and those of the DOE's Office of General Counsel and Office of the Inspector General. In a determination letter dated October 29, 1996 the EE stated that it had located responsive documents, and that those documents were being provided to Mr. Hecht, with portions deleted pursuant to Exemption 6 of the FOIA.

In his appeal, Mr. Hecht does not challenge the EE's application of Exemption 6, but instead contends that

the search for responsive documents was inadequate. In this regard, he claims that there are a large number of documents that should have been provided to him, but were not included in the EE's response to his request. As examples of the type of documents that Mr. Hecht claims should have been provided, he cites two letters that he wrote to Ronald Bowes, a DOE employee, the minutes of a meeting concerning the Russian - American MOC that occurred in Geneva, Switzerland on November 30 through December 3, 1993, and a report on Mr. Bowes' recent trip to Russia to discuss financing for energy efficiency demonstration zones.

In order to determine the scope of the search that was performed, we contacted the EE. We were informed that because of the extreme breadth of Mr. Hecht's request, the EE interpreted that request as covering only the three sub-categories of documents specified above. The EE informed us that a literal interpretation of the request would have required the EE to search for, review and reproduce thousands of pages of documents, and that such a task would be unreasonably burdensome and disruptive of that Office's operations. See memorandum of January 9, 1996 telephone conversation between Robert Palmer, OHA Staff Attorney, and Tom Sacco, EE.

II. Analysis

The DOE regulations governing the processing of FOIA requests provide that such requests "must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort."

10 C.F.R. § 1004.4(b). Requests for well-defined categories of documents shall be regarded as conforming to this requirement "if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The Freedom of Information Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office." 10 C.F.R. § 1004.4(c)(1). If a request does not reasonably describe the records sought, the DOE response "will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records." 10 C.F.R. § 1004.4(c)(2).

As an initial matter, it is clear from the record in this case that Mr. Hecht seeks access to a much broader range of documents than is reflected in the EE's interpretation of his request. In narrowing the scope of the request, the EE has apparently determined that Mr. Hecht has failed to submit a request for reasonably described documents as that term is defined in the DOE regulations. However, there is no indication in the record before us that the EE notified Mr. Hecht of this deficiency, or consulted with him in any meaningful way in its attempt to narrow his request. (1) This was inconsistent with the regulatory provisions quoted above. We will therefore remand this matter to the EE. On remand, the EE should inform Mr. Hecht that his request is overly broad, and should confer with him in an attempt to reduce the request to manageable proportions by reformulation or by agreeing to an orderly procedure for the production of records. See, e.g., Charles Varon, 6 DOE ¶ 80,125 (1980).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James L. Hecht on December 16, 1996 is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Office of Energy Efficiency and Renewable Energy for further proceedings in accordance with the directions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial

review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 15, 1997

(1)The EE has informed us that during telephonic communications with Mr. Hecht, he reiterated the statement in his request that he was particularly interested in the three sub- categories of documents. See memorandum of January 9, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Tom Sacco, EE. However, we do not believe that these communications constitute a consultation with DOE officials in order to narrow the scope of a FOIA request within the meaning of 10 C.F.R. § 1004.4(c)(2). As set forth above, there is no indication in the record that Mr. Hecht was made aware at any point in this proceeding that his request was unacceptable as submitted. Furthermore, during these communications, Mr. Hecht did not indicate in any way that he intended to withdraw the broader requests for information that he submitted. Id.

Case No. VFA-0245, 26 DOE ¶ 80,154

January 15, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: J.B. (Jack) Truher

Date of Filing: December 16, 1996

Case Number: VFA-0245

On December 16, 1996, Mr. J.B. (Jack) Truher completed the filing of an Appeal from a determination issued to him on October 23, 1996, by the Deputy Inspector General for Inspections of the Office of Inspector General (Deputy IG) of the Department of Energy (DOE). In that determination, the Deputy IG partially granted a request for information filed by Mr. Truher under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In his request for information, Mr. Truher sought the following documents concerning an IG investigation:

1. All pages of all DOE/IG investigative documents of file #94-RI-032 that name Mr. Truher.
2. All pages of all the documents that include a justification by the Stanford Linear Accelerator Center (SLAC) management for rehiring employees who just retired, and how SLAC implemented or exceeded these policies.
3. All pages of all documents that include a determination by the DOE IG of whether SLAC is in noncompliance with ethical or legal requirements regarding Stanford's Early Retirement Incentive Program (SERI).
4. All pages of documents explaining DOE sanctions on SERI, a determination of misconduct or a corrective response by SLAC, Stanford, or DOE, regarding Mr. Truher's complaint to the DOE/IG.
5. All pages of all documents related to Mr. Truher's charges of reprisal by SLAC and Stanford University.

In his determination, the Deputy IG released ten documents in their entirety, released fourteen documents with material redacted pursuant to Exemptions 5, 6 or 7(C) of the FOIA, and withheld another five documents in their entirety pursuant to Exemptions 5, 6 or 7(C). In his Appeal, Mr. Truher requests that the DOE release all of the redacted information and the withheld documents.

II. Analysis

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

In the present case, we have reviewed the information withheld pursuant to Exemption 5 and find it is clearly both predecisional and deliberative pursuant to Exemption 5. In fact, we have confirmed that the information withheld pursuant to Exemption 5 contains opinions and interpretations from various DOE employees, the disclosure of which would discourage open, frank discussions between these individuals. Specifically, document number 37 (withheld in its entirety) and portions of other documents withheld pursuant to Exemption 5 contain handwritten notes and calculations from investigators commenting on and highlighting different facets of the IG investigation. These comments and calculations are clearly predecisional and deliberative in their nature and their release could only inhibit honest communication and evaluations by investigators in the future. Thus, we conclude that the Deputy IG made a correct determination regarding the material withheld pursuant to Exemption 5.

B. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Pursuant to established legal precedent, there is no doubt that the names of individuals redacted in this case qualify as "similar files" under Exemption 6.

In order to determine whether a record may be withheld pursuant to Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be invaded by the disclosure of the record. If the agency does not identify a privacy interest,

it may not withhold the record pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Comm.). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

Exemption 7(C) applies to a much narrower class of cases than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Pursuant to Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both Exemptions 6 and 7(C) require a balance of the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of privacy" (emphasis added). Since the documents at issue in this case meet Exemption 7(C)'s threshold test, we need only examine the Deputy IG's actions pursuant to the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124 at 80,550 (1992).

Pursuant to the provisions of Exemption 7, we have examined investigations conducted by the Office of the Inspector General in response to complaints by individuals, as in this case, and found that they are law enforcement activities. See e.g., Stoel Rives, LLP, 25 DOE ¶ 80,189 at 80,723 (1996); Robert Burns, 19 DOE ¶ 80,134 at 80,596-97 (1989). Since the material qualifies for Exemption 7 analysis, we must consider whether release of the withheld material would result in one of the harms listed in Exemption 7. Ferguson v. Federal Bureau of Investigation, 957 F.2d 1059, 1065 (2d Cir. 1992). We have reviewed the material withheld pursuant to both Exemption 6 and 7(C) and found that it contains names (corresponding salary figures released), names and years of service and job title (corresponding retirement status and in some cases salary figures released), names and social security numbers and length of employment and job title (corresponding salary figures and in some cases employment status released), and the name of the person interviewed by an IG investigator (corresponding comments by the individual released). All of the individuals whose names and identifying information the Deputy IG withheld are either actual sources or possible sources in the investigation into alleged mismanagement of SERI.

We have found there is a strong privacy interest in the names and related identifying information of sources and witnesses to an investigation. Sources and witnesses have an obvious privacy interest in remaining anonymous. See James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109 at 80,524 (1990). Furthermore, the public interest favors protecting the identities of sources and witnesses, rather than disclosing them, to insure that witnesses continue to provide information voluntarily for law enforcement investigations, without fear of retribution. See generally King v. Department of Justice, 830 F.2d 210, 232-36 (D.C. Cir 1987). Since there are strong privacy and public interests in protecting these identities, we find that the Deputy IG properly withheld the names of its sources or potential sources. Furthermore, in the instances where the Deputy IG withheld the corresponding salary, retirement information, years of service, job title, and social security numbers, all of these involved identifying pieces of information that someone could use to discover the identities of these individuals. However, in reviewing documents 28, 30, 45 and 46, all withheld in their entirety, we found that disclosure of the title headings used in each of these documents would not invade anyone's privacy interest, nor are the headings "predecisional" or "inextricably intertwined" with the exempt material pursuant to any Exemption 5 considerations. Accordingly, we find that the Deputy IG should release the

title headings in documents 28, 30, 45, and 46.

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Comm., 489 U.S. at 773. The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987). Mr. Truher has not demonstrated and we do not find any public interest in the disclosure of the requested information. We fail to see how release of the particular names and other identifiers of the Deputy IG's sources or possible sources in an investigation would aid the public in understanding anything about the workings of the government. In view of the fact that there is no apparent public interest to balance against the significant potential invasion of personal privacy, we find that the Deputy IG properly withheld the names and identifying information of sources and possible sources from disclosure. Accordingly, we find that the Deputy IG properly withheld the names of individuals and the related information that someone could use to identify them.

It Is Therefore Ordered That:

(1) The Appeal filed by J.B. (Jack) Truher on December 16, 1996, Case No. VFA-0245, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Deputy Inspector General for Inspections of the Office of Inspector General of the Department of Energy who will release only the title headings used in the documents numbered 28, 30, 45 and 46.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 15, 1997

Case No. VFA-0246, 26 DOE ¶ 80,150

January 14, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Keci Corporation

Date of Filing: December 2, 1996

Case Number: VFA-0246

On December 2, 1996, August Kugler (Kugler) of Keci Corporation (Keci) filed an Appeal from a determination issued to the firm in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004 and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The determination was issued on September 25, 1996, by DOE's Office of Inspector General (OIG).(1) This Appeal, if granted, would require that OIG release responsive documents, if they exist, that were withheld under FOIA Exemption 7(C), 5 U.S.C. §552(b)(7)(C).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Keci is an engineering firm that was an unsuccessful bidder on a contract awarded by DOE's Richland Operations Office (DOE/RL). Keci contends that the successful bid by Kaiser Engineers Hanford (Kaiser) was not responsive to the RFP and that Kaiser was improperly awarded the contract. Keci further alleges that a named individual, formerly employed by Kaiser, provided information supporting this allegation to DOE. On February 7, 1994, Keci filed a request with DOE's FOI/Privacy Act Branch (DOE/HQ) for:

(1) the complete document(s) including any attachments or references submitted by [a named individual] to the Department of Energy in approximately October of 1993 on the subjects of Kaiser Engineers Hanford's implementation of or failure to properly implement Washington State Regulations for Corporations performing engineering in the State of Washington, including any allegation of retaliatory actions. The transmittal letter may be dated October 29, 1993, and the receipt date in the Department of Energy may be November 1, 1993.

(2) the complete response provided by the Department of Energy to [a named individual]. This response may be dated approximately November 18, 1993.

(3) documents prepared by or received by the Department of Energy related to the above subject including but not limited to recorded information whether on tape or on disc, including but not limited to telephone

records and logs, meeting records and logs, activity reports and correspondence.

Letter from Keci to DOE (February 7, 1994).

DOE/HQ referred the request to OIG. On September 25, 1996, OIG issued a determination in response to Keci's FOIA request. It responded to the request for documents referring to the named individual by stating:

With respect to your request for documents concerning the above, the Office of Inspector General neither confirms nor denies the existence of such records. Lacking an individual's consent, an official acknowledgment of an investigation, or an overriding public interest, even to acknowledge the existence of investigatory records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. Refer to 5 U.S.C. §552 (b)(7)(C).

Letter from Deputy Inspector General for Inspections, OIG, to Keci (September 25, 1996) (Determination Letter).

II. Analysis

This Decision and Order will focus on the propriety of OIG's determination of a privacy interest and OIG's refusal to confirm or deny the existence of investigatory records concerning a third person. As detailed below, we will uphold both actions.

An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(2) A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under Exemption 7(C) of the FOIA, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983); William H. Payne, 26 DOE ¶ 80,144 (1996). In order to use a Glomar response, there must be a cognizable privacy interest at stake and insufficient public interest in disclosure to outweigh that privacy interest. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy at 3 (Winter 1986) (FOIA Update). As explained below, these circumstances exist here, and OIG correctly refused to admit or deny the existence of investigatory records involving a third person.

A. Keci's Allegations

In this Appeal, Keci alleges that the OIG's refusal to confirm or deny the existence of records concerning disclosures made by a named individual was improper because (1) there was official confirmation that an enforcement file exists, and (2) there is an overriding public interest in the conduct of the DOE/RL procurement in question. Letter from Keci to Director, OHA (December 2, 1996) (Appeal Letter). In support of this position, Kugler informed us that he called the Office of the Secretary and was given the dates of correspondence between the named individual and DOE. See Memorandum of Telephone Conversation Between Kugler and Valerie Vance Adeyeye, OHA Staff Attorney (December 13, 1996).

A FOIA appeal is not the proper forum for the consideration of any alleged irregularities in the DOE/RL contract award, procurement process, or Keci's subsequent bid protest. Thus, we will decide only whether OIG properly used the Glomar response. As an initial matter, we find that Keci has not substantiated its allegation that references to the named individual are found in an officially confirmed enforcement file or proceeding. Kugler may have received dates of correspondence between the named individual and DOE, although he did not receive written acknowledgment of any investigation or enforcement action regarding the named individual.(3) Therefore, we find no official confirmation of an enforcement action which identifies the individual.

B. The OIG Response

In reviewing this Appeal, we contacted employees of OIG to discuss the Glomar response to Keci's FOIA request. An OIG staff attorney stated that OIG has a policy of refusing to confirm or deny the existence of records in response to a FOIA request when the following circumstances exist:

1. The request is made by a third party.
2. The request is for information about a person identified by name.
3. The requested records, if they exist, would be contained in an enforcement file.
4. The named individual is not deceased.
5. The individual has not given the requester a waiver of his privacy right.
6. There has been no official confirmation that an enforcement file or proceeding

exists.

Memorandum from Jackie Becker, Attorney, Office of the Inspector General to Linda Lazarus (November 27, 1996). In this case, OIG determined that the six factors existed and on that basis issued a Glomar response to Keci's FOIA request.

C. Exemption 7(C)

1. In general

Exemption 7(C) of FOIA, 5 U.S.C.§ 552(b)(7)(C), allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The use of the Glomar response under Exemption 7(C) is justified only when it is determined that there is a cognizable privacy interest at stake and that there is insufficient public interest in disclosure to outweigh it. See FOIA Update at 3.

The threshold test for withholding information under Exemption 7(C) is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). Amendments to the FOIA in 1986 extended the protection of Exemption 7 to all records compiled for "law enforcement purposes." See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987).

OIG is an investigative, law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that OIG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995).

2. The balancing test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980).

a. The privacy interest

An individual who files an official complaint alleging irregularities in DOE's procurement process has a privacy interest in being protected from possible retaliation. We have previously found that sources mentioned in OIG files have a strong privacy interest in remaining anonymous. See Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); James L Schwab, 21 DOE ¶ 80,117 (1991). Indeed, the courts have recognized the possibility of harassment or intimidation of these sources, and have consistently found that privacy interests in the identities of individuals providing information to government investigators are greatly amplified. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991), *cited in* Stoel Rives, LLP, 25 DOE ¶ 80,189 at 80,724 (1996). Therefore, unless that person has waived this privacy interest, he is entitled to protection from disclosure of his activities.

We asked Kugler if the named individual had waived his privacy right, and consented to the release of any responsive records that may exist. Kugler admitted that the named individual, an employee of a government contractor, never gave Keci a waiver of his privacy rights, and, in fact, was very reluctant to discuss the matter with Kugler. See Memorandum of Telephone Conversation Between Kugler and Valerie Vance Adeyeye, OHA Staff Attorney (December 13, 1996). We have previously stated that a person does not forfeit his or her right to privacy simply by accepting employment with a government contractor. See William Payne, 26 DOE ¶ 80,144(1996); Baez v. Department of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Bast v. Department of Justice, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (government officials do not surrender right to personal privacy although individual's position may increase the public interest in disclosure).

The Appellant further contends that the named individual has no privacy right in the non- disclosure of OIG enforcement records because of the public nature of a government contract and alleged misconduct in the award of that contract. This argument is also without merit. The named individual's privacy interest is not destroyed because the requester may have some knowledge of the facts contained in the requested records. Weisberg v. Department of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); L & C Marine Transp. Ltd. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) (privacy interest is not lost because information may be discovered through other means). Moreover, even assuming, *arguendo*, that specific material that might confirm Keci's allegations may exist, the existence of those records does not abrogate the individual's right to privacy on the issue of whether he is involved in an OIG investigation. See Davis v. Department of Justice, 968 F.2d 1276 (D.C. Cir. 1992) (requester has burden of proving that the specific material he seeks has been officially acknowledged or is in the public domain).

b. The public interest in disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. FOIA Update at 4. We have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). The Supreme Court has held that information which does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." Reporters Committee, 489 U.S. at 775.

Here, the Appellant claims that the public interest in disclosure stems from the named individual's alleged assertions of irregularities in a DOE/RL procurement. We agree that there is a strong public interest in the disclosure of official misconduct. However, we find no proof of official misconduct. The Appellant's allegations concerning the procurement process are unsubstantiated. The Appellant has failed to confirm the existence of a formal OIG enforcement proceeding or criminal case arising from an OIG investigation. Courts have held that unsubstantiated allegations of official misconduct do not establish a public interest in disclosure. See McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993) (no public interest absent evidence of employee wrongdoing or public investigation); Triestman v. Department of Justice, 878 F. Supp. 667 (S.D.N.Y. 1995) (no substantial public interest in disclosure of information concerning possible investigation of law enforcement agent).

c. Weighing the public interest against the privacy interest

Here, as detailed above, the public interest in disclosure of unsubstantiated allegations of official misconduct is weak. The privacy interest involved is real and identifiable. Thus, the public interest in disclosure of any records that may exist does not outweigh the privacy right of the individual.

D. Disclosure of the Existence of Records Would Reveal Exempt Information

Accordingly, if OIG enforcement records involving the named individual exist, refusal to confirm or deny the existence of these records is proper under Exemption 7(C).(4) As detailed below, a Glomar response to such FOIA requests is necessary to protect the privacy rights of individuals whose identity may be revealed in an OIG investigation.

If OIG had admitted that documents responsive to the Appellant's FOIA request exist, but claimed that the documents themselves were exempt from disclosure under Exemption 7(C), it would have revealed the existence of a law enforcement investigation involving the named individual. If OIG had responded that there were no files concerning the named individual, then FOIA requesters could infer that OIG only refuses to confirm or deny the existence of enforcement records when such records actually exist. FOIA requesters could then properly infer that a Glomar response from OIG means that a law enforcement file involving a named individual exists. This could compromise the privacy rights of individuals who may be the subjects of third-party FOIA requests in the future. Thus, by refusing to confirm or deny the existence of an enforcement file on the named individual, OIG has properly protected that individual's privacy rights.

III. Conclusion

We find that OIG was justified in providing a Glomar response to the Appellant's FOIA request because the records sought, if they exist, would be exempt from disclosure under the FOIA and the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Keci Corporation on December 2, 1996, OHA Case No. VFA- 0246, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 14, 1997

(1)Keci received the determination letter on October 28, 1996.

(2)"Glomar" refers to the first instance in which a federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the

existence of any such documents).

(3)We asked DOE/HQ to search the correspondence database of the Office of the Secretary for any references to the named individual. They found two documents from the named individual to the Secretary of Energy, but neither document was responsive to Keci's request.

(4)It is important to note that we could reach the same result by relying on those cases that hold that names of private individuals appearing in an agency's law enforcement files are "categorically" exempt from disclosure under Exemption 7(C). Safecard, 926 F.2d at 1205- 06.

Case No. VFA-0247, 26 DOE ¶ 80,157

January 28, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ezra A. Beattie, Sr.

Date of Filing: January 3, 1997

Case Number: VFA-0247

On January 3, 1997, Ezra A. Beattie, Sr. (Appellant) filed an Appeal from a final determination issued on October 24, 1996, by the Department of Energy's (DOE) Office of Inspector General (IG). In that determination, the IG released copies of one responsive document in its entirety and an additional three responsive documents from which information had been deleted. This partial release occurred in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

The Appellant submitted a request for information to the DOE seeking copies of all documents regarding certain allegations concerning him involving an alleged incident at the Pantex Courier Section in Amarillo, Texas. On October 24, 1996, the IG issued a determination in response to this request releasing one document in its entirety and withholding portions of three other documents under Exemptions 6 and 7(C). On January 3, 1997, the Appellant filed the present Appeal, contending that the DOE's withholding of the deleted information was improper.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemptions 6 and 7(C) are at issue in the present case.

Release of the withheld information would reveal the identities of potential witnesses, informants and confidential sources. Since release of these individuals' identities might subject them to harassment, intimidation or other personal intrusions, the IG has withheld it under both Exemptions 6 and 7(C). The Appeal contends that the IG improperly applied these exemptions.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of

State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. In the present case, the requested information pertains to an IG investigation of allegedly criminal activities occurring at a DOE facility. The IG is therefore a classic example of an organization with a clear law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either: (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3.

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 law enforcement purpose threshold is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992); James L. Schwab, 21 DOE ¶ 80,117 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990); Jerry O. Campbell, 17 DOE ¶ 80,132 (1988). Exemption 6 allows an agency to withhold information if its release would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). By contrast, Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes, if its release could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). It is only necessary to address the application of Exemption 7(C) to these documents since all of the documents were compiled for law enforcement purposes and any document which satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Similarly, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

(1) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY-TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,524 (1990). The Appeal claims that the conclusion of the IG investigation at issue in the present case terminates these privacy interests. This assertion is without merit. The courts have

consistently held that the passage of time does not negate individuals' privacy interests in non- disclosure of their identities. See e.g., McDonnell v. U.S., 4 F.3d 1227, 1256 (3d Cir. 1993). The potential for harassment, intimidation or other personal intrusions remains present even after the conclusion of an IG investigation. Accordingly, we find that the individuals whose identities are being withheld have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public which may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also Horner, 879 F.2d at 879.

It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." See e.g., Safecard, 926 F.2d at 1205; KTVY-TV, 919 F.2d at 1469. In the absence of a compelling reason for deviating from this body of precedent we reach that conclusion in the present case.

(3) The Balancing Test

Because release of the individuals' identities could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we have found significant privacy interests. After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we have found that release of information revealing the individuals' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Our findings are consistent with those reached by several appellate courts, that when presented with a similar set of facts, have found that the privacy interests of individuals supplying information to government investigators clearly outweigh the negligible public interest in disclosure of these individuals. See, e.g., Safecard; KTVY-TV, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); Cucarro, 770 F.2d at 359.

While we are strongly committed to keeping the public fully informed about the DOE, we are also concerned about preserving the privacy rights of individuals providing information to the IG's investigators. By releasing the responsive documents with only those redactions necessary to prevent identification of specific individuals, the agency has provided as much information as possible while safeguarding individual privacy rights.

III. CONCLUSION

On the basis of the facts presented and federal case law, we have found significant privacy interests in the individuals' identities. We have also determined that disclosure would not significantly increase the public's understanding of the operations and activities of the government. Accordingly, we find that this information was properly withheld under Exemptions 6 and 7(C).

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Ezra A. Beattie, Sr. on January 3, 1997 (Case Number VFA-0247) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 28, 1997

Case No. VFA-0248, 26 DOE ¶ 80,148

January 7, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Carlos Blanco

Date of Filing: December 9, 1996

Case Number: VFA-0248

On December 9, 1996, Carlos Blanco filed an Appeal from a determination issued on November 5, 1996, by the Bonneville Power Administration (BPA). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Parts 1004 and 1008.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1. The Privacy Act requires each federal agency to, inter alia, permit an individual to gain access to information about that individual which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2).

I. Background

On October 23, 1996, Mr. Blanco requested, "[u]nder the Freedom of Information Act (FOIA) or the Privacy Act, whichever applies to this case," a copy of a fact-finder's report that was compiled by a paralegal specialist on behalf of the BPA Office of General Counsel (BPA/GC). Memorandum from Carlos Blanco to Veronica Williams, BPA (October 23, 1996). The fact-finder's report concerned a July 1996 incident which took place in a BPA cafeteria, and which involved, among other people, Mr. Blanco. BPA issued a determination on November 5, 1996, in which it released portions of the report, but withheld the rest of the report under FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5), (6). Letter from Richard A. Nelson, BPA, to Carlos Blanco (November 5, 1996). Withheld from Mr. Blanco were the body of the report, statements of witnesses taken by the fact- finder, and several exhibits attached to the report.

In his Appeal, Mr. Blanco states:

I am dissatisfied with [BPA's] determination, and wish to appeal it for the following reasons:

1. I have a right to access personal information contained in a US Government file.
2. I have a right to respond to any unfavorable information that is contained in a US Government file.
3. I have a right to correct any erroneous information contained in a US Government file.
4. I have a right to be notified when unfavorable information contained in a US Government file is

given to third parties. In this case, there are no specific policies or procedures to safeguard, disseminate, and/or destroy any documents containing unfavorable information.

5. I have a right to know how the unfavorable information is/will be used internally at BPA. In this case, there are no specific policies or procedures to govern who has access to the information, or how the information is/will be used.
6. Finally, I have a right to a reasonable precaution that the unfavorable information contained in a US Government file is not misused.

Letter from Carlos Blanco to Office of Hearings and Appeals (OHA) (undated).

II. Analysis

A. The Applicability of the Privacy Act

As an initial matter, we note that it is the general practice of the DOE to process a request by an individual for information about that individual under both the Privacy Act and the FOIA. However, in the present case, we find for the reasons explained below that the record at issue is not subject to the provisions of the Privacy Act.

The Privacy Act requires each federal agency to permit an individual to gain access to and request amendment of information which is contained in any "system of records" maintained by the agency.(1) 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2), (3). A "system of records" is defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5); 10 C.F.R. § 1008.2(m). An individual is entitled under the Privacy Act "to gain access to his record or to any information pertaining to him which is contained in the system," and has the right to request amendment of his own record. 5 U.S.C. § 552a(d).

BPA/GC has informed us that fact-finder reports such as the report which is the subject of the present Appeal are typically filed by reference to the name of the person or persons whose allegations were the subject of the fact-finding. Memorandum of telephone conversation between Mary Wooldridge, BPA/GC, and Steve Goering, OHA (December 20, 1996). Because such records are retrieved by the name of an individual, they are contained in a Privacy Act "system of records." However, the fact- finder's report that was requested by Mr. Blanco was completed only recently and therefore has not yet been filed in this system of records. Thus, Mr. Blanco does not have the right *under the Privacy Act* to gain access to or to request amendment of the fact-finder's report. We next examine Mr. Blanco's right to access this report under the FOIA, and specifically the exemptions cited by BPA in withholding information from Mr. Blanco.

B. The Applicability of FOIA Exemptions to the Information Withheld by BPA

1. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work product privilege, and the "deliberative process" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, BPA relied upon the attorney work product, deliberative process, and witness statement privileges of Exemption 5.

a. Attorney Work Product Privilege

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947) (Hickman). This privilege does not apply to every written document generated by an attorney, but only to those prepared either for trial or in anticipation of litigation. Coastal States, 617 F.2d at 865. The Federal Rules of Civil Procedure extend the privilege to documents prepared "by or for" a litigant. Fed. R. Civ. P. 26(b)(3). So long as there is "some articulable claim likely to lead to litigation," id., or potential litigation has become "identifiable," the work product privilege will attach. See William Hyde, 17 DOE ¶ 80,130 at 80,570 (1988) (citing Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976)).

In the present case, the fact-finder's report was prepared by a paralegal working at the request and under the direction of Joseph Bennett, a BPA attorney. Memorandum of telephone conversation between Joseph Bennett, BPA/GC, and Steve Goering, OHA (December 20, 1996). Moreover, there is no question that there was potential for litigation in July and August of 1996, when the fact-finder's report was generated. BPA/GC stated that the report was prepared in anticipation of litigation arising from an incident that was the subject of the report. Memorandum of telephone conversation between Joseph Bennett, BPA/GC, and Steve Goering, OHA (December 20, 1996). BPA/GC also informed us that Mr. Blanco has recently filed an Equal Employment Opportunity (EEO) complaint with BPA concerning the incident, which action confirms the potential for both administrative and court litigation. Id.; see Exxon Corp. v. Department of Energy, 585 F. Supp 690, 700 (D.D.C. 1983) ("administrative litigation certainly can beget court litigation and may in many circumstances be expected to do so"); cf. Williams v. McCausland, No. 90-Civ-7563, slip op. at 29 (S.D.N.Y. Jan. 18, 1994) (documents generated in connection with litigation before Merit Systems Protection Board).

It is also clear that the report in question is precisely the type of document meant to be protected by the work product privilege. In the seminal case of Hickman v. Taylor, the Supreme Court set forth the rationale behind the privilege.

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman, 329 U.S. at 510-11. In this case, the investigator sifted relevant from irrelevant facts on behalf of the attorney, and presented her findings in the report that was withheld from the Appellant. Therefore, based on our review of the report and the circumstances present, we agree with BPA that the body of the report, the witness statements, and the exhibits are protected from disclosure by the attorney work product privilege of Exemption 5. See Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (witness statements); Exxon Corp. v. FTC, 466 F. Supp. 771, 772-73 (D.D.C. 1978) (economist's report), aff'd, 663 F.2d 120 (D.C. Cir. 1980); Wilson v. Department of Energy, No. 84-3163, slip op. at 8 (D.D.C. Jan. 28, 1995) (consultant's report).

b. Deliberative Process Privilege

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making

government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give and take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

BPA explained in its determination that the fact-finder's report

was created to assist BPA management in determining whether a claim of alleged harassment occurred which violated BPA's Anti-Harassment Policy. Many portions of the report reflect the personal views and recommendations of its author. For example, the report contains [the fact-finder's] personal opinion of the credibility of witnesses and reliability of evidence. Release of this type of material could interfere with the candid exchange of written views in the future, thereby depriving the final decisionmaker the benefit of being able to thoroughly evaluate this matter.

Letter from Richard A. Nelson, BPA, to Carlos Blanco (November 5, 1996) at 2. We have reviewed the report and agree with BPA's characterization of it. The report is clearly both predecisional and deliberative, and therefore was properly withheld under the deliberative process privilege of Exemption 5.

c. Witness Statement Privilege

In various contexts, the courts have found that statements given by witnesses in the course of agency investigations are withholdable under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (Air Force aircraft accident investigation); Ahearn v. United States Army Materials & Mechanics Research Ctr., 583 F. Supp. 1123, 1124 (D. Mass. 1984) (Inspector General investigation). In American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308 (D.D.C. 1977), the U.S. District Court for the District of Columbia observed:

[C]ommon sense dictates that a warning to witnesses that their testimony will be generally disclosable under the FOIA would discourage candor and would severely limit the effectiveness of Inspector General investigations. . . . The Court views as unrealistic plaintiffs' suggestion that the facts of each particular case be examined to determine whether nondisclosure of witnesses' statements is justified. Witnesses in future Inspector General investigations, many of which undoubtedly will concern more controversial matters than the present case, cannot be expected to rely on an uncertain assurance that a court will not require public disclosure of their testimony.

Id. at 1314.

BPA states in its determination letter that its investigation in the present case "required that those persons interviewed give candid opinions of their co-workers and/or supervisors. Release of the statements would inhibit cooperation of witnesses in future investigations for fear that such statements would be made public." Letter from Richard A. Nelson, BPA, to Carlos Blanco (November 5, 1996) at 2. Applying the same rationale used by the courts in withholding witness statements, we agree with BPA and find that the witness statements were properly withheld from Mr. Blanco. See Weber, 465 U.S. at 802 ("The legislative history of Exemption 5 . . . recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations."); see also Richard Joslin, 26 DOE ¶ 80,101 at 80,502 (1996) (witness statements withheld under the Exemption 5 deliberative process privilege).

d. The Public Interest in Disclosure of Material Subject to Exemption 5

As explained earlier, under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. For information withheld under the attorney work product privilege, we find that the public interest is best served by non-disclosure in order to insure that government attorneys are able to prepare their clients' cases free from the kind of "undue and needless interference" cited by the Supreme Court in Hickman v. Taylor. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." Hickman, 329 U.S. at 510-11. Without the protection of the privilege, government attorneys would be handicapped from providing effective representation to agencies. Regarding information withheld under the deliberative process and witness statement privileges, we find that the public interest is served by the frank and open expression of views by agency employees and the continued candor of witnesses in matters being investigated by an agency. Therefore, we find that the public interest does not mandate release of the material withheld under Exemption 5.

We further find that the existence of tangible risks to the interests protected by the work product privilege satisfies the reasonably foreseeable harm standard set forth by the Attorney General in 1993. This standard applies a presumption in favor of disclosure which, unless an "agency reasonably foresees that disclosure would be harmful to an interest protected" by an Exemption, should result in a determination by the agency that the public interest lies with disclosure. Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies (October 4, 1993). Because the documents in question were created in response to a specific incident involving the Appellant, and because the Appellant has filed an EEO complaint as a result of the incident, we can reasonably foresee that release of the documents will give the Appellant "the benefit of the agency's legal and factual research and reasoning, enabling him to litigate ? on wits borrowed from the adversary.'" FTC v. Grolier Inc. 462 U.S. 19, 30 (1983) (Brennan, J., concurring) (quoting Hickman, 329 U.S. at 516 (Jackson, J., concurring)). Accordingly, the DOE cannot responsibly make a discretionary disclosure of the withheld portion of the fact-finder's report.

2. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

BPA states that the witnesses who provided statements to the fact-finder in the present case "have a significant privacy interest in their statements and portions of the report that refer to their statements. The witness statements and other portions of the report contain candid comments and opinions of [BPA] cafeteria personnel and cafeteria customers that might lead to reprisals." Letter from Richard A. Nelson, BPA, to Carlos Blanco (November 5, 1996) at 2. In this respect, BPA's determination is consistent with our prior decisions and decisions of the federal courts finding that witnesses who have provided information to agency investigators have a strong privacy interest in remaining anonymous. Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); James L. Schwab, 21 DOE ¶ 80,117 (1991); Walsh v. Department of the Navy, No. 91 C 7410, slip op. at 5 (N.D. Ill. Mar. 23, 1992). If the information

in the witness statements could be released without revealing the identities of the witnesses, the privacy interests of the individual could be protected. However, it is apparent from our review of the fact-finder's report that the requester would very likely be able to determine the identities of the witnesses from the content of their statements.

The public interest in the information contained in the witness statements is not as clear. On one hand, the events that led to the fact-finding report have given rise to an EEO complaint and charges of harassment. There is an arguably strong public interest in allegations of violations of federal laws and policies at a government facility. On the other hand, the release of the information withheld in the present case would only shed light on one isolated incident at a BPA cafeteria. Thus, despite any allegations stemming from this incident, releasing the information in question would not likely shed significant light on the operations and activities of the Government. Moreover, the public interest favors the protection of identities of witnesses rather than disclosure, in order to ensure that witnesses continue to provide information voluntarily in future investigations. On balance, because the public interest does not clearly favor release of the information, and because distinctly perceptible privacy interests are at stake, we find that BPA properly withheld the witness statements and other information in the fact-finder's report that could identify witnesses.

For the reasons stated above, we conclude that BPA correctly applied FOIA Exemption 5 and 6 in withholding information from the Appellant. Accordingly, the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Carlos Blanco on December 9, 1996, Case Number VFA-0248, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 7, 1997

(1) As implied by the issues raised in Mr. Blanco's Appeal, the Privacy Act also imposes certain requirements on government agencies in their use of personal information, including limitations on disclosure to third parties. However, the appeal authority of the OHA under the DOE Privacy Act regulations extends only to the review of determinations issued in response to requests by individuals for access to records or amendment of records. 10 C.F.R. § 1008.11(a). Moreover, in Mr. Blanco's original request to BPA, he did not seek to amend records, but rather requested only access to records under the Privacy Act. Thus, only the first issue raised by Mr. Blanco, relating to his right to access particular records, is within the scope of the present Appeal.

Case No. VFA-0250, 26 DOE ¶ 80,153

January 15, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:I.B.E.W.

Date of Filing:December 12, 1996

Case Number: VFA-0250

On December 12, 1996, a branch office of the International Brotherhood of Electrical Workers (I.B.E.W.) filed an Appeal from determinations issued to it by the Savannah River Operations Office (SR) of the Department of Energy (DOE) on August 9, 1996, October 10, 1996 and November 8, 1996. In those determinations, SR partially granted a request for information and denied a request for a waiver of fees in connection with a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, the I.B.E.W. asks that we order a new search for responsive documents and grant its request for a fee waiver.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, the I.B.E.W. sought copies of documents containing the following items:

1. An accurate accounting of all moneys, materials, time, lost productivity, etc., associated with Westinghouse Savannah River Company's (WSRC) "anti- Union" training for supervisors and informational meetings with the nonexempt employees and how WSRC passed on those expenses to the Department of Energy (DOE).
2. Any and all memos, correspondence, flyers, electronic mail etc., concerning the Union and its activities, generated by DOE or its contractor WSRC in the last eight to ten months including directives, comments, suggestions, training

plans or requests for funding to conduct "anti-Union" training, including documents generated between the DOE and the contractor for Wackenhut Services Incorporated.

3.A copy of the contract between DOE/WSRC and Prime South for operating the power generating stations.

In the August 9, 1996 determination letter, SR enclosed a copy of the contract between WSRC and the DOE and a site map. Subsequently, in the October 10, 1996 determination letter, SR released to the

I.B.E.W. copies of documents responsive to Item 2 of its request (also numbered 2 above). SR stated that it did not find any documents responsive to the I.B.E.W.'s other two requests. However, in the November determination letter, SR informed the I.B.E.W. regarding Item 3 of its request (also numbered 3 above) that the DOE has no contractual relationship with Prime South. SR informed the I.B.E.W. that Prime South is a subcontractor to a private firm that leases government facilities. To verify these facts, SR provided the I.B.E.W. with a copy of the DOE's lease agreement with the private firm. In the October determination letter, SR also stated that the I.B.E.W. had earlier agreed to pay $32.58 in fees. The I.B.E.W. states that it agreed to pay this fee in order to expedite its receipt of the documents SR planned to release, but that SR allowed the I.B.E.W. to reserve its right to contest the fee at a later date.

In its appeal, the I.B.E.W. argues that additional responsive information must exist to show the amount of money WSRC spent in "anti-Union" activities and how WSRC passed this cost onto the DOE. The I.B.E.W. states that the DOE Contracting Officer for WSRC must have obtained correspondence or other documentation from WSRC to show how it financed "anti-Union" activities, including training in Charleston, S.C., and for materials and equipment used to produce training plans. The I.B.E.W. contends that the contract between the DOE and WSRC requires that WSRC provide the DOE with this information. Furthermore, the I.B.E.W. requests a fee waiver for the costs associated with processing its FOIA request. In support of this request, the I.B.E.W. states that it could channel the information it received to the local news media and wire services for distribution and that it has access to the I.B.E.W.'s international magazine, "The IBEW Journal," and the AFL-CIO's monthly magazine. The I.B.E.W. also asserts that the requested information would contribute significantly to the public's understanding of how WSRC was illegally wasting taxpayer money. Finally, the I.B.E.W. contends that it is not a commercial interest because it does not have any dues-paying members working at WSRC or the DOE and that no one will reap any financial benefit from release of the requested information.

II. Analysis

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted SR to ascertain the validity of the I.B.E.W.'s contention that other responsive documents must exist.(1) An official at SR informed us that they searched for documents in response to Item 1 of the request (also numbered 1 above) in a literal manner. That is, SR correctly searched for documents specifically dealing only with "anti-Union" activities. However, based on the I.B.E.W.'s appeal, it appears to us that the I.B.E.W. meant to request documents concerning the accounting of WSRC's union-related training activities. The I.B.E.W.'s narrow wording of its request effectively limited SR's search. Although it would be appropriate for us to find that SR's search was adequate, because

the I.B.E.W. clarified its request on appeal, we will expedite matters and remand the I.B.E.W.'s clarified request back to SR for a further search of documents.

B. Fee Waiver

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the Act states,

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two-prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors that an agency must consider to determine whether the requester has met the first statutory fee waiver condition, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) the subject of the request; whether the subject of the requested records concerns "the operations or activities of the government";

(B) the informative value of the information to be disclosed; whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) the contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) the significance of the contribution to public understanding; whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). Finally, in addition to satisfying these four factors, the DOE must also find that the information is not requested for use primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii).

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is appropriate only where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." See Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1481-83 (1989); U.A. Plumbers and Pipefitters Local 36, 24 DOE ¶ 80,148 at 80,621 (1994) (Local 36). The requested documents concern the DOE's oversight of a contractor and that contractor's dealings with a labor union. This oversight function is clearly a government activity, and thus, we find this request meets the conditions outlined in Factor A.

Factor B requires a consideration of whether the disclosure of information is "likely to contribute" to the public's understanding of government operations and activities. See Local 36; Seehuus Associates, 23 DOE ¶ 80,180 (1994) (Seehuus). The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general population. Seehuus, 23 DOE at 80,694. If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate. The information at issue here is not in the public domain and could contribute to the public's understanding of government operations. We therefore find that the requested information meets this criterion.

Factor C requires us to consider whether the requested documents would contribute to the understanding of the subject by the general public. To meet this test, the requester must have the ability and intention to disseminate this information to the public. James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992). In the present case, the I.B.E.W. has stated that it has access to the I.B.E.W.'s international magazine (alleged circulation over 800,000) and the AFL-CIO's monthly magazine (alleged circulation in the millions). Assuming these claims are correct, we find that the I.B.E.W. has demonstrated that it has the ability to disseminate information to a significant number of people in the general public. We also find that the I.B.E.W. has demonstrated the intention to disseminate information it obtains from the requested documents to the public and thus improve the public's understanding of government operations. See Eugene Maples, 23 DOE ¶ 80,111 at 80,522 (1993).

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of government operations or activities. The Department of Justice has suggested the following test for this factor:

To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.

1995 Justice Department Guide to the Freedom of Information Act 381 (1995); See Local 36; Seehuus.

In the present case, the I.B.E.W. asserts that the requested documents enable it to determine how the government spends money and whether a DOE contractor illegally wasted taxpayer funds. If the responsive documents do in fact contain such information, we believe that disclosure would likely enhance the public's understanding of these matters to a significant extent.

In view of our evaluation of the foregoing factors, we find that the I.B.E.W. has, with respect to the documents, satisfied the four factors that an agency must weigh to determine whether the requester has met the public interest requirement. In other words, the I.B.E.W. has shown that disclosure of the documents is in the public interest because this disclosure is likely to contribute significantly to the public understanding of government operations or activities. The next requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

A commercial interest is one that furthers a commercial trade or profit interest as those terms are commonly understood. OMB Fee Guidelines, 52 Fed. Reg. 10,017-18. The Second Circuit of the U.S. Court of Appeals also expounded on the meaning of "commercial" in the context of the FOIA. American Airlines v. National Mediation Board, 588 F.2d 863 (2d Cir. 1973) (AA). In AA, the Court addressed the issue of whether a division of the teamsters union had information that could be considered commercial in light of the fact that the union "does not have profit as its primary aim." The court stated,

"Commercial" surely means pertaining or relating to or dealing with commerce. Labor unions, and their representation of employees, quite obviously pertain to or are related to commerce and deal with the commercial life of the country.

Id. at 870. Similarly, the I.B.E.W. or International Brotherhood of Electrical Workers is a labor union that, in representing its employee members is related to commerce, and deals with the commercial life of the country. As such, we find that the I.B.E.W. has a commercial interest in the requested information.

Finally, we must balance the requester's commercial interest against the identified public interest and determine which interest is primary. If we determine that the public interest in disclosure is greater in magnitude than the requester's commercial interest, then we will grant the fee waiver. In this case, we find that the interest in the requested information is primarily the I.B.E.W.'s commercial interest. Although we recognize that the general public has an interest in the requested information, in that the information could shed light on the DOE's oversight of its contractor and its contractor's actions regarding unionizing efforts,

we find that the primary interest in this information is for the benefit of the I.B.E.W.'s own membership. The I.B.E.W. membership has a much greater stake in information regarding unionizing efforts at a location where a contractor employs its members, than the general public's interest in this type of information. Although evidence of fraud, waste and abuse could grow out of release of this information, a subject important to the general public, we find, in this case, that the I.B.E.W. is more concerned with protecting its own members' union activities than informing the public. Accordingly, we must deny the I.B.E.W.'s Appeal for a fee waiver.

It Is Therefore Ordered That:

(1) The Appeal filed by the I.B.E.W. on December 12, 1996, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Authorizing Official of the Savannah River Operations Office of the Department of Energy for a search for any documents concerning Westinghouse Savannah River Company's activities dealing with labor unions or efforts to unionize. .

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 15, 1997

(1)*/ See memoranda of telephone conversations between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and David Darugh, DOE Savannah River Office of Chief Counsel.

Case No. VFA-0251, 26 DOE ¶ 80,151

January 15, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Gretchen Lee Coles

Date of Filing: December 16, 1996

Case Number: VFA-0251

On December 16, 1996, Gretchen Lee Coles (Ms. Coles or the Appellant) filed an Appeal from determinations issued on September 17, 1996, by the Albuquerque Operations Office (Albuquerque) and November 7, 1996, by the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE). The determinations were issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to conduct a further search for documents responsive to Ms. Cole's FOIA request.

BACKGROUND

The Appellant's father, Lee H. Coles, was employed by the Atomic Energy Commission at the Portsmouth Gaseous Diffusion Plant in Ohio (Portsmouth) between 1953 and his death in 1958.(1) The Appellant contacted DOE's Office of Human Radiation Experiments seeking information concerning her father's possible exposure to ionizing radiation. The Appellant's request for information was referred to the Oak Ridge FOIA Office.

Subsequently, the Appellant submitted a formal FOIA request to Oak Ridge seeking a copy of her father's medical records, radiation exposure records, personnel records, and personnel security file. In this FOIA request, the Appellant sought to obtain documents from DOE as well as from other federal agencies that had employed her father. (2)

The FOIA/Privacy Act Officer at Oak Ridge (Oak Ridge FOIA Officer) informed the Appellant that DOE could not search for records within the control of another federal agency. The Oak Ridge FOIA Officer also advised the Appellant that she must file a separate FOIA request with each agency that employed her father to obtain all the records that she was requesting. See Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge FOIA Officer, and Linda Lazarus, OHA Staff Attorney (January 7, 1997).

The Oak Ridge FOIA Officer forwarded the Appellant's FOIA request to Albuquerque and asked that Albuquerque search for responsive records and provide a direct response to Ms. Coles.(3) On September 17, 1996, Albuquerque issued a determination stating that:

(1) the Albuquerque Personnel Security Division (PSD) had been unable to find Mr. Cole's personnel security file. The PSD destroys a personnel security file after the file has not been active for ten years;

(2) the Albuquerque Occupational Safety and Health Division (OSHD) had been unable to find Mr. Coles' radiation exposure records;

(3) Albuquerque does not maintain medical and personnel records on former federal employees. After an employee stops working for a federal agency, Albuquerque transfers the employee's medical and personnel records to the National Personnel Records Center; and

(4) the Albuquerque FOIA Officer had sent the Appellant's FOIA request to the National Personnel Records Center for processing and the issuance of a direct response to the Appellant.

On November 7, 1996, Oak Ridge issued a determination to the Appellant stating that records responsive to her FOIA request could not be found. Attached to this determination was a letter from the Radiation Protection Program Manager at Portsmouth indicating that they had no record showing a "positive exposure" to radiation for Mr. Coles.

Ms. Coles is appealing the adequacy of the search for documents responsive to her FOIA request by Oak Ridge and by the Albuquerque PSD and OSHD.(4) In her Appeal, Ms. Coles contends that the search was inadequate. She specifically alleges that DOE had not searched for records that would reflect her father's employment at other federal agencies. Ms. Coles has set forth no reason why she believes that DOE would possess records of other agencies that relate to her father.

ADEQUACY OF THE SEARCH

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

As detailed below, we find that Oak Ridge and Albuquerque followed procedures reasonably calculated to uncover the materials sought by the Appellant in her FOIA request. The Oak Ridge and Albuquerque FOIA Officers contacted people who would have knowledge of whether relevant documents exist, and these individuals used appropriate procedures to search for the records requested by Ms. Coles. The search for these documents was adequate.

The Albuquerque Search

In reviewing this Appeal, we contacted the Albuquerque FOIA Officer and two other employees to discuss the search conducted for Mr. Coles' radiation exposure and personnel security records at Albuquerque. They provided the following information:

(1) Radiation Exposure Records. The FOIA Officer informed us that if such records exist at Albuquerque, they would be in the Albuquerque Occupational Safety and Health Division (OSHD). See Memorandum of Telephone Conversation between Elva Barfield, Albuquerque FOIA Officer, and Linda Lazarus, OHA Staff Attorney (November 6, 1996).

We then contacted the OSHD employee who is responsible for searching radiation exposure records at Albuquerque to respond to FOIA requests. He stated that records of radiation exposure of federal employees at Albuquerque that predate 1989 are in two safes. The first safe contains the original log of

radiation exposure. This log is not arranged alphabetically. The second safe contains the same information as the log book, but the OSHD employee organized the information alphabetically. When OSHD receives a request for records that would reflect whether an employee was exposed to radiation before 1989, the OSHD employee searches the records contained in the second safe by checking whether the employee's name appears in the alphabetical listing.

The OSHD employee followed this procedure in responding to the Appellant's FOIA request, and found no responsive records. See Memorandum of Telephone Conversation between Donald Brady, Albuquerque OSHD and Linda Lazarus, OHA Staff Attorney (December 23, 1996).

(2) Personnel Security File. The FOIA Officer informed us that if Mr. Coles' personnel security file were at Albuquerque, it would be in the Personnel Security Division (PSD). See Memorandum of Telephone Conversation between Elva Barfield and Linda Lazarus (November 6, 1996).

The administrative assistant at the PSD has the responsibility for supervising FOIA searches in the Division. She explained the process by which the Division responds to a FOIA request. She said that an employee of the PSD checks the Central Personnel Clearance Index (CPCI). The CPCI contains information on the location of personnel security files and should show whether a file is at Albuquerque. However, even if the CPCI does not indicate that a personnel security file is in Albuquerque, an employee of the PSD conducts an alphabetical search for the individual's file in the files for the relevant time.

The administrative assistant informed us that files that have been active within the past three years are kept in alphabetical order in a vault. Older inactive files are kept in secure storage in alphabetical order in other locations. Generally, the PSD destroys personnel security files after the file has been inactive for ten years. (5)

The administrative assistant further stated that the PSD conducted a search for the personnel security file of Mr. Coles following normal procedures, but no documents were found. See Memorandum of Telephone Conversation between Margaret Todd, Administrative Assistant, PSD, and Linda Lazarus, OHA Staff Attorney (January 2, 1997).

The Oak Ridge Search

In reviewing this Appeal, we contacted the Oak Ridge FOIA Officer to discuss the searches conducted for Mr. Coles' medical, radiation exposure, personnel and personnel security records. She provided the following information:

(1) Medical and Personnel Records. Oak Ridge does not maintain the medical or personnel records of former Atomic Energy Commission employees. Such records are sent to Headquarters or the National Personnel Records Center.(6)

Oak Ridge has jurisdiction over medical records of certain other federal and contractor employees. These records are under the control of Lockheed- Martin Utility Systems, Inc., at Portsmouth and the Oak Ridge Associated Universities. Because Mr. Coles had been identified as a former Atomic Energy Commission employee, it was unlikely that his medical records would be at these locations. Nevertheless, the Oak Ridge FOIA Officer asked that the custodians of these records search for documents responsive to Appellant's FOIA request. These custodians reported that they were unable to find any records concerning Mr. Coles.

Additionally, Lockheed-Martin Energy Systems, Inc., at Portsmouth maintains personnel records of contractor employees. Because Mr. Coles had been identified as a former Atomic Energy Commission employee, it was unlikely that his personnel records would be at this location. Nevertheless, the Oak Ridge FOIA Officer asked an employee of the personnel office to search for Mr. Coles' records. This employee reported that she had been unable to locate any responsive records.

(2) Radiation Exposure Record. Radiation exposure records are maintained in the Dosimetry Section of Lockheed-Martin Utility Services, Inc., at Portsmouth and at the Oak Ridge Associated Universities. The Oak Ridge FOIA Officer asked the custodians of these records to search for records that might reflect whether Mr. Coles had been exposed to radiation. After searching, the custodians reported that they had been unable to find any records concerning Mr. Coles.

(3) Personnel Security File. Oak Ridge does not maintain the personnel security files of former Atomic Energy Commission employees.(7)

However, Oak Ridge does maintain personnel security files of certain federal and contractor employees at the Personnel Security Clearance and Assurance Branch (PSCAB). Because Mr. Coles had been identified as a former Atomic Energy Commission employee, it was unlikely that his personnel security records would be at this location. Nevertheless, the Oak Ridge FOIA Officer asked that a search be conducted for Mr. Coles' records. No records were found.

See Memoranda of Telephone Conversation between Amy Rothrock, Oak Ridge FOIA Officer, and Linda Lazarus, OHA Staff Attorney (December 20 and 23, 1996 and January 7, 1997).

The Appellant's Contentions Concerning The Records of Other Agencies

The Appellant also complains that the searches conducted by Oak Ridge and Albuquerque were inadequate because they failed to uncover records reflecting her father's employment at other federal agencies. Appellant's contentions are without merit. First, under the FOIA, DOE has no jurisdiction to conduct a search for documents located in other agencies. The FOIA requires only that each agency search for records within its own possession and control. See 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Nor has the Appellant set forth facts that would show that DOE has possession or control of records of other agencies that are responsive to Appellant's FOIA request. See Gilberte Brashear, 25 DOE ¶ 80,198 (1996).

Conclusion

The Oak Ridge and Albuquerque FOIA Officers followed procedures that were reasonably calculated to uncover the materials sought by the Appellant in her FOIA request. The Oak Ridge and Albuquerque FOIA Officers contacted people who would have knowledge of whether relevant documents exist, and these individuals searched for records following appropriate procedures. The search for these documents was therefore adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Gretchen Lee Coles on December 16, 1996, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 15, 1997

(1)This statement is based on information provided by the Appellant.

(2)The Appellant has indicated that her father worked for many other federal agencies, including the Department of Interior, the Army, and the Department of Commerce.

(3)The Oak Ridge FOIA Officer had previously referred the Appellant's FOIA request to the FOIA and Privacy Act Division of the Office of the Executive Secretariat (the Headquarters FOIA Office) to conduct a search for responsive records. A FOIA/Privacy Act Specialist at the Headquarters FOIA Office (Headquarters FOIA Specialist) informed the Oak Ridge FOIA Officer that she had no reason to believe that records concerning Mr. Coles were at Headquarters. The Headquarters FOIA Specialist also indicated that, if they still exist, Mr. Coles' personnel security file should be at Albuquerque and his medical and personnel records should be at the National Personnel Records Center in St. Louis, Missouri. See Memorandum of Telephone Conversation between Verlette Moore, FOIA Specialist, Headquarters' FOIA Office, and Linda Lazarus, OHA Staff Attorney (January 7, 1997).

(4)The Appellant also raised two additional matters. First, the Appellant asks that DOE define the term "no positive exposure" to radiation contained in the letter from the Radiation Protection Program Manager attached to the Oak Ridge determination. As a preliminary matter, it is important to note that the FOIA does not require an agency to respond to questions. Bendetto Enterprise, Inc., 19 DOE ¶ 80,106 (1989). Here, however, the Appellant is not asking a question concerning the definition of a term, but is raising an issue relating to the adequacy of the Oak Ridge search for documents. It is appropriate for us to address this issue. Accordingly, we contacted the Oak Ridge FOIA Officer and asked whether records concerning Mr. Coles had been located. The FOIA officer indicated the Radiation Protection Program Manager had not located any such records. The Oak Ridge FOIA Officer further informed us that the letter from the Radiation Protection Program Manager is a form letter which is used when no records concerning an individual have been located. See Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge FOIA Officer, and Linda Lazarus, OHA Staff Attorney (January 8, 1997). Second, the Appellant states that she requests documents concerning the health of Atomic Energy Commission employees at Portsmouth. This request was not included within the original FOIA request and therefore is not properly part of this Appeal. We have asked the Headquarters FOIA Office to treat this matter as a new request under the FOIA and issue a direct response to Ms. Coles.

(5)There are two exceptions to this rule: First, in 1994, a moratorium on the destruction of personnel security files was imposed by DOE. Second, PSD has one box containing personnel security files that have been inactive since the 1950's which has not been destroyed. When a request is made under the FOIA for older records, a PSD employee searches this box. See Memorandum of Telephone Conversation between Margaret Todd, Administrative Assistant, PSD, and Linda Lazarus, OHA Staff Attorney, (January 2, 1997).

(6)As detailed above, a FOIA specialist at the Headquarters' FOIA Office indicated that these records were not at Headquarters, and the Appellant's FOIA request was forwarded to the National Personnel Records Center in St. Louis, Missouri, for issuance of a direct response to Ms. Coles.

(7)As set forth in Footnote 3, based on information received from the Headquarters' FOIA Specialist indicating that Mr. Coles' personnel security file might be in Albuquerque, the Oak Ridge FOIA officer requested that Albuquerque conduct a search for records and issue a direct response to Ms. Coles. In its determination, Albuquerque indicated that it had no records concerning Mr. Coles. It also indicated that personnel security files that have been inactive for ten years are generally destroyed.

Case No. VFA-0254, 26 DOE ¶ 80,149

January 14, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Digital City Communications, Inc.

Date of Filing:December 19, 1996

Case Number: VFA-0254

On December 19, 1996, Digital City Communications, Inc. (Digital) filed an Appeal from a determination issued to it by the Oakland Operations Office (Oakland) of the Department of Energy (DOE) on December 6, 1996. In that determination, Oakland denied a request filed by Digital on October 24, 1996, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the DOE would be ordered to release in its entirety the information that was withheld in the December 6, 1996 determination.

The FOIA requires that agency records which are held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a submission dated October 24, 1996, Digital filed a Request for Information under the FOIA (Request) requesting from Oakland a copy of the manual pertaining to software known as Network Intrusion Detector (NID) and the executable code of NID (the software). The software was developed by the University of California, a DOE contractor, at the Lawrence Livermore Laboratory. Its function is to detect and analyze intrusions from individuals not authorized to use a computer, or unauthorized or suspicious activities by authorized users. In its December 6, 1996 determination letter (Determination Letter), Oakland denied Digital's request citing Exemption 4 of the Freedom of Information Act. Oakland stated that, "[t]he NID software package is currently in a development stage. Since it is also a candidate for future technology transfer possibilities, it is not available for general release at this time." See Determination Letter.

In its December 19, 1996 Appeal, Digital argues that (i) Exemption 4 is not applicable to the information at issue, (ii) Oakland's determination was vague and unsupported, and (iii) Exemption 4's applicability had been waived due to the widespread distribution of the software.

II. Analysis

As explained below, because Oakland failed to examine whether the NID software constitutes a "record" under the FOIA, and whether the manual and the software are "agency records," we are remanding the case in order that it may make those determinations. Further, Oakland has failed to adequately justify its determination that the software and manual are exempt from release under Exemption 4, as it did not provide any analysis of whether the University of California would suffer competitive harm through its release. Nor did Oakland state whether any non-exempt material could be segregated for release. Therefore, we are remanding this matter to Oakland for a new determination, for the following reasons.

Before we can consider the applicability of Exemption 4 to the withheld information, we must first determine whether that information constitutes a "record" for FOIA purposes. If the information in question does not constitute a record, the FOIA is inapplicable and we cannot mandate the release of the software and manual. For the reasons discussed below, we are unable to render a determination on this threshold issue based on the state of the record before us and will remand the case for further review and investigation. However, we are providing additional comments which are intended to guide Oakland in its new determination in this matter.

A. Records and Agency Records

In this case, we must initially consider whether the software at issue is a record, by using the guidance laid out in John Gilmore, 24 DOE ¶ 80,117 (1994) (Gilmore) and Cleary, Gottlieb, Steen & Hamilton v. Department of Health and Human Services, 844 F. Supp. 770, 781-82 (D.D.C. 1993) (Cleary).(1) Cleary held that a computer program is a record where the program is not generic word processing or prefabricated software but instead is uniquely tailored to manipulate a database so that the program is used to actually preserve information and perpetuate knowledge. See Cleary, 844 F. Supp. at 782. In Gilmore, we found that software which merely connected several geographically distant computers, allowing each user to interact with other users, was not a record. We found the software in that case to be a tool which neither contained nor manipulated information, but instead merely provided a method of access. The software did not contain a database, was not a source of information, and did not manipulate or preserve information in a database. See Gilmore, 24 DOE at 80,544.

Oakland has not made a determination in this case regarding whether the requested software constitutes a record under the FOIA. See Record of Telephone Conversation between Dawn Goldstein, Staff Attorney, OHA, and RoseAnn Pelzner, FOIA Officer, Oakland (December 26, 1996). We are remanding it for them to make a determination regarding this issue, applying the case law described above.(2)

If Oakland determines that the NID software is a record, it must then determine whether the software is an "agency record." In a two-part test, the Supreme Court defined agency records as documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. U.S. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (Tax Analysts). The NID software and the manual appear to meet both of those criteria.

B. Adequacy of Exemption 4 Justification

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; see also

Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. Because the information at issue in this case was submitted as part of a contract between the DOE and the University of California, this information is not considered to have been submitted voluntarily and is therefore considered "confidential" if it meets the test set out in National Parks. Cf. Nayar & Company, P.C., 23 DOE ¶ 80,185 at 80,710 (1994) (information submitted in response to request for proposal).(3)

Both the FOIA and the DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents. Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Data Technology Industries, 4 DOE ¶ 80,118 (1979). Thus, a FOIA determination that material should be withheld under Exemption 4 because its disclosure is likely to cause substantial harm must include the reasons for believing such harm will result to the competitive position of the person from whom the information is obtained. Larson Associated, Inc., 25 DOE ¶ 80,204 (1996); Milton L. Loeb, 23 DOE ¶ 80,124 (1993). In its determination letter, after Oakland explained the purpose of Exemption 4, it said simply that "[t]he NID software package is currently in a development stage. Since it is also a candidate for future technology transfer possibilities, it is not available for general release at this time." Determination Letter at 1. Thus, in this case, there was no explanation why release of the software and/or the manual would likely cause substantial harm to the competitive position of the software's creator, the University of California. (4) Alternately,

Oakland could provide an explanation why the release of specific information within the proposal would impair the government's ability to obtain necessary information in the future. See Critical Mass, 975 F.2d at 879.

Thus, we are remanding this case so that Oakland may give Digital a specific explanation as to why Exemption 4 applies to the information at issue in the present case. We also point out that the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979). Consequently, Oakland should consider whether non-exempt material can be released. (5)

Accordingly, we will remand this case to Oakland, which should promptly issue a new determination releasing any non-exempt information to the appellant. Though we are not upholding Oakland's initial determination, we still believe Oakland is in the best position to make initial determinations as to whether the information is a "record" for purposes of the FOIA. If so, Oakland should then determine whether the release of specific information within the proposal would impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the software's creator. In making the latter determination, Oakland should keep in mind that conclusory allegations of harm do not suffice to protect information from disclosure under Exemption 4. Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (Westlaw, DCT database) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict"). For the reasons explained above, the present Appeal will be granted.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Digital City Communications, Inc., Case No. VFA-

0254, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the DOE's Oakland Operations Office, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 14, 1997

(1)We note that the manual itself clearly appears to be both a record and an agency record under the FOIA. Therefore, the remaining issue with respect to the manual is whether Exemption 4 is applicable.

(2)Oakland should also be aware of the fact that in the opinion of the Department of Justice, one of the recent FOIA amendments, 5 U.S.C. § 552(f)(2), which takes effect March 31, 1997, appears to include software in the definition of a record. See FOIA Update at 2 (Fall 1996).

(3)DOE regulations set forth four additional criteria to be considered in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4: (i) whether the information has been held in confidence by the person to whom it pertains; (ii) whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor; (iii) whether the information was transmitted to and received by the DOE in confidence; and (iv) whether the information is available in public sources. 10 C.F.R. § 1004.11(f).

(4)Oakland may also wish to determine whether other exemptions apply to the requested information. If DOE itself owns the software and could therefore suffer competitive harm through release of the requested material, Oakland may wish to consider whether the "qualified privilege" is applicable under Exemption 5. See Ball, Janik and Novack, 25 DOE ¶ 80,197 (1996). Further, it is possible, regardless of who owns the software, that it could be withheld under Exemption 2, which would prevent the release of information that could be used to circumvent a statute or agency regulations.

Moreover, the Cooperative Research and Development Agreements (CRADA) provisions of the National Competitiveness Technology Transfer Act of 1989, 15 U.S.C. § 3710a, could possibly provide additional protection to the information at issue. If that is the case, Oakland should consider the applicability of Exemptions 3 and 4 in this context.

(5)Digital also argues that because the NID software is available throughout the DOE and because DOE has released in general terms a flow-chart of how the software works, this is tantamount to public release. We do not agree. While information which is already publicly available generally may not be withheld, in this case, the software is not publicly available. DOE users must request a key from an NID client representative in order to gain access to the software. The documentation that Digital itself submitted indicates that redistribution of the software at this time is clearly limited to DOE. See Attachment to Appeal Letter. Further, release of a very general diagram of the software's workings is obviously completely different from public release of the software itself. Thus, we find that the NID software is currently not publicly available.

Case No. VFA-0255, 26 DOE ¶ 80,155

January 17, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Harold Bibeau

Date of Filing: December 23, 1996

Case Number: VFA-0255

On December 23, 1996, Harold Bibeau filed an Appeal from a determination issued to him under the Freedom of Information Act (FOIA) on December 4, 1996, by the Argonne Group(1) (Argonne) of the Department of Energy (DOE). In his Appeal, Mr. Bibeau asserts that Argonne failed to provide him with all of the responsive documents in its possession regarding his Request for Information (FOIA Request) dated May 28, 1996.

I. Background

In his FOIA Request, Mr. Bibeau requested from Argonne copies of documents relating to radiation or "drug-hormone" experiments conducted within the confines of the Oregon or Washington State Penitentiaries.(2) Mr. Bibeau included a list of three researchers, Dr. Carl Heller, C.A. Paulsen and Mavis Rowley, who he states were associated with these studies. Also included in Mr. Bibeau's FOIA Request was a list of individuals he claims served on various review boards, individuals who were connected with various DOE facilities during the period the experiments were being conducted, and individuals who worked for the AEC. Argonne, in its Determination Letter dated December 4, 1996, informed Mr. Bibeau that Argonne National Laboratory had conducted a search of its records but could not find any documents responsive to his FOIA Request.

In an October 12, 1996 letter to Argonne that Mr. Bibeau submitted with his appeal, Mr. Bibeau states:

Argonne was the receiving agency of Doctor Heller's published papers for archival storage. Argonne is the holder of records detailing correspondence between James Liverman and Sidney Marks in Dr. Liverman's 1975-76 attempt to establish medical follow up for the research subjects of both Dr. Heller and Dr. Paulsen's studies. Argonne was the home office of Douglas Grahn, Associate Director, Division of Biology and Medical Research. It was Dr. Grahn who solicited the assistance of Dr. Heller for the Life Sciences Committee, Space Science Board, [National Academy of Sciences/National Research Council].

To make myself perfectly clear: you have documents in your possession that are responsive to my FOIA request dated May 28, 1996.

Letter from Harold Bibeau to Argonne National Laboratory (October 12, 1996).

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To ascertain the extent of the search conducted for documents responsive to Mr. Bibeau's request, we contacted Argonne, who referred us to the personnel who conducted the search at Argonne National Laboratory. Memorandum of telephone conversation between Betty Lyon, Argonne, and Steve Goering, OHA (January 8, 1997); Memorandum of telephone conversation between Mark Masek, Manager, Publications and Record Services, Argonne National Laboratory, and Steve Goering, OHA (January 8, 1997). The lab's Publications and Record Services (PRS) searched the Argonne Records Management Database, the Argonne Publications Tracking Database, the Card Catalogue of ANL Publications, and the Center for Human Radiobiology (CHR) Box Inventory, using the keywords "Oregon, "Washington," "testic*,(3) "peni*" (for penitentiary), "human reproductive system(s)," "reprodu*," "Space Science Board," "drug," "hormone," "Grahn," "Heller," "Paulsen," and "Rowley." The Argonne Records Management Database tracks all lab records. The Argonne Publications Tracking Database tracks lab publications from 1991 to the present. The Card Catalogue of ANL Publications indexes lab publications prior to 1991. The CHR Box Inventory records the location of files in boxes received from the CHR for storage at Argonne. Based on the results of this keyword search, PRS then physically inspected the boxes, files, and publications that it thought might contain information responsive to Mr. Bibeau's request. No responsive documents were found.

The only potentially responsive documents that PRS identified but did not inspect were contained in a correspondence file in the custody of Dr. Douglas Grahn, who was mentioned in Mr. Bibeau's October 12, 1996 letter to Argonne. However, the lab's general counsel recently contacted Dr. Grahn in the process of responding to a subpoena ordering the production of "all documents relating to experimentation on prisoners at the Oregon State Penitentiary or in any prison in the State of Washington.(4) Dr. Grahn informed the general counsel that he "collected these materials in his role as a member of a committee reporting to the National Academy of Sciences and that the records became the property of that agency." Letter from Arthur Zilberstein, Esq., Argonne National Laboratories, to Kendall Zylstra, Berger and Montague (November 8, 1996).(5)

Finally, Mr. Bibeau stated in his appeal that he has documents in his possession that bear the following notation: "This document is maintained by Argonne National Laboratory. If you have any problems notify us." Appeal at 2. The appellant did not identify particular documents that contain this notation. However, in the process of analyzing Mr. Bibeau's Appeal, we searched the DOE's OpenNet Database, which tracks certain documents made publicly available after October 1, 1994, and which can be searched from internet address http://www.doe.gov/html/osti/opennet/opennet1.html. A search of this database using the query "heller" found references to 91 documents, and the query "marks AND liverman" found references to 52 documents. Many of these documents have been scanned electronically, and therefore can be viewed online. The pages we viewed containing scanned documents each had at the top the statement, "This document is maintained by Argonne National Laboratory. If you have any problems notify us." This statement may well be the source of the appellant's belief that Argonne has responsive documents in its possession. The underlined portion

of the statement contained a hypertext link to a page where the user can send a message to Argonne. We sent a message to Argonne inquiring about the meaning of this statement. Argonne informed us that it does not maintain the original hard copies of these documents, but does maintain a server that houses electronic scanned versions of over 252,000 documents. Electronic mail from Michele D. McCusker-Whiting, Technical Support, Argonne, to Steven Goering, OHA (January 8 and 10, 1997). This was confirmed by information on several OpenNet pages that contained links to electronic versions of documents. These pages indicated that original documents are located at DOE's Coordination and Information Center in Las Vegas, Nevada. Although the electronic versions of the documents are likely subject to the FOIA, Argonne is not required to search through the electronic versions for responsive documents as they are publicly available through the OpenNet database at the internet address cited above. See Salomon, Inc., 18 DOE ¶ 80,125 at 80,573 (1989) (quoting Tax Analysts v. Department of Justice, 845 F.2d 1060, 1065 (D.C. Cir. 1988), aff'd 492 U.S. 136 (1989) ("agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access"); Department of Justice v. Tax Analysts, 492 U.S. 136, 150 (1989) (rejecting "argument that an agency has not ? withheld' a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available") (emphasis added). Of course, if Mr. Bibeau has difficulty accessing the OpenNet database, he may seek the assistance of the DOE in accessing the database, and if necessary the DOE can provide hard copies of documents to the appellant.

III. Conclusion

Based on the information provided to us, we have no doubt that Argonne conducted a search reasonably calculated to uncover material responsive to Mr. Bibeau's request. Accordingly, the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Harold Bibeau on December 23, 1996, Case Number VFA-0255, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 17, 1997

(1)The Argonne Group is affiliated with the DOE's Chicago Operations Office and Argonne National Laboratory.

(2)From 1963 to 1973, the University of Washington, Seattle, conducted studies on the effects of radiation on human testicular function of inmate volunteers at the Washington State Prison. Tissue samples from this study were analyzed at the Oak Ridge National Laboratory. During the period August 1963 to May 1971 the Pacific Northwest Research Foundation conducted similar studies on inmate volunteers at the Oregon State Prison in Salem, Oregon. Both studies were supported by the Atomic Energy Commission (AEC), a predecessor agency of the DOE. See Department of Energy, HUMAN RADIATION EXPERIMENTS: The Department of Energy Roadmap to the Story and the Records (1995) (Roadmap

Document) (description of experiments catalogued as OT-14 (Washington) and OT-21 (Oregon)).

(3)"The asterisk indicates that a "wildcard" search was performed, i.e. the equivalent of searching using all possible keywords beginning with the letters "testic."

(4)"On November 4, 1996, Mr. Bibeau's attorney served Argonne National Laboratory with a subpoena ordering the lab to "produce all documents in your possession, custody or control which relate or pertain in any manner whatsoever to any and all medical experiments utilizing humans as subjects, specifically, and without limitation, all documents relating to experimentation on prisoners at the Oregon State Penitentiary or in any prison in the State of Washington." Letter from Kendall S. Zylstra, Berger and Montague, to Arthur Zilberstein, Esq., Argonne National Laboratories (November 1, 1996). The lab informed Mr. Bibeau's attorney on November 8, 1996, that it "does not possess the records sought in your subpoena . . . ." Letter from Arthur Zilberstein to Kendall Zylstra (November 8, 1996).

(5)Mr. Bibeau might be interested in filing a FOIA request for these records with the National Academy of Sciences.

Case No. VFA-0257, 26 DOE ¶ 80,156

January 23, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Cascade Scientific, Inc.

Date of Filing:December 24, 1996

Case Number: VFA-0257

On December 24, 1996, Cascade Scientific, Inc. (Appellant) filed an Appeal from a determination issued on November 21, 1996 by the Richland Operations Office (Richland) of the Department of Energy (DOE). In that determination, Richland withheld information identified as responsive to the Appellant's November 13, 1996 Request under the Freedom of Information Act (FOIA). This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 13, 1996, the Appellant submitted a FOIA request to Richland seeking information relating to Request for Proposal No. 310769 (Proposal). (1) Specifically, Appellant requested documents containing specific pricing and equipment model numbers submitted by Sorvall and Beckman, the two firms that were selected under the Proposal.

In its November 21, 1996 Determination Letter (Determination Letter), Richland released two documents. The first was a purchase order for the Beckman class 1 centrifuge system and was released in its entirety. The second document was a redacted purchase order for the Sorvall centrifuge systems (Purchase Order). Richland deleted the unit costs for the class 2, 3, 4 and 6 centrifuge systems contained in the Purchase Order along with the total Shipping and Handling charge. (2) In its Determination Letter, Richland stated that disclosing the withheld information would allow a competitor to gain insight into Sorvall's unique pricing strategy and thus place Sorvall at a competitive disadvantage. The Determination Letter further stated that if specific pricing information were released to competitors, the government's ability to obtain the most favorable terms in future procurements would be impaired since companies would be less willing to risk disclosure of their bid information.

On December 24, 1996, the Appellant filed the present Appeal in which it contends that Richland's refusal to release the withheld information was improper. Appellant asserts that Sorvall's "unique pricing strategy" may result from violation of its General Service Administration Contract Agreement (GSA Contract

Agreement). Consequently, without release of the withheld pricing information, Appellant argues that it has no way to evaluate whether the contracts awarded under the Proposal were proper and whether it was put at a competitive disadvantage due to Sorvall's violation of the GSA Contract Agreement.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either: (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; see also Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. Information submitted in response to a request for proposal is not considered to have been submitted voluntarily and is therefore to be considered "confidential" if it meets the test set out in National Parks. See Nayar & Company, P.C., 23 DOE ¶ 80,185 at 80,710 (1994).

DOE regulations set forth four additional criteria to be considered in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4: (i) whether the information has been held in confidence by the person to whom it pertains; (ii) whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor; (iii) whether the information was transmitted to and received by the DOE in confidence; and (iv) whether the information is available in public sources. 10 C.F.R. § 1004.11(f).

As an initial matter, we do not have any jurisdiction to hear contract claims and thus can not consider Appellant's arguments regarding the alleged illegality of Sorvall's prices. (3) See Painters District Council No. 55, 24 DOE ¶ 80,149 (1994). However, because Appellant's Appeal also challenges the correctness of the application of Exemption 4 to the withheld information, we have conducted a review of the withheld material.

In the present case, the portions of the Purchase Order withheld by Richland under Exemption 4 consist of the unit price for each of the centrifuge systems along with the total charge for shipping and delivery of the systems. This information is clearly "commercial" within the meaning of Exemption 4, and this information was obtained from a "person," since the definition of "person" includes corporate entities. 5 U.S.C. § 551(2). The issue to be determined therefore is whether the withheld information is confidential. (4)

In support of its determination, Richland and Battelle argue that because the centrifuge industry is relatively small and that the general prices of centrifuge systems are known, release of the unit prices of individual centrifuge systems and the shipping and delivery charges in the Purchase Order would allow a competitor insight into Sorvall's pricing strategy and thus cause competitive harm to Sorvall. See Memorandum of telephone conversation between Kyle Wright, Contract Specialist, Battelle, and Richard Cronin, OHA Staff Attorney (December 31, 1996). We agree with Richland and Battelle on this issue. Courts and executive agencies applying the National Parks test have long recognized that information which reveals pricing strategy can be withheld under Exemption 4. See, e.g., Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507, 512 (D. Kan. 1984). In a competitive environment with relatively few competing firms, release of such information could enable rival firms armed with detailed

information about the submitters' pricing strategy to undercut the submitters' bids and eliminate these firms from effective competition. Cf. Manuel J. Blanco, 14 DOE ¶ 80,116 (1986) (total revenue figures for companies in a small and highly competitive industry withheld because given other industry knowledge revenue figures could be used by a firm to undercut a competing firm's bid). Given the facts before us, we therefore find that release of the unit prices in the Purchase Order could cause competitive harm. (5)

The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the unit prices and other information properly withheld under Exemption 4. Consequently, Appellant's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Cascade Scientific, Inc. on December 24, 1996, Case Number VFA-0257, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 23, 1997

(1)1/ The Proposal was a solicitation issued by Battelle, the DOE contractor which operates Pacific Northwest Laboratories (PNL), to provide various centrifuge equipment to PNL. Two firms, Sorvall Instruments (Sorvall) and Beckman, Inc. (Beckman), were selected to provide equipment under the Proposal. Beckman was selected to provide a class 1 centrifuge system and Sorvall was selected to provide one class 2, one class 3, one class 4 and one class 6 centrifuge system.

(2)Richland released the total price listed in the Purchase Order for the Sorvall centrifuge systems.

(3)The DOE's Inspector General's Office may have jurisdiction to investigate the Appellant's claim that Sorvall's bidding practices regarding Request for Proposal No. 310769 were improper.

(4)The Determination Letter did not claim that the withheld information was subject to any privilege. Consequently, we need not consider whether the information could have been subject to any recognized privilege.

(5)In light of our finding of competitive harm, we need not determine whether the government's ability to obtain necessary information in the future would be harmed by disclosure of the withheld information.

Case No. VFA-0258, 26 DOE ¶ 80,159

January 31, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugene Maples

Date of Filing: January 2, 1997

Case Number: VFA-0258

On January 2, 1997, Eugene Maples of Hopkins, South Carolina, filed an Appeal from a determination issued on November 25, 1996, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). That determination denied in part Mr. Maples' request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records that are held by a covered branch of the federal government, and that have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). The FOIA also lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

In 1993, Mr. Maples provided information to OIG regarding the State of South Carolina's alleged misuse of funds maintained by the Department of Energy. The monies were Petroleum Violation Escrow funds collected by the federal government from oil companies for violations of petroleum pricing regulations from 1973 to 1981. Funds not needed for direct restitution to injured persons are used to provide indirect restitution to overcharged customers. For this purpose, the states implement energy-related programs that benefit

the general public. OIG investigated the allegations and submitted a report to the Department of Justice for appropriate action. The Department of Justice decided not to take any action on OIG's report and the case was closed.

Mr. Maples requested a "copy of the final report issued by the Inspector General's Office on the investigation of the misuse of Oil Overcharge funds by the State of South Carolina." Request Letter dated May 7, 1996 from Eugene Maples to Jane A. Payne, FOIA Officer, OIG. OIG released the report and its exhibits, but withheld almost all names and identifiers within those documents. Determination Letter dated November 25, 1996 from William H. Garvie, Assistant Inspector General for Investigations, OIG, to Eugene Maples. Portions of the documents were withheld because "[n]ames and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C)"

of the FOIA. Id. Mr. Maples appeals all of the withholdings, claiming that release of the information is in the public interest.

ANALYSIS

Both Exemptions 6 and 7(C) allow the withholding of information dealing with personal privacy. The former permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Exemption 7(C) applies to a much narrower class of cases but has a less exacting standard that gives it somewhat more expansive coverage. Under Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both of these exemptions require balancing the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7 (C), the information must have been compiled for law enforcement purposes. In addition, because information may be withheld where there is only a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6, where the balance calls for information to be withheld only if there is a "clearly unwarranted invasion of privacy" (emphasis added). Because, as we find below, the documents at issue in this case meet Exemption 7's threshold (complied for law enforcement purposes), we need only examine the withholding under the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149, at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124, at 80,550 (1992).

Applying these standards to the records in this case, we find that the information involved in this Appeal(1) were compiled for a law enforcement purpose. OIG was investigating whether South Carolina misused funds that were maintained by the DOE. The courts have held that where Inspectors General are investigating potential criminal activity, they are engaged in law enforcement activities for the purposes of Exemption 7(C) even if they conclude there was no criminal wrongdoing. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995), cert. denied, ___ U.S. ___, 134 L.Ed.2d 546, 116 S.Ct. 1422 (1996). We also have made extensive examinations of the Inspector General's activities in this area and found that they are law enforcement activities. See, e.g., Stoel Rives, LLP, 25 DOE ¶ 80,189, at 80,723 (1996); Robert Burns, 19 DOE ¶ 80,134, at 80,596-97 (1989). In this case, the investigation into potential criminal activity clearly demonstrates a relation "to the enforcement of federal law and ... a rational connection between the investigative activities and the agency's law enforcement duties" that meets the Exemption 7 threshold test. Western Journalism Center v. Office of the Independent Counsel, 926 F. Supp. 189, 191 (D.D.C. 1996).

Once the material meets the threshold standard in Exemption 7, we consider whether release of the withheld material would result in one of the harms listed in Exemption 7. Ferguson v. FBI, 957 F.2d 1059, 1065 (2d Cir. 1992). In this case, OIG believes release would harm the personal privacy of certain individuals, and it invoked Exemptions 6 and 7(C). Thus, the agency must perform the balancing test noted above. The OIG Determination Letter divided the withheld material into two categories: (1) names and (2) other information which might disclose individual identity. We will follow OIG's categories in this examination.

1. Names

OIG withheld all of the names in the report and its exhibits, except those of OIG employees, the Governor of South Carolina, President Bush, Vice President Gore, and FBI special agents. All other names in the report and its exhibits were withheld. As we have stated previously, a name by itself does not create a privacy interest that can be protected for the purposes of FOIA exemption analysis. The News Tribune, 25

DOE ¶ 80,181, at 80,700 (1996). Rather, the privacy interest exists when a name is linked with information which reveals something personal or private about an individual. Id. at 80,699.

In this case, most of the names in the report and its exhibits are witnesses who were interviewed in the course of the OIG investigation into Mr. Maples' allegations. We have found that witnesses and sources have a strong privacy interest in remaining anonymous. James L. Schwab, 21 DOE ¶ 80,117, at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109, at 80,524 (1990); Jerry O. Campbell, 17 DOE ¶ 80,132, at 80,576 (1988). Linking a person with a potential criminal investigation could result in harassment and certainly would involve considerable embarrassment. Manna v. Department of Justice, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, ___ U.S. ___, 133 L.Ed.2d 405, 116 S.Ct. 477 (1995); Wichlacz v. Department of the Interior, 938 F. Supp. 325, 333 (E.D. Va. 1996). The same is true for those who were interviewed during the investigation. Id.; McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993); Jon Berg, 22 DOE ¶ 80,140, at 80,587 (1992).

Conversely, the public interest in this information in this case is minimal. For Exemption 7(C), the Supreme Court has constructed a narrow public interest standard. Information falls within the public interest for the purposes of the FOIA only if release of the information is likely to contribute "'significantly to public understanding of the operations of the government.'" Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)); see Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 494-95 (1994). Release of the names in this case would add little to the public's knowledge about governmental activity. Rather, it is the information dealing with what happened, the government's investigation and conclusions, which serve the public need for insight into the workings of government. James L. Schwab, 21 DOE at 80,557. Thus, under the circumstances of this case, knowing the names of those who were interviewed regarding the alleged misuse of the oil overcharge funds would not appreciably assist the public understanding of government. In fact, both this office and the courts have found that withholding the names of witnesses better serves the public interest by allowing those witnesses to speak freely to government investigators without fear that their identities will be disclosed and that they will be subject to possible harassment. Kiraly v. FBI, 728 F.2d 273, 278-79 (7th Cir. 1984); Holy Spirit Ass'n for the Unification of World Christianity v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (per curiam); Lloyd R. Makey, 20 DOE at 80,523-24; The Die-Gem Co., 19 DOE ¶ 80,124, at 80,569 (1989).

Turning to the balancing test on these names, we find that in the present case there is little or no public interest in the additional information to be gained by release of the names. On the other side of the scale there is a considerable privacy interest in not being linked with allegations of potential criminal conduct (particularly when OIG has determined there was no criminal act). There is also a strong privacy interest in not being identified as a person interviewed in a criminal investigation. Thus, on balancing these facts, we find that the privacy interest of these individuals outweigh the public interest and that release of the names would pose an unacceptable breach of personal privacy. See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 922-23 (11th Cir. 1984) (witnesses); Southwest Resource Dev., 24 DOE ¶ 80,164, at 80,654 (1995). Accordingly, we find that OIG properly withheld these names under Exemption 7(C).

Notwithstanding these factors, Mr. Maples contends that there is a strong public interest that outweighs any intrusion into the privacy of the persons whose names were withheld. In particular, he states that "the material withheld should be made public in order that any and all false, fraudulent, and misleading statements can be refuted through 'sworn statements' by all individuals involved." He claims that "the personnel involved should not be concerned with releasing their names and their records if the information they provided is truthful and based upon the law or court decisions." Appeal Letter dated December 24, 1996, from Eugene Maples to Director, Office of Hearings and Appeals, DOE.

We do not accept this argument. There is no evidence of fraud in the record of this FOIA appeal. Absent some special circumstance not apparent in this case, where the OIG finds no fraud or criminal violation, the privacy interest outweighs the public interest in the release of the names of persons investigated, and the public interest is satisfied by release of the facts and conclusions of the investigation. Robert E.

Caddell, 20 DOE ¶ 80,103, at 80,508-09 (1990).

Although we find that OIG properly withheld the names of witnesses it contacted in the course of its investigation, there is another set of withheld names that should be released. As we stated, OIG withheld almost all names mentioned in the report and its exhibits. For example, the name of the attorney at the Department of Justice to whom the original OIG oral report was made was withheld. We have previously held that federal employees carrying out their official duties have no privacy interest in having their names linked with their work-product unless it reveals something personal or private about that individual or there are other special circumstances. The Cincinnati Enquirer, 25 DOE ¶ 80,206, at 80,769 (1996); William H. Payne, 25 DOE ¶ 80,190, at 80,727 (1996). In another instance, the name of a person with knowledge of the Stripper Well funds was withheld, although the name appeared in the documents merely because Mr. Maples mentioned that he had spoken with him. Also, the name of the owner of a private, minority owned company was withheld. These people do not appear to be sources or subjects of the investigation. Based on our limited review of the documents, we believe that OIG may have improperly withheld these and possibly other names from the version of the report and its exhibits it provided to Mr. Maples. Therefore, we believe that the best course is to allow OIG, which is most familiar with the report and its exhibits, to determine whether any additional names that were withheld may be released. The names of persons that do not appear to be sources or subjects of the investigation, should be released unless OIG is able to provide a more detailed justification for its withholding of the names of those other than witnesses.

2. Other Information

OIG also withheld other information. This includes, but is not limited to, job titles, consisting of the office and department in which the individuals worked, and pronouns. None of this material has an inherent privacy interest. Under Exemptions 6 and 7(C), names and other information that would tend to disclose the identity of certain individuals may be withheld. Although job titles in general do not constitute personal information, in some situations, a specific, unique job title may identify an individual. Southwest Resource Development, 24 DOE ¶ 80,164, at 80,654 (1995). But, where OIG determines that release of the name is appropriate, the job title should be released as well. We have previously stated that a pronoun which grammatically takes the place of the name of a person, but which does not name the person itself, is not personal information even when the name itself may be withheld. James E. Phelps, 20 DOE ¶ 80,169, at 80,703 (1990). However, in unusual and limited situations, might describe with a degree of certainty some individual (for example, if there was only one woman in an office) the pronouns could be withheld.

CONCLUSION

This Appeal will be remanded to OIG to determine whether any additional names that were withheld may be released. The names of persons that do not appear to be sources or subjects of the investigation should be released. In addition, OIG should release job titles where it determine the release of a name is justified. Finally, OIG should review the report and its exhibits to determine where pronouns can be released. If OIG determines that release is not warranted, it must provide a more detailed justification for its withholding of the names of those individuals who are not witnesses.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eugene Maples of Hopkins, South Carolina, OHA Case No. VFA-0258, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General which shall release the information previously withheld, or issue a new determination in accordance with the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial

review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 31, 1997

(1)There were six exhibits to the report that originated in other offices of the DOE. Those documents have been sent to the other offices for a determination concerning their release. They are not at issue in this Appeal.

Case No. VFA-0260, 26 DOE ¶ 80,160

February 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Acadian Gas Pipeline System

Date of Filing: January 13, 1997

Case Number: VFA-0260

On January 13, 1997, Acadian Gas Pipeline System (Acadian) filed an Appeal from a determination issued to it on November 26, 1996, by the Department of Energy's Strategic Petroleum Reserve Project Management Office (SPRP). That determination was issued in response to a request for information that Acadian submitted on October 25, 1996 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, Acadian asserts that SPRP failed to provide it with documents in its possession that are responsive to its request.

I. Background

On October 25, 1996, Acadian filed a request for information in which it sought "all records regarding the DOE's sale of certain Strategic Petroleum Reserve property, specifically, 67.2 miles of 36-inch pipeline identified as the Weeks Island Crude Oil Pipeline located in Iberia Parish, Louisiana and the attendant rights-of-way, servitudes, and easements." See Letter from Acadian to Director, Office of Hearings and Appeals (OHA) (January 9, 1997) (Appeal Letter). On November 26, 1996, SPRP issued a determination which stated that it was enclosing a complete file regarding "DOE's Capline Commercialization Project." See Letter from Durinda L. Robinson, SPRP to Acadian (November 26, 1996) (Determination Letter). However, SPRP indicated that certain portions of this document were withheld pursuant to Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). Id. at 2. SPRP categorized the withheld portions as the "rental cost of the throughput rate." Determination Letter at 1.

On January 13, 1997, Acadian filed the present Appeal with the Office of Hearings and Appeals. In its Appeal, Acadian challenges the adequacy of the search conducted by SPRP.(1) Specifically, Acadian

contends that immediately after reviewing the documents provided by SPRP, it became apparent that SPRP had omitted responsive documents in addition to the "throughput information" identified in the Determination Letter. Appeal Letter at 3. Acadian maintains that SPRP omitted appraisals assessing the fair market value of the Weeks Island properties, as well as other information. Id. Further, Acadian maintains that SPRP failed to provide it with a Vaughn index listing the documents withheld and a basis for withholding each document. Id. Based on these assertions, Acadian asks that the Office of Hearings and Appeals direct SPRP to conduct a new search for responsive documents and to produce a Vaughn index.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was reasonable, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

As stated above, Acadian alleges that SPRP omitted responsive information in addition to the "throughput information" identified in its Determination letter. Appeal Letter at 3. Acadian asserts that it was only after reviewing the documents released to it by SPRP that Acadian discovered the probable existence of other responsive documents. Appeal Letter at 3. In reviewing the present Appeal, we contacted officials at SPRP to ascertain the extent of the search that had been performed. Upon receiving Acadian's Request for Information, the Realty Officer at SPRP conducted a manual search of her files. She located a complete file containing information regarding the DOE's Capline Commericalization Project. SPRP released some of this information to Acadian, but withheld the throughput information described above, under Exemption 4 of the FOIA. However, SPRP has informed us that other responsive documents, namely the appraisals referenced in Acadian's Appeal letter, do exist, and were among the withheld information but were not identified. Based on our conversation with SPRP, it is not clear whether further additional responsive documents now exist.

Under these circumstances, we find that this FOIA request has not been subjected to a search sufficiently thorough and conscientious to meet the established standards of reasonableness. See David Hackett, 24 DOE ¶ 80,166 (1995); Robert Heitman, 24 DOE ¶ 80,152 (1995). Since SPRP failed to identify the existence of other responsive documents, we cannot at this time find that the search has been adequate. Consequently, we will remand this matter to SPRP so that it may conduct a new search consistent with the guidance provided in this Decision. SPRP should issue a new determination which identifies all responsive documents and justifies any withholdings. Acadian may, if it wishes, appeal the new determination.

In addition to a new search, Acadian requests that it be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation of why that exemption is applicable. On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990). At the administrative levels, determinations need only include a general description of the withheld material, and a statement of the reason for withholding each document. Therefore, we reject Acadian's request for a Vaughn index. However, as stated above, in its new determination SPRP should provide Acadian with a general description of all withheld information and the reasons for any withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed by Acadian Gas Pipeline System on January 13, 1997, is granted as specified in paragraph (2).

(2) This matter is remanded to the Department of Energy's Strategic Petroleum Reserve Project Management Office so that it may issue a new determination regarding any documents that may be responsive to the Acadian Gas Pipeline System's October 25, 1996 FOIA Request.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 18, 1997

(1)Acadian does not challenge the withholding of the "throughput information" under Exemption 4 of the FOIA.

Case No. VFA-0261, 26 DOE ¶ 80, 162

February 20, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: STAND of Amarillo, Inc.

Date of Filing: January 22, 1997

Case Number: VFA-0261

On January 22, 1997, the Office of Hearings and Appeals (OHA) received an Appeal filed by STAND of Amarillo, Inc. (STAND) from a determination issued to it by the Freedom of Information Officer at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "the Officer"). The Officer's determination was issued in response to a request for information that was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. The Appeal, if granted, would require the Officer to release 91 documents to STAND and to conduct a further search for documents responsive to its request.

I. Background

On November 2, 1995, STAND (Serious Texans Against Nuclear Dumping) filed a FOIA request with the Albuquerque Operations Office (DOE/AL). In that request, STAND sought access to 96 specifically described documents that Mason & Hanger Corp. (formerly Mason & Hanger - Silas Mason) (M&H) produced during the discovery phase of a licensing proceeding before the Texas Natural Resource Conservation Commission (TNRCC). M&H is the Management and Operations contractor for the DOE's Pantex facility near Amarillo, Texas. In this proceeding, the TNRCC considered applications for hazardous waste and water quality permits submitted in connection with the operation of the Pantex plant. (1)

In its response to STAND's request, DOE/AL determined that the requested documents were not "agency records" within the meaning of the FOIA because the documents were part of M&H's legal files and by the terms of the Management and Operations contract were the property of M&H. In a Decision and Order issued on February 12, 1996, we found that the DOE/AL's determination was premature and we remanded the matter to that Office to complete the search for responsive documents. STAND of Amarillo, Inc., 25 DOE ¶ 80,167 (1996) (STAND I).

The DOE/AL completed its search and issued a second determination to STAND. In that determination, DOE/AL stated that one of the 96 requested documents had been located in the DOE's Amarillo Area Office, and that four additional documents remained in M&H's legal files, but had either originated with or had been received by DOE officials. These five documents were provided to STAND in their entirety. With regard to the remaining 91 documents, DOE/AL reiterated its previous determination that these materials are not agency records because they are part of M&H's internal legal files, which under the terms of M&H's contract with the DOE are the property of the contractor.

In response to an appeal by STAND, the OHA issued a second Decision and Order in this matter on August 9, 1996. STAND of Amarillo, Inc., 26 DOE ¶ 80,105 (1996) (STAND II). In that Decision, we found that circumstances had changed since the request was filed. The TNRCC permits had been issued. We cited a letter dated February 2, 1996 from Karen Richardson, M&H's Chief Counsel, to STAND. We said that pursuant to the provisions of the letter, "once the [hazardous waste and water quality] permits have been issued, both DOE and Mason & Hanger would review STAND's request ?in terms of what documents would have been available under the FOIA absent the ... [TNRCC] case proceeding.'" 26 DOE at 80,105, citing M&H's February 2 letter. Because we believed that such a review could result in the release of the requested documents to STAND, we remanded this case to the DOE/AL.

In a determination issued to STAND on December 12, 1996, the Officer stated that after our August 9 remand, another search for responsive documents was performed. The Officer added that no additional documents were located, and that the 91 documents remained in M&H's legal files and were therefore not subject to the FOIA.

On January 22, 1997, STAND filed the current Appeal. In its submission, STAND contends that the material it requested is subject to the FOIA because the DOE has either possession of, or control over, the 91 documents, and that copies of these documents in the DOE's possession were not located because of an inadequate search.

Because the record in this proceeding was unclear as to the results of our August 9 remand, we contacted DOE officials in Albuquerque and Amarillo. We were informed that the review by M&H and DOE officials that was discussed in STAND II had not occurred. Apparently the review offered in the February 2, 1996 letter from the M&H Chief Counsel to STAND was intended by M&H to be part of a proposed agreement by which STAND was to provide M&H with certain documents in STAND's possession. Because STAND did not provide these documents or otherwise respond to M&H's letter, M&H declined to perform the review discussed in STAND II. See telephone memoranda of February 4, 1997 conversation between James Snyder, DOE/AL and Robert Palmer, OHA Staff Attorney, and February 6, 1997 conversation between Clinton Fitts, DOE Amarillo Area Office and Mr. Palmer.

II. Analysis

A. Adequacy of the Search

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

Given the totality of the circumstances in this case, including the fact that a number of searches were performed, we find that STAND has received an adequate search for documents responsive to its request. As previously stated, in STAND I we remanded this matter to the DOE/AL so that Office could perform a more complete search. As a result of that remand, five of the 96 requested documents were identified as responsive and provided to STAND. After our remand in STAND II, a second search was performed. That search included the offices of the Assistant Area Manager for Projects & Environmental Management. The request was also referred to M&H officials at the Pantex facility. See memorandum of February 13, 1997 telephone conversation between Mr. Fitts and Mr. Palmer. There is nothing in the record to indicate that a

third search would result in the identification and release of additional responsive documents. We therefore reject STAND's claim that the search for responsive documents was inadequate.

B. Agency Records

STAND also claims that the 91 documents in the possession of M&H are subject to the FOIA as agency records because they are under the control of the DOE. As support for this argument, STAND contends that the DOE produced these documents for STAND's examination during the discovery portion of the TNRCC regulatory proceeding.

The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in United States Department of Justice vs. Tax Analysts, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch..., or any independent regulatory agency." 5 U.S.C. § 552(f). In addition, where an agreement between the DOE and a prime contractor provides that documents relating to work under the contract shall be the property of the government, such records shall be subject to disclosure under the DOE regulations. 10 C.F.R. § 1004.3(e)(1).

M&H, which is a privately owned and operated corporation, is clearly not an "agency" as that term is defined in the FOIA. Moreover, the language of the contract between M&H and the DOE supports the Officer's determination that the 91 documents are not subject to disclosure under the FOIA. That contract provides, in pertinent part, that:

(a) ... [e]xcept as provided in paragraph (b) of this clause ... , all records acquired or generated by the Contractor in performance of this contract shall be the property of the Government and shall be delivered to the Government ... as the Contracting Officer may from time to time direct ....

(b) ... The following records ... are the property of the Contractor and not within the scope of paragraph (a) above:

...

(6) [p]rivileged or confidential Contractor financial or legal information....

(7) Internal legal files;

...

STAND contends that the term "internal legal files" should be interpreted as including only documents that are subject to the attorney-client or the attorney work product privileges. As described in STAND's initial request, the 91 documents appear to consist of internal communications between M&H employees concerning waste disposal and other environmental issues.

We do not find STAND's interpretation of clause b(7) of the contract to be convincing. Instead, clause b(6) of the contract must be considered in order to interpret clause b(7) properly. Clause b(6) is the one that includes documents that are subject to the attorney-client and the attorney work product privileges. Because we do not believe that the parties would intentionally include a redundant clause in the contract, we do not agree with STAND that clause b(7) applies only to privileged legal documents. Moreover, the record does not support STAND's assertion that the 91 documents were produced by the DOE in conjunction with the TNRCC regulatory proceeding. Instead, we conclude that the records were and are M&H's records and were and are in the sole possession of M&H. When M&H's attorneys produced the

documents during discovery, those documents were removed from the contractor's environmental files and placed in its legal files. See memorandum of February 13, 1997 telephone conversation between Mr. Fitts and Mr. Palmer. We find that, at the time of the request, the withheld documents resided in M&H's legal files and nowhere else, and were therefore not owned by the DOE under the contract.

Finally, STAND argues that because the 91 documents discuss environmental and health issues, they should be determined to be subject to disclosure under the DOE regulations. In support of this claim, STAND cites 10 C.F.R. § 1004.3(e). That regulation states, in pertinent part, that "(1) [w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)....(3) The policies stated in this paragraph: ... (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety ...."

We do not agree with STAND's interpretation of this regulatory provision. Absent specific language in this provision to the contrary, we do not believe that in enacting § 1004.3(e)(3)(ii) the DOE intended to alter the terms of its contracts concerning what documents are the property of the DOE and what documents are the property of the contractor. Instead, we conclude that when a contract provides that records involving environmental or safety concerns are the property of the government, § 1004.3(e)(3)(ii) directs the agency to make those records public unless they are exempt. As stated above, the 91 documents are not the property of the government under the terms of the contract. We therefore reject STAND's contention that the documents are subject to disclosure pursuant to 10 C.F.R. § 1004.3(e).

III. Conclusion

STAND has failed to demonstrate that the DOE's search for responsive documents was inadequate or that the 91 documents are subject to release under the FOIA or under DOE regulations. For the reasons set forth above, we will therefore deny STAND's appeal. (2)

It Is Therefore Ordered That:

(1) The Appeal filed by STAND of Amarillo, Inc. on January 22, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 20, 1997

(1)1/ As a party to the TNRCC proceeding, STAND was permitted to view the 96 documents, but was not allowed to make copies of them.

(2)2/ We have been informed by Mr. Fitts that pursuant to a directive from DOE Under Secretary Thomas P. Grumbly, the DOE's Amarillo Area Office has been instructed to conduct a document-by-document review with M&H for the purpose of determining whether additional documents may be released to STAND. This Decision should not be interpreted as altering or otherwise affecting that directive.

Case No. VFA-0262, 26 DOE ¶ 80, 161

February 20, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner:William H. Payne

Date of Filing: January 22, 1997

Case Number: VFA-0262

On January 22, 1997, William H. Payne (Payne or the Appellant) filed an Appeal from a determination issued on December 4, 1996, by the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his Appeal, Payne requests that we direct Albuquerque to (1) release legal invoices it withheld under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), on the grounds of the attorney work-product privilege; (2) search for certain records responsive to the Appellant's FOIA request in the legal files of a government contractor; and (3) identify and produce records that would indicate whether a named former DOE official had been charged with sexual harassment or had been the subject of a "security clearance action."

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552 (b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On October 16, 1996, the Appellant submitted a FOIA request seeking access to the following:

(1) invoices submitted by private law firms to Sandia National Laboratories (Sandia National Laboratories and Sandia Corporation will both be referred to as "Sandia") (1) for the defense of a sexual harassment lawsuit involving Sandia employees;

(2) investigative reports concerning the plaintiff's allegations of sexual harassment in the Sandia litigation; and

(3) records indicating whether a former DOE official had been accused of sexual harassment or the subject of a "security clearance action."

On December 4, 1996, Albuquerque issued a determination letter responding to this FOIA request. In response to the Appellant's request for legal invoices, Albuquerque provided the names of two law firms that Sandia had retained to defend the sexual harassment law suit and provided the dollar amount paid to these firms. The actual invoices were withheld in their entirety under Exemption 5 of FOIA on the grounds

of attorney work-product privilege.

Albuquerque indicated that there were no agency records of investigative reports concerning the allegations of the sexual harassment complaint. Albuquerque further stated that such records are maintained in the legal files of Sandia, and that these files are not owned by DOE.

Based on Exemptions 6 and 7(C) of the FOIA, Albuquerque refused to confirm or deny the existence of records that would indicate whether a former DOE official had been accused of sexual harassment or the subject of a "security clearance action." Albuquerque supported this position by stating that:

Lacking evidence of an individual's consent, an official acknowledgment of an investigation by the agency, or an overriding public interest in the information, even to acknowledge the existence of such records pertaining to any named individual could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Payne has appealed this determination on three grounds. First, Payne alleges that invoices prepared by private law firms and directed to a government contractor are not internal government records and are therefore not withholdable under Exemption 5 of the FOIA. Second, he claims that records concerning an investigation of allegations of harassment located in the files of a government contractor are subject to the FOIA and should be released as a matter of public policy. Finally, Payne contends that records that would indicate whether a DOE official had been accused of sexual harassment or the subject of a security clearance action are not withholdable under Exemption 6 or Exemption 7(C) of the FOIA.

ANALYSIS

As detailed below, we have determined that Albuquerque (1) properly withheld portions of legal invoices based upon the attorney work-product privilege recognized under FOIA Exemption 5, but failed to segregate and release non-privileged portions of the documents; (2) correctly asserted that records in the possession of a government contractor were not releasable under the FOIA because they were not agency records or under the control of DOE; (3) correctly refused to confirm or deny the existence of records that would indicate whether a former DOE official had been accused of sexual harassment or the subject of a "security clearance action."

I. The Attorney-Work Product Privilege under Exemption 5 of the FOIA

Albuquerque withheld in their entirety monthly billing invoices issued by private law firms for work performed defending a sexual harassment law suit for Sandia under the attorney work-product privilege of Exemption 5. The Appellant claims that Exemption 5 does not apply because they were not government documents. As detailed below, contrary to the Appellant's position, these invoices are intra-agency documents and portions of these statements were properly withheld. However, these invoices also contain non-exempt material that must be segregated and released to the Appellant.

A. The DOE's Role in Litigation Involving Sandia

Sandia is the contractor responsible for managing the Sandia National Laboratory for DOE. The contract between DOE and Sandia provides procedures for the defense and settlement of claims against Sandia. Under these procedures, Sandia must inform DOE when a suit has been filed against it arising from its performance under the contract. Absent special circumstances, DOE must reimburse Sandia for the costs and expenses of litigation, including judgments, court costs and attorneys' fees. The contract permits DOE to direct the litigation or substitute government counsel for the contractor's private counsel. To make informed decisions concerning the litigation, DOE reviews and evaluates the billing statements of Sandia's private counsel.

B. The Invoices

The monthly billing invoices at issue were prepared by two private law firms retained by Sandia to defend the sexual harassment law suit. The invoices were sent to Sandia for payment. The sample invoices that we examined set forth the date of the services provided, the initials of the attorney providing the services, a brief description of the nature of the services provided, and the daily number of hours billed by each attorney. At the end of the statement, the attorneys whose initials appear in the statement are identified and the total number of hours billed by each attorney are then multiplied by the particular hourly rate charged for each attorney's services. The monthly billing statements also state the amounts charged for various administrative services such as photocopying.

C. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). A prerequisite for invoking Exemption 5 is that the document at issue be an inter-agency or intra-agency document. When documents have been created outside of an agency but pursuant to agency initiative, courts have held that such documents are intra- agency documents. See Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); Joyce E. Economus, 23 DOE ¶ 80,182 (1994) (Exemption 5 is applicable to documents prepared by outside contractors).

Here, the invoices are intra-agency documents because of the relationship between DOE, Sandia and the private law firms. Pursuant to the DOE-Sandia contract, DOE generally reimburses Sandia for the cost of litigation, settlement and judgment. DOE may also exercise substantial control over the litigation. The billing records are used by DOE to monitor the litigation and determine whether it is necessary to impose additional controls. As DOE uses these invoices as part of its decision-making process, they are "intra-agency" documents within the scope of Exemption 5. The fact that these invoices were generated by private law firms retained to defend Sandia does not destroy the intra-agency aspect of these documents. See Rio Grande Sun, 15 DOE ¶ 80, 132 (1987) (Exemption 5 applies to invoices prepared by law firm representing DOE contractor); Tri-City Herald, 18 DOE ¶ 80,115(1989), (work-product documents of DOE contractor constitute intra-agency documents under Exemption 5).

D. The Attorney Work-Product Privilege

Exemption 5 of the FOIA encompasses documents covered by the attorney work-product privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). The attorney work-product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947). This privilege is limited. It does not extend to every written document generated by an attorney. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. See, e.g., Coastal States at 865.

It is well settled that attorney fee information is normally not privileged. Indian Law Resource Center, 477 F. Supp. 144, 149 (D.D.C. 1979) (Indian Law). However, information contained in billing statements is privileged when it reveals litigation strategy, the thoughts or impressions of the attorneys, or the *specific* nature of the services provided by attorneys, such as research into particular areas of the law. Indian Law; C.D. Varnadore, 24 DOE ¶ 80, 123 (1994). See also Rio Grande Sun.

Applying these principles to the present case, we find that the invoices contain both privileged and non-privileged material. The non-privileged information contained in these documents includes the attorneys' identities, the hourly rates charged by each attorney, the total fees charged for the litigation, and the cost of

expenses such as photocopying, reporting services and mileage. The privileged information contained in these documents consists of the descriptions of the specific services, the dates on which legal services were provided by each attorney, the monthly and daily totals of hours billed by each attorney, and the total monthly dollar amount charged for each attorney's services. This information is privileged because it would provide opposing counsel with insight into Sandia's litigation strategy by revealing the timing and intensity of the provided services. Rio Grande Sun.

E. The Public Interest in Disclosure

Under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. We find that the public interest is best served by non-disclosure to insure that attorneys representing the government or government contractors are able to prepare their clients' cases free from the kind of "undue and needless interference" cited by the Supreme Court in Hickman v. Taylor. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." Hickman, 329 U.S. at 510-11. Without the protection of the privilege, attorneys representing the government would be handicapped from providing effective representation. Moreover, as detailed below, release of the work-product information is not in the public interest because it would impede the government's ability to monitor and control the cost of contractor litigation. Therefore, we find that the public interest does not mandate release of the material withheld under Exemption 5.

We further find that disclosure of this material would cause a tangible risk of harm to the interests protected by the work-product privilege. An individual who reads the privileged portion of these invoices will obtain information concerning Sandia's litigation strategy that is generally unavailable to a party in litigation. Future litigants with access to the privileged portion of the invoices will have an advantage over Sandia. Moreover, Sandia will be reluctant to provide privileged documents (including detailed invoices) to DOE if DOE releases these documents to the public. Thus, release of the work-product information would cause direct harm by impeding DOE's ability to monitor and control the cost of contractor litigation. See C.D. Varnadore, 24 DOE ¶ 80,123 (1994) (information contained in legal invoices issued by law firm representing DOE contractor is confidential under Exemption 4 because disclosure would impair DOE's ability to obtain such information in the future). This finding satisfies the reasonably foreseeable harm standard set forth by the Attorney General in 1993. Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies (October 4, 1993).

F. Segregation

The FOIA explicitly mandates that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt [from disclosure]." 5 U.S.C. § 552(b). Although the billing statements contain some information that may properly be withheld under Exemption 5, Albuquerque's blanket application of the privilege was improper. While the attorney work-product privilege applies to both facts and opinions, it does not apply to all information within a document. In the instant case, the invoices contain non-privileged information such as the attorneys' identities, the hourly rates charged by each attorney and the cost of expenses such as photocopying. Our cases have required segregation and the release of such non-privileged materials. See Oxy USA, Inc., 23 DOE ¶ 80,133 (1993).

In view of the foregoing, we shall grant the present Appeal to the extent that we will remand this matter to Albuquerque and require that it issue a new determination concerning these invoices. Before issuing this determination, Albuquerque shall review the invoices withheld in their entirety and delete under the attorney work-product privilege of Exemption 5 only those portions of the invoices that we have found properly withheld. Albuquerque shall then release any reasonably segregrable non-exempt information.

II. Agency Records

In his FOIA request, the Appellant sought investigative reports of the plaintiff's allegations in the Sandia sexual harassment lawsuit. Albuquerque responded by stating that there were no agency records responsive to this request, but that Sandia had records of investigations in its legal files. Albuquerque further indicated that DOE does not own these records.

The Appellant claims that he is entitled to obtain records in the possession of a contractor under the FOIA and that records concerning sexual harassment should be public as a matter of policy. The Appellant's position is without merit. As detailed below, the records at issue are not subject to the FOIA because (1) they are not "agency records" and (2) the contract between DOE and Sandia provides that Sandia own the records. Because DOE does not own or control these records, it does not have the authority to order their release.

The FOIA requires the release of non-exempt "agency records" in response to a FOIA request. To determine whether a document is an "agency record," we must resolve (1) whether the organization is an "agency" for purposes of the FOIA. and if not, (2) whether the requested material is nonetheless an "agency record." See, e.g., B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) .

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day- to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with DOE, Sandia is the prime contractor responsible for maintaining and operating the Sandia National Laboratory. While DOE obtained Sandia's services and exercises general control over the contract work, it does not supervise Sandia's day-to-day operations. We therefore conclude that Sandia is not an "agency" subject to the FOIA.(2) Thus, the records do not qualify as "agency records" under the test set forth by the federal courts. See Department of Justice v. Tax Analysts, 492 U.S. 136, 145-46 (1989); see also Forsham, 445 U.S. at 185-86; Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150-51 (1980).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and Sandia to determine the status of such records. Clause H-18 establishes the ownership of records relating to work performed under the contract. This clause provides that, as a general matter, DOE owns the records acquired or generated by Sandia in the

performance of the contract. However, the contract specifically provides that Sandia owns, inter alia, personnel records of individual employees, records relating to allegations, investigations and resolution of employee misconduct (including charges of discrimination), and internal legal files.(3) We find that any documents in Sandia's possession that would reflect investigations of allegations of sexual harassment would fall within the categories of documents described above owned by Sandia under the contract. Therefore, unless such documents are submitted to the DOE, these records would be contractor's records, which are not subject to release under the DOE regulations. Accordingly, we find that the records relating to an investigation of allegations of sexual harassment are neither "agency records" within the meaning of the FOIA, nor subject to release under DOE regulations.

III. Albuquerque's Refusal to Confirm or Deny the Existence of Records Regarding a Named Individual

Relying upon Exemptions 6 and 7(C) of the FOIA, Albuquerque refused to confirm or deny the existence of records that would indicate whether a former DOE official had been accused of sexual harassment or had been the subject of a security clearance action. The Appellant contends that information concerning such matters is not withholdable under Exemptions 6 or 7(C). As detailed below, Appellant's position is without merit.

A. Glomar

An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(4) A Glomar response is justified when the confirmation of the existence of certain records would itself reveal exempt information. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983).

A Glomar response must be used consistently to protect the privacy of individuals who are the subject of FOIA requests as other responses will reveal exempt information. For example, if Albuquerque had admitted that documents responsive to the Appellant's FOIA request exist, but claimed that these documents were exempt from disclosure, it would have revealed the existence of records indicating that the named individual had been the subject of a sexual harassment complaint or a "security clearance action." Moreover, if Albuquerque provides a Glomar response only when exempt records exist, FOIA requestors will soon note the pattern and will be able to infer that Albuquerque only refuses to confirm or deny the existence of exempt records when such records actually exist. This would compromise the privacy rights of individuals who may be the subjects of third party FOIA requests in the future.

B. The Appellant's Contentions

The Appellant alleges that a named former DOE official had been charged with sexual harassment by sixteen women and that his security clearance had been revoked. Payne implies that the revocation of the individual's security clearance, and the individual's subsequent resignation, were connected to the charges of sexual harassment. Payne has submitted no evidence corroborating these facts. Nor has he alleged the existence of a criminal or civil investigation involving the named individual. The Appellant appears to be seeking records that would indicate whether this former DOE official had been the subject of sexual harassment complaints and security clearance actions to confirm his suspicions.

C. Exemptions 6 and 7(C)

Both Exemptions 6 and 7(C) allow the withholding of information dealing with personal privacy. The former permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Under Exemption 7(C), agencies may withhold "records or information compiled for law

enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both exemptions require a balance of the interest in personal privacy in the withheld information against the public interest in the same information.

There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7(C), the information must have been compiled for law enforcement purposes. In addition, because information may be withheld where there is only a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6 where the balance calls for a "clearly unwarranted invasion of privacy" (emphasis added). Because, as we find below, the documents at issue here meet Exemption 7's threshold test, we need only examine the withholding under the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124 at 80,550 (1992).(5)

1. Law enforcement purpose

Information may be withheld under exemption 7(C) if an agency compiled such information as part of or in connection with a law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). An agency's enforcement of a civil statute is considered performed for a "law enforcement" purpose under Exemption 7. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 (D.C. Cir. 1974). Exemption 7 applies to records generated during a background security investigation performed in connection with federal employment, see e.g. Mittleman v. OPM, 76 F.3d 1240, 1241-43 (D.C.Cir. 1996), and to documents gathered by an Equal Employment Opportunity Office during an investigation of allegations of discrimination. Raytheon Company, 25 DOE ¶ 80,156 (1995). Thus, records that would indicate whether a former DOE official had been accused of sexual harassment or had been the subject of a security clearance action would fall within the scope of Exemption 7.

2. The balancing test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980). This standard also applies when determining whether the disclosure of the existence of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983).

a. The privacy interest

An individual has a strong privacy interest in the non-disclosure of the existence of records that would indicate that he has been the subject of a sexual harassment investigation because of the stigma associated with being investigated. See Fund for Constitutional Government v. National Archives & Records Service, 656 F.2d 856, 865 (D.C. Cir. 1981); James L. Schwab, 21 DOE ¶ 80,117 (1991). The D.C. Circuit has acknowledged that investigation subjects possess substantial privacy interests because they may be embarrassed and suffer harm to their reputations if others learn that they are the target of a law enforcement investigation. Safecard, 926 F.2d at 1205.

An individual also has a strong privacy interest in the non-disclosure of records that would indicate that he has been the subject of a security clearance action.(6) Although being the subject of a security clearance action is not always stigmatizing, the disclosure of this fact may lead to harassment or embarrassment. If

an individual has been the subject of a security clearance action, it increases the likelihood that this individual was granted a security clearance or denied a clearance after an investigation. If the fact (or the increased likelihood) that an individual has a security clearance were disclosed to the public, this individual could be targeted by terrorists or spies who might harass or threaten the individual to obtain access to classified information. It is well settled that an increased risk of harassment and annoyance constitutes an invasion of personal privacy. See Weisberg v. Department of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); See also Hemengway v. Hughes, 601 F. Supp.1002 (D.D.C. 1985) (information regarding citizenship of persons accredited to attend State Department briefings exempt from disclosure because disclosure could place an individual in jeopardy). Moreover, if an individual had been denied a security clearance, the disclosure of this information would be stigmatizing.

The Appellant implies that the named individual waived his privacy interest because he was a high-level DOE official. This position is without merit. A person does not forfeit his or her right to privacy simply by accepting employment as a government official. See Baez v. Department of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Bast v. Department of Justice, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (government officials do not surrender right to personal privacy although individual's position may increase the public interest in disclosure).

The Appellant further implies that the named individual has no privacy interest in the non- disclosure of these records because of the public nature of his alleged misconduct. This argument is also without merit. The named individual's privacy interest is not destroyed because the requester may have some knowledge of the facts contained in the requested records. Weisberg v. Department of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); L & C Marine Transp. Ltd. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) (privacy interest is not lost because information may be discovered through other means). See also Davis v. Department of Justice, 968 F.2d 1276 (D.C. Cir. 1992) (requester has burden of proving that the specific material he seeks has been officially acknowledged or is in the public domain).

b. The public interest in disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of documents of the type requested by Payne. We have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). The Supreme Court has held that information that does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." Reporters Committee, 489 U.S. at 775. If a public interest is identified, then it must be determined whether the public interest in disclosure outweighs the privacy right of the individual.

Here, the Appellant apparently claims that the public interest in disclosure relates to the fact that he is trying to expose governmental corruption. Appellant claims that the named individual was formerly a high level DOE official who has been guilty of misconduct. We agree that there is a strong public interest in the disclosure of official misconduct. Here, however, there has been no proof of official misconduct. The Appellant's allegations concerning the named individual are unsubstantiated. The Appellant has failed to demonstrate (or even allege) the existence of a formal proceeding or criminal case against the named individual. Courts have held that unsubstantiated allegations of official misconduct do not establish a public interest in disclosure. See McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993) (no public interest absent evidence of employee wrongdoing or public investigation); William H. Payne, 26 DOE ¶ 80,144 (1996) (no substantial public interest in disclosure of information concerning possible investigation when allegations of official misconduct are unsubstantiated).

c. Balancing the interests

When an individual who has not been formally charged with a crime or other misconduct would be exposed as a target of a law enforcement investigation, the public interest in disclosure must be very strong to overcome the invasion of privacy. Fund for Constitutional Government, 656 F.2d at 866. Here, as detailed above, the public interest in disclosure of unsubstantiated allegations of official misconduct is weak. Thus, the public interest in disclosure of these records does not outweigh the privacy interest of the individual. Accordingly, if records indicating that the named individual was accused of sexual harassment or the subject of a security clearance action exist, the fact of the existence of these records may be withheld under Exemption 7(C).(7)

D.. The Glomar Response Was Appropriate

We find that Albuquerque was justified in providing a Glomar response to the Appellant's FOIA request because the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny the portion of the Appeal that relates to Albuquerque's refusal to confirm or deny the existence of enforcement records concerning a named individual.

CONCLUSION

In view of the foregoing, we shall grant the present Appeal in part. This matter will be remanded to Albuquerque with directions to issue a new determination. Before issuing this determination, Albuquerque shall review the legal invoices from the law firms that represented Sandia in the sexual harassment law suit and delete under the attorney work- product privilege of Exemption 5 only the descriptions of the specific services, the dates on which legal services were provided by each attorney, the monthly and daily totals of hours billed by each attorney, and the total monthly dollar amount charged for each attorney's services. Albuquerque shall release any segregable, non-exempt information. We will deny the remainder of the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on January 22, 1997, is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2) This matter is remanded to the Albuquerque Operations Office to issue a revised determination concerning the legal invoices withheld in their entirety. In this revised determination, Albuquerque shall release any segregable, non-exempt information. Under the attorney work-product privilege of Exemption 5, Albuquerque may delete only the descriptions of the specific services , the dates on which legal services were provided by each attorney, the monthly and daily totals of hours billed by each attorney, and the total monthly dollar amount charged for each attorney's services.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 20, 1997

(1)Sandia is the contractor responsible for managing the Sandia National Laboratory for DOE. Contract

No. DE-AC04-94AL85000. Under the contract, DOE exercises general control over the work performed at Sandia, but does not supervise day-to-day operations. The contract specifically details many aspects of the relationship between DOE and Sandia, including the ownership of records and procedures for the defense and settlement of claims against Sandia.

(2)Although Sandia is not an agency for the purposes of the FOIA, Sandia records could become "agency records" if they were obtained by DOE and were within DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the Appellant's request. Memorandum of Telephone Conversation between Karen Griffith, Attorney, Office of Chief Counsel, Kirkland Area Office, DOE and Linda Lazarus, Staff Attorney, Office of Hearings and Appeals (February 19, 1997).

(3)The section of Clause H-18 that sets forth the categories of documents that belong to Sandia under the contract contains an exception for records contained in certain enumerated Privacy Act Systems of Records (Privacy Act records). These records belong to DOE. After examining the categories of Privacy Act records enumerated in this exception, and speaking to two Albuquerque employees, we are convinced that Albuquerque performed an adequate search for records responsive to the Appellant's FOIA request in these Privacy Act records and that no records were found. Memorandum of Telephone Conversation between Ron O'Dowd, Office of Chief Counsel, and Linda Lazarus, Staff Attorney, Office of Hearings and Appeals (February 19, 1997); Memorandum of Telephone Conversation between Elva Barfield, FOIA Officer, Albuquerque, and Linda Lazarus (February 19, 1997).

(4)"Glomar" refers to the first instance in which a Federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents).

(5)Although it is unnecessary to reach this issue, Exemption 6 also permits the withholding of records concerning these issues. See Hunt v. U.S. Marine Corps,, 935 F. Supp. 46 (D.D.C. 1996) (information concerning an individual's security clearance withholdable under Exemption 6); Schonberger v. National Transp. Safety Board, 508 F. Supp. 941, 944-945 (D.D.C. 1981) (Exemption 6 protects identity of federal employees accused of wrongdoing).

(6)We understand the term "security clearance action" used by the Appellant in his FOIA request to include an action which involves the grant, denial, revocation or continuation of an access authorization.

(7)It is important to note that we could reach the same result by relying on those cases that hold that names of private individuals appearing in an agency's law enforcement files are "categorically" exempt from disclosure under Exemption 7(C). Safecard, 926 F.2d at 1205-06.

Case No. VFA-0263, 26 DOE ¶ 80, 163

February 24, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Fried, Frank, Harris, Shriver & Jacobson

Date of Filing:January 24, 1997

Case Number: VFA-0263

On January 24, 1997, the law firm of Fried, Frank, Harris, Shriver & Jacobson (Fried) filed an Appeal from a determination by the Albuquerque Operations Office (AO) of the Department of Energy (DOE) on December 24, 1996. In that determination, AO partially granted a request for information issued to the Appellant made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, Fried asks that we order AO to release the withheld material.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, Fried sought copies of documents related to the DOE Request for Proposal No. RFP DE-RP04-96AL89607 (RFP). Specifically, Fried sought copies of the complete proposal submitted by Burns and Roe Enterprises, Inc., all responses to DOE questions provided by Burns and Roe, the initial and final "Best and Final Offer" submitted by Burns and Roe, and a complete copy of the contract awarded as a result of the RFP, including all modifications and supplemental agreements to the contract as of October 1, 1996. In the determination letter, AO enclosed a copy of the contract between Burns and Roe Enterprises, Inc. and the DOE. AO, pursuant to the provisions of 5 U.S.C. § 552(b)(3) (Exemption 3) and citing Subtitle B, Section 821 of the National Defense Authorization Act of 1997 (NDAA), P.L. 104-20, withheld the proposal and related information. AO stated that Section 821 of the NDAA bars release of the Burns and Roe proposal because it states that a proposal may not be made available to any person under Section 552 of Title 5 of the United States Code (the Freedom of Information Act) when the proposal has not been set forth

or incorporated by reference in the contract.(1) AO stated that since the Burns and Roe proposal has not been set forth or incorporated by reference in the contract, it must withhold the remaining requested information.

In its appeal, Fried argues that AO should release the Burns and Roe proposal because the contract that AO awarded incorporated it by reference. Fried cites the following four examples of instances where the final contract incorporated elements of the Burns and Roe proposal:

(a) All Representations, Certifications, and other statements of offeror are explicitly incorporated by reference at Paragraph H.01, page (57) of the material disclosed (page references, unless otherwise noted, are to handwritten page numbers on the bottom, middle of each page);(b) Section J, Attachment B, page (127) et seq., "Work Breakdown Structure" (Part of the Contract Work Statement, see Paragraph C.01) bears the original RFP Number and appears to be taken directly from the Burns and Roe proposal;© Section J, Attachment F, page (173) et seq., "Small Business Plan" incorporates the Burns and Roe proposal (note parenthetical heading on page (173), "Contractor's Plan is incorporated herein");(d) The Statement of Work ("SOW") Section J, Attachment A, beginning at page (90), contains numerous revision bars not present in the RFP and must represent changes from the Burns and Roe proposal.

Fried also argues that the DOE has the discretion to release the requested material. With this in mind, Fried maintains that the FOIA is a disclosure statute and that discretionary decisions not to disclose must have a rational basis. Finally, Fried states that the contract the DOE released to it contains references to a contract modification numbered 001, and an "Exhibit B," both of which the DOE did not include in the copy of the contract it sent to Fried. Fried also states that the contract is missing pages 1 through 40 and page 168. Fried requests that we order release of these missing portions of the contract.

II. Analysis

As an initial matter, AO informed us that it mistakenly did not include the contract modification number 001 when it released a copy of the contract to Fried. Accordingly, we find that AO should release the contract modification numbered 001 to Fried. AO also clarified the confusion regarding the other missing pages and "Exhibit B" not included in the contract sent to Fried. AO informed us that "Exhibit B" referred to in boxes 15c/15d/15e of Standard Form 26 is actually "Section B" included in Attachment A, Statement of Work. Fried has received this document. Finally, AO informed us that the alleged missing pages were proposal instructions from the RFP and were never a part of the final contract. Since these proposal instructions were not part of the final contract, AO informed us that these pages were not actually missing from the copy Fried received from AO. At the very least, we find that this unusual numbering system in a final contract, in which there are different handwritten and typewritten numbers on the same page, to be very confusing. Since these pages contain only proposal instructions, AO should review these pages and either release them to Fried or provide an explanation as to why they are exempt from release.

Exemption 3 of the FOIA, cited by AO, allows agencies to withhold information if specifically authorized by another federal statute. However, the withholding statute must meet strict statutory guidelines. An agency properly invokes Exemption 3 only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the Exemption's coverage if it satisfies either of its standards.

As stated above, Fried contends that the final contract incorporates the Burns and Roe proposal and, therefore, pursuant to the provisions of Section 821 of the NDAA, the DOE should release the proposal. In fact, AO confirmed that the awarded contract probably incorporates some proposal information. See February 20, 1997 Record of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Sam Espinosa and Terry Apodaca, AO. Because Section 821 of the NDAA does not bar the release of proposal information that has been incorporated into a contract, Exemption 3 does not apply in this case as a reason to withhold the proposal in its entirety. Therefore, we will remand this case to AO to either release the proposal information incorporated into the awarded contract or provide a detailed explanation for withholding any such information, including the examples Fried cites, and why Exemption 3 is applicable to them. Finally, on remand, AO may consider the applicability of other FOIA exemptions to the requested information.

It Is Therefore Ordered That:

(1) The Appeal filed by Fried, Frank, Harris, Shriver & Jacobson on January 24, 1997, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Authorizing Official of the Albuquerque Operations Office of the Department of Energy to either release copies of documents responsive to Fried, Frank, Harris, Shriver & Jacobson's September 24, 1996 request for the proposal submitted by Burns and Roe Enterprises, Inc., related to the DOE Request for Proposal No. RFP DE-RP04-96AL89607 or provide a detailed explanation for withholding any responsive information. Finally, the Freedom of Information Authorizing Official must release the contract modification numbered 001 to the appellant.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 24, 1997

(1)Section 821 of the NDAA incorporates the non-disclosure provisions described above into Section 303B of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 253(b).

Case No. VFA-0264, 26 DOE ¶ 80, 165

February 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lois Blanche Vaughan

Date of Filing: January 27, 1997

Case Number: VFA-0264

On January 27, 1997, Lois Blanche Vaughan filed an Appeal from a determination issued to her on May 3, 1996, by the Oak Ridge Operations Office (DOE/OR) of the Department of Energy (DOE). That determination concerned a request for information submitted by Ms. Vaughan pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE/OR would be required to conduct a further search for responsive material.

I. Background

Ms. Vaughan was employed by Tennessee Eastman Corporation (Eastman) in Kingsport, Tennessee from 1948 to 1956.(1) Eastman operated two sites at Oak Ridge from 1943 to 1947. From 1966 to 1968, she was employed by Holston Defense Corporation (Holston), a subsidiary of Eastman also located in Kingsport. Ms. Vaughan alleges that Eastman performed experiments for unknown agencies of the United States government at various times during her employment. See Letter from Laurie D. Mitchell, Esq., to Director, Office of Hearings and Appeals (OHA) (January 27, 1996) (Appeal Letter). Ms. Vaughan contends that she was exposed to radiation from several sources, including the shipment of radioactive material between DOE/OR and Eastman, while she lived in Kingsport. (2) On August 23, 1995, she filed a request for all records that referred to her alleged occupational exposure to radiation at Eastman or to radiation research conducted on Eastman employees. See Letter from Lois Vaughan to Privacy Act Officer, DOE/OR (August 23, 1995). On May 3, 1996, DOE/OR issued a determination informing Ms. Vaughan that no responsive documents

could be located.(3) On January 27, 1997, counsel for Ms. Vaughan filed an Appeal with OHA contending that the search for documents was inadequate. See Appeal Letter.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). Accord Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Master v. F.B.I., 926 F. Supp. 193, 196 (D.D.C. 1996) (Master). "The standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we first contacted the DOE/OR FOIA Officer to ascertain the scope of the search. Because Ms. Vaughan was never employed by DOE/OR, the FOIA Officer informed us that her employment records would not be found there. Nonetheless, the FOIA Officer searched for records by the requester's Social Security number, but did not find any responsive records. Because Ms. Vaughan attributed her alleged radiation exposure to the shipment of radioactive material between Oak Ridge and Kingsport, the FOIA Officer searched the DOE/OR Records Holding Area (7000 cubic feet of classified and unclassified records) for "any documents pertaining to the subject shipments as well as any reference to the Holston Defense Corporation, the Holston Valley Hospital, or Kingsport." Determination Letter at 1. The FOIA Officer then searched the files of the Oak Ridge National Laboratory Chemical Division. However, in accordance with DOE Records Management regulations, documents over six years old pertaining to shipments of radioisotopes have been destroyed. After seeking guidance from the requester, the FOIA Officer then contacted personnel at the Holston Army Ammunition Plant (formerly Holston Defense Corporation). Plant personnel referred DOE/OR to Department of Army officials at Rock Island, Illinois, who maintain historical information. These officials stated that to their knowledge, no radioactive materials were used at the Holston plant. Id. at 2.

DOE/OR did not perform a physical search for shipment records, labeling such an effort "burdensome." Shipment records at DOE/OR, if they exist, would be scattered throughout three plants, one of which has 300 buildings. There is no central files location, no index, and no database of these records.(4) In addition, DOE offices are not required to maintain records dating back 30 to 50 years, and thus it is not likely that such old records still exist. Therefore, we conclude that were we to order a search through thousands of unindexed files for records that likely do not exist, it would impose an unreasonable burden on DOE/OR. See Nation Magazine v. U.S., 71 F.3d 885, 892 (D.C. Cir. 1995) (concurring with the district court's determination that a request to search 23 years of unindexed files would impose an unreasonable burden on an agency)

We find that DOE/OR followed procedures that were reasonably calculated to uncover the material Ms. Vaughan requested. Miller, 779 F.2d at 1384-85. The fact that the search did not uncover documents alleged to be in the possession of DOE does not mean that the search was inadequate. See Master, 926 F. Supp. at 197. In addition, the requester has not provided us with any evidence that responsive documents exist. See Memorandum of Telephone Conversation between Laurie Mitchell, Esq., and Valerie Vance Adeyeye, OHA Staff Attorney (February 12, 1997). Personal belief is not a sufficient basis to support a finding that a search was inadequate. Glen Milner, 25 DOE ¶ 80,215 (1996). Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on January 27, 1997, by Lois Blanche Vaughan, OHA Case No. VFA-0264, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 25, 1997

(1)Kingsport is located approximately 100 miles northeast of Oak Ridge, Tennessee.

(2)Ms. Vaughan originally filed her request for information with the DOE Office of Human Radiation Experiments. That office forwarded her file to DOE/OR after investigation determined that her exposure may have been occupational and not experimental.

(3)With the determination letter, DOE/OR sent Ms. Vaughan documents explaining the agency's efforts to comply with the President's Executive Order regarding Human Radiation Experiments, and recommendations for compensation to the subjects of identified experiments.

(4)DOE/OR has offered to provide the requester an index of documents available in its reading room that pertain to a state-conducted study on environmental radiation dose reconstruction. This information may assist the requester in determining the level of radiation exposure of the population of Tennessee.

Case No. VFA-0265, 26 DOE ¶ 80, 164

February 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Martha J. McNeely

Date of Filing:January 28, 1997

Case Number: VFA-0265

On January 28, 1997, Martha J. McNeely (Appellant) filed an Appeal from a determination issued on December 26, 1996 by the Richland Operations Office (Richland) of the Department of Energy (DOE). In that determination, Richland stated that it was unable to locate documents responsive to the Appellant's December 3, 1996 request under the Privacy Act of 1974, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require the DOE to conduct another search for responsive documents.

I. Background

On December 3, 1996, the Appellant submitted a Privacy Act request to Richland seeking copies from the DOE of her medical and dental records along with any existing bone and tissue samples obtained from her. In her request, the Appellant stated that her parents had worked at the DOE's predecessors' facility at Hanford, Washington, and that she had received medical treatment at Kadlec Hospital and possibly other government facilities during the period 1946 through 1954. (1) The Appellant provided Richland with the names of her parents, her social security number and her date of birth. In its December 26, 1996 Determination Letter (Determination Letter), Richland stated that it had conducted a search for Appellant's medical and dental records using her name, date of birth and social security number but were unable to locate any responsive records. (2)

On January 28, 1997, the Appellant filed the present Appeal. In her submission, the Appellant argues that the search for documents was inadequate. The Appellant cites a number of studies that she believes she may have been involved in as a child in Hanford, Washington, and thus her involvement in these studies would have created medical records. Specifically, the Appellant asserts that she was a student at Lewis and Clark Elementary School in Hanford, Washington during 1948 through 1953 and believes that she was one of "an identified group of irradiated schoolchildren and children of Hanford workers." The Appellant also asserts that she may have been involved in an experiment named "Project Sunshine" which may have been connected with an entity referred to as the "Strontium" unit. The Appellant also asserts that she may have participated in "Project Gabriel," a study she asserts involved the uptake and retention of strontium and cesium in humans. The Appellant also apparently claims that she may have been involved with a study described in a "1951 report from St. Louis" which referenced a nationwide appeal for "tens of thousands of baby teeth." Nevertheless, the Appellant contends Richland provided no information concerning any of the above projects. Finally, the Appellant argues that the fact that Hanford discovered that her parents' medical records were transferred to DuPont indicates that her own medical records are still in the possession of Hanford.

II. Analysis

The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). (3)

We inquired as to the search that was conducted for records the Appellant requested. (4) See Memorandum of telephone conversation between Angela Ward, Richland, and Richard Cronin, OHA

Staff Attorney (January 31, 1997); Memorandum of telephone conversation between Yvonne Sherman, Richland, and Richard Cronin, OHA Staff Attorney (February 7, 1997). We were informed that a DOE contractor, the Hanford Environmental Health Foundation (HEHF), has possession of all of the available systems of records which could contain responsive material. HEHF possesses medical records on Hanford employees from the time period specified by the Appellant along with medical records from Kadlec Hospital, where Hanford employees and their families were treated. The Kadlec Hospital records are stored by the patient's date of birth, and a search was conducted using the Appellant's date of birth. No records were found. A search was also made of the Hanford employee medical records in HEHF's possession using the Appellant's and Appellant's parents' names and the Appellant's social security number. No records regarding the Appellant were found but evidence was discovered indicating that the Appellant's parents' employee medical records were among those that had been transferred by DuPont to Wilmington, Delaware.(5)

With regard to the Appellant's assertions regarding the studies in which she may have participated, a Richland official informed us that she had no knowledge of any documents existing in Richland regarding "Project Sunshine" or "Project Gabriel." See Memoranda of telephone conversation between Yvonne Sherman, Richland, and Richard Cronin, OHA Staff Attorney (February 7, 1997). Further, the only records in Richland regarding screening of elementary school children were whole body counts for background radiation performed beginning in 1963, which was after the period during which the Appellant reported that she lived in Hanford. Thus, no search was made regarding these records. The official further stated that she did not have any knowledge of agency records regarding any studies involving baby teeth. In addition, the official had knowledge of only one study using strontium at Hanford and that the study involved two male researchers as subjects.

Given the facts presented before us, we believe that Richland made a reasonable search for responsive material. However, given the Appellant's assertions regarding her possible involvement with human radiation studies, we believe that other DOE facilities may possess relevant human radiation documents. Since DOE Headquarters is best equipped to search for these records, we will remand this matter to DOE Headquarters so that it may conduct a search for responsive records which possibly may exist at other DOE facilities. (6) The Appellant's Appeal will therefore be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Martha J. McNeely on January 28, 1997, Case Number VFA-0265, is granted in part as set forth in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Headquarters Freedom of Information and Privacy Group so that a broader search may be made for medical and dental records regarding Martha J. McNeely.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in

which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:February 25, 1997

(1)During this period Kadlec Hospital was a federal government facility at Hanford, Washington.

(2)Richland did locate evidence that at one time it possessed records regarding the Appellant's parents but that those records had been taken by DuPont, the contractor operating the DOE's Hanford facility at the time her parents were employed at Hanford, to a DuPont facility at Wilmington, Delaware. Richland provided the Appellant with information on how to contact DuPont to obtain those records. See Memorandum of telephone conversation between Angela Ward, Richland Operations Office, and Richard Cronin, OHA Staff Attorney, (January 31, 1997).

(3)In processing Appellant's request, Richland conducted its search as if the request had been made under the Freedom of Information Act, which encompasses a greater range of documents than the Privacy Act. See Memorandum of telephone conversation between Yvonne Sherman, Richland, and Richard Cronin, OHA Staff Attorney (February 18, 1997).

(4)We note that the Privacy Act and the Freedom of Information Act apply only to agency documents and not to tissue samples in the possession of an agency. Nevertheless, we have been informed by an official at Richland that the only tissue samples of any kind that Richland possesses are a few samples from long-deceased individuals reduced to ash.

(5)We do not believe that the fact that employee health records were at one time created for the Appellant's parents would necessarily indicate that an employer created a medical record for an employee's child.

(6)We will also provide to DOE Headquarters under separate cover the additional information the Appellant provided in her Appeal.

Case No. VFA-0266, 26 DOE ¶ 80,169

March 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: J. Richard Quirk, Esquire

Date of Filing: February 4, 1997

Case Number: VFA-0266

On February 4, 1997, J. Richard Quirk, Esquire (Appellant) filed an Appeal from a final determination issued to him on January 3, 1997, by the Department of Energy's (DOE) Savannah River Operations Office (SR). In that determination, SR claimed that it did not possess any documents responsive to a request for information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to conduct an additional search for responsive information.

I. BACKGROUND

On October 8, 1996, the Appellant submitted a request for information to the DOE seeking copies of: "All contracts, inspection reports and other records concerning the Four Soil Vapor Extractor Unit built by Brown Engineering, reference # AB 10150 C." Request at 1. On January 3, 1997, SR issued a determination in which it claimed that:

DOE's contract with Westinghouse Savannah River Company (WSRC) ... provides: ?The following records are considered the property of the Contractor and are not Government Documents ... Confidential Contractor financial information, and correspondence between the Contractor and other segments of the Contractor located away from the DOE facility; ....' The records you have requested are considered confidential contractor documents; and therefore, they are not Government records and not covered under the FOIA.

Determination Letter at 1. On February 4, 1997, the Appellant filed the present Appeal, challenging the SR's determination that it did not possess any responsive documents.

II. ANALYSIS

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). We review the adequacy of an agency's search under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute

exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In the instant case, SR's determination suggests that documents responsive to the appellant's request exist, but are neither agency records nor subject to 10 C.F.R. § 1004.3(e)(1). Accordingly, we must determine on appeal whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Moreover, we must determine whether any records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994).

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as a DOE contractor, are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham); see also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976). Documents are considered to be "agency records" if they were obtained by an agency and were within the agency's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

A. Whether the Scope of SR's Search for Responsive Documents was Appropriate

After reviewing the record, we found that SR's determination that all of the documents responsive to the Appellant's request were contractor records was not sufficiently supported in its determination letter. While it is quite possible that this determination is correct, it would have been unusual for a facility to be constructed on a DOE site without some records concerning the facility making their way into DOE's files. Accordingly, we contacted SR to ascertain the scope of its search for responsive documents. In response to

our inquiry, SR has begun an additional search for responsive documents. This expanded search has already located and identified at least 4 responsive documents in the DOE's files. Accordingly, we are remanding this issue to SR for: (1) a continuation of this expanded search; and (2) determinations of the releasability of all responsive documents located by this search.

B. Whether any Responsive Documents Were the Property of the Government

A separate and distinct issue before us is whether all the records concerning the Four Soil Vapor Extractor Unit at the Savannah River Site are the property of WSRC. Applying the Orleans standard to the present case, we find that WSRC is clearly not an "agency" under the FOIA. Since WSRC is not an agency for the purpose of the FOIA, any documents that are the property of WSRC are not agency records. Nor are documents that are owned by a contractor, according to the terms of the contractual agreement between the contractor and the DOE, subject to 10 C.F.R. § 1004.3(e)(1). Because the determination letter did not indicate the nature of the documents it found to be owned by WSRC, we contacted SR to obtain clarification on this issue from SR officials. As of this writing, WSRC officials are compiling an index of documents in its possession that concern the Four Soil Vapor Extractor Unit built by Brown Engineering. Accordingly, on remand, SR must review this index and determine whether any document identified in the index is the property of the government. Any such document should be reviewed for possible disclosure under 10 C.F.R. § 1004.3(e)(1).

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to the Department of Energy's Savannah River Operations Office for completion of the expanded search for responsive documents and the issuance of a new determination letter. On remand, SR should: (1) determine whether each document listed in WSRC's index is the property of the government, (2) identify each document located by SR's expanded search, (3) indicate whether each document identified in steps (1) or (2) is released or withheld, and (4) clearly explain any withholdings of documents.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by J. Richard Quirk, Esquire, on February 4, 1997 (Case Number VFA-0266) is hereby granted and remanded to the Savannah River Operations Office for further processing in accordance with the instructions set forth above.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 19, 1997

Case No. VFA-0267, 26 DOE ¶ 80,195

June 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James D. Hunsberger

Date of Filing: May 20, 1997

Case Number: VFA-0267

On May 20, 1997, James D. Hunsberger filed an Appeal from a determination issued to him on December 30, 1996, by the Nevada Operations Office (Nevada) of the Department of Energy (DOE). That determination concerned the remand of a prior Appeal Mr. Hunsberger filed with the Office of Hearings and Appeals (OHA) regarding a request for information that he had made pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Parts 1004 and 1008. If the present Appeal were granted, the DOE would be required to conduct a further search for the information Mr. Hunsberger has requested.

I. Background

On December 12, 1995, Mr. Hunsberger submitted a request for information under the Freedom of Information and Privacy Acts to the Department of Energy. In that initial request he sought all information concerning human experiments of which he may have been a part. He specifically sought information about experiments that tested the effects of a broad range of specified types of radiation on human subjects. Other elements of his initial request are not at issue at the present appeal. The request was referred to the DOE's Office of Human Radiation Experiments (OHRE) for a response.

In a July 22, 1996 Determination Letter, the Acting Director of the OHRE stated that her staff had searched the documents available in the DOE's human radiation experimentation database and found no responsive documents. In addition, they looked into ongoing research involving humans and electric and magnetic fields (EMF), and provided Mr. Hunsberger with information about one project. Mr. Hunsberger appealed this determination, contending that the search was inadequate. In particular, he stated that his request was far broader than EMF studies. He also questioned the accuracy of several of the statements in the determination letter, especially those dealing with ongoing research.

In a September 20, 1996 Decision and Order, the OHA found that the OHRE's search was adequate, but that the search of the agency as a whole was inadequate. It found the

search inadequate on the departmental level because although personal identifiers had been removed from the documents in the database that the OHRE had searched, the unredacted originals, which might possibly contain the names of subjects, are located at the Coordination and Information Center (CIC) in Nevada. The Nevada Operations Office, which is responsible for CIC, confirmed that the records can be searched by name. In addition, because it appeared from his request that Mr. Hunsberger may have been seeking information about experiments that were performed on prison populations, Nevada indicated that a

search could be conducted of records connected to prisoner experimentation. The case was remanded to the Freedom of Information and Privacy Act Division so that it could determine the appropriate place to search for documents that might contain the names of experiment subjects and documents that concerned experimentation on prison populations. James D. Hunsberger, 26 DOE ¶ 80,121 (1996). The Freedom of Information and Privacy Act Division referred the remand to Nevada.

In its December 30, 1996 Determination Letter, Nevada indicated that its search revealed no responsive documents concerning Mr. Hunsberger. (It did not mention its search of the prisoner experimentation records, however.) On January 31, 1997, Mr. Hunsberger sent a letter indicating his desire to appeal that determination, stating that he would send a further letter explaining his appeal. The OHA received his letter of explanation on May 20, 1997. In his letter Mr. Hunsberger claims for the first time that the appropriate place for a search to be conducted is the DOE's "intelligence elements" which, he feels, are administering the experiments on him.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Acadian Gas Pipeline System, 26 DOE ¶ 80,160 (1997).

In reviewing the present Appeal, we contacted Nevada to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Mr. Hunsberger's request might exist. We were informed that Nevada conducted a search of the DOE's Human Radiation Experiment files and Nevada's Radiation Exposure History files. No files containing his name were located.

As stated above, in his Appeal, Mr. Hunsberger expresses for the first time his belief that the "intelligence elements" of the DOE are responsible for the experiments that have been

conducted on him "over a period of some 15 years, 24 hours a day with interruptions." Appeal Letter received May 20, 1997, from James D. Hunsberger to Director, OHA, at 1. In response to this claim, this Office asked the DOE's Office of Energy Intelligence (OEI) to conduct a search for any records that contain Mr. Hunsberger's name. We have been informed that it has no such records. Memorandum of Telephone Conversation between Loretta Lanier, OEI, and William Schwartz, OHA (June 13, 1997).

We are convinced that Nevada followed procedures that were reasonably calculated to uncover the material sought by Mr. Hunsberger in his request. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that the search did not uncover documents Mr. Hunsberger believed may be in the possession of DOE does not mean that the search was inadequate. In addition, Mr. Hunsberger has not provided any evidence, beyond his personal belief, that any additional, relevant documents exist in the DOE's files. Therefore, under the circumstances of this case, we find that Nevada's search for responsive documents was adequate. Accordingly, Mr. Hunsberger's Appeal should be denied.

We note that prison experimentation records are not within the scope of Mr. Hunsberger's present Appeal. However, in response to the September 20, 1996 Decision and Order, Nevada has informed this Office that it recently conducted a search for information concerning experimentation on prisoners and has printed a computer compilation of the titles of some 900 publicly available documents on the subject of prisoner experimentation. Nevada is sending that compilation directly to the appellant. The appellant is encouraged to review the compilation and notify Nevada of any titles that he feels may assist him in his research.

It Is Therefore Ordered That:

(1) The Appeal filed on May 20, 1997, by James D. Hunsberger, Case No. VFA-0267, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 18, 1997

Case No. VFA-0268, 26 DOE ¶ 80,166

March 5, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Sheet Metal Workers' International Association

Date of Filing: February 11, 1997

Case Number: VFA-0268

On February 11, 1997, Sheet Metal Workers' International Association (the Appellant) filed an Appeal from a determination issued to it on January 3, 1997, by Amy Rothrock, Authorizing Official, Oak Ridge Operations Office (DOE/OR). That determination denied a request for information which the Appellant filed on December 12, 1996, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release in its entirety information that was sought in the December 12, 1996 Request.

In its December 12, 1996 FOIA Request, the Appellant sought, inter alia, copies of the certified payrolls and the apprentice registration forms for the Clean Room installed by a sub-contractor, Liberty Industries, for Lockheed Martin Energy Research Corporation (LMERC), the prime contractor of DOE's X-10 site at Oak Ridge. In the January 3, 1997 determination, DOE/OR found that the requested records are not in the possession of DOE. It also stated that its search did not extend to the files of LMERC. DOE/OR therefore found that it does not possess any responsive records subject to the provisions of the FOIA. The Appellant challenges this determination.

According to the Appellant, the contract to build the Clean Room was a project subject to the Davis-Bacon Act, 40 U.S.C. § 276a. The Appellant asserts that under regulations implementing that Act, DOE is required to possess the requested payroll and apprentice registration forms in order to ensure compliance with the Act's pay provisions. See 29 C.F.R. § 5.5(a)(3)(ii)(A).

After speaking with DOE/OR, we learned that DOE/OR considers the Clean Room contract to be a service contract, and therefore not a construction contract covered by the Davis-Bacon Act.(1)

Thus, under this interpretation, DOE/OR is not required to maintain and, in fact, does not possess any responsive records. See Electronic Mail Message between Amy Rothrock and Dawn Goldstein (February 21, 1997); Record of Telephone Conversation between Amy Rothrock and Dawn Goldstein (February 21, 1997). Therefore, DOE/OR's determination that the agency possessed no responsive records subject to the FOIA at the time of the request was correct.

Even though there are no responsive documents in the possession of DOE, a DOE regulation, 10 C.F.R. § 1004.3, requires additional analysis. This regulation states that responsive documents must be disclosed if the contract between the DOE and a contractor provides that those documents are the property of the agency. Under LMERC's current contract with DOE, records and files pertaining to wages, salaries, and benefits and wage, salary and benefit administration are the property of LMERC. See Contract No. DE-AC05-96OR22464 between DOE and LMERC, Provision H.22(b)(5) (DEAR 970.5204-AL 92-84

(November 1992)). The payroll certifications and the apprentice registration forms clearly fall within that provision.(2) Further, since the requested records concern a subcontractor, Liberty Industries, these records could also be considered procurement records, which, under the LMERC contract, also belong solely to the contractor. Thus, Section 1004.3 does not require the release of these records and the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Sheet Metal Workers' International Association on February 11, 1997, Case Number VFA-0268, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 5, 1997

(1)DOE/OR interpreted the contract this way because installing the Clean Room essentially consisted of putting up some pre-fabricated panels to create a room within an existing room. DOE/OR considered this installation to be service and not construction. See Electronic Mail Message between Amy Rothrock and Dawn Goldstein, Staff Attorney, OHA (February 21, 1997); Record of Telephone Conversation between Amy Rothrock and Dawn Goldstein (February 21, 1997).

(2)Apprentice registration forms are necessary to determine which category of pay a construction worker is entitled to under the Davis-Bacon Act. See Record of Telephone Conversation between Patrick J. Riley, Counsel, Appellant, and Dawn Goldstein (February 21, 1997). Thus, these records would pertain to wage administration and accordingly belong to the contractor.

Case No. VFA-0271, 26 DOE ¶ 80,178

April 14, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nancy Donaldson

Date of Filing: March 17, 1997

Case Number: VFA-0271

This Decision and Order concerns an Appeal that Nancy Donaldson filed from a determination that was issued to her by the Safety Manager (the Manager) at the Bonneville Power Administration (BPA). The Manager issued that determination in response to a request for information that Ms. Donaldson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in volume 10 of the Code of Federal Regulations, Part 1004. The Appeal, if granted, would require the Manager to conduct a further search for documents responsive to the request.

Background

In her FOIA request, Ms. Donaldson sought access to all documents pertaining to any occupational exposure of her late husband, Don Donaldson, to asbestos or any other known carcinogen during his tenure as a BPA employee from 1972 to 1986. In response to this request, the Manager provided Ms. Donaldson with the results of asbestos testing performed at nine BPA facilities during the years 1985 through 1991 and product inventory sheets compiled in 1990 at two BPA locations. In his determination letter, the Manager stated that no additional documents responsive to Ms. Donaldson's request existed. He explained that prior to 1989, products used in BPA facilities were not documented by product name, company, form or container size. According to the Manager, records of this type were not maintained until approximately 1990, when the BPA performed its first Hazardous Materials Inventory as required by Occupational Safety and Health Administration (OSHA) regulations. The Manager also stated that he conducted an informal survey of BPA employees whose jobs were similar to Mr. Donaldson's and who worked at several of the facilities at which Mr. Donaldson was employed. According to the Manager, the results of this study were mostly

inconclusive as to the names and manufacturers of the products that these employees used or encountered during their tenure with the BPA. The surveyed employees did indicate, however, that they used alcohol-based aerosols during the course of their employment.

In her Appeal, Ms. Donaldson contends that the Manager's search for responsive documents was inadequate. In support of this claim, she points out that the Manager's response did not include the results of any asbestos testing prior to 1985. In addition, Ms. Donaldson states that the documents provided to her do not mention transite paneling, even though "through discussions with [Mr. Donaldson's] co-workers," she learned that her late husband "regularly and continuously was required to work on, in, and around components and equipment where transite paneling/board was installed and milled just prior to his required, assigned duties." Appeal at 1. Transite paneling contains asbestos.

Analysis

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In order to evaluate the scope of the search, we contacted the BPA. We were informed that the search for responsive documents included each site at which Mr. Donaldson worked and at which files of any type were maintained.(1) The files of the BPA District Headquarters and Safety Office were searched, and Ms. Donaldson's request was referred to Clayton Environmental, the certified industrial hygiene firm that performed the asbestos testing at BPA facilities during the years 1985 through 1991. See memorandum of April 3, 1997 telephone conversation between Gene McClelland, BPA and Robert Palmer, OHA Staff Attorney.

In her Appeal, Ms. Donaldson argues that the absence of testing data for years prior to 1985 is evidence of an inadequate search. In support of this contention, she claims that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq., required the BPA to conduct tests to determine the level of asbestos exposure in its facilities. However, the portion of that Act that concerned testing for hazardous materials in the workplace did not apply to the federal government. See 29 U.S.C §§ 651 (definition of "employer"), 655. The testing of federal buildings for asbestos was not legislatively mandated until the passage of the Asbestos Hazard Emergency Response Act of 1986, 15 C.F.R §§ 2641 et seq. Ms. Donaldson's claim that the absence of pre-1985 asbestos testing data is evidence of an inadequate search is therefore without merit.

Ms. Donaldson also claims that the BPA's search was inadequate because it did not include documents concerning the presence of transite paneling at the facilities at which Mr. Donaldson worked. In response to this argument, the BPA points out that Ms. Donaldson's request was for documents relating to the exposure of her husband to carcinogens or toxic materials. The BPA contends that the asbestos fibers in transite paneling are "non-friable" in nature, i.e., that there is no risk of exposure unless the paneling is cut or otherwise disturbed. See memorandum of April 3 telephone conversation between Mr. McClelland and Mr. Palmer. However, in Ms. Donaldson's Appeal, she indicates that she is interested in receiving documents concerning this paneling because her husband allegedly worked in areas where the paneling had recently been milled and installed. In view of these statements, the BPA has agreed to search for documents concerning the presence of transite paneling at the facilities at which Mr. Donaldson was employed. We will therefore remand this portion of the Appeal to the BPA so that this search can be performed.

It Is Therefore Ordered That:

(1) The Appeal filed by Ms. Nancy Donaldson, Case Number VFA-0271, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Safety Manager at the Bonneville Power Administration. Within 30 days of the date of this Decision, the Manager will conduct a search for documents concerning the existence of transite paneling at the BPA facilities at which Mr. Donaldson worked, and will issue a new determination to Ms. Donaldson based upon the results of that search.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 14, 1997

(1)Some of the locations at which Mr. Donaldson worked were unmanned facilities, such as power transmission stations.

Case No. VFA-0272, 26 DOE ¶ 80,170

March 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chemical Weapons Working Group Inc.

Date of Filing: February 25, 1997

Case Number: VFA-0272

On February 25, 1997, Chemical Weapons Working Group Inc. (CWWG) filed an Appeal from a determination the Freedom of Information Act Official of the Federal Energy Technology Center (FOIA Official) of the Department of Energy (DOE) issued to it on January 17, 1997. In that determination, the FOIA Official partially granted a request for information that CWWG filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In its request for information, CWWG sought all records relating to ELI Eco Logic, a provider of a hazardous waste destruction technology called the Eco Logic Process. In her determination, the FOIA Official released five documents in their entirety, withheld portions of three documents with material redacted pursuant to Exemption 4 of the FOIA, withheld two documents in their entirety pursuant to Exemption 4 of the FOIA, withheld three documents pursuant to Exemption 5 of the FOIA, and withheld another five documents pursuant to both Exemptions 4 and 5 of the FOIA.(1) A representative of the

FOIA Official also explained to Leonard Tao, OHA Staff Attorney, in a March 11, 1997 phone conversation, that the FOIA Official meant to withhold an April 27, 1995 Proposal, Volumes I, II and III, pursuant to Exemption 3 of the FOIA, as authorized by the National Defense Authorization Act of 1997 (NDAA), Pub. L. No. 104-201, § 821, 110 Stat. 2422, 2609 (1997) (NDAA).(2) In its Appeal, CWWG requests that the DOE release all of the redacted information and the withheld documents. Moreover, CWWG requests that the FOIA Official conduct an additional search "in light of the apparently deliberate problems with this search." Finally, CWWG requests that, if the FOIA Official withheld information solely because "it was the information that CWWG was seeking," we take disciplinary action against the FOIA Official.

II. Analysis

As an initial matter, even if we were to find that the FOIA Official withheld information solely because "it was the information that CWWG was seeking," we do not have the authority to take disciplinary action

against the FOIA Official. See 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Moreover, in our review of this Appeal, we found no reason to believe that the FOIA Official acted improperly.

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In its Appeal, CWWG did not provide any evidence that additional responsive information exists, but cites "deliberate problems" with the original search as a reason for a further search. In our review of the letters between the parties, it became apparent to us that there were no "deliberate problems" with the search as much as a communication problem between representatives of the Federal Energy Technology Center and CWWG. This communication problem involved confusion over what exactly CWWG originally requested. Once the parties clarified CWWG's request, the FOIA Official responded to CWWG's request.

As part of our review, we contacted a representative of the FOIA Official to inquire about the details surrounding her search.(3) The representative of the FOIA Official informed us that she contacted the Associate Director and several other officials of the Office of Project Management, the Director of Environment and Waste Management, the Project Manager for the SAIC contract, the contract specialist dealing with the SAIC contract in the Acquisition and Assistance Division, and the FOIA Officer at the Pittsburgh Energy Technology Center to request that they search their records for responsive information. We find that the FOIA Officer searched the areas that might have reasonably contained responsive information. Since the FOIA Officer conducted a thorough search and verified that no additional responsive documents exist, and since CWWG has not suggested other locations to search, we must deny this portion of the Appeal.

B. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information if specifically authorized by another federal statute. However, the withholding statute must meet strict statutory guidelines. An agency properly invokes Exemption 3 only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the Exemption's coverage if it satisfies either of its standards. See Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984). The D.C. Circuit has stated that the Exemption 3 analysis under the FOIA is not dependent on the factual content of the documents at issue; instead "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (Fitzgibbon) (quoting

Association of Retired Railroad Workers v. U.S. Railroad Retirement Board, 830 F.2d 331, 336 (D.C. Cir. 1987)).

The Supreme Court has established a two-prong standard of review for Exemption 3 cases. See CIA v. Sims, 471 U.S. 159, 167 (1985); Fitzgibbon, 911 F.2d at 761 (applying the Sims test). First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. Id. at 167. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute.

The NDAA is a federal statute that contains language specifically prohibiting the FOIA official from releasing protected information. The pertinent part of the NDAA states that "[e]xcept as provided . . . , a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code." NDAA at 2609. The statute states, however, that it "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." Id. Since the NDAA allows contracting officials no discretion in withholding certain types of information, we find that it meets the subpart (A) requirement of Exemption 3. Having satisfied the threshold inquiry by classifying the NDAA as a statute of exemption, we must now determine if the information withheld from CWWG satisfies the criteria of the statute.

To satisfy Exemption 3, the Proposal withheld from CWWG must meet the criteria laid out above in the NDAA. We conclude that the DOE properly withheld the Proposal. We reviewed the document and find that it is a "proposal in the possession or control" of the DOE "submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." NDAA at 2609. Furthermore, a representative of the FOIA Official informed us that the final contract between the DOE and the contractor does not set forth or incorporate by reference any part of the Proposal. Thus, the FOIA Official has no discretion to release the Proposal. Accordingly, we find that the FOIA Official properly applied Exemption 3 and the NDAA to the requested Proposal.

C. Exemption 4 and Exemption 5

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have consistently held that a submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

The FOIA Official cited Exemption 4 as a basis for withholding in their entirety a "Cost Plan submitted 11/22/96," and a "Draft Sampling and Analysis Plan prepared by SAIC." In addition, the FOIA Official withheld portions of three other documents with material redacted pursuant to Exemption 4. We reviewed all these documents and find that each of them contains commercial information within the meaning of Exemption 4. Furthermore, the submitter, SAIC, created and provided all these documents to the DOE

specifically for the purpose of acquiring a contract. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996) (Industrial); Tri-City Herald, 16 DOE ¶ 80,114 (1987). The DOE also obtained this material from a "person" as required by Exemption 4, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). We also conclude that much of the information withheld, cost data and analytical methods and procedures, is confidential because its release would substantially harm the submitter's competitive position. We have stated in the past that release of cost and financial information could be used by a competitor to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See Industrial; International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, were the submitter to release, for example, its cost estimates for completing specific tasks and reveal its unique methods and procedures to accomplish these tasks, any competitor could easily determine how to adjust its own costs and approach to arrive at a lower contract price and plan to ultimately beat the submitter's best price and procedures in a future bid process. However, we find that some information in these documents, including cover sheets, background information and headings is releasable. Accordingly, we will require the FOIA Official to either release cover sheets, background information and headings from these documents or provide a detailed explanation for withholding any such information.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The FOIA Official withheld the following three documents in their entirety pursuant to Exemption 5: (1) Addendum to Selection Statement dated December 12, 1995; (2) Memorandum from W. Huber to T. Martin re: Technical Evaluation of SAIC's EcoLogic #DE-RO21-96MC33091; and (3) NEPA Determination dated April 25, 1996. We reviewed the documents withheld in their entirety pursuant to Exemption 5 and find that they contain information both predecisional and deliberative pursuant to Exemption 5. In fact, we have confirmed that the information withheld pursuant to Exemption 5 contains opinions and interpretations from various DOE employees, the disclosure of which would discourage open, frank discussions between these individuals. Specifically, the Addendum to Selection Statement has a DOE employee's comments and notes to other DOE employees regarding different aspects of the selection process. The Huber Memorandum contains a DOE employee's evaluation of the submitter's

proposal to another DOE employee. Likewise, the NEPA Determination is another document intended for internal DOE review regarding the submitter's compliance with the National Environmental Policy Act. All these documents are clearly predecisional and deliberative in their nature and their release could inhibit honest communication and evaluations by DOE employees in the future. However, we find that some information in these documents, including cover sheets and headings, are releasable. Accordingly, we will require the FOIA Official to release cover sheets and headings contained in these documents or provide a detailed explanation for withholding any such information.

The FOIA Official cited Exemption 4 and Exemption 5 as a basis to withhold five documents: (1) a "PC note dated April 8, 1996, from James Marsh to W. Huber"; (2) a "Memorandum dated April 3, 1996 from W. Huber to R. Manilla re: Technical Evaluation of SAIC Contract"; (3) an "April 3, 1996, memorandum from Huber to Manilla re: Discussed cost analysis"; (4) a "Price Negotiation Memorandum dated September 16, 1996"; and (5) a "Response to Revised SOW [Statement of Work] dated July 30, 1996." The April 8, 1996 "PC note" from Marsh to Huber is nearly identical to the "April 3, 1996, memorandum from Huber to Manilla re: Discussed cost analysis." One document is a hard copy of an E-mail note and the other is the paper copy of the same memorandum. These documents describe a DOE employee's views expressed on a Statement of Work regarding EcoLogic. Similarly, the "Memorandum dated April 3, 1996 from W. Huber to R. Manilla re: Technical Evaluation of SAIC Contract" contains a DOE employee's thoughts to another DOE employee regarding the submitter. All these memoranda's contents are clearly predecisional and deliberative in their nature. Thus, the release of this information could inhibit honest communication and evaluations by DOE employees in the future. However, we find that the headings of these memoranda are not information withholdable under Exemption 4 or Exemption 5. Accordingly, we will order the FOIA Official to release the headings of these memoranda.

The "Price Negotiation Memorandum dated September 16, 1996" contains cost and pricing information based on information the submitter provided to the DOE and recommendations regarding price negotiation. This document also contains commercial information within the meaning of Exemption 4 and deliberative predecisional information within the meaning of Exemption 5. The release of the commercial information would substantially harm the submitter's competitive position. Furthermore, the recommendations regarding price negotiation are clearly predecisional and deliberative in their nature and their release could inhibit honest communication and evaluations by DOE employees in the future. However, we find that the first page of the Price Negotiation Memorandum contains some background information that is not withholdable under either Exemption 4 or Exemption 5. Accordingly, we will require the FOIA Official to either release background information on the first page or provide a detailed explanation for withholding.

The "Response to Revised SOW [Statement of Work] dated July 30, 1996" is a document created by the submitter detailing to the DOE its approach and work plan, including staffing and schedule and cost estimates. This document clearly contains commercial information within the meaning of Exemption 4. However, we do not find any information in this document withholdable under Exemption 5. Furthermore, we find that the first four pages of this document contain background information that is not withholdable under Exemption 4. Accordingly, we will require the FOIA Official to release background information on the first four pages of this document or provide a detailed explanation for withholding.

III. The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. We have determined that Exemption 3 and the NDAA require the continued withholding of the April 27, 1995 Proposal submitted by SAIC. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, we are not permitted such consideration where, as in the application of Exemption 3, the applicable statute requires non-disclosure.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we also do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

Notwithstanding our finding that the FOIA Official properly applied Exemption 5 to the requested information, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested information consists of the opinions of individuals regarding different aspects of the bid proposal process involving the submitter. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion in these types of bid processes. Employees and managers would be less likely to communicate their opinions during such bid processes if they knew or suspected that an agency would release their opinions to the public. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the requested documents would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by Chemical Weapons Working Group, Inc. on February 25, 1997, Case No. VFA-0272, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Official of the Federal Energy Technology Center (FETC) of the Department of Energy who will release cover sheets, background information and headings from any material withheld under Exemption 4 in the FETC's January 17, 1997 determination letter to Chemical Weapons Working Group, Inc. or provide a detailed explanation for withholding any such information after taking into account the submitter's views regarding the impact of possible release. Furthermore, we will require the FOIA Official to release cover sheets and headings withheld under Exemption 5 in the FETC's January 17, 1997 determination letter to Chemical Weapons Working Group, Inc. or provide a detailed explanation for withholding any such information. We will also require the FOIA Official to release the headings in the following documents: (1) "PC note dated April 8, 1996, from James Marsh to W. Huber"; (2) "Memorandum dated April 3, 1996 from W. Huber to R. Manilla re: Technical Evaluation of SAIC Contract"; (3) "April 3, 1996, memorandum from Huber to Manilla re: Discussed cost analysis"; (4) "Price Negotiation Memorandum dated September 16, 1996"; and (5) "Response to Revised SOW dated July 30, 1996." We will require the FOIA Official to either release background information on the first page of the "Price Negotiation Memorandum dated September 16, 1996" or provide a detailed explanation for withholding. Finally, we will require the FOIA Official to either release background information on the first four pages of the "Response to Revised SOW dated July 30, 1996" or provide a detailed explanation for withholding.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 25, 1997

(1) In the determination letter, the FOIA Official described one of the documents as follows:

Transmittal letter from SAIC [Science Applications International Corporation] transmitting "proposal" to Thomas Martin, DOE, re:SAIC contract dated July 30, 1996. Enclosed proposed work plan withheld in its entirety under exemption 4 referenced above.

A representative of the FOIA Official informed us that the "[e]nclosed proposed work plan" is actually the same document as the document called the "Response to Revised SOW [Statement of Work] dated July 30, 1996, work plan references EcoLogic process" withheld in its entirety under both Exemption 4 and Exemption 5. See March 11, 1997 Memorandum of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Debra Murphy, Federal Energy Technology Center. We have included this document in the category of documents withheld under both Exemption 4 and Exemption 5. Also, the representative of the FOIA Official informed us that the FOIA Official released "SITE Superfund Innovative Technology Evaluation, Technology Profiles" in its entirety.

(2) In her determination letter, the FOIA Official cited only the NDAA and failed to cite explicitly Exemption 3 in withholding the April 27, 1995 Proposal.

(3) 3/ See memoranda of telephone conversations between Leonard Tao, Office of Hearings and Appeals Staff Attorney, and Debra Murphy, Federal Technology Center (Case No. VFA-0272).

Case No. VFA-0273, 26 DOE ¶ 80,172

March 28, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burlin McKinney

Date of Filing: March 3, 1997

Case Number: VFA-0273

On March 3, 1997, Burlin McKinney (McKinney) filed an Appeal from a determination issued to him on February 20, 1997, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). That determination denied in part McKinney's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

I. Background

On May 23, 1995, McKinney submitted a letter to the DOE Office of Occupational Safety requesting information on the beryllium health and safety program at the Y-12 plant in Oak Ridge, Tennessee. DOE's Freedom of Information Act/Privacy Group (DOE/HQ) forwarded one document to the Office of the Inspector General (OIG) for review, and this document (referred to as "Document 13")

was later released to McKinney. On October 24, 1995, McKinney submitted a memorandum to DOE's Oak Ridge Operations Office (DOE/OR) requesting all documents pertaining to an August 19, 1987 OIG investigation of alleged illegal activity at that facility. DOE/OR located three responsive documents and forwarded copies to OIG for review. OIG released redacted versions to McKinney. Document 13 was again released to McKinney, but with all personal pronouns redacted. See Letter from McKinney to Director, OHA (March 3, 1997). DOE/OR also sent a copy of the memorandum to DOE/HQ, which again forwarded the request to the OIG for processing. On February 20, 1997, the OIG released additional documents, all but two redacted, to McKinney. See Letter from Assistant Inspector General For Investigations to McKinney (February 20, 1997) (Determination Letter). Portions of the documents were withheld under FOIA Exemptions 5, 6, and 7(C). The OIG released a total of 26 documents in response to both requests.

In his Appeal, McKinney requests that OIG (1) release the personal pronouns in all documents, since these pronouns were previously released to him in Document 13(1); (2) release all references to Martin Marietta Energy Systems (MMES) supervision and management in order to make the documents easier to read; (3) release all references to DOE employees and DOE contractor employees; (4) release all references to letters and documents; and (5) review all documents again.

II. Analysis

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding a portion of Document 6 from McKinney, the OIG relied upon the deliberative process privilege of Exemption 5.

The deliberative process privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct.1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

After reviewing Document 6, we conclude that the OIG correctly applied Exemption 5 in its determination. The document at issue is an OIG form entitled "Memo To Enter Data Into IGMIS." This memo refers to a case based on a complaint alleging contractor safety violations and irregularities in time cards at DOE/OR. The OIG deleted the section entitled "Remarks," which contains the recommendation of an OIG employee for the next steps to take in processing the case. This memo, written by a DOE employee for internal DOE purposes, is an agency memorandum. Furthermore, the material in the Remarks section is both predecisional and deliberative. It was written before the DOE, and specifically the OIG, adopted a final position on the case in question. Finally, we note that the release of this recommendation could inhibit employees from expressing their candid views if they believed that those views could become public knowledge. Therefore, the Remarks section of Document 6 is precisely the sort of record of the deliberative and "thinking" processes which Exemption 5 is designed to protect. Sears, 421 U.S. at 153 (quoting Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967)). See also Perkins Coie, 26 DOE ¶ 80,127 (1996). Accordingly, we hold that the withheld portion of Document 6 meets all the requirements for withholding material under the Exemption 5 deliberative process privilege. In addition, we conclude that release of this material would cause reasonably foreseeable harm to the interests the agency is protecting under Exemption 5 and therefore is not in the public interest.

However, both the FOIA and the implementing DOE regulations require that non-exempt material which may be reasonably segregated from withheld material be released to a requester. 5 U.S.C. §552(b); 10 C.F.R. § 1004.10(c). See Mink, 410 U.S. at 73, 89 (1972); Boulder Scientific Company, 19 DOE ¶ 80,126 at 80,577 n.3 (1989). Exemption 5 only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material or the non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. See Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971); Lead Industries Association, Inc. v. Occupational Safety and Health Administration, 610 F.2d 70, 85 (2d Cir. 1979). Our review of Document 6 reveals that all other non-exempt material was disclosed to the requester. Thus we find that the OIG, pursuant to DOE regulations, properly released those portions of Document 6 containing factual or non-exempt material.

B. Exemptions 6 and 7(C)

The OIG withheld material in twenty-four documents pursuant to Exemptions 6 and 7(C). Both exemptions allow the withholding of information dealing with personal privacy. Exemption 6 permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10 (b)(6). Exemption 7(C) applies to a much narrower class of cases, but has a less exacting standard that gives it somewhat more expansive coverage. Under Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both of these exemptions require a balance of the interest in personal privacy in the withheld information against the public interest in the same information. See Michael Grosche, 26 DOE ¶ 80,146 (1996) (Grosche).

There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7(C), the information must have been compiled for law enforcement purposes. In addition, because information may be withheld where there is only a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6 where the balance calls for a *"clearly unwarranted* invasion of privacy" (emphasis added). Because, as we find below, the documents at issue in this case meet Exemption 7's threshold test, we need only examine the withholding under the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124 at 80,550 (1992); Grosche, 26 DOE at 80,643.

Applying these standards to the documents in this case, we find that the records sought by the appellant were compiled for a law enforcement purpose. The threshold test for withholding information under Exemption 7(C) is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The OIG is an investigative, law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). In this case, the OIG was investigating allegations of fraud and safety violations at DOE/OR. As a result of its duties, we find that the OIG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995); Keci Corporation, 26 DOE ¶ 80,659 (1997).

Once the material qualifies for withholding under Exemption 7, we consider whether release of the withheld material would result in one of the harms listed in Exemption 7. Ferguson v. Federal Bureau of Investigation, 957 F.2d 1059, 1065 (2d Cir. 1992). The OIG believes that withholding names and information that would tend to disclose the identity of certain individuals will protect their privacy "so that they will be free from harassment, intimidation and other personal intrusions." See Determination Letter at 2. We have previously stated that a name by itself does not create a protectable privacy interest for the purposes of FOIA exemption analysis. The News Tribune, 25 DOE ¶ 80,181 at 80,700 (1996). Rather, the privacy interest exists when a name is linked with information that reveals something personal or private about an individual. Id. at 80,699. In this case, many of the names in the OIG files are linked with job titles, dates of employment, and documents that reveal some personal information about the individual. We have stated previously that a person has a strong privacy interest in the fact that he or she was the subject of or interviewed during a potential criminal investigation. See Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); Jon Berg, 22 DOE ¶ 80,140 at 80,587 (1992). This is because linking a person with a potential criminal investigation would result in harassment and considerable embarrassment. Manna v. Department of Justice, 51 F.3d 1158, 1166 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 477 (1995). Therefore, we find that the OIG was correct in withholding from McKinney not only the names of individuals involved in the Oak Ridge investigation, but identifying information as well.

In determining whether the disclosure of law enforcement records could reasonably be expected to

constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)) (Reporters Committee). Case law dictates that information withheld under Exemption 7(C) falls within the public interest for the purposes of the FOIA only if "release of the information is likely to contribute significantly to public understanding of the operation of the government." Reporters Committee, 489 U.S. at 775. See also Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 494-95 (1994).

The OIG found no fraud or criminal violation in this investigation. Releasing the names of those individuals whom the OIG concluded were not responsible for any fabrication of time cards or safety violations would add little to the public's knowledge of governmental activity. This office has consistently found that withholding the names of witnesses better serves the public interest because it allows witnesses to speak freely to government investigators without fear that their identities will be disclosed and that they will be subject to possible harassment. Lloyd R. Makey, 20 DOE ¶ 80,109 at 80,523-24 (1990); The Die-Gem Co., 19 DOE ¶ 80,124 at 80,569 (1989).

Therefore, we find that there is no public interest in the withheld information. The privacy interest of the named individuals outweighs the public interest in the release of the names of persons investigated. The public interest is satisfied by release of the facts and conclusions of the investigation. Robert E. Caddell, 20 DOE ¶ 80,103 at 80,508-09 (1990). See also McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (protecting the identities of scientists investigated and exonerated on charges of scientific misconduct).

C. Other Information Withheld

The OIG also withheld dates of letters and other documents and the subjects of letters and documents. The requester asks that some of this material be released to improve the "readability" of the documents. It is not the purpose of the FOIA appeal process to provide a requester with documents that are easy to read. However, we must provide the requester with all non-exempt material which may be reasonably segregated from withheld material. See 10 C.F.R. § 1004.10(c). In addition, we must provide this material unless it would pose an "inordinate burden" to do. We have reviewed the withheld documents, and find that some words that were redacted do not appear to be exempt under the FOIA. For example, in several documents, the same word is released in one sentence and redacted in another. Thus, we find that the documents should be reviewed to determine that all releasable information is segregated from the exempt material and provided to the requester in a consistent fashion as required by DOE regulations. See 10 C.F.R. § 1004.7(b)(3).

The appellant also requests the job title and name of a DOE employee, assigned to the Office of the General Counsel (OGC) at DOE Headquarters, who was interviewed in the course of this investigation. This information was withheld under Exemptions 6 and 7(C). The OIG advised us that they withheld that information to protect the employee's privacy. We concur with their withholding of portions of the record of the interview in order to protect the privacy of the employee. We find that the document has been appropriately redacted, and that the OIG properly released all non-exempt material to the requester.

It Is Therefore Ordered That:

(1) The Appeal filed by Burlin McKinney on March 3, 1997, Case Number VFA-0273, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Inspector General, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 1997

(1)The OIG has agreed that the redactions of personal pronouns were inconsistent. They have agreed to release personal pronouns in Documents 3, 5, 6, 7, 10, 11, 12, and 14. Also, because the word "supervisor" was released in Documents 13 and 16, that word will be released also. See Memorandum of Telephone Conversation between Jackie Becker, OIG, and Valerie Vance Adeyeye, OHA (March 12, 1997).

Case No. VFA-0274 26 DOE ¶ 80,174

April 1, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard J. Levernier

Date of Filing: March 5, 1997

Case Number: VFA-0274

On March 5, 1997, Richard J. Levernier (Levernier) filed an Appeal from a determination issued to him on February 27, 1997, by the Office of the Inspector General (OIG) of the Department of Energy (DOE). That determination denied in part Levernier's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records held by a covered branch of the federal government, and not made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). The FOIA also lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9);10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a January 29, 1997 FOIA request, Levernier requested a copy of an OIG report regarding the investigation of allegations that an individual at the DOE's Rocky Flats Environmental Technology Site (Rocky Flats) tape recorded telephone conversations. OIG provided Levernier redacted copies of two documents in its February 27, 1997 determination letter. One of the documents was an OIG Abstract Report of Inspections entitled "Alleged Tape Recording of Conversations at the Rocky Flats Environmental Technology Site and Other Management Issues" (Abstract). The other document was a memo from the Deputy Inspector General for Inspections to various DOE officials which described the findings and conclusions in the Abstract (Memo). In its determination letter, OIG stated that names and other information which would tend to disclose the identity of individuals who provided information to OIG were withheld from the released copies of the Memo and Abstract pursuant to Exemptions 6 and 7(C) of the FOIA. OIG noted in its determination letter that

Exemption 6 protects from disclosure "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." OIG also noted that Exemption 7(C) provides protection from disclosure for records or information compiled for law enforcement purposes but only to the extent that production of such documents could reasonably be expected to constitute an unwarranted invasion of personal privacy. OIG concluded that individuals named in the Abstract and Memo were entitled to protection from harassment or other personal intrusions and that the public interest

in the identity of the individuals whose names appear in these documents does not outweigh the individuals' privacy interests.

Levernier challenges the OIG's withholding of material from the Memo and Abstract and asserts a number of arguments. First, Levernier argues that the documents at issue do not qualify for Exemption 6 protection since the documents are not "personnel, medical or similar files." Second, Levernier argues that the documents are not protected by Exemption 7(C) since they were not records or information compiled for law enforcement purposes. In support of this argument, Levernier asserts that the OIG Office of Inspections is responsible for only the following functions: (1) inspections and analyses; (2) reviews based on administrative allegations received by the OIG; and (3) processing Inspector General referrals to DOE management for appropriate action. He alleges that none of these functions relate to law enforcement. Lastly, Levernier argues that DOE and DOE contractor personnel should not be entitled to any privacy protections for decisions and actions they made in the course of their official duties.

II. Analysis

Both Exemptions 6 and 7(C) allow the withholding of information dealing with personal privacy. The former permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Exemption 7(C) applies to a much narrower class of cases, but has a less exacting standard that gives it somewhat more expansive coverage. Under Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both of these exemptions require a balance of the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7 (C), the withheld information must be compiled as a part of, or in connection with, an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). In addition, because information may be withheld where there is only a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6 where the balance calls for a "clearly unwarranted invasion of privacy" (emphasis added). Because, as we find below, the documents at issue in this case meet Exemption 7's threshold test, we need only examine the withholding under the standard of Exemption 7(C). See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 at 80,620 (1995); K.D. Moseley, 22 DOE ¶ 80,124 at 80,550 (1992).

Initially, we must reject Levernier's arguments regarding the non-law enforcement nature of the Abstract and Memo and find that these documents were compiled for a law enforcement purpose. The Exemption 7 "law enforcement" exception to mandatory release of information under the FOIA encompasses compliance with both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F. 2d. 73, 81 n.46 (D.C. Cir 1974). The OIG is charged with investigating and correcting waste, fraud and abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). Both documents were created in connection with an OIG investigation concerning possible violation of DOE regulations and orders as a result of the taping of telephone conversations by an individual employed at Rocky Flats. Consequently, we find that the Memo and Abstract were compiled for law enforcement purposes within the meaning of Exemption 7(C).

In evaluating this Appeal, we have reviewed unredacted copies of the Memo and Abstract. The material withheld by the OIG consists of the names of the individuals who provided information referenced in the documents along with certain words or phrases whose release, OIG asserts, would also disclose the identities of the individuals when viewed in combination with the released information in the documents. In determining whether the release of the names in the Abstract and Memo could be reasonably expected

to constitute an unwarranted invasion of personal privacy, we note that the courts have used a balancing test which weighs the privacy interests that would be infringed against the public's interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee). We have consistently found that subjects, sources and witnesses mentioned in OIG files have a strong privacy interest in remaining anonymous. See Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 (1995).

In his Appeal, however, Levernier has argued that DOE officials and contractor personnel should not be entitled to privacy protections for actions taken in the course of their official duties. This argument is without merit. While we recognize that federal employees have a smaller expectation of privacy than private citizens, a privacy interest nevertheless exists when the association of a federal or contractor employee's name with a law enforcement file could subject the employee to harassment and embarrassment. See KTTY-TV v. U.S., 919 F.2d 1465 (10th Cir 1990) (interviewees mentioned in U.S. Postal Service investigation report found to have a legitimate privacy interest in not being harassed or embarrassed by other persons); but see William H. Payne, 25 DOE ¶ 80,190 (1996) (federal employees have diminished privacy interest because of public interest in knowing how public employees are doing their jobs). Thus, an individual's privacy interest exists whether or not an investigation concerns actions taken in the course of the individual's official duties. Accordingly, we find that the individuals in the present case have a strong privacy interest.

We further find there is little, if any, public interest in revelation of the names of the individuals in the documents at issue. In Reporters Committee, the Supreme Court held that the public interest which is to be considered in the FOIA context is limited to that which sheds light on government activities and

operations. 489 U.S. at 773-75. Release of the names in the Memo and Abstract would simply produce no additional information regarding OIG activities or operations. Consequently, the balance of these factors in the present case indicates that the release of the names would constitute an unwarranted invasion of personal privacy.

The remaining information which was deleted from the Abstract and Memo consists of scattered descriptive words or phrases. Under Exemptions 6 and 7(C), names and other information that would tend to disclose the identity of individuals entitled to privacy protection may be withheld. Southwest Resource Development, 24 DOE ¶ 80,164 (1995) (Southwest). Within the context of the released portions of the Abstract and Memo, these words and phrases might identify an individual by disclosing certain functions performed by that individual. See Southwest. As discussed above, in this case, the little public interest in the identity of the individuals whose names have been deleted from the Abstract and Memo does not outweigh these individuals' privacy interest in being free from intrusion into their private lives. Consequently, the release of identifying information would constitute a clearly unwarranted invasion of privacy. Accordingly, because OIG properly applied Exemption 7(C) to the withheld information in the Abstract and Memo, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard J. Levernier, OHA Case No. VFA-0274, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 1, 1997

Case No. VFA-0275, 26 DOE ¶ 80,171

March 28, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alexander German

Date of Filing: March 11, 1997

Case Number: VFA-0275

On March 11, 1997, Alexander German (Appellant) filed an Appeal from a final determination issued on February 7, 1997, by the Department of Energy's (DOE) Office of Inspector General (IG). In that determination, the IG released copies of 14 responsive documents in their entirety and an additional 11 responsive documents from which information had been deleted. This partial release occurred in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

The Appellant submitted a request for information to the DOE seeking copies of all documents regarding "reports to the IG by employee hotline regarding Case No. I95RS080." Determination Letter at 1. On February 7, 1997, the IG issued a determination in response to this request releasing 14 documents in their entirety and withholding portions of 11 other documents under Exemptions 6 and 7(C). The withheld portions consist of names, and other identifying information, of certain individuals. On March 13, 1997, the Appellant filed the present Appeal, contending that the DOE's withholding of the deleted information was improper.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemptions 6 and 7(C) are at issue in the present case.

In the determination letter, the IG claims that release of the withheld information would reveal the identities of potential witnesses, informants and confidential sources. Since release of these individuals' identities might subject them to harassment, intimidation or other personal intrusions, the IG has withheld them under both Exemptions 6 and 7(C). The Appellant contends that the IG improperly applied these exemptions.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and

embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is therefore a classic example of an organization with a clear law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3.

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold of law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992); James L. Schwab, 21 DOE ¶ 80,117 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990); Jerry O. Campbell, 17 DOE ¶ 80,132 (1988). Since all of the documents were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

(1) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY-TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,524 (1990). Accordingly, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the

context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); cert. denied, 494 U.S. 1078 (1990).

It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." See, e.g., Safecard, 926 F.2d at 1205; KTVY-TV, 919 F.2d at 1469. In the absence of a compelling reason for deviating from this body of precedent, we reach that conclusion in the present case.

(3) The Balancing Test

Because release of the individuals' identities could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Our findings are consistent with those reached by several appellate courts. When presented with a similar set of facts, these courts have found that the privacy interests of individuals supplying information to government investigators clearly outweigh the negligible public interest in disclosure of these individuals' identities. See, e.g., Safecard; KTVY-TV, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); Cucarro, 770 F.2d at 359.

While we are strongly committed to keeping the public fully informed about the DOE, we are also concerned about preserving the privacy rights of individuals providing information to the IG's investigators. By releasing the responsive documents with only those redactions necessary to prevent identification of specific individuals, the agency has provided as much information as possible while safeguarding individual privacy rights.

III. CONCLUSION

On the basis of the facts presented and federal case law, we find significant privacy interests in the individuals' identities. We also find that disclosure would not significantly increase the public's understanding of the operations and activities of the government. Accordingly, we find that this information was properly withheld under Exemptions 6 and 7(C).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Alexander German on March 11, 1997 (Case Number VFA-0275) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 1997

Case No. VFA-0276, 26 DOE ¶ 80,175

April 4, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant:Terry J. Fox

Case Number: VFA-0276

Date of Filing: March 7, 1997

On March 7, 1997, Terry J. Fox of Lacey, Washington, filed an Appeal from a determination issued on February 5, 1997 by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). That determination denied Mr. Fox's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that agency records held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). This Appeal, if granted, would require BPA to conduct another search of its files for responsive information.

BACKGROUND

In his FOIA request, Mr. Fox sought a list generated from computer record logs in the possession of BPA of all long-distance telephone calls made from his brother's telephone number at BPA from December 1995 through November 1996, the date of his request. BPA responded on February 5, 1997. In its determination letter BPA informed Mr. Fox that there were no records responsive to his request. In fact, BPA stated that after checking the computer tape telephone logs, not only were there no records of outgoing calls for his brother's telephone number, there were no records of outgoing calls from any BPA telephone number starting with the same three number prefix as his brother's number. In fact, computer tapes did not list the originating BPA telephone number for any outgoing call. Further, according to the determination

letter, in an attempt to satisfy Mr. Fox's request for information, BPA also contacted Mr. Fox and offered to search for particular telephone numbers that had been called from BPA. However, Mr. Fox apparently responded that he did not know which numbers to search for, and that finding the numbers that were called is the purpose of his FOIA request. Finally, the determination letter states that there were no records in a separate list of any cellular phone calls made by his brother. Mr. Fox appeals the determination. He also requests that we bring this matter to the attention of the DOE Inspector General.

ANALYSIS

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information that it has created or obtained. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby

v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein); Miller v. Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985); Martha L. Powers, 24 DOE ¶ 80,147 at 80,618 (1994); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Kowalczyk v. Department of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (and cases cited therein); Thomas Stampahar, 26 DOE ¶ 80,140 at 80,593-94 (1996); ; Energy Products, Inc., 23 DOE ¶ 80,114 at 80,528 (1993). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)). This FOIA search standard has been specifically adopted by the federal courts of the Ninth Circuit where both Mr. Fox and BPA are located. Citizens Commission on Human Rights v. Food and Drug Admin., 45 F.3d 1325, 1328 (9th Cir. 1995); Zemansky v. Environmental Protection Agency, 767 F.2d 569, 571 (9th Cir. 1985). In its application of this standard, this Office will remand a case for further action if it is evident that an inadequate search was conducted, or if evidence reveals that other documents that were not identified during the initial search exist. Linda J. Carlisle, 24 DOE ¶ 80,124 at 80,560 (1994); McGraw-Hill Nuclear Publications, 22 DOE ¶ 80,157 at 80,627 (1992).

We contacted BPA to determine if it performed a proper search. BPA informs us that there are no responsive cellular telephone records because it did not issue to Mr. Fox's brother a cell phone. However, the records for the non-cellular telephone calls present a different issue. There is no question that Mr. Fox's brother is a BPA employee with the phone number that Mr. Fox listed in his FOIA request. Because Mr. Fox's brother's telephone number has the most common prefix at BPA, we asked BPA to conduct another full search of its telephone computer tapes. BPA informed us that these computer tapes are the only BPA records that might have the information Mr. Fox seeks. As a means of control comparison, we also asked BPA to search the computer tapes for phone calls made from BPA to certain telephone numbers at DOE Headquarters in the Forrestal Building in Washington, D.C. As a second control, we asked that BPA search for Mr. Fox's home phone number in its records of outgoing calls to determine if he was the recipient of any calls placed from a BPA telephone.

BPA has completed the search of the telephone logs we requested. It searched for all of the months Mr. Fox listed in his FOIA request. As a result of this search BPA has again found that its records do not list any telephone calls as specifically coming from Mr. Fox's brother's BPA telephone number. The results of the control search explain the reason for this. BPA reports thousands of telephone calls were made to DOE Headquarters during the search period. However, the computer tapes record only a few general BPA switchboard numbers as the outgoing source. They are not listed by individual BPA telephone numbers. After investigating this matter for us, the BPA FOIA office states that not all of its current telecommunications equipment has the capability to correlate individual telephone calls to particular telephones from which they were made. While this may change in the future, BPA avows that for the period covered by its FOIA search in this case, the information in the computer tape logs only shows general BPA numbers as the sources of outgoing calls. Finally, BPA's search for calls to Mr. Fox's telephone from BPA revealed no matches with his number.

As the foregoing demonstrates, BPA has done an adequate job in attempting to satisfy Mr. Fox's request. We find that the searches it completed were reasonably calculated and conscientiously performed to reveal the records Mr. Fox seeks. Cf. Archie M. LeGrand, Jr., 25 DOE ¶ 80,171 at 80,681 (1996). Thus we find that the BPA search satisfied the requirements of the FOIA. Given the state of the BPA records, there simply are no responsive documents that conform to Mr. Fox's request. Accordingly, Mr. Fox's Appeal should be denied. Finally, there were no responsive documents demonstrating any wrongdoing, and without deciding whether there is an appropriate forum in which to consider Mr. Fox's request, we will not refer this matter to the DOE Inspector General.

It Is Therefore Ordered That:

(1) The Appeal filed by Terry J. Fox of Lacey, Washington, OHA Case No. VFA-0276, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 4, 1997

Case No. VFA-0277, 26 DOE ¶ 80,173

April 1, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Daniel J. Bruno

Date of Filing: March 7, 1997

Case Number: VFA-0277

On March 7, 1997, Daniel J. Bruno (Appellant) filed an Appeal from a final determination issued on February 23, 1997 by the Department of Energy (DOE). In that determination, the DOE released copies of 33 documents requested by the Appellant. However, portions of several of these documents were withheld under FOIA Exemption 6. This partial release occurred in response to a request for information filed by the Appellant, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release an additional document.

The sole issue before us is the Appellant's contention that the DOE should have located and released to him a copy of a written statement allegedly submitted by a Ms. Linda Ruhnow to a Ms. Caryl A. Butler-Gross of the Office of Energy Intelligence (OEI) regarding the Appellant's grievance action.

In order to determine the validity of the Appellant's claim we spoke with an OEI official who has personal knowledge of the search for responsive documents in this case. That official informed us that he had personally discussed this matter with Ms. Butler-Gross. Memorandum of March 13, 1997, Telephone Conversation between Edward McGinnis, OEI, and Steven Fine, OHA. That official indicated that Ms. Butler-Gross had emphatically denied ever receiving any written statements concerning the Appellant's grievance proceeding from any third party, including Ms. Ruhnow.

If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

We find that the OEI official's discussion with the individual who, the appellant claims, received the document in question fulfilled the DOE's obligation to conduct a reasonable search for responsive documents. Under the circumstances, DOE's failure to locate the document to which the appellant refers was not erroneous. Accordingly, we have determined that this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Daniel J. Bruno on March 7, 1997 (Case Number VFA-0277) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 1, 1997

Case No. VFA-0277

April 1, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Daniel J. Bruno

Date of Filing: March 7, 1997

Case Number: VFA-0277

On March 7, 1997, Daniel J. Bruno (Appellant) filed an Appeal from a final determination issued on February 23, 1997 by the Department of Energy (DOE). In that determination, the DOE released copies of 33 documents requested by the Appellant. However, portions of several of these documents were withheld under FOIA Exemption 6. This partial release occurred in response to a request for information filed by the Appellant, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release an additional document.

The sole issue before us is the Appellant's contention that the DOE should have located and released to him a copy of a written statement allegedly submitted by a Ms. Linda Ruhnow to a Ms. Caryl A. Butler-Gross of the Office of Energy Intelligence (OEI) regarding the Appellant's grievance action.

In order to determine the validity of the Appellant's claim we spoke with an OEI official who has personal knowledge of the search for responsive documents in this case. That official informed us that he had personally discussed this matter with Ms. Butler-Gross. Memorandum of March 13, 1997, Telephone Conversation between Edward McGinnis, OEI, and Steven Fine, OHA. That official indicated that Ms. Butler-Gross had emphatically denied ever receiving any written statements concerning the Appellant's grievance proceeding from any third party, including Ms. Ruhnow.

If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

We find that the OEI official's discussion with the individual who, the appellant claims, received the document in question fulfilled the DOE's obligation to conduct a reasonable search for responsive documents. Under the circumstances, DOE's failure to locate the document to which the appellant refers was not erroneous. Accordingly, we have determined that this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Daniel J. Bruno on March 7, 1997 (Case Number VFA-0277) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 1, 1997

Case No. VFA-0278, 26 DOE ¶ 80,177

April 4, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Milner

Date of Filing: March 7, 1997

Case Number: VFA-0278

On March 7, 1997, Glen Milner (Appellant) filed an Appeal from a determination issued to him on February 12, 1997, by the Freedom of Information Officer at the Department of Energy's Albuquerque Operations Office (DOE/AL). That determination followed the remand from this Office of a case in which the Appellant had appealed a previous determination by the DOE/AL. See Glen Milner, 26 DOE ¶ 80,147 (1996) (Milner). The previous determination by DOE/AL had denied the Appellant's request for a fee waiver with regard to a request for information he submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. In Milner, a partial fee waiver was granted. If the present Appeal were granted, the DOE would be ordered to conduct an additional search and release additional documents under that fee waiver.

I. Background

In a March 22, 1996 FOIA request, the Appellant sought information generated since 1985 pertaining to specially fitted railcars for the transport of nuclear weapons.(1) In May 8, 1996 and October 7, 1996 determinations, DOE/AL denied the Appellant's request for a

fee waiver or alternative fee arrangements.

The Appellant appealed, and in the Milner Decision and Order issued on December 23, 1996, this Office found that a fee waiver should be granted to the Appellant, but only for "documents generated from 1992 until the completion of the search that concern specially fitted railcars for the transport of nuclear weapons." Milner, 26 DOE at 80,650. On remand, DOE/AL determined that it possessed only one responsive document. Although not required to do so, it also summarized for the Appellant what it had learned regarding the railcars.(2) Letter from Elva Ann Barfield, Freedom of Information Officer, DOE/AL to Glen Milner (February 12, 1997) (Determination Letter). The Appellant subsequently filed the present Appeal in which he contends that the search for responsive documents was inadequate. Letter from Glen Milner to Director, OHA (March 7, 1997) (Appeal Letter).(3)

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., James H. Stebbings, 25 DOE ¶ 80,177 (1996); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

The Appellant makes several arguments in support of his assertion that additional responsive documents must exist. First, the Appellant argues that DOE/AL must have only looked for documents generated after 1992, not in the year 1992 itself. Second, the Appellant believes that the document he was sent was part of another document and requests identification of both the document he was sent and its source document. Third, the Appellant claims that DOE/AL only searched for documents concerning shipping the railcars to Russia, instead of all post-1991 documents dealing with the railcars. Fourth, the Appellant does not believe that DOE/AL searched for documents generated as close to the present date as possible. Fifth, the Appellant notes that the specially fitted railcars have been observed standing in Texas and he therefore believes that documents explaining that fact must exist.

We have examined each of the Appellant's arguments carefully and make the following determinations. First, DOE/AL guessed that perhaps as many as 500 documents concerning the railcars have been generated by the DOE or DOE contractors since 1992. However, it chose to send only the document it felt most clearly explained why the railcars had not gone to Russia. It stated that this document was part of an internal DOE newsletter on operational and physical security which appeared in January 1993. The remainder of the newsletter concerned topics wholly unrelated to the railcars.(4) See March 14th Telephone Memorandum.

This type of extremely restricted search is not what was contemplated in the fee waiver granted in Milner. Our decision clearly granted a fee waiver for all "documents generated from 1992 until the completion of the search that concern specially fitted railcars for the transport of nuclear weapons." Milner, 26 DOE at 80,650. Thus, a search for the additional responsive documents referred to in the March 14th telephone memorandum is necessary.(5) Furthermore, because we were informed in the March 14th telephone conversation that no search had yet been conducted for responsive documents, on remand DOE/AL should search for responsive documents from January 1992 until the date it starts work on this matter on remand. See Thomas P. Koenigs, 26 DOE ¶ 80,131 at 80,577 (1996) (search beyond the normal cutoff, date of request, is appropriate "[w]hen a requester seeks current data and the agency's response is substantially delayed").

Finally, in response to the Appellant's request regarding the current status of the railcars, we note that under the FOIA, agencies are not required to answer questions, but instead are required only to release non-exempt, responsive documents. DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978). However, in the March 14th telephone conversation, we learned that while the dismantlement process has been slowed by the processing of the railcars under the National Historic Preservation Act, Mr. Richey believes that the dismantlement should be complete within six to nine months.

In conclusion, we find that DOE/AL improperly restricted its search. On remand, DOE/AL shall identify all documents responsive to the Appellant's request and for which a fee waiver was granted, and either release them or provide adequate justification for withholding any portion of them.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen Milner on March 7, 1997, Case Number VFA-0278, is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Albuquerque Operations Office, which shall conduct a search for documents responsive to the Appellant's request and for which a fee waiver was previously granted as described in the above Decision and Order, and shall promptly issue a new determination regarding the

result of that search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 4, 1997

(1)In the March 22 request, the Appellant noted that in 1992 then U.S. Secretary of State James Baker announced that the railcars would be sent to Russia for use in the disarmament of nuclear weapons by that country. The Appellant also stated that since reading several articles describing that plan, he had not heard whether the railcars had been sent and wished to know if they had been sent, and if not, what had happened to them.

(2)DOE/AL had learned that the plan to send the railcars to Russia had been discarded as being infeasible and that the railcars were currently being dismantled. Further, it had learned that the State Department originally made the offer to provide the railcars to Russia, but eventually agreed with Russian officials that the plan was infeasible. Thus, additional responsive documents may exist at the State Department. See Records of Telephone Conversations between Richard Richey, Chief of Engineering, Transportation Safety Division, DOE/AL, and Dawn Goldstein, Staff Attorney, Office of Hearings and Appeals (OHA) (March 18 and 19, 1997). The Appellant may make an additional FOIA request to that agency.

(3)The Appellant is only appealing the adequacy of DOE/AL's search for documents for which he was granted a fee waiver. It appears that he has not pursued the remainder of his original request, i.e. for the railcar documents generated before 1992, for which no fee waiver was granted.

(4)The article, while reproduced by DOE/AL on two pages, contained the notations "continued on page 2" and "continued on page 3." This article was photocopied from the three pages it occupied in the newsletter and was shrunk to fit two pages. The entire article was reproduced for the Appellant. Record of Telephone Conversation between Jim Snyder, Office of Public Affairs and Richard Richey, both of DOE/AL, and Dawn Goldstein (March 14, 1997) (March 14th telephone memorandum).

(5)In the March 14th telephone conversation, we were informed that DOE contractors AlliedSignal Corporation and Mason & Hanger Corporation possess many of these documents. We note that a search for these documents must be conducted, and as required under 10 C.F.R. § 1004.3, any of these documents which are responsive and owned by DOE must be identified and are subject to mandatory release unless exempt.

Case No. VFA-0279, 26 DOE ¶ 80,180

April 24, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert B. Freeman

Date of Filing: March 21, 1997

Case Number: VFA-0279

On March 21, 1997, Robert B. Freeman filed an Appeal from a determination issued on February 13, 1997, by the Western Area Power Administration (WAPA). The determination responded to a request for information filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1008.

The Privacy Act requires each federal agency to, inter alia, permit an individual to gain access to information about that individual which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). Also relevant to the present appeal is the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 27, 1997, Mr. Freeman requested from WAPA documents "related to an adverse determination made by James Biggs [a WAPA manager] in a questionable fitness for duty matter." Letter from Robert B. Freeman to J.M. Schafer, WAPA (Jan. 27, 1997). Specifically, Mr. Freeman requested, inter alia, information provided by WAPA to a psychologist, Dr. Torres, and a psychiatrist, Dr. Kendall, who evaluated Mr. Freeman, as well as the "complete raw data and test results" from both doctors' evaluations. Id.

WAPA issued a determination on February 13, 1997, in which it released certain information responsive to Mr. Freeman's request. Letter from Michael L. Watkins, Privacy Act Officer, WAPA, to Robert B. Freeman (Feb. 13, 1997). However, WAPA withheld several documents in their entirety, citing provisions of the Privacy Act and DOE regulations that exempt from disclosure "information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5); 10 C.F.R. § 1008.9(a)(2). WAPA also withheld the raw data and test results from both doctors' evaluations. The Privacy Act authorizes federal agencies to establish a "special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him." 5 U.S.C. § 552a(f)(3). The applicable DOE procedure is set forth at 10 C.F.R. § 1008.8(c)-(e). The Privacy Act officer stated in WAPA's determination:

Both Dr. Torres and Dr. Kendall have strongly recommended that information pertaining to Dr. Torres' evaluation not be provided to you.

It is my understanding that you have provided your manager with the name of a physician . . . . Upon verification of the physician's identity, the documents will be made available to the physician, who will then have full authority to disclose the documents to you.

Letter from Michael L. Watkins, WAPA, to Robert B. Freeman at 2.

Upon receiving Mr. Freeman's Appeal, we contacted the Appellant by telephone. He told us that medical records were released to his designated physician and were read to him, but that he never obtained physical possession of the documents. Memorandum of telephone conversation between Robert Freeman and Steven Goering, OHA (Apr. 1, 1997). After we contacted WAPA to inquire about this, WAPA contacted the physician, who then released these documents to Mr. Freeman. However, Mr. Freeman stated that his physician never received certain materials from Dr. Torres, such as diagnostic tests performed on him. Memorandum of telephone conversation between Robert Freeman and Steven Goering, OHA (Apr. 4, 1997).

II. Analysis

A. Material Provided by WAPA to Dr. Torres

The Privacy Act exempts from release "any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). The exemption "is not limited to an attorney's work product, but extends to any records compiled by counsel or other persons in reasonable anticipation of a civil action or proceeding." Hernandez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982) (citing Smiertka v. Department of Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978)).

In the present case, WAPA withheld certain information from Mr. Freeman that it states was "prepared in reasonable anticipation of a civil action and/or administrative proceedings between [WAPA] and the American Federation of Government Employees." The withheld documents consist of printed electronic mail and draft memoranda dated from July through September 1996, and pertaining to a decision by WAPA in September 1996 to eliminate one helicopter from its fleet. In its response to the present Appeal, WAPA provided copies of two unfair labor practice charges that were filed in October 1996 by the American Federation of Government Employees (AFGE). At issue in one of these cases is WAPA's decision to eliminate one helicopter (which had been flown by the Appellant) without first entering into negotiations with AFGE. The other charge relates to an earlier decision by a WAPA manager to remove the Appellant from flight duty. These charges were filed with the Federal Labor Relations Authority (FLRA), and are currently under investigation. WAPA advises us that, depending on the outcome of the investigation, these charges could result in a hearing before the FLRA.

We do not agree with WAPA that the documents at issue were compiled "in reasonable anticipation" of a civil action or proceeding. The federal courts offer us scant guidance in interpreting the meaning of the phrase "in reasonable anticipation" as it is used in the Privacy Act. However, in applying the attorney work product privilege, the courts have often had to determine whether documents are prepared in anticipation of litigation and are thus protected by the privilege. And it is clear from those cases that documents qualify for the privilege only if the anticipation of litigation was at least one factor in the decision to compile the documents. Indeed, several courts have found that in order for the privilege to apply the anticipation of litigation must be "the primary motivating purpose behind the creation of the document." United States v. Rockwell Int'l, 897 F.2d 1255, 1266 (3d Cir. 1990); United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985); Binks Mfg. Co. v. National Presto Indus., 709 F.2d 1109, 1119 (7th Cir. 1983) (quoting Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982)); United States v.

El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982); see also C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 2024 (1994) ("[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."). This interpretation, as applied to the Privacy Act, is in accord with guidance issued by the Office of Management and Budget shortly after the enactment of the Act. Responsibilities for the Maintenance of Records About Individuals by Federal Agencies, 40 Fed. Reg. 28948, 28960 (July 9, 1975) ("[T]he purpose of the compilation governs the applicability of [subsection (d)(5)].")

It is true that the documents at issue were all prepared between one week and three months before the AFGE's charges were filed, and all relate to either WAPA's decision to eliminate the helicopter from its fleet or the WAPA manager's decision to remove the Appellant from flight duty. Because a primary issue discussed with the AFGE at the time concerned whether WAPA's decision needed to be negotiated with the union beforehand, it was entirely reasonable for WAPA to anticipate that, once its decision was made, AFGE would file an unfair labor practice charge. Moreover, these documents were later compiled and provided to one of the doctors who evaluated Mr. Freeman to determine his fitness to fly. Thus, the documents were both created and later compiled as part of a decision-making process that quickly led to reasonably anticipated charges against the agency. However, we have no reason to believe that the documents in question were generated *because of* WAPA's anticipation of those charges being filed. Rather, we believe that the documents would have been created as part of the decision-making process whether or not WAPA anticipated that the decision finally taken would lead to a civil action or proceeding. We therefore find that these documents may not be withheld under subsection (d)(5) of the Privacy Act.

Moreover, even if a Privacy Act exemption were properly invoked by WAPA, information that is exempt from disclosure under the Privacy Act must be released to a requester unless it is also exempt from disclosure under the FOIA. 5 U.S.C. § 552a(t)(2). Thus, it is the general practice of the DOE to process a request by an individual for information about that individual under both the Privacy Act and the FOIA. Even if, as in the present case, a requester specifically requests records under the Privacy Act, it well serves administrative efficiency and the requester to process the request under the FOIA as well, rather than requiring the requester to file a separate FOIA request for the same records. Accordingly, we will remand this case to WAPA for a new determination either releasing the information withheld under subsection (d)(5) of the Privacy Act, or explaining why the information is otherwise exempt under the Privacy Act *and* also exempt under the FOIA.(1)

B. Records in the Possession of Dr. Torres Not Provided to the Appellant

As we stated above, Mr. Freeman has requested certain records related to Dr. Torres' evaluation that have not yet been provided to him. Our threshold inquiry regarding these records is whether they are subject to the FOIA. First, we must determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). Finally, we must determine whether these documents are contained in a "system of records," and thus subject to the Privacy Act. After reviewing this matter, for the reasons stated below we conclude that the records in question are not subject to the FOIA or the Privacy Act, and are not subject to release under DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by entities that contract with the DOE are subject to the FOIA. See, e.g., B.M.F. Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the entity is an "agency" for purposes of the FOIA, and if not, (ii) whether the requested material

is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an entity will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba- Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976). Because the structure and daily operations of Dr. Torres' practice are not subject to substantial federal control, it is not an "agency" subject to the FOIA.

Although Dr. Torres' medical practice is not an agency for the purposes of the FOIA, his records responsive to Mr. Freeman's request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's control at the time of the Appellant's request.(2)

Even if a document fails to qualify as an "agency record," it may still be subject to release if the contract between the DOE and an outside party provides that the document in question is the property of the agency. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

In the present case, there was no written or oral agreement between the DOE and Dr. Torres that any records generated by Dr. Torres would be the property of the Government. Memorandum of telephone conversation between Ronald Klinefelter, WAPA, and Steve Goering, OHA (Apr. 10, 1997). Because the records in question are not the property of the Government, they are not subject to release under the DOE regulations. Thus, we find that the medical records in the possession of Dr. Torres sought by the Appellant are neither "agency records" within the meaning of the FOIA, nor subject to release under DOE regulations.

In order to be subject to release under the Privacy Act, the records in questions would have to be contained in a "system of records," which the Act defines as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). As we have already established above, the records sought by Mr. Freeman that are in the custody of Dr. Torres have never been under the control of the DOE. Therefore, they are not contained in a "system of records" subject to the Privacy Act.

III. Conclusion

For the reasons stated above, we will grant Mr. Freeman's Appeal to the extent that we will remand this matter to WAPA to process the Appellant's request under both the Privacy Act and the FOIA. On remand, WAPA should issue a new determination releasing to Mr. Freeman the material it provided to Dr. Torres that is not exempt under both the FOIA and the Privacy Act. Further, WAPA should withhold exempt information only if it reasonably foresees that disclosure would be harmful to an interest protected by the relevant exemption under the FOIA. In all other respects, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert B. Freeman on March 21, 1997, Case Number VFA-0279, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Western Area Power Administration, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 24, 1997

(1) Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

(2) Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

(3) Dr. Torres did send copies of certain medical records to WAPA, but these were copies of the records that Dr. Torres forwarded to Dr. Kendall, which were in turn provided to Mr. Freeman's designated physician, and which have now been provided to Mr. Freeman. Memoranda of telephone conversations between Ronald Klinefelter, WAPA, and Steve Goering, OHA (Apr. 7, 1997, and Apr. 9, 1997). Thus, although these records qualify as "agency records" under the test set forth by the federal courts, they have already been provided to the Appellant.

Case No. VFA-0280, 26 DOE ¶ 80, 179

April 17, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Information Focus on Energy, Inc.

Date of Filing:March 24, 1997

Case Number:VFA-0280

On March 24, 1997, Information Focus on Energy, Inc. (IFE) filed an Appeal from a February 18, 1997 determination by the Assistant Inspector General for Resource Management (Assistant IG) of the Office of Inspector General of the Department of Energy (DOE). In that determination, the Assistant IG partially granted a request for information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, IFE asks that we order a new search for responsive documents.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, IFE sought copies of documents containing "[t]he titles, report numbers, and issue dates of all DOE Inspector General Reports, including inspection reports, for the years 1988 through September, 1996." In the February 18, 1997 determination letter, the Assistant IG enclosed copies of listings for all audit reports, including "investigative and inspection reports that have a public distribution." The Assistant IG also stated that her office did not maintain lists of investigative and inspection reports. Furthermore, the Assistant IG noted

that the FOIA does not require the compilation or creation of a record for the purpose of satisfying a request for records.

In its appeal, IFE argues that its request did not ask the Assistant IG to create a list of investigative and inspection reports. IFE contends that the Assistant IG should have in its files releasable copies of title pages of these reports. IFE also states that the Assistant IG only identified documents available for "public distribution." Based on the Assistant IG's statement in the determination letter, IFE infers that the Assistant IG has additional inspection reports and audits that she is improperly withholding.

II. Analysis

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted the Assistant IG to ascertain the validity of IFE's contention that there exist title pages of unidentified reports and that the Assistant IG did not identify in her determination letter other documents responsive to IFE's request.(1) An official in the Assistant IG's office informed us that the IG's office has additional investigative and inspection reports not included in the compilation lists sent to IFE. Some of these reports have title pages. Furthermore, the official confirmed that the Assistant IG did not identify all of the documents responsive to IFE's request. The Assistant IG only identified those documents available for "public distribution." Since the scope of the FOIA is not limited to documents that have previously been made available to the public, the Assistant IG must conduct a search for all responsive documents, including those that are not for "public distribution." If the Assistant IG finds that responsive material contained in those documents is withholdable pursuant to the FOIA, she should identify these documents and cite the appropriate FOIA exemption. Accordingly, we will remand this matter to the Assistant IG to either release the "titles, report numbers, and issue dates of all DOE Inspector General Reports, including inspection reports, for the years 1988 through September, 1996" or provide a detailed explanation for withholding any such information.

It Is Therefore Ordered That:

(1) The Appeal filed by Information Focus on Energy, Inc. on March 24, 1997 is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Assistant Inspector General for Resource Management of the Office of Inspector General of the Department of Energy to search for and release documents containing titles, report numbers, and issue dates of all DOE Inspector General Reports, including inspection reports, for the years 1988 through September 1996 or provide a detailed explanation for withholding any such information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 17, 1997

(1)*/ See memoranda of telephone conversations between Leonard M. Tao, Office of Hearings and

Appeals Staff Attorney, and Jane Payne, Office of the Inspector General.

Case No. VFA-0281, 26 DOE ¶ 80,181

April 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Information Focus on Energy, Inc.

Date of Filing:March 24, 1997

Case Number: VFA-0281

Information Focus on Energy, Inc. (IFOE) filed an Appeal from a determination issued to it on February 28, 1997 by the Department of Energy's FOIA/Privacy Act Division (DOE/HQ). In that determination, DOE/HQ denied a request for information that IFOE filed on October 22, 1996 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. IFOE was denied access to the records contained in the DOE Occurrence Reporting and Processing System (ORPS) operated by the Idaho National Engineering Laboratory for the DOE Office of Environment, Safety and Health. This Appeal, if granted, would require DOE/HQ to release the information that it withheld in the February 28, 1997 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 22, 1996, Robert Keller of IFOE(1) submitted a request under the FOIA to DOE for "[a]ccess to the DOE Occurrence Reporting and Processing System operated by the Idaho National Engineering Laboratory for the DOE Office of Environment, Safety and Health. Only access to records designated as not containing classified or other sensitive information is requested." See Letter from IFOE to FOI Officer, DOE/HQ (October 22, 1996). DOE/HQ referred the request to the Office of Operating Experience Analysis and Feedback (DOE/EH).

ORPS is a database containing over 30,000 final and nonfinal (2) occurrence reports submitted by field offices. Events such as injuries and accidents (or anything considered newsworthy by site personnel) are reported to ORPS in a notification report. These reports are finalized within 45 days and sent to the local public reading room, then to DOE/HQ, where the final reports are kept in the headquarters public reading room for 2 years. Some records in the ORPS database have been determined to be unclassified controlled nuclear information (UCNI). DOE/EH gave DOE/HQ the material it found responsive--a diskette containing a list of the title of each final occurrence report categorized at the unusual or emergency level, the facility where the occurrence took place, the report number, the discovery date, and the report date. The list did not include reports containing UCNI or classified information.

DOE/HQ reviewed the request and took the position that IFOE had requested access to the ORPS database itself and not to the records contained in ORPS. DOE/HQ then informed IFOE that "[t]he FOIA allows for access to agency records that exist, not to government computing systems that require other procedures to permit access to the database in those systems." See Letter from Director, FOIA/Privacy Act Division, DOE/HQ, to IFOE (February 28, 1997). Therefore, DOE/HQ denied the request but enclosed the diskette with the determination letter.

On March 24, 1997, IFOE appealed the denial. IFOE claimed that denial of its request violated a DOE order stating Department policy to encourage a positive attitude toward reporting occurrences. See Letter from IFOE to Director, OHA (March 24, 1997) [hereinafter Appeal Letter] at 2. In addition, IFOE alleges that it is not requesting access to government computer systems, but rather "access to the electronic records on a timely basis, such as by downloading from a publicly available Worldwide Web site." Id.

II. Analysis

IFOE raises two issues in its appeal. First, it appeals DOE/HQ's interpretation of the scope of its request. Second, IFOE alleges that denial of its appeal is contrary to the electronic record provisions of the 1996 amendments to the Freedom of Information Act.

A. Scope of the Request

"The FOIA generally provides that any person has a right, enforceable in court, of access to federal agency *records* . . .." Justice Department Guide To the Freedom of Information Act, U.S. Department of Justice, Office of Information and Privacy (September 1996) (emphasis added) at 3. The FOIA applies to "records" maintained by "agencies" within the executive branch of the federal government. Id. at 12. Thus, DOE/HQ is correct when it states in its final response to IFOE that the FOIA does not provide for access to agency databases. However, DOE/EH interpreted the request as a request for access to the records within the database, and we agree with this interpretation. In an attempt to be responsive given the large volume of material in the database, DOE/EH gave DOE/HQ a list of the titles of final reports in the database and recommended that DOE/HQ release the list to the requester as responsive material. That list was released.

The requester alleges that DOE/HQ has interpreted its request too narrowly. We agree, and find that it should have interpreted the request as a request for access to the records contained in the ORPS database. In our analysis of this case, we reviewed a sample nonfinal occurrence report (3) that was printed from the database. On the basis of that review, we find that nonfinal reports should have been identified as responsive to IFOE's request. However, although the nonfinal reports contain factual material, they also contain information that appears to be predecisional and deliberative. We conclude that Exemption 5 may apply to this data, as may other FOIA exemptions. Accordingly, we grant this portion of the appeal and remand this matter to DOE/HQ so that the nonfinal reports may be reviewed to determine if they contain any non-exempt, releasable data. (4)

B. Request for Electronic Records

IFOE asks in its appeal that it be given access to nonclassified, nonsensitive, nonfinal reports (5) in a timely fashion via the Internet. Appeal Letter at 2-3. The requester alleges that denial of this request is contrary to the 1996 FOIA amendments found in Public Law 104-231. Id. We do not agree. Although the 1996 FOIA amendments mandate that records be made available to the public electronically via a website by November 2, 1997, as of this date, there is no website for ORPS records. Therefore, documents do not exist in the format that IFOE desires, i.e., they are not available on the Internet. Accordingly, we deny this portion of the appeal and find that DOE/HQ is not required under the FOIA to reproduce ORPS records in electronic format on the Internet in response to this appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Information Focus On Energy, Inc. on March 24, 1997, Case Number VFA-0281, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the FOIA/Privacy Act Division, which shall review the request for nonclassified, nonsensitive, nonfinal occurrence reports, and segregate and release non-exempt portions of these reports or issue a new determination adequately justifying continued non-disclosure of this information.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 27, 1997

(1)IFOE publishes a newsletter on issues related to commercial and governmental uses of nuclear materials.

(2)Nonfinal occurrence reports reflect the analysis, opinions and recommendations of DOE contractors with direct line responsibility for operation of a facility. These nonfinal reports also contain comments and concerns identified in a review performed by the responsible DOE field office and program office.

(3)Completion of a nonfinal report is the first step in a notification system. Occurrences in the field must be reported to ORPS via a nonfinal report within 24 hours of the event, usually before a thorough investigation of the event can be completed. Thus, data in the report is often inaccurate and the final report of the event may be radically different from the nonfinal report.

(4)Although not required under the FOIA, in view of the thousands of records in the database, it may be beneficial for the requester and DOE if DOE first produces an index of any records found responsive in the same format as the final report listing previously released to IFOE. This index might assist IFOE in selecting the information it would like to obtain, and thus obviate DOE's burden to produce redacted versions of all nonfinal reports.

(5)IFOE noted that the diskette included only emergency level events. DOE/EH is willing to provide the requester with an additional list of lower level final occurrence reports.

Case No. VFA-0282, 26 DOE ¶ 80,182

April 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Levernier

Date of Filing: March 26, 1997

Case Number: VFA-0282

On March 26, 1997, Richard J. Levernier (Appellant) filed an Appeal from a final determination issued to him on February 28, 1997, by the Department of Energy's (DOE) Office of Inspector General (IG). In that determination, the IG released copies of 26 responsive documents in their entirety, withheld 27 documents in their entirety and released an additional 158 responsive documents from which information had been deleted. This partial release occurred in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information, and conduct an additional search for responsive documents.

I. BACKGROUND

On February 28, 1997, the IG issued a determination letter in response to two requests

submitted by the Appellant. The first request (#93122201G) sought all information relating to him as the subject of an IG investigation. Determination Letter at 1. The second request (#RF94-054) sought ". . . any ?records,' including tape recordings, written transcripts or summaries, of recordings of telephone conversations between [him] and Wackenhut Services, Inc.-Rocky Flats Plant (WSI-RFP) personnel." Id. The determination letter released 26 documents in their entirety. However, the Determination letter also withheld 27 documents in their entirety as well as portions of 158 other documents under Exemptions 5, 6, 7(C) and 7(D). (1) On March 26, 1997, the Appellant filed the present Appeal, challenging these withholdings. In addition, the Appellant contends that the IG's search for responsive documents was inadequate because it failed to locate and identify documents located in the files of the former Office of Contractor Employee Protection (OCEP).

II. ANALYSIS

A. Adequacy of the Search

If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations appearing at 10 C.F.R. Part 1004, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981). However, the FOIA requires that a search be reasonable,

not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1385 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see also Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein).

The Appellant alleges that the IG's search for responsive documents was inadequate because it did not recover any files from OCEP. At the time when the Appellant filed the requests for information at issue in the present case, OCEP was not part of the IG. The Appellant had filed a separate request with OCEP. In response to that request, OCEP issued a determination letter on March 31, 1994 which released to him all documents in its possession that were responsive to his request. Accordingly, the IG was not required to include OCEP's files in its search for documents responsive to the present requests. However, the IG searched the files again and found no responsive documents that had not already been provided to the Appellant. For these reasons, we find that the Appellant has not shown that IG's search for documents responsive to FOIA requests #93122201G and #RF94-054 was inadequate.

B. Whether the IG's Withholdings Were Proper

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Exemptions 5, 6, 7(C) and 7(D) are at issue in the present case.

1. Withholdings under Exemption 5

The IG withheld one document in its entirety (Document 172) and portions of an additional six documents (Documents 6, 104, 120, 125, 132 and 180) under Exemption 5's deliberative process privilege. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears).

Courts have recognized several privileges incorporated into Exemption 5, including the deliberative process privilege. To fall within the scope of the deliberative process privilege, a document must be: (1) predecisional, that is, antecedent to the adoption of an agency policy; and (2) deliberative, that is, recommending or expressing an opinion on legal or policy matters. Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); See also Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985).

This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (Mink) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of the agency decisions. Sears, 421 U.S. at 151. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. The FOIA, as implemented by 10 C.F.R. § 1004.10(c), requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The only exceptions to the command of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries Assoc., Inc. v.

Occupational Safety and Health Admin., 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id.

In order to review the IG's withholdings under Exemption 5, we obtained copies of a representative sample of the documents it withheld under Exemption 5 (Documents 104, 120, 132, 172 and 180) from the IG. Our review of these documents has revealed that these documents contain some information which is strictly factual in nature. Accordingly, we find that IG had failed to properly segregate factual material from the information it withheld under Exemption 5.

Moreover, our review indicates that the IG has withheld more information than necessary to ensure that its deliberative process would not be revealed. Accordingly, we are remanding this portion of the Appeal to the IG. On remand, the IG should review all the information it has withheld in all seven documents under the deliberative process privilege in order to determine if it is both predecisional and deliberative. In addition, the IG must segregate and release any factual information contained in the withheld portions of those document that are not inextricably intertwined with withheld information. The IG must then issue a new determination letter in which it releases this information, withholds it under other applicable FOIA exemptions, or better explains why it considers the information to be predecisional and deliberative.

In our view, release of the vast majority of the information withheld under Exemption 5 in these documents would pose no tangible risk to interests protected under the FOIA. Accordingly, we find that the IG must review all of its withholdings under Exemption 5 to ensure that they are appropriate under the "reasonably foreseeable harm" standard set forth by the Attorney General in 1993. This standard applies a presumption in favor of disclosure which, in the absence of a reasonably foreseeable harm to an interest protected by an exemption, should result in a determination by the agency that the public interest lies with disclosure. See J. Reno, Memorandum for Heads of Departments and Agencies (October 4, 1993). On remand, after properly segregating and releasing factual material, the IG should consider the possibility of releasing some or all of the Exemption 5 material in light of this standard.

2. Exemptions 6 & 7(C)

The IG withheld approximately 26 documents in their entirety and portions of numerous other documents under Exemptions 6 and 7(C) claiming that release of the withheld information would reveal the identities of potential witnesses, informants and confidential sources. The Appellant generally contends that the IG improperly applied these exemptions.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. U.S. Dept. of Health and Human Services, 70 F.3d 729, 732-33 (2nd Cir. 1995) (Ortiz) ("An Inspector General of a federal

government agency engages in law enforcement activities within the meaning of FOIA") and cases cited therein. In the present case, the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3.

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold of law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992); James L. Schwab, 21 DOE ¶ 80,117 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990); Jerry O. Campbell, 17 DOE ¶ 80,132 (1988). Since all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

(1) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY-TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,524 (1990). Accordingly, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Therefore, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); cert. denied, 494 U.S. 1078 (1990).

It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." See, e.g., Safecard, 926 F.2d at 1205; KTVY-TV, 919 F.2d at 1469. In the absence of a compelling reason for deviating from this body of precedent, we reach that conclusion in the present case.

(3) The Balancing Test

Because release of the individuals' identities could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Our findings are consistent with those reached by several appellate courts. When presented with a similar set of facts, these courts have found that the privacy interests of individuals supplying information to government investigators clearly outweigh the negligible public interest in disclosure of these individuals' identities. See, e.g., Safecard; KTVY-TV, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); Cucarro, 770 F.2d at 359.

Among the information withheld by the IG in order to protect the identity of individuals whose names appear in IG's files were some recordings and transcripts of telephone conversations that the Appellant had participated in. Because release of these transcripts could reasonably be expected to reveal the identity of an individual or individuals that provided information to the IG, we find that the IG properly withheld these documents in their entirety under Exemptions 6 and 7(C).

3. Exemption 7(D)

The IG has withheld six documents under Exemption 7(D), claiming that: (1) release of this information would reveal confidential sources, or (2) the information was supplied by confidential sources. Determination Letter at 2. Exemption 7(D) allows for the withholding of "Records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source . . . [or] information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D) (1994). "Exemption 7(D) is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, see Brant Construction v. United States EPA, 778 F.2d 1258, 1262 (7th Cir. 1985), and (2) ?encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential.' United Technologies Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985)." Ortiz v. U.S. Dept. of Health and Human Services, 70 F.3d 729, 732 (2nd Cir. 1995) (Ortiz). As the court stated in Ortiz: "[A] source is confidential within the meaning of Exemption 7(D) if the source ?provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" Id. Citing United States v. Landano, 508 U.S. 165; 113 S.Ct. 2014, 2019 (1993). Accordingly, we find that the information withheld by the IG under this exemption was properly withheld.

III. CONCLUSION

While we are strongly committed to keeping the public fully informed about the DOE, we are also concerned about preserving the privacy rights of individuals whose identities are contained in IG's files. By releasing the responsive documents with only those withholdings necessary to prevent identification of specific individuals, the agency can provide as much information as possible while safeguarding individual privacy rights and safety.

For the reasons set forth above, we have found that the Office of Inspector General's search for responsive documents was adequate and that its withholdings under Exemptions 6, 7(C) and 7(D) were appropriate. However, we are remanding a portion of this Appeal to the IG for further consideration of the applicability

of Exemption 5 as set forth above.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard Levernier on March 26, 1997 (Case Number VFA-0282) is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Inspector General for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 25, 1997

(1) In addition, the determination letter explained that the IG had not released an additional 13 responsive documents that it assumed the Appellant had previously obtained, and had referred a total of 26 documents to other DOE offices for further processing under the FOIA.

Case No. VFA-0283, 26 DOE ¶ 80,183

April 25, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Research Information Services, Inc.

Date of Filing: March 27, 1997

Case Number: VFA-0283

On March 27, 1997, Research Information Services, Inc. (RIS), filed an Appeal from a determination issued to it on February 26, 1997, by the Nuclear Transfer and Supplier Policy Division of the Office of Arms Control and Nonproliferation (OACN) of the Department of Energy (DOE). That determination concerned a remand of a RIS Appeal of a previous OACN determination concerning a request for information submitted by RIS pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OACN would be required to conduct a further search for responsive material and to prepare a list identifying the documents responsive to the request.

I. Background

In its original, July 26, 1996 request, RIS sought all information pertaining to determinations by the Secretary of Energy under 10 C.F.R. Part 810, concerning the People's Republic of China (PRC). Part 810 consisted of a series of regulations promulgated by the DOE in order to implement section 57b of the Atomic Energy Act of 1954. That section empowers the Secretary of Energy to authorize United States persons to engage directly or indirectly in the production of special nuclear material outside the United States. RIS was particularly interested in information regarding Stone and Webster Engineering Corporation and Westinghouse Electric Corporation (Westinghouse).

On September 25, 1996, OACN issued its determination, stating that the information RIS was requesting was in the Freedom of Information Reading Room because there had been other FOIA inquires for similar records. Determination Letter dated September 25, 1996, from Kenneth N. Luongo, Senior Advisor to the Secretary for Nonproliferation and Policy and Direct of the Office of Arms Control and Nonproliferation, to Heidi M. Strobel, Director, Legal Research, RIS, at 1. Further, OACN informed RIS that some information was not in the Reading Room because (1) it had originated with other Executive Branch agencies and RIS' request had been forwarded to those agencies for a determination, (2) it was

classified information and was undergoing a review by the Office of Declassification for a determination of what could be released, or (3) it was withheld under Exemption 4 of the FOIA. Id. at 1-2.

On October 29, 1996, RIS filed an Appeal with this office, claiming that the absence of several categories of responsive documents from the DOE Reading Room is evidence that OACN's search for responsive documents was inadequate. This office issued a Decision and Order on November 27, 1996, ordering that OACN issue a new determination letter. That new determination letter was to specifically identify each

document in the DOE's possession that is responsive to RIS' request and indicate whether the document was available in the Reading Room, withheld under Exemption 4, undergoing classification review, or referred to another Executive Branch agency. Finally, for each responsive document the OACN found to have originated with another agency, the determination letter was required to indicate the name of the agency and date on which the request was forwarded to that agency. Research Information Services, Inc., 26 DOE ¶ 80,139, at 80,592 (1996).

On February 26, 1997, OACN issued another determination letter to RIS. This letter included specific listings of documents that originated with the Departments of State, Commerce, and Defense; the Arms Control and Disarmament Agency; and the Nuclear Regulatory Commission. It also provided a listing of responsive DOE documents currently undergoing classification review. Determination Letter dated February 26, 1997, from Trisha Dedik, Director, Nuclear Transfer and Supplier Policy Division, Office of Arms Control and Nonproliferation to Heidi M. Strobel, Director, Legal Research, RIS, at 1. The determination letter further stated that all other documents are in the Reading Room as a portion of a file containing Part 810 material that was collected in response to other, almost identical requests that led OACN to place the information in the Reading Room.(1) However, because those documents number in the hundreds, a specific listing was not prepared. Id. at 2. On March 26, 1997, RIS appealed this determination, claiming that DOE has (1) still not searched for and made available all the responsive unclassified, non- exempt agency records at DOE and (2) willfully disregarded the November 27, 1996 Decision and Order by refusing to provide a list of document responsive to RIS' request. Appeal Letter received March 27, 1997, from Heidi M. Strobel, Director, Legal Research, RIS, to Director, Office of Hearings and Appeals (OHA), at 3.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we contacted OACN to ascertain whether any other documents exist that are responsive to RIS' request. In its first Appeal, RIS indicated that some of the information in the Reading Room led it to believe that OACN was withholding information or had not done a complete search. For example, Westinghouse has a specific authorization that required it to report to DOE twice a year. Only one of those semi-annual reports is in the Reading Room. OACN indicated that the reports contain company-specific, proprietary information and should be withheld under Exemption 4. However, OACN has never justified their withholding to RIS or even indicated that the Westinghouse reports exist. After we spoke with OACN, it requested that we remand the matter so that it can review the semi-annual reports and issue a new determination either fully justifying the withholding of the Westinghouse reports under Exemption 4 or releasing this information. Memorandum of Telephone Conversation dated April 16, 1997, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Jim Kratz, OACN. We have no evidence before us that tends to show that OACN has failed to identify other information responsive to RIS' request. Finally, in respect to RIS' second claim that OACN has not provided a list identifying the documents responsive to its request, OACN is not required to provide a list of information that it is releasing. By making the Part 810 information available in the Reading Room, it has released that information. We will grant RIS' Appeal in part and remand the matter to OACN for a new determination that either justifies the withholding of the semi-annual Westinghouse reports under Exemption 4 or releases the information.

It Is Therefore Ordered That:

(1) The Appeal filed on March 27, 1997, by Research Information Services, Inc., Case No. VFA-0283, is hereby granted to the extent provided in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Office of Arms Control and Nonproliferation for a new determination that either justifies the withholding of the semi-annual reports under Exemption 4 or releases the information.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 25, 1997

(1) RIS is requesting Part 810 information about dealings with the PRC. Therefore, some of the information in the Reading Room dealing with other countries would not be responsive. However, the vast majority of Part 810 information deals with the PRC. Memorandum of Telephone Conversation dated April 9, 1997, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Jim Kratz, OACN.

Case No. VFA-0284, 26 DOE ¶ 80,185

May 9, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burns Concrete, Inc.

Date of Filing: April 3, 1997

Case Number: VFA-0284

On April 3, 1997, Burns Concrete, Inc., (Burns) filed an Appeal from a determination issued on January 30, 1997, by the DOE's Pittsburgh Naval Reactors Office (PNR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 20, 1995, Burns filed a request under the FOIA for documents submitted by Walters Ready Mix, Inc. (Walters) in connection with a purchase order for concrete supplied for the Expanded Core Facility Dry Cell Project at DOE's Bettis Atomic Power Laboratory, Naval Reactors Facility (NRF). This project was terminated in 1993 and Walters submitted the documents sought by Burns as part of a settlement proposal to recover its costs associated with the project. The project was rebid in early 1996, and Walters again filled the purchase order for concrete used in the project.

Because Burns sought information submitted by a third party, PNR sought and received comments on Burns' request from Walters. Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen (representing Walters), to James S. Carey, Jr., PNR (April 2, 1996); see Exec. Order No. 12,600, 3 C.F.R. 235 (1988) (requiring notice to submitters). PNR issued a final determination on April 26, 1996. Letter from H.A. Cardinali, Manager, PNR, to Linda Szimhardt, Office Manager, Burns (April 26, 1996). In its determination, PNR released a number of documents in their entirety to Burns, but withheld certain responsive documents and portions of other responsive documents under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Id.

Burns filed an Appeal of PNR's determination on June 17, 1996. Letter from Linda Szimhardt, Burns, to Director, Office of Hearings and Appeals (OHA) (June 7, 1996). We granted Burns' Appeal in part and remanded the matter to PNR to issue a new determination releasing additional information to Burns. Burns Concrete, Inc., 26 DOE ¶ 80,143 (1996). PNR issued its new determination on January 30, 1997. In its present Appeal, Burns objects to the withholding of certain information in PNR's new determination and

challenges the adequacy of PNR's search for responsive documents.

II. Analysis

A. Information Withheld Under Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). The United States Court of Appeals for the District of Columbia Circuit has found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879.

Clearly, documents submitted by a company to the DOE in connection with a proposal for reimbursement of costs it incurred are "commercial" within the meaning of Exemption 4 because of the vendor's commercial interest in receiving compensation. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)) (records are commercial so long as the submitter has a "commercial interest" in them). In addition, the information was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of that Exemption. See Allnet Communications Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also Ronson Management Corp., 19 DOE ¶ 80,117 (1989).

Regarding whether the documents at issue are "confidential," we have held consistently that information submitted in connection with a Request for Proposal is not submitted voluntarily and is therefore to be considered confidential only if it meets the test set out in National Parks. E.g., Glen M. Jameson, 25 DOE ¶ 80,191 (1996). The federal courts have reasoned that even though such submissions are voluntary in the sense that no company is forced to do business with the government, information required by the terms of a Request for Proposal must be submitted if "contractors want to win lucrative government contracts . . . ." McDonnell Douglas Corp v. NASA, No. 91-3134, slip op. at 4 (D.D.C. June 30, 1995).

Similarly in the present case, the documents submitted by Walters were required to be submitted in order for the company to do business in connection with a government project, and specifically in order to receive reimbursement once that project was terminated. Indeed, Walters did not argue, nor did PNR conclude, that the documents at issue were submitted voluntarily. Accordingly, we will find the information at issue to be "confidential" only to the extent that its disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the submitter, Walters.

1. Concrete Mix Design Test Data

Some of the information withheld from Burns in PNR's April 26, 1996 determination concerned a mix design, High Density Concrete Mix Design 3500 psi (Trial Batch NX145-1), submitted by Walters for concrete that was to be used in the Dry Cell Project. Burns was provided with the mix design for this

concrete, but six pages of testing data were withheld in their entirety and portions of one page of test results were released with certain information redacted. In our decision on Burns' Appeal of PNR's first determination, we concluded that PNR should release to Burns any non-exempt material contained in the documents withheld in their entirety, and should also release additional information from the page partially withheld because this information had been revealed in the mix design already provided to Burns. 26 DOE ¶ 80,143 at 80,600-01.

In its January 30, 1997 determination, PNR released information from each of the seven pages at issue, but withheld certain information from each page under Exemption 4. The information withheld consisted of the results of the laboratory testing of the concrete mix designed by Walters and the results of Walters' measurement of the properties of the blend of aggregate that was used in the mix. Walters contends that this data should be withheld because (1) "Burns intends to use the information to try to affect a recompetition of the project for which the special mix was developed" or could "approach the prime contractor which received the award and underbid Walters for the concrete requirement;" (2) the information "would give Burns an improved position in future competitions . . . in any similar procurements;" and (3) the information was developed at Walters' expense,(1) and releasing this information would allow competitors access to this information without incurring the same expense. Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen (representing Walters), to James S. Carey, Jr. (April 2, 1996) at 3-4.

In our previous Appeal decision, we rejected Walters' first argument because we found that the prospect of a rebid of the project or concrete requirement was "extremely unlikely," based on the fact that "the project has now proceeded to the point where it would likely be economically impractical to terminate it." 26 DOE ¶ 80,143 at 80,601. We reject this argument here for the same reason.

Regarding Walters' second and third arguments, we note at the outset that the issue of competitive harm must be resolved on a case-by-case basis. Nonetheless, in interpreting Exemption 4, the federal courts have set forth certain guidelines that can be helpful when carefully applied to the facts of a specific case. For example, a case quite analogous to the present was decided by the United States Court of Appeals for the District of Columbia Circuit in Worthington Compressors, Inc. v. Costle, 662 F.2d 45 (D.C. Cir. 1981). Underlying the dispute in Worthington was an Environmental Protection Agency requirement that manufacturers of air compressors provide to the government "test results and design specifications of their products in ?production verification' reports." Id. at 48. One compressor manufacturer requested the data submitted by four competing compressor manufacturers. The court outlined the following analysis necessary to determine the extent of competitive harm caused to a submitter:

The substantial competitive harm test is rather simple to apply in the typical reverse- FOIA case where Government disclosure is the sole means by which competitors can gain access to the requested information. The court considers how valuable the information will be to the requesting competitors and how much this gain will damage the submitter. In this case, however, we have the additional wrinkle that the requested information is available, at some cost, from an additional source. In our view, this requires that the inquiry be expanded to include two considerations: (1) the commercial value of the requested information, and (2) the cost of acquiring the information through other means.

The first consideration is based on the obvious fact that a submitter can suffer competitive harm only if the requested information has commercial value to competitors. When the information does have commercial value, the second consideration comes into play. If the information is freely or cheaply available from other sources, such as reverse engineering, it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm to the submitter. If, on the other hand, competitors can acquire the information only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter.

. . . .

The dimensions of the windfall can be measured by evaluating the commercial practicability of private acquisition of the commercially valuable information. If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the FOIA conduit could damage the competitive position of the submitters, to the advantage of FOIA requesters.

Id. at 51.

Thus, where there is competition in a given industry, the courts have reasoned that release of "proprietary technical information ?would seriously undermine a company's competitive advantage by allowing competitors to have access to ideas and design details that they would not have had or would have had to spend considerable funds to develop on their own.'" SMS Data Prods. Group, Inc. v. Department of the Air Force, No. 88-0481-LFO, slip op. at 3 (D.D.C. March 31, 1989) (citation omitted). We do find that there is competition among concrete companies in Walters' market area, as demonstrated by the fact that Burns competed with Walters on the Dry Cell Project. However, Walters must also demonstrate that there is a "likelihood of substantial competitive harm" in order for the information to be exempt from release. Id. at 530. We cannot find that Walters has made such a showing with respect to the testing results that have been withheld from the appellant.

Applying the method of analysis used by the D.C. Circuit in Worthington, we first must determine whether the "requested information has commercial value to competitors." The appellant contends that the data from tests performed on the mix

indicates whether the mix design was reproduced per the values as calculated in the mix design. Consequently, the test results should fall within the same ranges of values as already revealed in the mix design. . . . This test data is always required to be submitted with concrete mix designs to verify the calculated values on the mix design.

Appeal at 2.

We found in our previous Appeal decision that the information contained in the test results can be withheld under Exemption 4 only if that information reveals "properties and characteristics of the special mix beyond that which is revealed by the mix design," the mix design already having been released to the appellant. 26 DOE ¶ 80,143 at 80,601. Based on our review of the specific data withheld from Burns, it is clear that releasing this data would reveal information not provided in the mix design. For example, the mix design alone does not reveal whether the mix, as tested, met the design specifications. The test results do reveal that fact, and more. The testing data indicate the extent to which the mix surpassed or fell short of the specifications. Where data was expected to fall within specified ranges, the test results show precisely where, within or outside of the ranges, the data fall.

This obviously does not end our analysis, however, since we must determine the value of this additional information in the hands of Walters' competitors. Walters argues that the information would bolster Burns' competitive position in future similar procurements by providing "insight into Walters' development process." Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen (representing Walters), to James S. Carey, Jr. (April 2, 1996) at 3. However, Walters does not explain *how* the results of tests on a product already developed, and for which the design specifications have already been released, would provide Burns or any other competitor such insight, nor does the submitter explain how this information "would give Burns an improved position in future competitions . . . in any similar procurements." Conclusory allegations of harm do not suffice to protect information from disclosure under Exemption 4. See Lykes Bros. S.S. Co. v. Pena, No. 92- 2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (Westlaw, DCT database) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict"). Without a more detailed explanation of the connection between release of the particular information being withheld and a resulting competitive harm to Walters, we cannot conclude that this information would be valuable to Walters' competitors.

Even if we were to find that the information was of great value, we would then need to determine

the cost to Walters' competitors of acquiring the same information through other means. Worthington, 662 F.2d at 51. If the information were "freely or cheaply available from other sources," then we would have to conclude that its release is unlikely to cause Walters substantial competitive harm. Id. If, on the other hand, the information could only be acquired at "considerable cost," or "private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the FOIA conduit could damage the competitive position" of Walters. Id. Walters' third argument, that release of the information would allow Burns to produce supporting data "without incurring the cost which Walters has already borne," addresses this issue, but provides us no detail as to the extent of that cost. Thus, we have no way to determine how difficult it would be for Burns or another competitor to acquire this information by running its own tests on the mix design or the aggregate used in that mix.

Because Walter's has not provided a sufficient basis for withholding the information described above, we will remand the testing data portion (pages 187, 188, 189, 191, 192, and 193)(2) of the determination to PNR, with directions to issue a new determination to the appellant. This determination should start with the presumption that the testing data that has been withheld is not exempt from disclosure, absent additional evidence from Walters regarding the substantial competitive harm likely to result from its release. Because Walters provided its comments on this issue to PNR over one year ago, and because at that time Walters was asked to address the release of a larger number of documents, we believe that Walters should now be given an opportunity to provide additional information to PNR to justify withholding the particular information at issue here. However, Walters' comments must *specifically* address the particular items of information that have been withheld (i.e. slump, % air, wet/dry weights, dry rodded weights, % voids, and bulk specific gravity), and explain in some detail how its competitors would use this particular information in a way that would likely result in substantial competitive harm to Walters. In addition, Walters should provide information as to the cost of running these tests, so that PNR can determine the cost to Walters' competitors of acquiring the testing data from other sources. Finally, we have found that there was information withheld from Burns on one page (page 194) that Burns has demonstrated it has already received. Therefore, this page should be released to the appellant in its entirety.

2. Cost, Profit, and Overhead Data

The vast majority of the data withheld from Burns in PNR's first determination concerned costs incurred by Walters prior to the termination of the Dry Cell Project in 1993. This information was submitted by Walters as part of a settlement proposal to recover its costs associated with the project. When Burns filed its June 1996 Appeal with this office, we reviewed the documents and ordered, inter alia, that on remand non-exempt information contained in three pages that had been withheld in their entirety should be released to Burns. In its January 30, 1997 determination, PNR released these three pages with certain information redacted and withheld from Burns under Exemption 4. In its present Appeal, Burns contends that some of the information withheld should be released.

As we noted in our decision on Burns' previous Appeal, information that, in a competitive market, would reveal the profit rates, general and administrative rates, and actual costs of a competitor company is exempt from release under the FOIA. Gulf & W. Indus., Inc. v. United States, 615 F. 2d 527 (D.C. Cir. 1979) (Gulf & Western). In Gulf & Western, the court found that with such information, the company's "competitors would be able to accurately calculate [the company's] future bids and its pricing structure from the withheld information. The deleted information, if released, would likely cause substantial harm to [the company's] competitive position in that it would allow competitors to estimate, and undercut, its bids." Id. at 530. For this same reason, we upheld in our prior decision PNR's withholding of a great deal of data that, for example, would have revealed Walters' actual costs, profit, and overhead.(3) However, we cannot find that such competitively sensitive information would be revealed by release of the pages at issue in the present case.

One of the three pages is a list of prices prepared by Walters for a number of products and services.(4)

The other two pages contain the prices for which three trucks were sold by an affiliate of Walters to another concrete company. Walters argues generally that the information withheld from the appellant would, if released, "give Burns detailed knowledge of Walters' various costs and strategies, which Burns could use to its competitive advantage in a number of ways." Letter from Sally B. Pfund and Robert J. Martinez, Williams & Jensen (representing Walters), to James S. Carey, Jr. (April 2, 1996) at 7. However, we cannot see how the release of any of the information in these pages would cause the types of competitive harm cited by Walters (e.g., allowing Burns to bargain with Walters' suppliers, divert future business from Walters, or gain enough knowledge of "Walters' financial information to be able to know where Burns might best be able to undercut Walters' prices"). Id.

We believe that two federal court cases cited by Burns, General Dynamics Corp., Space Sys. Div. v. Department of the Air Force, 822 F. Supp. 804 (D.D.C. 1992), and Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988), support the release of the information in the pages at issue. Key to the courts' decisions in those cases to uphold the release of information was the fact that "competitively sensitive information such as cost, overhead, or profit identifiers would not be revealed." General Dynamics, 822 F. Supp. at 807; see Acumenics, 843 F.2d at 802, 806 (release of unit prices would not reveal Acumenics' "profit multiplier," the "product of a company's overhead, general and administrative costs (G & A), and profit, (overhead rate x G & A rate x profit)"). Other court cases dealing with the withholding of pricing information support the proposition that, "[t]o justify protection under exemption 4, a submitter must present persuasive evidence that disclosure of the unit prices would reveal some confidential piece of information, such as a profit multiplier or risk assessment, that would place the submitter at a competitive disadvantage." Comdisco, Inc., v. General Servs. Admin., 864 F. Supp. 510, 516 (E.D. Va. 1994); see also CC Distribs., Inc., v. Kinzinger, No. 94-1330, slip op. at 5 (D.D.C. 1995) ("Defendants [agency] repeatedly asked plaintiff to explain how its competitors could reverse-engineer its pricing methods and deduce its concessions from suppliers. In response, the record amply demonstrates that plaintiff merely restated its conclusions. On such a showing, defendants were unable to assess plaintiff's claims with any specificity, . . .")

In the present case, we find that Walters has not provided sufficient justification for withholding the information contained in the pages at issue. Again, we note that it has been over one year since Walters' most recent opportunity to present its position, and that Walters was asked to address the release of a large volume of information. We found the justification presented by Walters at that time sufficient to support the withholding of much of the information at issue in Burns' previous Appeal. Although Walters' arguments do not justify withholding the information contained in the three pages recently withheld from the appellant, we believe, as we stated in Section II.A above, that Walters should be given another opportunity to provide a basis for withholding this information. We will therefore also remand this portion of PNR's determination (withholding information from pages 203, 204 and 205). Absent an adequate basis for withholding, PNR should issue a new determination releasing the information in question to the appellant.

B. Adequacy of PNR's Search for Responsive Documents

Burns also asserts that there should be additional responsive documents in the possession of the DOE that have not been released. Appeal at 6. In the event we were to agree, we would order an additional search. However, we already reviewed PNR's search for responsive documents in our prior Appeal decision and found that the search was reasonably calculated to uncover responsive documents and was therefore adequate. The OHA procedural regulations allow for our reconsideration of a prior Decision and Order under certain limited circumstances, none of which apply in the present case.(5) Therefore, to the extent that the present Appeal requests that we reconsider our previous decision as to the adequacy of PNR's search for responsive documents, the Appeal will be denied.

III. Conclusion

For the reasons explained above, we will remand this case to PNR, to promptly issue a new determination releasing the non-exempt information to the appellant in accordance with this decision, or explain in detail its reasons for withholding any of this information.(6) In all other respects, the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Burns Concrete, Inc., Case No. VFA-0284, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE's Pittsburgh Naval Reactors Office, which shall promptly issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 9, 1997

(1) As we noted in our decision on Burns' previous Appeal, the Appellant disputes Walters' contention that Walters was not reimbursed by the government for the costs incurred in running tests on the concrete mix design. Although it appears from our review of the relevant documents that Walters was in fact reimbursed for the cost of testing, PNR assures us that Walters was reimbursed for the costs incurred in preparing the test results for submittal, but not for the costs of running the tests. Memorandum of telephone conversation between James Carey, PNR, and Steve Goering, OHA (October 24, 1996).

(2) In this Decision we will refer to pages by the page number assigned by the appellant in its Appeal.

(3) See 26 DOE ¶ 80,143 at 80,603, and cases cited therein (profit, general and administrative expenses, and overhead have been recognized by the courts as protected under Exemption 4).

(4) Burns speculates that the title of the price list, "Call in Prices," "indicate[s] that this list would be quoted by Walters over the telephone. This is also the information that anyone, including Burns Concrete or any other competitor, could easily obtain by simply calling Walters on the telephone. Therefore this list does not reflect information that the provider would not make available to the public." Appeal at 5. However, Walters informed PNR that the information on this list had not been made available to the public, and was for in-house use only. Memorandum of telephone conversation between James Carey, PNR, and Steven Goering, OHA (Apr. 11, 1997). In any event, as we explain in our discussion of the D.C. Circuit's decision in Critical Mass above, the mere fact that information is not customarily made available to the public exempts that information from disclosure under Exemption 4 only if that information was submitted to the government voluntarily, which is not the case here.

(5) The regulations state in pertinent part:

(b) (1) An application for modification or rescission of an order shall be processed only if--

(i) the application demonstrates that it is based on significantly changed circumstances; and

(ii) the period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(2) For purposes of this subpart, the term "significantly changed circumstances" shall mean--

(i) the discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) the discovery of a law, rule, regulation, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application is based and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) there has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

10 C.F.R. § 1003.55(b).

(6) PNR has also agreed to release to the appellant information it inadvertently withheld from page 207, labeled "Remaining project to complete," and to attempt to provide the appellant a more legible copy of page 192, as requested in Burns' Appeal. Memorandum of telephone conversation between James Carey, PNR, and Steven Goering, OHA (Apr. 11, 1997); Appeal at 4, 5.

Case No. VFA-0286, 26 DOE ¶ 80,184

May 5, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alfred G. Bell

Date of Filing: April 7, 1997

Case Number: VFA-0286

On April 7, 1997, Alfred G. Bell filed an Appeal from a determination issued to him on March 24, 1997, by the Department of Energy's Oak Ridge Operations Office (OR). That determination was issued in response to a request for information submitted by Mr. Bell under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Bell asserts that OR failed to provide him with a responsive document in its possession regarding a Request for Information he made on January 17, 1997.

I. Background

On January 17, 1997, Mr. Bell filed a request for information in which he sought a copy of an occurrence report completed as a result of his being diagnosed with Chronic Beryllium Disease in accordance with criteria outlined in DOE Order 5000.3B. See Determination Letter at 1. On March 24, 1997, OR issued a determination which stated it conducted a search of its files and located a report entitled "Individual Accident/Incident Report". Id. However, this was not the document Mr. Bell referred to in his request. Nevertheless, OR provided this report to Mr. Bell. OR further informed Mr. Bell that this report was the only record that it could locate concerning his diagnosis of Chronic Beryllium Disease. Id.

On April 7, 1997, Mr. Bell filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Bell challenges the adequacy of the search conducted by OR. Specifically, Mr. Bell argues that OR failed to provide him a copy of an occurrence report concerning him in accordance with DOE Order 5000.3B. Mr. Bell further contends that the existence of this report was alluded to by Mr. Rufus H. Smith, Diversity Programs and Employee Concerns Manager, OR, in a letter dated on January 14, 1997. He has enclosed a copy of this correspondence with his present Appeal. Mr. Bell asks that the OHA direct OR to conduct a new search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether

any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at OR to ascertain the extent of the search that had been performed. Upon receiving Mr. Bell's Request for Information, OR contacted the Y-12 Plant where Mr. Bell was employed at the time an occurrence report would have been generated concerning his diagnosis with Chronic Beryllium Disease. The Department of Energy Site Office as well as the contractor, Lockheed Martin Energy Systems, Inc., each conducted a search of its files and was unable to locate documents responsive to Mr. Bell's request. OR further indicated that the Y-12 Industrial Hygiene Department also conducted a manual search of its files and could not locate an occurrence report pertaining to Mr. Bell. However, during their search, OR was able to obtain medical records from the Y-12 Medical Department that pertained to Mr. Bell, specifically a report entitled "Individual Accident/Incident Report." This report was released to Mr. Bell. OR has confirmed to us that this report is not the occurrence report requested by Mr. Bell.

As stated earlier, the appellant argues that Mr. Rufus Smith, OR's Operations Diversity Programs and Employee Concerns Manager, indicated in a January 14 letter that a copy of an occurrence report was completed concerning Mr. Bell in accordance with the criteria outlined in DOE Order 5000.3B. Mr. Smith also indicated in this letter that Mr. Bell could gain access to this document through the Freedom of Information Act office in Oak Ridge. We have reviewed this correspondence and OR has informed us that it contacted Mr. Smith to search his files for the requested occurrence report. Subsequently, Mr. Smith informed officials in OR that he was unable to locate any reponsive documents, and signed a certification that a diligent and adequate search had been perfomed. See OR's Response at 1. Thus, it appears that Mr. Smith was mistaken when he stated in his January 14 letter that an occurrence report concerning Mr. Bell had been completed.(1) Given the facts presented to us, we find that OR conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Bell's Request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Alfred G. Bell, OHA Case No. VFA-0286, on April 7, 1997, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 5, 1997

(1)Outside of the FOIA context, we have asked OR to investigate why an occurrence report concerning

Mr. Bell was not created. OR has agreed to do so, and will respond directly to Mr. Bell.

Case No. VFA-0287, 26 DOE ¶ 80,186

May 9, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: John D. Kasprowicz

Date of Filing: April 15, 1997

On April 15, 1997, John D. Kasprowicz filed an Appeal from a determination issued to him by the Manager of the Department of Energy's (DOE) Chicago Operations Office (hereinafter referred to as "the Manager"). This determination was issued on April 7, 1997 in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that a document that was released to Mr. Kasprowicz in redacted form be released in its entirety.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his FOIA request, Mr. Kasprowicz sought access to a copy of a November 22, 1996 memorandum from the Acting Chief Counsel of the Chicago Operations Office to the U.S. Attorney for the Northern District of Illinois. In this document, the Acting Chief Counsel discussed the issue of whether the Department of Justice (DOJ) should provide legal counsel for Mr. Kasprowicz and certain other DOE employees who were named as defendants in a civil lawsuit.

In her determination, the Manager found that portions of the memorandum were exempt from mandatory release under 5 U.S.C. § 552(b)(5) and 552(b)(6) (Exemptions 5 and 6, respectively). Citing Exemption 5, the Manager withheld those portions of the memorandum that describe the Acting Chief Counsel's position as to whether the employees should receive DOJ representation. Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).(1) The Manager further determined that the names of the DOE employees, other than Mr. Kasprowicz, who have requested DOJ representation should be withheld pursuant to Exemption 6. Exemption 6 protects from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In his Appeal, Mr. Kasprowicz does not contest the Manager's application of Exemption 6. Instead, he requests that we review the Manager's determination that portions of the memorandum may be withheld pursuant to Exemption 5.

II. Analysis

A. Applicability of Exemption 5

Exemption 5 is generally recognized as encompassing the attorney- client, attorney work-product and governmental deliberative process privileges. See, e.g., Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). In withholding portions of the memorandum, the Manager relied upon the "deliberative process" and "attorney work product" privileges of Exemption 5. The "deliberative process" privilege shields from mandatory disclosure documents that are "predecisional" and "deliberative," i.e., that were created during agency consideration of a proposed action and that were part of a decision making process. Darci L. Rock, 13 DOE ¶ 80,102 (1985); Texaco, Inc., 1 DOE ¶ 80,242 (1978). The privilege serves to insure open, uninhibited and robust debate of various options by eliminating the fear of disclosure of preliminary viewpoints. Coastal States, 617 F.2d at 866. Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions is enhanced. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149-51 (1975) (Sears). The "attorney work product "privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." Coastal States at 864. This privilege is applicable to documents that were prepared by an attorney "in contemplation of litigation." Id.

In order to properly evaluate the Manager's application of Exemption 5, we conducted a de novo review of the withheld material. For the reasons set forth below, we conclude that the Manager properly determined that the material redacted under Exemption 5 is exempt from mandatory disclosure. As we previously stated, Exemption 5 is applicable to documents that were created during consideration of a proposed action and which were part of a decision making process. The memorandum was created during the DOJ's consideration of the employees' requests for government representation, and consists in large part of a recitation of the Acting Counsel's opinions as to the substance of the employees' requests and the factors that should weigh into the DOJ's decision. The withheld portions are therefore predecisional and deliberative in nature. Furthermore, we conclude that the memorandum was prepared by an attorney "in contemplation of litigation," and may therefore be considered "attorney work product." The memorandum contains legal argument and recommendations as to whether the DOJ should become involved in pending litigation by agreeing to represent parties to that litigation. We therefore find that the withheld portions of the memorandum are exempt from mandatory disclosure pursuant to Exemption 5.

B. Segregability

The fact that a document contains material which is exempt from disclosure does not necessarily make the entire document exempt. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, segregation and release of non-exempt material are not necessary when it is inextricably intertwined with the exempt material, such that release of the non-exempt material would compromise the confidentiality of the withheld material. Lead Industries Association v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

Based on our review of the memorandum, we find that the Manager has already provided Mr. Kasprowicz with all segregable factual information. Although the withheld portions of the memorandum contain some factual matter, we conclude that it is inextricably intertwined with exempt material, such that release of the factual material would expose the deliberative process of which the memorandum is a part. Accordingly, we find that the withheld portions of the memorandum contain no segregable factual material.

C. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of

the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which its government operates, we find that interest to be attenuated by the fact that the withheld portions of this memorandum are composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would result in foreseeable harm to the interests that are protected by the deliberative process privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie the deliberative process privilege).

D. Conclusion

For the reasons set forth above, we find that the Manager properly redacted the memorandum provided to Mr. Kasprowicz pursuant to the FOIA, and that release of the withheld material would not be in the public interest. We will therefore deny his FOIA appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by John D. Kasprowicz on April 15, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 9, 1997

(1)*/ In his Appeal, Mr. Kasprowicz misinterprets the language of this exemption. He expresses a mistaken belief that this exemption is applicable only if the requester is involved in litigation against the agency from which records are sought. The language "which would not be available to a party ... in litigation with the agency" is a description of the types of documents that Exemption 5 was intended to protect, and does not mean that this exemption may only be applied in instances where the requester is party to a lawsuit involving the agency.

Case No. VFA-0288, 26 DOE ¶ 80,187

May 16, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Roderick L. Ott

Date of Filing:April 18, 1997

Case Number:VFA-0288

On April 18, 1997, Roderick L. Ott filed an Appeal from a March 24, 1997 determination by the Manager of the Office of Scientific and Technical Information (OSTI) of the Oak Ridge Operations Office of the Department of Energy (DOE). In that determination, the Manager denied the Appellant's request for information and his request for a waiver of fees under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Ott asks that we order a new search for responsive documents and grant his request for a fee waiver.

I. Background

In his request for information, Mr. Ott sought copies of all documents "pertaining to him" by name from the files of 28 named OSTI employees. On March 4, 1997, Mr. Ott clarified his request by asking for copies of all documents created since October 1, 1988 pertaining to him by name, and involving DOE activities he participated in, from the files of the 28 named OSTI employees. He further stated that this request included "Franklin planner records, notes, correspondence, and any other miscellaneous records." In the March 24, 1997 determination letter, the Manager denied Mr. Ott's request because it did not "reasonably describe the records sought" to enable an OSTI employee familiar with the subject matter to locate the records with a reasonable amount of effort. The Manager also stated that Franklin planner records and personal notes are personal records and are not subject to the FOIA. The Manager also denied Mr. Ott's request for a waiver of fees because Mr. Ott did not state how disclosure of the requested information would benefit the public interest. Finally, the Manager stated that to continue processing Mr. Ott's request, OSTI needed two things: (1) information that would allow

it to properly identify the requested documents and (2) Mr. Ott's commitment to pay all fees associated with the processing of the request.

Mr. Ott appeals the "prolonging and denial" of his request and the decision to require him to pay search fees for the processing of his request. In his Appeal, Mr. Ott states that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and that his request for information is not primarily in his commercial interest.

II. Analysis

The FOIA specifies two requirements for requests: that the request "reasonably describe" the records sought and that the requester make the request in accordance with an agency's published procedural regulations. 5 U.S.C. § 552(a)(3). A description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort." H.R. Rep. No. 876, 93rd Cong., 2d. Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271. "Broad, sweeping requests lacking specificity are not permissible" under the FOIA. Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1977).

In reviewing the Appeal, we contacted OSTI to determine what would be involved to conduct a search for all documents since October 1, 1988 pertaining to Mr. Ott from the files of 28 named

OSTI employees, including "Franklin planner records, notes, correspondence, and any other miscellaneous records." A representative of OSTI estimated that it would cost at least $7,992 and consume more than 140 hours of search time to search the electronic mail records alone for documents "pertaining to" Mr. Ott. The OSTI representative stated that OSTI only has electronic mail records that go back one year, but that this search would require someone familiar with the system to look at each record individually. Furthermore, the OSTI representative also stated that there is no easy way of identifying information regarding Mr. Ott in its employees' files. Since Mr. Ott is an OSTI employee, documents "pertaining to him" and covering a wide array of subject matter could exist in multiple places in the 28 individuals' files. Thus, based on the way Mr. Ott worded his request, OSTI would have to search most of its office files for documents created since October 1, 1988 that might pertain to Mr. Ott. The OSTI representative also stated that he spoke with Mr. Ott approximately six times and requested that he narrow his request, but that Mr. Ott never did so.(1)

Under these circumstances, we find that Mr. Ott's request would require more than a "reasonable amount of effort" for OSTI to complete a search. Thus, we find that Mr. Ott's request is not reasonably descriptive as the FOIA requires. See Keese v. United States, 632 F. Supp. 85, 91 (S.D. Tex. 1985) (requests for all documents containing a requester's name are not "reasonably specific"). We also note that OSTI has indicated to us its willingness to confer with Mr. Ott to reformulate the scope of his request, should he desire to do so. See 10 C.F.R. § 1004.4(c)(2)(DOE should offer assistance in reformulating a non-conforming request). Accordingly, we must deny Mr. Ott's request for a new search for responsive documents.

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(I); see also 10 C.F.R. § 1004.9(a). However, the Act states,

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two-prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam). The DOE has implemented the statutory standard for granting fee waivers in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors that an agency must consider to determine whether the requester has met the first statutory fee waiver condition, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) the subject of the request; whether the subject of the requested records concerns "the operations or activities of the government";

(B) the informative value of the information to be disclosed; whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) the contribution to an understanding by the general public of the subject likely to result from

disclosure; and

(D) the significance of the contribution to public understanding; whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(I). Finally, in addition to satisfying these four factors, the DOE must also find that the requester did not request the information for use primarily in his own commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii).

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is appropriate only where the subject matter of the requested documents specifically concerns identifiable "operations or activities of the government." See Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1481-83 (1989); U.A. Plumbers and Pipefitters Local 36, 24 DOE ¶ 80,148 at 80,621 (1994) (Local 36). The documents Mr. Ott requested concern a specific DOE employee. It is possible that documents pertaining specifically to Mr. Ott are documents that concern identifiable "operations or activities of the government." However, since Mr. Ott did not provide additional information regarding the subject matter or narrow the subject matter request, it is impossible for us to determine whether the requested information meets this requirement. Thus, we find that Mr. Ott has not adequately shown that his request meets the conditions outlined in Factor A.

Factor B requires a consideration of whether the disclosure of information is "likely to contribute" to the public's understanding of government operations and activities. See Local 36; Seehuus Associates, 23 DOE ¶ 80,180 (1994) (Seehuus). The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general population. Seehuus, 23 DOE at 80,694. If the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate. The information at issue here is probably not in the public domain since it relates only to one individual. However, without additional information regarding the subject matter, we cannot determine whether releasing the information would contribute to the public's understanding of government operations. We therefore find that Mr. Ott has not adequately shown that his request meets the conditions outlined in Factor B.

Factor C requires us to consider whether the requested documents would contribute to the understanding of the subject by the general public. To meet this test, the requester must have the ability and intention to disseminate this information to the public. James L. Schwab, 22 DOE ¶ 80,133 at 80,569 (1992). In the present case, Mr. Ott has not shown that he has the ability to disseminate information to a significant number of people in the general public.

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of government operations or activities. The Department of Justice has suggested the following test for this factor:

To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.

1995 Justice Department Guide to the Freedom of Information Act 381 (1995); See Local 36; Seehuus. In the present case, Mr. Ott has again not shown how the information he requested would enhance the public's understanding of government operations or activities, let alone show that the material would advance such understanding to a significant extent.

In view of our evaluation of the foregoing factors, we find that Mr. Ott has not satisfied any of the four factors that an agency must weigh to determine whether the requester has met the public interest requirement. Accordingly, we must deny Mr. Ott's Appeal for a fee waiver.

It Is Therefore Ordered That:

(1) The Appeal filed by Roderick L. Ott on April 18, 1997 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 16, 1997

(1)*/ See May 5, 1997, May 8, 1997 and May 12, 1997 Memoranda of Telephone Conversations between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and Lowell Langford, OSTI.

Case No. VFA-0289, 26 DOE ¶ 80,193

June 13, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Sandra Clayton

Date of Filing: May 16, 1997

Case Number: VFA-0289

On May 12, 1997, Sandra Clayton (Clayton) filed an Appeal from a determination issued to her in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on March 13, 1997 by the Western Area Power Administration (WAPA). This Appeal, if granted, would require that WAPA release responsive documents, if they exist, that were withheld under FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 14, 1997, Clayton filed a request with WAPA for "a copy of all documents relating to the investigation and final report on the sexual harassment allegations from [a named individual] in reference to [a named individual]." Letter from Sandra Clayton to Manager, WAPA (February 14, 1997) (Request Letter). In the letter, Clayton also stated:

I am requesting the following:

- Copies of interviews from all parties (names withheld)
- Copies of all documents compiled relative and material to this investigation
- Copy of the final investigative report, whether it be draft, not formally issued, or formally issued ([name of investigator] investigation).

Request Letter. On March 13, 1997, WAPA responded to Clayton's request and would neither confirm nor deny the existence of records responsive to her request. It responded to the request for documents by stating:

[WAPA] neither confirms nor denies the existence of records responsive to your request. Lacking an individual's consent, or an overriding public interest, even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal

privacy.

Letter from FOIA Officer and General Counsel, WAPA, to Clayton (March 13, 1997) (Determination Letter). On April 15, 1997, Clayton replied to WAPA, appealing its decision. Letter from Clayton to FOIA Officer and General Counsel, WAPA (April 15, 1997). That letter was forwarded to the Office of Hearings and Appeals (OHA) and this Appeal was filed on May 16, 1997.

II. Analysis

A. Clayton's Allegations

In her Appeal, Clayton alleges that WAPA's refusal to confirm or deny the existence of responsive records in order to protect the privacy of those participating in the investigation was improper. She argues that DOE should have redacted names from any responsive material, as directed in her request. In addition, she states that she is acquainted with many of the individuals involved in the investigation, and can secure their consent to release the information. She did not address the issue of the public interest in this matter. This Decision and Order will focus on the propriety of WAPA's determination of a privacy interest and its subsequent refusal to confirm or deny the existence of investigatory records concerning a third person. As detailed below, we will uphold both actions.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

An agency's statement in response to a FOIA request that it will neither confirm or deny the existence of records is commonly called a "Glomar" response.(1) We have previously used the Glomar response to protect individual privacy in connection with law enforcement proceedings under Exemption 7(C). Keci Corporation, 26 DOE ¶ 80,150 (1997); William Payne , 26 DOE ¶ 80,144 (1996) (finding a strong privacy interest in protecting the identities of individuals who provide information to government investigators). However, WAPA does not allege that any law enforcement proceeding is, or was, at issue in this case. Memorandum of Telephone Conversation between Assistant General Counsel, WAPA, and Valerie Vance Adeyeye (June 3, 1997). Instead, WAPA relied on Exemption 6(2) for its use of the Glomar response. This procedure is equally applicable to protect an individual's privacy interest in sensitive non-law enforcement records such as welfare records, disciplinary records of relatively minor misconduct, or records of employee counseling programs. See Beck v. Department of Justice, 997 F.2d 1489, 1493 (D.C. Cir. 1993); Ray v. I.N.S., 778 F. Supp. 1212, 1214 (S.D. Fla. 1991).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. Richard Levernier, 26 DOE ¶ 80,174 (1997). First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). See generally Ripskis, 746 F.2d at 3.

(1) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY- TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990).

Clayton argues that she is acquainted with individuals who have participated in the alleged investigation, and can obtain their consent. However, she has not produced any documents supporting this assertion, nor has she proven to us that the individual who is the alleged target of the investigation has waived his or her privacy rights. Accordingly, we find that the individuals whose identities are allegedly being withheld in this case have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. The Court held that only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Reporters Committee, 109 S. Ct. at 1483 (1989). The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." See, e.g., Safecard, 926 F.2d at 1205; KTVY-TV, 919 F.2d at 1469. In addition, federal courts have consistently denied requests for information identifying specific government employees as the subjects of findings of wrongdoings, explaining that such information sheds no light on the employer agency's actions. See Beck v. Department of Justice, 997 F.2d 1489, 1493 (D.C. Cir. 1993) (refusing to confirm or deny the existence of disciplinary records pertaining to named DEA agents); Department of Air Force v. Rose, 452 U.S. 352, 396 (1976) (denying third party request for names of disciplined Air Force Academy cadets); Ray v. I.N.S., 778 F. Supp. 1212, 1214 (S.D. Fla. 1991) (upholding INS' refusal to confirm or deny existence of investigative records concerning INS officer) (Ray). Clayton has not offered any evidence of an overriding public interest in this matter. We find that release of such information, if it exists, would not contribute significantly to the public's understanding of the operations of WAPA. Therefore, we find no overriding public interest in the alleged investigation.

(3) The Balancing Test

Because release of the individuals' identities could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. In this case, merely acknowledging the existence of records would be tantamount to disclosing the fact that an individual has participated in or been the subject of an investigation, the disclosure of which fact would constitute a clearly unwarranted invasion of personal privacy. See Justice Department Guide to the FOIA, Department of Justice (September 1996) at 256. After weighing the significant privacy interests present in this case against an insubstantial or non- existent public interest, we find that release of information revealing the individuals' identities, if such information exists, would constitute a clearly unwarranted invasion of personal privacy. Our findings are consistent with those reached by several federal courts. When presented with a similar set of facts, these courts have found that the privacy

interests of individuals supplying information to government investigators clearly outweigh the negligible public interest in disclosure of these individuals' identities. See, e.g., Safecard; KTVY-TV, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); Cucarro, 770 F.2d at 359; Ray, 778 F. Supp. at 1214 (refusing to confirm or deny the existence of investigative records concerning agency employee in order to protect his reputation and good standing in the community).

For the reasons set forth above, we find that WAPA properly invoked the "Glomar" response and refused to confirm or deny the existence of the requested records under Exemption 6. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Sandra Clayton on May 16, 1997 (Case Number VFA-0289) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 13, 1997

(1)"Glomar" refers to the first instance in which a federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to the submarine-retrieval ship "Glomar Explorer" by neither confirming nor denying the existence of any such documents). See also Minier v. CIA, 88 F.3d 796, 801-02 (9th Cir. 1996) ("neither confirm nor deny" response found proper for request seeking records on individual's employment relationship with CIA).

(2)Even though WAPA informed us that they relied on Exemption 6 of the FOIA, the determination letter did not mention the exemption by name and incorrectly used the less restrictive language of Exemption 7(C), i.e., "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Nevertheless, we are analyzing this case under the correct language of Exemption 6, i.e., "would constitute a clearly unwarranted invasion of personal privacy."

Case No. VFA-0290, 26 DOE ¶ 80,188

May 23, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Bonita L. Haynes

Date of Filing: April 25, 1997

Case Number: VFA-0290

On April 25, 1997, Bonita Haynes (Appellant) filed an Appeal from a final determination issued on March 25, 1997, by the Department of Energy's (DOE) Office of Inspector General (IG). In that determination, the IG released a redacted copy of a document requested by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld portions of that document.

I. BACKGROUND

The Appellant submitted a request for information to the IG seeking copies of a memorandum dated December 29, 1993 from IG case file No. I94RS033. Determination Letter at 1. On March 25, 1997, the IG issued a determination in response to this request releasing that document to the Appellant. However, the IG redacted the names of two individuals from the document. On April 25, 1997, the Appellant filed the present Appeal, contending that the IG's withholding of the two names was improper.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemptions 6 and 7(C) are at issue in the present case.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C.

Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is therefore a classic example of an organization with a law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3.

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold of law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992); James L. Schwab, 21 DOE ¶ 80,117 (1991); James E. Phelps, 20 DOE ¶ 80,169 (1990). Since all of the documents were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The IG has found a privacy interest in the identities of the two individuals whose names have been withheld. The Determination letter states in pertinent part:

Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in Office of Inspector General investigative matters, which in these cases include subjects, witnesses, sources of information and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 1. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of subjects, witnesses, and other sources of information. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY-TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro). Accordingly, we have followed the courts' lead. James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,129 (1990).

One of the two individuals whose names are being withheld in the present case appears to be a potential subject of an IG investigation. Accordingly, the IG's identification and description of that individual's privacy interest is appropriate. However, the context of the document from which the names were redacted indicates that the second individual was neither a subject, a witness, nor a source of information. Rather this individual was a federal employee to whom the matter discussed in the memo was referred for further consideration. Therefore, the rationale supplied in the determination letter by the IG does not explain why it found that the federal employee had a protectable privacy interest. No other privacy interest in withholding this individual's identity is readily apparent. Consequently, we are remanding this portion of the Appeal to the IG. On remand the IG should either release this information or provide an adequate

justification for its withholding.

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Consequently, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

Because release of a subject's identity could reasonably be expected to subject him or her to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for the subject. It is well settled that the privacy interests of individuals that are the subjects of government investigations outweigh the public interest in the disclosure of their identities. See Department of Air Force v. Rose, 425 U.S. 352, 381 (1976). After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing the subject's identity could reasonably be expected to constitute an unwarranted invasion of personal privacy. Accordingly, we find that the identity of the subject was properly withheld under Exemptions 6 and 7(C).

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of subjects. By releasing the responsive document with only those redactions necessary to prevent identification of specific individuals, the agency can provide as much information as possible while safeguarding individual privacy rights.

However, since the IG has not shown that release of the federal employee's name would intrude upon a protectable privacy interest, we are remanding that portion of the Appeal to the Office of Inspector General for further processing in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Bonita Haynes on April 25, 1997 (Case Number VFA-0290) is hereby granted and remanded to the Office of Inspector General for further processing in accordance with the instructions set forth above and is denied in all other aspects.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 23, 1997

Case No. VFA-0291, 26 DOE ¶ 80,189

May 27, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martha J. McNeely

Date of Filing: April 28, 1997

Case Number: VFA-0291

On April 28, 1997, Martha J. McNeely filed an Appeal from a determination issued to her on March 27, 1997, by the Freedom of Information and Privacy Act Division (FOIA/PAD) of the Department of Energy (DOE). That determination concerned the remand of a prior Appeal Ms McNeely filed with the Office of Hearings and Appeals (OHA) regarding a request for information pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The initial request for information was made to the Richland Operations Office of the DOE. If the present Appeal were granted, the DOE would be required to conduct a further search for Ms McNeely's medical records.

I. Background

On December 3, 1996, Ms McNeely submitted a Privacy Act request to Richland seeking copies of her medical and dental records along with any existing bone and tissue samples obtained from her. In her initial request, Ms McNeely stated that her parents had worked at the DOE's predecessors' facility at Hanford, Washington, and that she had received medical treatment at Kadlec Hospital and possibly other government facilities during the period 1946 through 1954. During this period, Kadlec Hospital was a federal government facility. Ms McNeely provided all the necessary information to conduct a search for the information she was requesting.

In its December 26, 1996 Determination Letter, Richland stated that it had conducted a search for her medical and dental records but was unable to locate any responsive records. On January 28, 1997, Ms McNeely filed an Appeal arguing that the search for information was inadequate. She indicated a number of studies that she may have been involved in as a child, including "Project Sunshine" and "Project Gabriel."

In a February 25, 1997 Decision and Order, the Office of Hearings and Appeals (OHA) found that Richland's search for responsive information was adequate, but because of Ms McNeely's assertions regarding her possible involvement with human radiation studies, we remanded the matter to DOE Headquarters for a search of other DOE facilities. We

found that DOE Headquarters was best equipped to search for other human radiation documents. Martha J. McNeely, 26 DOE ¶ 80,164 (1997). In its March 27, 1997 Determination Letter, FOIA/PAD indicated that the files of the Office of Environment, Safety and Health contained no documents that were responsive to Ms McNeely's request. Determination Letter dated March 27, 1997, from GayLa D. Sessoms, Director, FOIA/PAD, to Martha J. McNeely. Approximately one month prior to the March 27 Determination Letter,

Ms McNeely received a letter from Congresswoman Zoe Lofgren's office that enclosed a copy of a letter to the Congresswoman from Tara O'Toole, Assistant Secretary, Environment, Safety and Health. Dr. O'Toole's letter indicated that Ms McNeely's experiences do not indicate involvement in biomedical radiation experiments but rather radiation exposure of an environmental nature. Letter dated February 21, 1997, from Tara O'Toole, DOE Assistant Secretary, Environment, Safety and Health, to the Honorable Zoe Lofgren. Ms McNeely claims that Dr. O'Toole would have no way of knowing the nature of her medical treatment unless she had reviewed her medical records. Appeal Letter received April 28, 1997, from Martha J. McNeely to Office of Hearings and Appeals. Ms McNeely contends that the DOE, therefore, must have her medical records in its possession.

II. Analysis

The Privacy Act requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name or the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

In reviewing the present Appeal, we contacted FOIA/PAD to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Ms McNeely's request might exist. We were informed that the Radiation Office had been contacted to conduct a search for any records that might by responsive to Ms McNeely's request. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and Tonya Woods, FOIA/PAD, May 9, 1997. FOIA/PAD indicated that after an extensive computer search using Ms McNeely's name, social security number, and birth date, no records were found. In addition, the request was transferred to the Nevada Operations Office for a search of the Coordination and Information Center, which keeps records on radiation exposure to individuals. The Nevada Operations Office corresponded with Ms McNeely regarding its search during the course of this Appeal.

We are convinced that FOIA/PAD followed procedures which were reasonably calculated to uncover the material sought by Ms McNeely in her request. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that the search did not uncover documents Ms McNeely believed may be in the possession of DOE does not mean that the search was inadequate. In addition, Ms McNeely has not provided any evidence, beyond her personal belief, that any additional, relevant documents exist in the DOE's files. Therefore, under the circumstances of this case, we find that FOIA/PAD's search for responsive documents was adequate and that no further documents responsive to Ms McNeely's request exist at DOE.

Further, Ms McNeely asserts that Dr. O'Toole's letter to Congresswoman Lofgren is evidence of the existence of her medical records at DOE. She contends that Dr. O'Toole would have no basis for making some of the statements contained in the letter to the Congresswoman unless Dr. O'Toole had reviewed her medical records and is now refusing the disclose them. Appeal Letter. We have reviewed this contention and conclude that it is not correct. We contacted Pam Frank, the DOE Case Manager responsible for processing the request Dr. O'Toole's office received from Congresswoman Lofgren. Congresswoman Lofgren's request included a case information sheet that Ms McNeely had provided to Congresswoman Lofgren. Ms Frank indicated that after she reviewed Ms McNeely's case information sheet, she recommended to Dr. O'Toole that she make the determination that ultimately appeared in her February 21, 1997 letter. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and Pam Frank, DOE Case Manager, May 14, 1997. Contrary to Ms McNeely's assertions, Ms Frank's recommendation and Dr. O'Toole's determination were based exclusively on Ms McNeely's case information sheet. Therefore, Ms McNeely's assertion has no merit.

The FOIA/PAD conducted a search that was reasonably calculated to uncover the material Ms McNeely

was requesting. Further, we do not believe Dr. O'Toole's office possessed any information that is being withheld from Ms McNeely. Rather, Dr. O'Toole's office reviewed the material Ms McNeely submitted and determined that DOE did not possess anything responsive to Ms McNeely's request. Accordingly, Ms McNeely's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on April 28, 1997, by Martha J. McNeely, Case No. VFA-0291, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 27, 1997

Case No. VFA-0292, 26 DOE ¶ 80,190

May 29, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mary Feild Jarvis

Date of Filing: May 2, 1997

Case Number: VFA-0292

On May 2, 1997, Mary Feild Jarvis, Ph.D., of Richland, Washington filed an Appeal from a determination issued on April 24, 1997 by the Richland Operations Office (Richland Operations) of the Department of Energy (DOE). That determination denied in part Dr. Jarvis' request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release some of the withheld information.

The FOIA requires that agency records that are held by a covered branch of the federal government, and that have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On November 26, 1995, Dr. Jarvis, a DOE employee in Richland, Washington, filed a FOIA request with the DOE Office of the Inspector General seeking documents pertaining to one of its investigations. On February 25, 1997, the Office of the Inspector General referred fourteen responsive documents to Richland Operations, as the originating office, for a release determination. Richland Operations issued its determination on April 24, 1997. It released

thirteen of the fourteen documents in full. However, it withheld portions of Document 2, a multi-part item that addresses a possible breach of the standards of ethical conduct by a DOE employee. To the extent it is relevant to this Appeal, Richland Operations withheld portions of an attachment to a letter to the DOE Regional Inspector General from the Richland Operations Office Chief Counsel that is part of Document Two. This two page attachment details the procedural history of the particular ethics concern. It also has a brief sketch of the substance of the concern. From this enclosure, Richland Operations Office deleted the name and routing symbol of the person who reported the concern as well as virtually the entire substance of the concern. The determination letter states that it withheld "names and other personal identifiers" under Exemption 6 of the FOIA, which protects personal privacy. The information withheld, however, goes well beyond the usual meaning of "personal identifiers," which are usually addresses, phone numbers, employee and social security numbers and the like, a definitional matter which has caused some difficulty in processing this Appeal. Dr. Jarvis only appeals the withholdings from this letter attachment in

Document 2.

ANALYSIS

Exemption 6 permits an agency to make a discretionary withholding of information that must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered by Exemption 6, an agency must balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (Rose); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991).

First, we believe that Document 2 meets the Exemption 6 threshold test as of being within the category of "personnel and medical files and similar files." The Supreme Court has taken a spacious view of what falls within this phrase. The Court has made clear that Exemption 6 extends to "detailed Government records on an individual which can be identified as applying to that individual." Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (quoting H.R. Rep. No. 89-1497, at 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428). See also Annotation, When Are Government Records "Similar Files" Exempt From Disclosure Under Freedom of Information Act Provision (5 USCS § 552(b)(6)) Exempting Certain Personnel, Medical and "Similar Files", 106 A.L.R. Fed. 94, 102 (1992). In this case, the document under consideration deals with an alleged ethical lapse by a particular DOE employee. This easily falls within the Supreme Court's Exemption 6 threshold definition. See Rose, 425 U.S. at 376-80; cf. Schonberger v. National Transp. Safety Bd., 508 F. Supp. 941, 943 (D.D.C. 1981) (material on employee discipline qualifies for Exemption 6 treatment).

In applying the balancing part of the Exemption 6 test, we must examine each type of information withheld, identify any privacy interest involved and weigh that against any public interest in the material as defined by the Supreme Court. In this case, because of the variety of material involved, we must consider Document 2 almost on a paragraph-by-paragraph basis.

First, Richland Operations withheld the name and an identifying address for the person who brought forward the ethics concern. We have not previously dealt with this particular type of name withholding. Nor have we unearthed any court decision dealing with the issue. However, we have consistently withheld the names of people who were sources in Inspector General investigations. Like an ethics concern, those documents involve inquiries into possible violations of legally binding standards of conduct. In those cases, we have found that the sources have a considerable privacy interest in having their identity shielded from disclosure for fear of the possibility of unwanted contacts or harassment. See, e.g., J.B. (Jack) Truher, 26 DOE ¶ 80,154 at 80,675 (1997) (and cases cited therein); Keci Corp., 26 DOE ¶ 80,150 at 80,661 (1997) (and cases cited therein). We find that rationale persuasive in this case as well.

Second, Richland Operations withheld almost the entire content of the substance of the concern. Virtually all of the withheld material consists of neutral recitations of official government activity by government employees, the names of government employees, and the name of one contractor employee. We have examined the unredacted document in detail and are unable to discern any privacy interest in most of the material withheld.

We have consistently found that names, by themselves, reveal nothing private about a person and, therefore, are not the type of information that creates a protectable privacy interest for the purposes of Exemption 6. The News Tribune, 25 DOE ¶ 80,181 at 80,700 (1996). A privacy interest may be created only when an individual's name is linked with some other piece of information "which reveals something personal about an individual." Id. at 80,699. In an Exemption 6 analysis, we must examine any linkage of information involved to determine the extent of any privacy interest. In this case, with the exception of the

name of the source, the only links concern place of employment and knowledge of events. So far as government employees are concerned, we find there is no privacy interest involved in this type of linkage. As far as a link of a name with the place of employment, we have said in the past, "[a]bsent unusual circumstances usually directly related to the nature of the job . . . individuals do not have a privacy interest in the fact that the federal government employs them." The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 70,769 (1996). Nor do we find any privacy interest in the knowledge of the facts surrounding the alleged ethics concern. The knowledge of these facts arises entirely from official government business. While there may be some limited circumstances when an agency might, in the course of official duties, acquire knowledge (such as criminal activity which might put that person in some form of jeopardy) for which privacy protection under Exemption 6 might be appropriate, such is not the case here. As a general matter, there simply is no privacy interest in material stating or describing a federal employee's official actions or duties "unless the work somehow reveals something personal or private about the individual . . . or there is some other special circumstance (for example, a reasonable, articulable belief that the person could be subject to harassment. . .)." Id. (citations omitted). See also William H. Payne, 25 DOE ¶ 80,190 at 80,727 (1996). There appears to be little, if any, information of this latter type in the withheld material, and what information that arguably might fall in that category can be sufficiently shielded by a more selective redaction.

Similarly, we find no privacy interest in the name and affiliation of a contractor employee who has direct knowledge of the facts of the potential ethics irregularity. We have recently found no privacy interest involved in the names and service dates of employees of Westinghouse Hanford Company, a DOE contractor. Diane C. Larson, 26 DOE ¶ 80,112 at 80,539-40 (1996). If this more detailed information does not present a privacy concern, it is unlikely in most cases that merely being named as a DOE contractor employee raises a privacy issue. Thus, absent some special consideration not present in this case, the simple information that a particular person works for a specified DOE contractor does not present a privacy interest. In addition, as we found above, in this case we see no privacy interest in knowledge of these official government activities surrounding the potential ethics concern.

Richland Operations states that it withheld the content of the ethics concern and the events surrounding it because it believes that a person knowledgeable about the case could determine who reported the ethics concern unless all the material is withheld. Our review of the document does not lead us inexorably to that conclusion. The enclosure enumerates six DOE employees and one contractor employee who have direct knowledge of the facts of the possible ethics concern. While a privacy concern may arise if there is a small group of people and one could tell from the withheld information which member of the group raised an allegation of misconduct, Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,773 (1996), we do not believe that is the situation here. The withheld information is so general and presented in such a neutral manner, that it seems unlikely that anyone could positively identify the source. In fact, the information in the attachment is so sketchy that someone who does not have direct knowledge of the facts, but who was told quickly about them, easily would have sufficient information to raise the ethics concern. Even if we could limit consideration to actual participants in the underlying activity, the enclosure clearly states that its enumeration of persons is not an exclusive list. Thus the group of people who have direct knowledge of and could have reported the alleged ethics concern necessarily extends beyond the withheld roster in Document 2. Therefore, once the name of the person who reported the concern is excised in those spots where the person is identified as the source of the concern (along with associated phrases), one cannot tell whether or not that name even appears in the enumeration. When one reasonably cannot identify who the reporting person is, then we believe there is no privacy interest involved in the material. Id.; see also Rose, 425 U.S. at 380 (summaries of Air Force Academy disciplinary proceedings should be released after redaction of identifying references); Carlos Blanco, 26 DOE ¶ 80,148 at 80,654 (1996) (substantive information should be released if privacy interest can be protected by redaction).

In considering the other part of the Exemption 6 equation for the only item for which we have definitively identified a privacy interest, the name and words associated with the source of the ethics concern, we are compelled to employ the Supreme Court's very narrow definition of what constitutes a public interest. For the purposes of Exemption 6 under the Supreme Court standard, information advances the public interest

only if the information is likely to contribute "'significantly to public understanding of the operations of the government.'" Reporters Committee, 489 U.S. at 775 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). See also Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 494-95 (1994). In this case, we cannot discern in the name (and associated material) any public interest that conforms to the Supreme Court standard. As we have noted in other, similar situations where individuals come forth with information about possible infractions, the release of the name tells nothing about the workings of government; conversely, there is a considerable interest in insuring that people feel free to bring possible wrongdoing to the attention of the proper authorities and that this interest is promoted by protecting identities of those who give the government such information. See Michael A. Grosche, 26 DOE ¶ 80,146 at 80,644 (1996).

The only potential public interest identified by the appellant is her claim that she needs the information to pursue potential litigation enforcing the equal employment laws. She has provided no further details of the alleged wrong-doing. However, as both this Office and the courts have made clear, unsubstantiated allegations of misconduct do not rise to the level of a public interest for the purposes of Exemption 6. See William H. Payne, 26 DOE ¶ 80,161 at 80,703 (1997) (and cases cited therein). Thus, in this case, we find that both the public and privacy interests we identified support withholding the name of the person who brought forward the ethics concern and associated phrases.

Accordingly, we will remand this case to Richland Operations. That Office shall issue a new determination either promptly releasing the non-source information or further explaining its withholding by identifying and explaining any privacy interest(s) for some or all of the withheld material and determine whether the identified interest(s) outweigh the public interest in disclosure. See, e.g., Raytheon Co., 25 DOE ¶ 80,156 at 80,640 (1996).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal of Mary Feild Jarvis, OHA Case No. VFA-0292, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Richland Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 29, 1997

Case No. VFA-0293, 26 DOE ¶ 80,191

June 6, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Information Focus on Energy, Inc.

Date of Filing: May 6, 1997

Case Number: VFA-0293

On May 6, 1997, Information Focus on Energy, Inc., (IFOE) filed an Appeal from a determination issued on March 31, 1997, by the Ohio Field Office (OFO) of the Department of Energy (DOE). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Parts 1004 and 1008.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 6, 1997, OFO received IFOE's request for, inter alia, "[c]opies of all DOE inspector reports for 1996 for the [DOE's] Fernald and Mound Sites. Also, copies of notes and/or written observations by DOE Facility Representatives and Environment, Safety and Health Site Representatives, or their managers, for 1996 at the Fernald and Mound Sites." Letter from Robert M. Keller, President, IFOE, to Freedom of Information Officer, Headquarters, DOE (October 15, 1996).(1)

OFO issued a determination on March 31, 1997, in which it released documents responsive to the appellant's request, but redacted from those documents portions which it described as "personal identifying information of individuals, including names of employees who may have been involved in various work-related incidents and other purely personal information regarding individuals . . . ." Letter from J. Phil Harmic, Manager, OFO, to Robert Keller, IFOE (March 31, 1997). OFO cited Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), as the basis for withholding this information.

In its Appeal, IFOE states,

In the March 31 reply, [OFO] supplied copies of material by Facility Representatives for January, 1996, and presumably, by their immediate supervisors. Not supplied was any material indicating how those notes and/or observations were used by [OFO] managers in directing their contractors. Additional material relating to uses of Facility Representative notes and written observations by [OFO] managers is sought under this Appeal.

Appeal at 1. IFOE also contends that the information redacted from the documents it obtained is not exempt from disclosure under the FOIA. Id. at 1-2.

II. Analysis

A. Additional Material Sought by IFOE

Regarding IFOE's request for additional materials in its Appeal, we have generally held that an appellant may not expand the scope of a request on appeal. Energy Research Found., 22 DOE ¶ 80,114 at 80,529-30 (1992); F.A.C.T.S., 26 DOE ¶ 80,132 at 80,578 (1996). In its original request, IFOE only asked for certain "notes and/or written observations." It did not request "material indicating how those notes and/or observations were used" until it filed the present Appeal. Because this additional request clearly represents an expansion of the scope of IFOE's request, this portion of IFOE's Appeal will be denied.(2)

B. The Applicability of FOIA Exemption 6 to the Information Withheld by OFO

There are three documents from which OFO withheld information under Exemption 6. One is entitled "TEAM MEMBER INFORMATION," and lists the names, titles, workplace addresses, work telephone numbers, and home telephone numbers of seven individuals who work for the DOE, a DOE contractor, or other private companies. OFO withheld only the home telephone numbers from this document. Another document, which is four pages long and handwritten, concerns the discovery of radioactively contaminated uniforms of guards at a DOE facility. The document details the actions taken once the contamination was discovered. Only the names of the affected guards were withheld from this document. The third document contains the results of a review of health and safety procedures and policies implemented by OFO. From one page of this document OFO withheld the names of three DOE employees, as well as substantive comments regarding two of the employees.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

1. Whether the Records at Issue are Personnel, Medical, or Similar Files

IFOE argues in its Appeal that because Exemption 6 "applies to personnel records, medical records and similar documents," it does not apply to "[d]ocuments which refer to or document performance of duties by Federal employees . . . ." Appeal at 2. However, in Washington Post, the Supreme Court made clear that "information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than ?personnel' or ?medical' files." Washington Post, 456 U.S. at 601. The Court concluded that the scope of Exemption 6 extends to any information contained in government records "which applies to a particular individual . . . ." Id. at 602; see also New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc) (applying Exemption 6 to tape recording of the last words of the crew of the space shuttle Challenger). In the present case, it is clear that each of the documents at issue contains information that applies to particular individuals. We therefore reject IFOE's assertion that these documents do not fall within the general scope of Exemption 6.

2. Whether the Information at Issue was Properly Withheld Under Exemption 6

The appellant also contends the OFO improperly withheld information under Exemption 6. In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by

the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

a. The Privacy Interests

Regarding the home telephone numbers of individuals withheld from IFOE, we find that significant privacy interests of these individuals would be affected by the release of this information. In finding that federal employees have a privacy interest in their home addresses, the Supreme Court has reasoned that "[m]any people simply do not want to be disturbed at home by work-related matters. . . . We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 501 (1994) (citations omitted). The Court recognized that "home addresses often are publicly available through sources such as telephone directories and voter registration lists, but ?[i]n an organized society, there are few facts that are not at one time or another divulged to another.'" Id. at 500 (quoting Reporters Committee, 489 U.S. at 763). The same reasoning leads us to conclude here that the individuals whose home telephone numbers were withheld by OFO have an significant interest in preventing the further dissemination of this information.

We next consider the privacy interests of the guards whose names appear in a document regarding the exposure of their uniforms to radiation. In an analogous prior case, we found that the subjects of human radiation experiments had a significant interest in protecting their names from disclosure. Morrison & Foerster, 24 DOE ¶ 80,107 (1994). We noted that the "language of the FOIA clearly indicates that preventing the public disclosure of an individual's medical condition is among the core purposes of Exemption 6." Id. at 80,517 (citing Rural Hous. Alliance v. Department of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974)). In the present case, the document in question does not reveal the specific impact of any radiation exposure on the medical condition of the guards. However, given the potential medical effects of radiation exposure, we conclude that the guards have a substantial privacy interest in the fact that they were or may have been exposed to radiation.

The DOE employees who are referred to in the third document in question also have a privacy interest that would be affected by the disclosure of their identities. The document contains comments addressing their job performance, and the courts have found that employees have substantial privacy interests with respect to such information, even if the information is favorable to an employee. See, e.g., Ripskis, 746 F.2d at 3 (D.C. Cir. 1984).

b. The Public Interest

Having found that significant privacy interests are at stake in all of the information withheld by OFO, we next must determine if these interests are outweighed by the public interest in disclosure of the information. In making this determination, as we note above, we look to whether release of the information would further the public interest by shedding light on the operations and activities of the Government.

First, we find that no public interest would be served by release of the home telephone numbers withheld by OFO, as this information reveals nothing about the operations and activities of the Government. Similarly, we do not see how the disclosure of the names of the guards whose uniforms were contaminated

by radiation would provide any information to the public regarding the workings of its Government. Although the fact that the uniforms were contaminated and the actions taken in response are matters of public interest, that information has already been released, and we find that no additional public interest would be served by the release of the names of the guards to whom the uniforms belonged. Thus, with respect to these two documents, we find that there is not a public interest in release of the information sufficient to outweigh the privacy interest at stake.

Finally, we turn to the issue of whether disclosing the identities of the DOE employees in the third document at issue would shed light on the operations and activities of the Government. IFOE argues in its Appeal that withholding the names of these individuals "prevents the public from holding its Federal and contractor employees accountable for actions which may protect or harm the health of employees and members of the public (including themselves)." Appeal at 2.

We agree with the appellant that there is a strong public interest in the operations and activities of the DOE as they affect the health and safety of the public and of DOE and contractor employees, and the document at issue does contain an appraisal of OFO's practices and policies in this area. However, the narrow question we face here is whether identifying individual DOE employees would shed light on those activities. The courts have generally found that where there is proven wrongdoing of a serious and intentional nature by high-level agency employees, the public interest in holding individual employees accountable for their actions outweighs any interest of such employees in shielding their identity. See, e.g., Stern v. Federal Bureau of Investigation, 737 F.2d 84, 94 (D.C. Cir. 1984) (public interest in "malfeasance by [a] senior FBI official . . . is not outweighed by his own interest in personal privacy"). On the other hand, in weighing privacy interests against the public interest in learning about misconduct by lower-level employees, the courts have found that the balance tips in favor of the privacy interest of the employee. Id. at 92 (privacy interest of lower-level employees "culpable only for inadvertence and negligence" outweighs the public interest in their identities). In the present case, two of the three individuals whose identities have been withheld are managers who have some level of responsiblity for implementing OH health and safety policy (the third individual is a general engineer at OH). However, regardless of the level of responsiblity exercised by these individuals, the document does not reveal serious and intentional wrongdoing on their part or even contain allegations of such misconduct. Indeed, it appears from our review of the document that it contains only the opinions of an observer on the health and safety activities of OFO. We therefore conclude that the public interest in the identities of these employees does not outweigh the privacy interests of the employees discussed above.

However, based on our review of the third document, we find that OFO withheld more information than was necessary to conceal the identities of the employees named in that document. Specifically, OFO withheld substantive comments of the author of the document that, by themselves, would not identify the employees in question. Such information appears after the first and second bullet on that page and at the beginning of the last line of material redacted in the document. We will therefore remand this matter to OFO to segregate the information in this document that does not reveal the identities of the three DOE employees, and to release that information or provide a basis other than FOIA Exemption 6 for its withholding.(3) In all other respects, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Information Focus on Energy, Inc., on May 6, 1997, Case Number VFA-0293, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Ohio Field Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are

situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 6, 1997

(1) IFOE also requested documents concerning the DOE's Savannah River Site. Copies of the request, which was filed with DOE Headquarters, were forwarded to OFO and the DOE's Savannah River Operations Office.

(2) Concurrent with the filing of IFOE's Appeal, OFO received a request from IFOE for these additional materials. Letter from Lewis Holman, IFOE, to Freedom of Information Officer, OFO (May 3, 1997) (received by OFO on May 6, 1997).

(3) It is possible that this information may be subject to withholding under the deliberative process privilege of FOIA Exemption 5. However, even if the information may be withheld under that Exemption, the information should be released unless OFO "reasonably foresees that disclosure would be harmful to an interest protected" by the Exemption. Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies (October 4, 1993).

Case No. VFA-0294, 26 DOE ¶ 80,197

June 27, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Patricia L. Baade

Date of Filing:June 3, 1997

Case Number: VFA-0294

On June 3, 1997, Patricia L. Baade (Appellant) completed the filing of an Appeal from determinations issued on April 3, 1997 and April 23, 1997, by the Department of Energy's Freedom of Information Act/Privacy Act Division and the Office of Inspector General, respectively.(1)These determinations were issued in response to a request for information submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In this Decision and Order, we will determine whether the DOE must release or identify materials withheld under FOIA Exemption 7(C), 5 U.S.C. §552(b)(7)(C), and conduct a further search for documents responsive to the Appellant's FOIA request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On February 2, 1997, the Appellant submitted a FOIA and Privacy Act request to the FOIA/Privacy Act Division seeking copies of any records pertaining to her that are in the possession of various DOE offices, including the Office of Economic Impact and Diversity (ED) and the Office of Inspector General (OIG).(2) The FOIA/Privacy Act Division requested that ED and OIG respond separately to the Appellant. The FOIA/Privacy Act Division then coordinated a search by the Offices of Personnel, Energy Intelligence, General Counsel and Safeguards and Security. On February 11, 1997, the FOIA/Privacy Act Division sent a letter to the Appellant requesting that she supply identifying information and fill out DOE Form 1800.1 for Privacy Act requests. This is a standard practice of the FOIA/Privacy Act Division which is followed in order to protect the privacy rights of individuals. The Appellant did not respond to that letter. On April 3, 1997, the FOIA/Privacy Act Division issued its determination, stating that the Offices of Personnel, Energy Intelligence, General Counsel and Safeguards and Security could not locate any responsive documents. On April 23, 1997, the OIG issued a separate determination, stating that because the Appellant had not supplied the information requested by the FOIA/Privacy Act Division, OIG treated the Appellant's request as a third-party request. Therefore, it stated,

[t]he Office of Inspector General neither confirms nor denies the existence of records responsive to your request. Lacking an individual's consent, an official acknowledgment of an investigation, or an overriding

public interest, even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. Refer to 5 U.S.C. § 552(b)(7)(C).

On June 3, 1997, the Appellant completed the filing of the present Appeal in which she contends that DOE's search for documents was inadequate and that OIG should release to her any responsive documents that it possesses.(3)

ANALYSIS

This Decision and Order will focus on the adequacy of DOE's search for records responsive to the Appellant's request and the propriety of OIG's refusal to confirm or deny the existence of responsive records. As detailed below, we have decided to remand this matter to the Headquarters' FOIA Office to conduct an additional search for responsive records, and we uphold OIG's refusal to confirm or deny the existence of records responsive to the Appellant's request.

I. Adequacy of the Search

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We first contacted the FOIA/Privacy Act Division to determine how the search had been coordinated. We learned that despite the fact that the Appellant had named five particular offices - the DOE Employee Counseling Services, Office of the Executive Secretariat, "health clinic," Office of the Assistant Secretary for Policy and International Affairs and the FOIA/Privacy Act Division itself as offices she believes possess responsive documents, none of these offices was searched. See Record of Telephone Conversation between Tonya Woods and Dawn Goldstein (May 20, 1997). Further, we have now learned that the Appellant was an employee of the Energy Information Administration (EIA), and that departmental element has not been searched for responsive records. In addition, on the basis of the Appellant's letter to this Office received on June 3, 1997, we now believe that the Chief Financial Officer may possess responsive documents concerning an Equal Employment Opportunity case settlement the Appellant received in approximately 1985. Further, as explained below, it is possible that the Office of Labor/Management and Employee Services may possess responsive documents. We therefore must remand this case to the FOIA/Privacy Act Division in order that these eight offices be searched for responsive documents.(4)

We then contacted the four offices that were searched to determine the extent of the searches performed. We learned that the Office of Safeguards and Security (OSS) had not been aware of the fact that the Appellant was a DOE employee from at least October 1, 1977 until July 15, 1985. OSS informed us that while microfiche records show that OSS had at least formerly possessed records pertaining to the Appellant, it was uncertain whether it had retained these records. It therefore agreed to conduct a new search for respective documents. See Record of Telephone Conversation between Victor Hawkins, OSS, and Dawn Goldstein (May 21, 1997).

The Office of Energy Intelligence (OEI) informed us that it possesses an extensive index of the names of all persons in its files. This index includes records dating from the time the DOE employed the Appellant. OEI informed us that none of the three names the Appellant used in the past or present is listed in its files. See Record of Telephone Conversation between Ed McGinnis, OEI, and Dawn Goldstein (May 22, 1997).

We believe that OEI has conducted a reasonable search.

Marilyn Greene of the Office of Personnel informed us that it had not realized that the Appellant had ended her tenure at DOE some twelve years ago. The Appellant's personnel records, including any health insurance records, which were formerly possessed by DOE, are currently the property of the National Personnel Records Center in St. Louis. See Record of Telephone Conversation between Marilyn Greene and Dawn Goldstein (May 22, 1997); Record of Telephone Conversation between Verlette Moore, FOIA/Privacy Act Division, and Dawn Goldstein (June 11, 1997). The Appellant may make a request of the National Personnel Records Center by writing to: 111 Winnebago Street, St. Louis, MO 63118-4199.

Two individuals at the Office of Assistant General Counsel for General Law (OGC), Isiah Smith and Maryann Shebek, were assigned to conduct a search of OGC. After learning from this Office of the age of any possible responsive documents, Isiah Smith informed us that he planned to conduct a further search for documents responsive to the Appellant's request. See Record of Telephone Conversation between Isiah Smith, OGC, and Dawn Goldstein (June 2, 1997). Maryann Shebek informed us that after conducting a new search, records responsive to the Appellant's request had been found. See Record of Telephone Conversation between Maryann Shebek, OGC, and Dawn Goldstein (June 2, 1997). According to Abel Lopez of OGC, his office planned to release those documents to the Appellant in a new determination which would also include the results of Mr. Smith's further search. See Record of Telephone Conversation between Abel Lopez and Dawn Goldstein (June 4, 1997). Ms. Shebek further informed us that Alison Davidow of Labor/Management and Employee Services may also possess responsive records. See Record of Telephone Conversation between Maryann Shebek and Dawn Goldstein (June 2, 1997).

Consequently, we shall direct this matter to the FOIA/Privacy Act Division for further action. Upon receiving the relevant files, the FOIA/Privacy Act Division shall coordinate a new search involving the offices mentioned above for a further or new search. It shall identify all documents responsive to the Appellant's request and either release them or provide adequate justification for withholding any portion of them.(5)

II. OIG's Refusal to Confirm or Deny the Existence of Records(6)

An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(7) A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under the FOIA, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983). As detailed below, these circumstances exist here, and OIG correctly refused to admit or deny the existence of records involving the Appellant.

OIG has a consistent policy of refusing to confirm or deny the existence of records in response to a FOIA request when the circumstances described in Keci Corporation, 26 DOE ¶ 80,150 (1997) and William H. Payne, 26 DOE ¶ 80,144 (1996) exist. Thus, first-party requesters (people who request information about themselves) must submit DOE Form 1800.1 and identifying information in order to ensure that individual privacy is protected to the highest degree possible. See Record of Telephone Conversation between Jackie Becker, OIG, and Dawn Goldstein (May 19, 1997). Because the Appellant never provided such information, OIG had no choice but to treat her as a third-party requester.(8) While we would prefer not to do so, in this Decision we therefore must consider the Appeal as though the FOIA request were filed by a third party, not by the subject of the information requesting her own records.

A consistent Glomar response to such FOIA requests is necessary to protect the privacy rights of individuals who have been the subjects of OIG investigations. If OIG had stated that documents responsive to the Appellant's FOIA request exist, but claimed that the documents themselves were exempt from disclosure under Exemption 7(C), it would have revealed the existence of a law enforcement investigation involving the subject of the requested information.(9) If OIG uses Glomar responses only when responsive records do exist and denies the existence of responsive documents when they do not

exist, then FOIA requesters could infer that OIG refuses to confirm or deny the existence of enforcement records only when such records actually exist. This could compromise the privacy rights of individuals who may be the subjects of third-party FOIA requests in the future.

We find that OIG was justified in providing a Glomar response to the Appellant's FOIA request because the records sought, if they exist, would be exempt from disclosure to third parties under the FOIA and the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny the portion of the Appeal that relates to OIG's refusal to confirm or deny the existence of enforcement records concerning the subject of the information.

III. Waiver

The Appellant claims that OIG has placed information from her alleged enforcement file into the public domain by disseminating the contents of her alleged OIG file and other information about her to various state and local agencies, as well as to the National Crime Information Center (NCIC) Interstate Identification Index. The Appellant therefore implies that DOE has waived the application of Exemption 7(C) to her alleged file because it has previously disclosed the contents therein.

However, the Appellant has failed to show that IG has taken any such action. The NCIC record that the Appellant sent to us does not include any mention of the topic of her alleged OIG enforcement file, nor does it demonstrate the source of the information contained in it. In addition, the OIG denies categorically that the OIG ever submits reports of any kind to the NCIC. See Record of Telephone Conversation between Jackie Becker, OIG, and Dawn Goldstein (May 19, 1997).

The extent to which the DOE has waived FOIA exemptions depends on the circumstances of the disclosure. Carson v. Department of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980). As found above, the Appellant has not demonstrated that any contents of an alleged OIG file relating to her have been disclosed either by official or unofficial departmental action.(10) Moreover, even if the DOE had released information into the NCIC, this database would not be considered the public domain since the database can only be used only by law enforcement agencies. See Record of Telephone Conversation between Jackie Becker and Dawn Goldstein (May 19, 1997). We therefore reject the Appellant's argument that the DOE has waived Exemption 7(C).

CONCLUSION

We will grant the present Appeal to the extent that we will require that DOE conduct a further search for documents. We will remand this matter to the Headquarters' FOIA/Privacy Act Division for a new determination with instructions to conduct a search for additional documents in other DOE offices. We will deny the portion of the Appeal that relates to OIG's refusal to confirm or deny the existence of enforcement records concerning the subject of the information.

It Is Therefore Ordered That:

(1) The Appeal filed by Patricia L. Baade on June 3, 1997, is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2) This matter is remanded to the FOIA/Privacy Act Division of the Office of the Executive Secretariat which shall coordinate a search of the following departmental elements for documents responsive to the Appellant's February 3, 1997 FOIA request: DOE Employee Counseling Services, Office of the Executive Secretariat, the Forrestal and Germantown health clinics, Office of the Assistant Secretary for Policy and International Affairs, FOIA/Privacy Act Division, Energy Information Administration, Chief Financial Officer, Office of Labor/Management and Employee Services, Office of Safeguards and Security and the Office of General Counsel. The FOIA/Privacy Act Division of the Office of the Executive Secretariat shall issue a new determination that reflects the results of this additional search.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 27, 1997

(1) 1/ The Appellant initially filed a submission with the Office of Hearings and Appeals (OHA) on May 12, 1997. The OHA held the submission in abeyance for reasons explained below. We consider the Appeal to have been filed as of our June 3, 1997 receipt of her letter dated May 30, 1997 notifying this Office that she was not appealing the DOE's Privacy Act determinations. We further note that we have accepted the Appeal of the April 3, 1997 determination, despite its lack of timeliness, because of the history of this matter. The DOE's search for documents responsive to the Appellant's FOIA and Privacy Act request had been assigned to different DOE offices which responded to her at different times. The Appellant was entitled to see which, if any, documents she received, before appealing the adequacy of any of the offices' searches.

(2) 2/ In her request, the Appellant referred to certain Central Intelligence Agency (CIA) documents pertaining to her which she believes are in the possession of the DOE. We note that any such documents in the possession of the DOE are subject to the FOIA. However, if the Appellant is requesting documents in the possession of the CIA (or any other federal or local agencies), she will need to make separate requests of those agencies.

(3) 3/ On May 22, 1997, the OHA requested that the Appellant supply the requested identifying information. On June 3, 1997, we received a response from the Appellant, notifying us that she declined to submit the requested information and, further, is only appealing the DOE's determinations under the FOIA, not under the Privacy Act. See Letter from Appellant to Dawn Goldstein, OHA at 3 (June 3, 1997).

We also note that although ED believes it has responded in substance to the Appellant's FOIA request, ED did not describe its response as a FOIA response nor notify the Appellant of her right to appeal its response to this Office. ED has not yet decided whether to make a formal FOIA response. See Records of Telephone Conversations between Tyrone Levi, ED, and Dawn Goldstein (June 3, 1997 and June 17, 1997); Record of Telephone Conversation between Tonya Woods, FOIA/Privacy Act Division and Dawn Goldstein (May 20, 1997). However, according to the Appellant's June 3, 1997 letter to this Office, she is not appealing ED's response.

(4) 4/ There are health units at both the Forrestal and Germantown locations of DOE. We suggest that both health units be searched for the Appellant's records.

(5) 5/ We note that the Appellant has used three names, Patricia L. Baade, Patricia L. Bryant, and P. Lee Baade, and urge the DOE offices to conduct their searches using each of the three names.

(6) 6/ The Appellant has requested that the OIG, rather than the OHA, respond to this portion of her FOIA Appeal. Under DOE regulations, OHA possesses the sole authority to process appeals of FOIA determinations, see 10 C.F.R. § 1004.8(a), with the exception of appeals within the provisions of 10 C.F.R. § 1004.8(f) (concerning classified and similar information). Accordingly, we must deny her request.

(7) 7/ "Glomar" refers to the first instance in which a Federal court upheld the adequacy of such a

response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents).

(8) 8/ Ms. Becker stated that if an OIG file does exist pertaining to the Appellant, OIG will release the contents of it, to the Appellant only, when DOE Form 1800.1 and the identifying information is submitted. Id.

(9) 9/ Exemption 7(C) of the FOIA, 5 U.S.C.§ 552(b)(7)(C), allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

(10) 10/ Unauthorized disclosures, in any event, would not constitute a waiver of exemption by the DOE. Simmons v. Department of Justice, 796 F.2d 709, 712 (4th Cir. 1986).

Case No. VFA-0295, 26 DOE ¶ 80,192

June 12, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Information Focus on Energy, Inc.

Date of Filing: May 14, 1997

Case Number: VFA-0295

On May 14, 1997, Information Focus on Energy, Inc. (IFOE) filed an Appeal from a determination issued to it by the Department of Energy's (DOE) Deputy General Counsel for Litigation (hereinafter referred to as "the Deputy Counsel"). This determination was issued on April 7, 1997 in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that a document that was released to IFOE in redacted form be released in its entirety.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, IFOE sought access to copies of DOE Office of General Counsel litigation summaries for 1995 and 1996 which identify litigation activities and DOE costs. In his response, the Deputy Counsel provided copies of the General Counsel Outside Contractor Litigation Cost reports for fiscal years 1995 and 1996. These reports detail costs incurred by DOE contractors in lawsuits stemming from performance of their contractual obligations. The information deleted from the copies provided to IFOE consists of the individual lawsuit settlement amounts.

In his determination, the Deputy Counsel withheld the settlement amounts pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Specifically, the Deputy Counsel stated that the amounts are exempt from mandatory disclosure because they are privileged as attorney work product and as information relating to settlement. The Deputy Counsel also found that release of the individual settlement amounts would not be in the public interest. In this regard, the Deputy Counsel stated that disclosure of the information could compromise future settlement negotiations and inhibit communications between the government and contractor legal counsel. The Deputy Counsel added that such disclosure could also subject the DOE to legal sanctions, because the terms of at least four of the settlement agreements in question prohibit disclosure of the settlement amount.

In its appeal, IFOE argues that the Deputy Counsel's determination regarding the scope of Exemption 5 is not supported by legal precedent, and that disclosure would serve the public interest because the public has

a right to know how government funds are being spent. IFOE therefore contends that the individual settlement amounts should be released unless such disclosure is proscribed by the terms of the settlement agreement.

II. Analysis

The federal courts have recognized public policy considerations favoring settlement of disputes over litigation, and the inhibiting effect that disclosure of settlement materials can have on the negotiating process. County of Madison v. United States Dep't of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981); Murphy v. Tennessee Valley Authority, 571 F.Supp. 502 (D.D.C. 1983)(Murphy). In Murphy, the court stated that revealing settlement information "would decrease the likelihood that future claims . . . will be resolved by negotiation rather than by litigation, and would therefore defeat the public policy which favors compromise over confrontation." 571 F.Supp. at 506 (citations omitted). For the reasons that follow, we find that the Deputy Counsel properly determined that the withheld settlement amounts are exempt from mandatory disclosure pursuant to Exemption 5.

A. Applicability of Exemption 5

Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The U.S. Supreme Court has held that this exemption incorporates every civil discovery privilege which the government enjoys under statutory and case law. United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); FTC v. Grolier, 103 S. Ct. 2209 (1983) (Grolier). See also Peter T. Torell, 15 DOE ¶ 80,127 (1987) (Torell). Therefore, any material that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. Accordingly, if the settlement amounts fall within a civil discovery privilege, they may be withheld under Exemption 5.

As previously stated, the Deputy Counsel relied upon the attorney work product and settlement negotiations privileges in withholding the settlement amounts. The attorney work product privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980). This privilege is applicable to material that was prepared by an attorney "in contemplation of litigation," id., including information relating to possible settlements of litigation. See, e.g., United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992). The settlement amounts at issue here resolved cases in which DOE contractors were parties and for which contractors would ultimately seek reimbursement for costs related to the case from the DOE pursuant to contractual provisions. In some cases the DOE was also a named party to the litigation. In all cases, the contractual provisions required that to ensure reimbursement of the litigation costs and settlement amounts by the DOE, the contractor seek approval from the DOE of any settlement amounts and accordingly, share litigation and settlement strategies with DOE attorneys. We conclude that the amounts are clearly attorney work product.

The federal courts have also recognized a civil discovery privilege for information relating to settlement negotiations. See, e.g., Olin Corp. v. Insurance Co. of North America, 603 F. Supp. 445, 449 (S.D.N.Y 1985). The OHA has also determined that settlement negotiations materials are exempt from mandatory disclosure pursuant to Exemption 5. Torell, Cities Service Oil & Gas Corp., 17 DOE ¶ 80,104 at 80,508 (1988). In reaching this determination, we recognize that the privilege exists in considerable part to encourage full disclosure between the parties involved in order to promote settlements rather than protracted litigation. Id. We therefore conclude that the Deputy Counsel properly determined that the settlement amounts are exempt from mandatory disclosure.

B. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. In its Appeal, IFOE argues that the withheld information should be released because the public has a considerable interest in knowing how much in federal funds was used to settle litigation. However, in his determination, the Deputy Counsel provided IFOE with the totals of the settlement amounts approved in both FY 1995 and FY 1996. In addition, the settlement amount in one case, Day v. NLO, was released to IFOE. (1) This amount, $20,000,000, accounts for more than 50 percent of the total expenditures for settlements during those two fiscal years. Therefore, the Deputy Counsel's response has substantially satisfied the public interest concerns regarding the expenditure of taxpayer funds.

Furthermore, the release of additional individual settlement amounts would result in foreseeable harm to the interests that are protected by the attorney work product and settlement negotiation privileges. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5). As Justice Brennan stated in Grolier, "It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons . . . [H]e could gain insight into the agency's general strategic and tactical approach to deciding . . . on what terms [lawsuits] may be settled." Grolier, 103 S. Ct. 2209 at 2216 (Brennan, J., concurring). The settlement amounts at issue here were negotiated in recent cases that involved issues that are the subject of frequent litigation involving the DOE (e.g., torts, labor relations and contractual disputes). The release of these amounts could compromise the DOE's efforts at negotiating future settlements in similar cases.

C. Conclusion

For the reasons set forth above, we find that the Deputy Counsel correctly determined that the settlement amounts are exempt from mandatory disclosure pursuant to Exemption 5, and that release of the information would not be in the public interest. IFOE's appeal will therefore be denied.

It Is Therefore Ordered That

(1) The Appeal filed by Information Focus on Energy, Inc. on May 14, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: June 12, 1997

(1)*/ We were informed by the Office of General Counsel (OGC) that this information was provided to IFOE because it has been reported in the news media and is therefore already in the public domain. See memorandum of June 6, 1997 telephone conversation between Jane Taylor, OGC, and Robert Palmer,

Staff Attorney, Office of Hearings and Appeals.

Case No. VFA-0297, 26 DOE ¶ 80,194

June 17, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dennis J. McQuade

Date of Filing: May 20, 1997

Case Number: VFA-0297

On May 20, 1997, Dennis J. McQuade filed an Appeal from a determination issued to him on May 7, 1997, by the Oak Ridge Operations Office of the Department of Energy (DOE/OR). In his Appeal, Mr. McQuade asserts, among other things, that DOE/OR failed to provide him with all documents in its possession responsive to a request he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Parts 1004 and 1008.

I. Background

In his April 2, 1997 request, Mr. McQuade requested from DOE/OR copies of all information placed in his DOE Personnel Security File from April 1996 to the date of his request. Letter from Dennis J. McQuade to Amy Rothrock, DOE/OR. Mr. McQuade also asked that if certain specified documents was not located in his Personnel Security File, he be apprised and the request forwarded to DOE Headquarters. Id. On May 7, 1997, DOE/OR issued a determination with which it enclosed what it states were all documents contained in his Personnel Security File in existence from the date of April 1996 to the date of Mr. McQuade's request. Letter from Amy Rothrock, DOE/OR, to Dennis McQuade (May 7, 1997); Electronic mail from Amy Rothrock, DOE/OR to Steven Goering, DOE Office of Hearings and Appeals (OHA) (May 29, 1997). In addition, because the information specified by Mr. McQuade was not located in this file, DOE/OR informed Mr. McQuade that his request was forwarded to DOE Headquarters for a search for these documents. Finally, DOE/OR explained to Mr. McQuade that because investigations into his background were performed by the Office of Personnel Management, DOE/OR forwarded a copy of his request to the OPM and asked that office to correspond directly with him concerning the request. Letter from Amy Rothrock, DOE/OR, to Dennis McQuade (May 7, 1997) at 1. In his Appeal, Mr. McQuade states that there are a number of documents that he has reason to believe are contained in his Personnel Security File, but which were not released to him by DOE/OR. The appellant requests that these documents be provided to him. Appeal at 1. Mr. McQuade also requests in his Appeal information concerning the documents that he received in response to his request, and questions the accuracy of certain information contained in the documents released to him. Id. at 1-2.

II. Analysis

As an initial matter, it will be helpful to clearly define the issues that are properly within the scope of the present Appeal. The DOE Privacy Act regulations state that "[a]ny individual may appeal the denial of a

request made by him for information about or access to or correction or amendment of records." 10 C.F.R. § 1008.11. The DOE FOIA regulations provide that a requester may file an Appeal of a determination "[w]hen the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . , or when the Freedom of Information Officer has denied a request for waiver of fees . . . ." 10 C.F.R. § 1004.8. In the present case, Mr. McQuade requested copies of the contents of his Personnel Security File. DOE/OR clearly did not deny this request, but instead provided in their entirety what it states were all documents responsive to the request.

We have, however, interpreted the DOE FOIA regulations to allow for an Appeal by a requester based upon a claim that the search for documents responsive to the request was not adequate. Though Mr. McQuade does not make this claim explicitly, it is the only basis upon which we have jurisdiction to consider his Appeal. We will therefore treat Mr. McQuade's submission as an Appeal of the adequacy of DOE/OR's search for responsive documents.

A. Adequacy of DOE/OR's Search

The Privacy Act requires each federal agency to, inter alia, permit an individual to gain access to information about that individual which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). The FOIA generally requires that documents held by the federal government be released to the public upon request. Generally, a FOIA search is a broad, all-encompassing search that would identify any documents also subject to a Privacy Act analysis. Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,775 (1996). Thus, we will analyze this case under FOIA principles. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In the present case, Mr. McQuade requested the contents of his Personnel Security File. Thus, in response to this request, DOE/OR was only required to search in that file. DOE/OR has informed us that it did search Mr. McQuade's file, and that "[a]ll documents in existence from the date of April 1996 to the date of Mr. McQuade's request that resided within his official personnel security file were provided in their entirety." Electronic mail from Amy Rothrock, DOE/OR to Steven Goering, DOE Office of Hearings and Appeals (OHA) (May 29, 1997). We therefore must conclude that DOE/OR's search was adequate in response to Mr. McQuade's request.

Mr. McQuade's assertion that other documents *should be* in his file is not relevant to our determination because such a claim concerns documents that were not in that file (even though Mr. McQuade believes they should have been), and therefore fall outside the scope of his request. If Mr. McQuade believes that there are documents concerning him in the possession of the DOE other than those in his Personnel Security File at DOE/OR, he may file a request for those documents.(1) He may not, however, broaden the scope of his original request in an Appeal to this office. F.A.C.T.S., 26 DOE ¶ 80,132 at 80,578 (1996); Energy Research Found., 22 DOE ¶ 80,114 at 80,529-30 (1992).

Finally, in his Appeal Mr. McQuade requested information concerning the documents that he received in response to his request. With respect to some of these documents, Mr. McQuade wants to know who put the documents into his file and why they were put there. Appeal at 1. Mr. McQuade also questions the accuracy of specific information contained in the documents released to him. Id. at 2. The FOIA and

Privacy Act do not require agencies to answer questions posed by requesters. Mr. McQuade does have the right under the Privacy Act to request "that information about him . . . in a DOE system of records be amended or corrected," 10 C.F.R. § 1008.6, and he may wish to file a request to amend or correct the records he recently received from DOE/OR. However, until DOE/OR has had an opportunity to respond to such a request, we cannot address that issue in an Appeal decision. If Mr. McQuade files a request for amendment or correction, and that request is denied, he certainly may file an Appeal with this office.

III. Conclusion

Based on the information provided to us, we have no doubt that DOE/OR conducted a search reasonably calculated to uncover material responsive to Mr. McQuade's request. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dennis J. McQuade, Case Number VFA- 0297, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 17, 1997

(1)As we note above, DOE/OR forwarded a copy of the request to DOE Headquarters, as requested by Mr. McQuade, and also forwarded the request to the Office of Personnel Management.

Case No. VFA-0298, 26 DOE ¶ 80,196

June 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Los Alamos Study Group

Date of Filing: June 2, 1997

Case Number: VFA-0298

On June 2, 1997, the Los Alamos Study Group (the Appellant) filed an Appeal from a determination issued to it on May 19, 1997, by the Department of Energy's Albuquerque Operations Office (AOO). That determination denied in part a request for information which the Appellant filed on August 15, 1996, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004.

In its August 15, 1996 FOIA Request, the Appellant sought Conceptual Design Plans (CDPs) for twelve different projects, one of which was the Los Alamos Neuron Science Center (LANSC) upgrades. In the May 19, 1997 determination, AOO found that no CDP had ever been executed for the LANSC upgrades. Accordingly, it indicated that there were no responsive records to that item of the Appellant's request.

In its Appeal, the Appellant accepts the statement that no CDP exists for the LANSC upgrades. However, it requests as alternative relief, "all equivalent documentation, including, but not limited to, conceptual plans, designs, reports, and descriptions of Department of Defense-funded activities, either current or planned at LANSC." Such documents, if they exist, are clearly outside the scope of the Appellant's intial FOIA request and the OHA will not consider this request in the context of the present Appeal. Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992) ("The OHA does not permit FOIA appellants to broaden their requests for information in an appeal.") Therefore, the Appellant should file a new request for this information. The present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Los Alamos Study Group on June 2, 1997, Case Number VFA-0298, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 19, 1997

Case No. VFA-0299, 26 DOE ¶ 80,198

June 30, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: International Brotherhood of Electrical Workers

Date of Filing: June 2, 1997

Case Number: VFA-0299

On June 2, 1997, the International Brotherhood of Electrical Workers (IBEW) filed an Appeal from a determination issued to it on April 28, 1997, by the Savannah River Operations Office (SR) of the Department of Energy (DOE). That determination was issued in response to a request for information submitted by IBEW under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, IBEW asserts that SR failed to provide it with responsive documents in its possession regarding a Request for Information it made on July 16, 1996.

I. Background

On July 16, 1996, IBEW filed a request for information in which it sought material regarding union-related activities at SR. SR issued two determinations regarding this request on October 10, 1996, and November 8, 1996, and IBEW appealed SR's final responses to the Office of Hearings and Appeals (OHA) on December 12, 1996. In those determinations, SR partially granted IBEW's request for information and released numerous documents responsive to IBEW's request. On Appeal, IBEW clarified its initial request and OHA remanded the clarified request back to SR for a further search of responsive documents. See I.B.E.W., 26 DOE ¶ 80,153 (1997). SR's clarified request sought the following additional information:

1. An accurate accounting of all moneys, materials, time, lost productivity, etc., associated with WSRC [Westinghouse Savannah River Company] "anti- Union" or union related training for supervisors and informational meetings with the nonexempt employees and how WSRC passed on those expenses to the DOE.
2. Any and all memos, correspondence, flyers, electronic mail, etc., concerning the Union and its activities, generated by DOE or its contractor WSRC in the last ten months including directives, comments, suggestions, training plans or requests for funding to conduct "anti-Union" or union-related training, including documents generated between the DOE and the contractor for Wackenhut Services Incorporated.
3. The documents concerning the account of WSRC's union-related training activities.

Determination Letter at 1.

On April 28, 1997, SR issued a determination which stated that WSRC as well as the SR program offices conducted a search of their files and found no additional documents responsive to IBEW's clarified request. Id.

On June 2, 1997, IBEW filed the present Appeal with OHA. In its Appeal, IBEW challenges the adequacy of the search conducted by SR. Specifically, IBEW argues that SR failed to provide it with information pertaining to the expenditure of government contract funds. See Appeal Letter at 1. In its Appeal, IBEW encloses an article from its May IBEW Journal regarding "the current Administration's position on organizing and federal contractors." Id. IBEW contends that this article demonstrates that its FOIA request is a serious matter and should be handled accordingly. Id. IBEW asks that the OHA direct SR to conduct a new search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at SR to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to IBEW's request might exist. SR has made a concerted effort to locate documents responsive to IBEW's request. Upon receiving IBEW's clarified Request for Information, SR contacted WSRC and various SR program offices to search for additional responsive documents. The Office of General Counsel and the Human Resource Division at WSRC conducted searches of their files and were unable to locate additional documents responsive to IBEW's clarified request. Likewise, searches were conducted at several SR program offices, including the Contracts Management Division, the Office of Safeguards and Security, the Human Resources Office, the Training Office and the Office of the Chief Financial Officer. None of these offices was able to locate additional responsive documents. Given the facts presented to us, we find that SR conducted an adequate search which was reasonably calculated to discover additional documents responsive to IBEW's Request. The fact that the search did not uncover documents alleged to be in the possession of DOE does not mean that the search was inadequate. See Master v. F.B.I., 926 F. Supp. 193, 196 (D.D.C. 1996). In addition, the requester has not provided us with any evidence that additional responsive documents exist. See Lois Blanche Vaughan, 26 DOE ¶ 80,165 (1997). Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by International Brotherhood of Electrical Workers, OHA Case No. VFA-0299, on June 2, 1997, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 30, 1997

Case No. VFA-0300, 26 DOE ¶ 80,199

July 3, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Information Focus on Energy, Inc.

Date of Filing: June 5, 1997

Case Number: VFA-0300

On June 5, 1997, Information Focus on Energy (IFOE) filed an Appeal from a determination issued to it by the Department of Energy's (DOE) Ohio Field Office. In this determination, the Ohio Office denied IFOE's request for a waiver of fees with regard to a request that it filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, IFOE asks that we grant its request for a fee waiver.

The FOIA requires that federal agencies generally release documents to the public upon request. The Act also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(I); see also 10 C.F.R. § 1004.9(a). For purposes of determining the appropriate fees to be charged, the FOIA sets forth four categories of requesters: commercial use requesters, educational and noncommercial scientific institutions, representatives of the news media, and all other requesters.(1) However, the DOE will grant a full or partial waiver of applicable

fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

I. Background

In its FOIA request, IFOE sought access to all Inspector General reports, and all written observations by DOE safety and health officials, concerning the Savannah River, Fernald and Mound facilities for the year 1996. The firm requested that all fees associated with the processing of the request be waived.

In its determination, the Ohio Office classified IFOE as a commercial use requester, based primarily on its resale of documents. A commercial use requester is one who seeks information for a use or purpose that furthers the requester's commercial, trade, or profit interests. See 10 C.F.R. § 1004.2(c). Accordingly, the Ohio Office determined that disclosure of the information sought in the request would primarily be in the commercial interest of IFOE, and its request for a fee waiver was denied.

In its Appeal, IFOE contests the Ohio Office's determination. As an initial matter, the firm claims that as the publisher of a monthly Internet newsletter, it should have been classified as a representative of the news media. Furthermore, IFOE contends that its request for a waiver should have been granted because release of the information would contribute significantly to the public's understanding of safety and health conditions at the named DOE facilities, and because the commercial value of the information is minimal at

best.(2)

II. Analysis

A. Classification of the Requester

In order to determine whether the Ohio Field Office properly classified IFOE for purposes of the FOIA, we must first examine the nature of this requester's business. IFOE is an organization which collects information pertaining to nuclear safety issues from federal agencies and disseminates that information to the public through its monthly newsletter and through sales from a catalogue of documents set forth at IFOE's website (http://www.ifoe.com). The newsletter is made available on a subscription basis and is distributed by electronic mail. Samples of the newsletter are also available at IFOE's website. The catalogue of documents consists of documents obtained from government agencies and reproduced in their entirety in electronic form, edited versions of other documents, collections of documents pertaining to a single issue compiled by IFOE and listed in the catalogue as a single item, and IFOE assessments of some of the documents.

In National Security Archive v. U.S. Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989) (National Security Archive), the U.S. Circuit Court for the District of Columbia set forth the criteria to be used in determining whether a FOIA requester should be considered a representative of the news media. In that case, the court determined that the Archive was a news media representative based largely on its publication of compilations of documents concerning national specific national security issues. In reaching this determination, the court indicated that the term "representative of the news media" should be interpreted broadly. 880 F.2d at 1386. Specifically, the court stated that a news media representative "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." Id. at 1387. See also Glen Milner, 21 DOE ¶ 80,116 (1991).

We believe that IFOE satisfies these criteria and is therefore a news media representative for purposes of the FOIA. The requester gathers information of potential interest to its customers through FOIA requests, attendance at public meetings and agency announcements, uses its editorial skills to publish that information in the form of a newsletter, and distributes the newsletter to its subscribers by way of electronic mail. Documents obtained through the FOIA are first examined to determine whether they contain information that is deemed worthy of inclusion in the newsletter. See memorandum of July 1, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Lewis G. Hulman, Professional Engineer, IFOE. In this regard, IFOE's actions are analogous to those taken by any other news media representative. Then a determination is made as to whether the document is of sufficient interest to IFOE's customers to be included in some form in the company's catalogue. Id.

Furthermore, we do not believe that the sale of documents from IFOE's catalogue alters the requester's status as a representative of the news media. As previously stated, many of the items listed in the catalogue are compilations of documents relating to a single subject, abridged versions of documents, and IFOE assessments of certain documents. We find publication activities of this type to be analogous to those discussed in National Security Archive. Although IFOE does provide some documents to its customers in unaltered form, the requester has informed us that it charges 15 cents per page for these documents. See memorandum of July 1, 1997 conversation between Mr. Palmer and Mr. Kulman. This fee appears to be designed only to recoup the costs incurred by IFOE in obtaining and processing the documents.(3) We therefore conclude that, despite the provision of these documents for a fee, IFOE remains a representative of the news media.

B. Fee Waiver

As we previously stated, the DOE will grant a full or partial waiver of applicable fees if disclosure of the

information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). The burden of satisfying this two-prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam). The DOE has implemented the statutory standard for fee waivers in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors that an agency must consider to determine whether the requester has met the first statutory fee waiver condition, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) the subject of the request; whether the subject of the requested records concerns "the operations or activities of the government";

(B) the informative value of the information to be disclosed; whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) the contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) the significance of the contribution to public understanding; whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). Finally, in addition to satisfying these four factors, the DOE must also find that disclosure of the requested information would not be primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii). In making this determination, the DOE must, in most cases, consider whether the requester has a commercial interest that would be furthered by the requested disclosure, and, if so, whether that commercial interest outweighs the public interest in disclosure.

In its determination, the Ohio Office found that IFOE's commercial interest outweighed the public interest in disclosure, and that therefore the firm's fee waiver request should be denied. However, we have previously determined that in cases involving news media requesters, the DOE may not consider the commercial interests of the requester in determining whether a fee waiver should be granted. David DeKok, 23 DOE ¶ 80,115 (1993). In this regard, the DOE's FOIA regulations state that "a request for records supporting the news dissemination function ... will not be considered to be a request for commercial use." 10 C.F.R. § 1004.9(b)(3). In addition, the D.C. Circuit Court held in National Security Archive that representatives of the news media have no commercial interest in information requested under the FOIA in support of their news gathering functions, even though they expect to turn a profit on their publication activities. National Security Archive, 880 F.2d at 1387-88. Because the Ohio Office's denial was based solely on its finding that IFOE's commercial interests outweighed the public interest in disclosure, that determination cannot stand.

Although we have found that the Ohio Office's fee waiver determination was incorrect, we do not have sufficient knowledge of the contents of the documents in question to conduct a *de novo* determination on the merits of IFOE's fee waiver request. Because the documents are in the possession of the Ohio Office, we will remand this matter so that Office may apply the fee waiver criteria set forth at 10 C.F.R. § 1004.9(a)(8)(i)(A)-(D) to IFOE's request. If, upon remand, the Ohio Office determines that IFOE is not entitled to a complete waiver of fees, the fees assessed should be determined with reference to IFOE's status as a member of the news media.

(1) The Appeal filed by the Information Focus On Energy on June 5, 1997, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Officer of the Ohio Field Office, who shall promptly issue a new fee waiver determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 3, 1997

(1)Educational and non-commercial scientific institutions and news media requesters are charged only for the actual costs of reproducing responsive documents, excluding charges for the first 100 pages. Commercial use requesters are charged an amount equal to the full direct costs of searching for, reviewing and duplicating the documents sought. All other requesters are charged an amount equal to the full reasonable direct cost of searching for and reproducing records, except that the first two hours of search time and the first 100 pages of document reproduction are furnished without charge. 10 C.F.R. § 1004.9(b).

(2)IFOE also argues that the DOE employee who made the determination regarding the firm's fee waiver request is not a Freedom of Information Officer and is therefore not authorized to make such determinations. We reject this contention. See April 1, 1997 memorandum from GayLa Sessoms, Director, FOIA/Privacy Act Division, Office of the Executive Secretariat, to J. Phillip Hamric, Manager, Ohio Field Office (designating the particular DOE employee as the FOIA Officer for the Ohio Field Office).

(3)Compare this fee with IFOE's per-year newsletter subscription rates of $50 (when provided via electronic mail) and $100 (via the U.S. Postal Service).

Case No. VFA-0301, 26 DOE ¶ 80,204

July 21, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nevada Indian Environmental Coalition

Date of Filing: June 6, 1997

Case Number: VFA-0301

On June 6, 1997, the Nevada Indian Environmental Coalition (NIEC) filed an Appeal from an April 18, 1997 determination by the Director of the Freedom of Information and Privacy Act Division of the Office of the Executive Secretariat (Director) of the Department of Energy (DOE). In that determination, the Director partially granted a request for information the Appellant made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, the NIEC asks that we order the Director to conduct a new search for responsive material.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, the NIEC sought copies of documents pertaining to the transportation of spent nuclear fuel from foreign sources across the northern part of Nevada. In her determination letter, the Director enclosed copies of several documents, but also stated that the DOE did not have responsive documents for the following three NIEC document requests:

1. List of all funding for any purpose relating to these particular shipments [of spent nuclear fuel] provided by DOE to government entities, including Tribes, states and local governments, showing the amounts given to each entity.
2. Resumes of all DOE personnel involved in working with the Tribes in Nevada concerning these shipments [of spent nuclear fuel].
3. Copy of the Draft Environmental Impact Statement (EIS).

In its appeal, NIEC argues that the Director should have documents responsive to the above-mentioned requests and the Director should release them.

With regard to the request for a list of all funding, the NIEC states that it has reason to believe that the Shoshone-Bannock Tribe received funding concerning shipments of spent nuclear fuel. Thus, the NIEC believes that documents must exist concerning this transaction. Furthermore, the NIEC states that the Director acknowledged in her determination letter that the Western Governors Association received funds

and that the DOE failed to provide copies to the NIEC showing the amount of these funds. Also, the NIEC contends that the DOE did not, in good faith, search for the requested information and that the DOE improperly withheld responsive information.

The NIEC also argues that the DOE should provide it with the "credentials of the experts" working with Tribes concerning the shipment of radioactive materials. The NIEC contends that if the DOE conducted a good faith search for resumes of DOE personnel, the DOE would have found responsive documents. Finally, the NIEC states that on April 21, 1995, the DOE published a draft EIS that it should have provided to many of the member NIEC Tribes for comments pursuant to federal laws and the Code of Federal Regulations. The NIEC states that none of its member Tribes received a draft of the EIS or a request for comments. Also, the NIEC states that it is illogical to believe that the DOE destroyed all of its copies of the draft EIS, since information contained in a draft EIS would not appear in the final version. Thus, the NIEC contends that the DOE must have this important information on file and that the DOE would have found a draft EIS if it had conducted a good faith search.

II. Analysis

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted a knowledgeable representative of the DOE Office of Environmental Management to ascertain the validity of the NIEC's contention that there exist documents concerning funding related to spent nuclear fuel provided by the DOE to government entities, including Tribes, states and local governments.(1) The DOE representative informed us that the DOE possesses a document responsive to the NIEC request.(2) This document is a record of the $250,000 grant that the DOE made to the Western Governors Association. Accordingly, we will remand this matter to the Director to release the responsive document or provide a detailed explanation for withholding any such information.

In the NIEC's Appeal and in discussions we had with the NIEC regarding its Appeal, the NIEC amended its request for resumes.(3) An NIEC representative stated that the NIEC is not interested only in resumes of personnel involved in working with the Tribes in Nevada concerning spent fuel shipments. Instead, the NIEC stated that it seeks employment background information for these individuals regardless of the source. The NIEC states this is the type of employment background information that can be found in SF-171 forms and that it does not wish to have any personal information about the employee, such as a social security number or any addresses. While the Director's response to the NIEC's request for resumes was not erroneous and we are not obligated to allow the NIEC to modify its request on appeal, since we are remanding the matter, as discussed above, we will request that the Director review the NIEC's amended request for information and send to the NIEC any documents responsive to the request for employment background information she may find or state the reasons why any responsive documents are exempt from

mandatory disclosure.

With respect to the draft EIS requested by the NIEC, we have confirmed that the DOE's Office of NEPA Policy and Assistance has a copy of the draft EIS.(4) Thus, we will direct the Director to release the draft EIS or provide a detailed explanation for withholding any portion of the document.(5)

It Is Therefore Ordered That:

(1) The Appeal filed by the Nevada Indian Environmental Coalition on June 6, 1997, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Director of the Freedom of Information Act and Privacy Act Division of the Office of the Executive Secretariat of the Department of Energy, who shall release a copy of the record of the $250,000 grant that the DOE made to the Western Governors Association or provide a detailed explanation for withholding any such information. In addition, the Director should consider the Nevada Indian Environmental Coalition's amended request for employment background information of the type that can be found in SF-171 forms and send to the NIEC any responsive information she may find or state the reasons why any responsive documents are exempt from mandatory disclosure. Finally, the Director shall release a copy of the "Draft Environmental Impact Statement on a Proposed Nuclear Weapons Nonproliferation Policy Concerning Foreign Research Reactor Spent Nuclear Fuel" (DOE/EIS-0218-D) or provide a detailed explanation for withholding any such information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 21, 1997

(1)1/ See records of telephone conversations between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and Brandt Petrasek, DOE Office of Environmental Management.

(2)The DOE representative also confirmed that in the past the Shoshone-Bannock Tribe has received funding for transportation activities. This funding was for general emergency response activities related to highway shipments of waste and materials coming out of the Idaho National Engineering and Environmental Laboratory (INEEL), but not for any spent fuel shipments.

(3)See Record of July 10, 1997 Telephone Conversation between Leonard M. Tao, Office of Hearings and Appeals Staff Attorney, and Anita Collins, NIEC.

(4)See Record of July 16, 1997 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Tomisha Addison, Office of NEPA Policy and Assistance.

(5)The issue of whether or not the DOE should have provided a copy of the draft EIS to the NIEC pursuant to federal law or the Code of Federal Regulations is not a matter relevant to the FOIA and thus is not within the proper scope of this appeal.

Case No. VFA-0302, 26 DOE ¶ 80,201

July 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Pedro Aponte Vazquez

Date of Filing: June 16, 1997

Case Number: VFA-0302

On June 16, 1997, Pedro Aponte Vazquez (Aponte) filed an Appeal from a determination issued to him in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004 and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The determination was issued on May 15, 1997 by DOE's Chicago Operations Office (DOE/CH). This Appeal, if granted, would require that DOE/CH perform another search for responsive documents.

I. Background

On August 30, 1995, Aponte filed a request with DOE's Office of the Secretary for "copies of documents regarding the medical, scientific, and experimental work of Dr. Cornelius Packard Rhoads for the U. S. Atomic Energy Commission (1945-1959)." Letter from Aponte to Hazel O'Leary, DOE (August 30, 1995). DOE's FOIA/Privacy Act Group (DOE/HQ) acknowledged receipt of the request on September 28, 1995, and searched the files of the History Division of the Office of the Executive Secretariat and the Coordination and Information Center (CIC) in Nevada. During the search, DOE/HQ learned that Dr. Rhoads(1) had been involved with cancer research at Memorial Hospital(2) in New York. DOE/HQ then transferred the request to DOE/CH to perform a further search because DOE/CH was responsible for the administration of contracts with MSK. On November 4, 1996, DOE/HQ issued a final determination, concluding that no responsive records were found at headquarters. Along with the letter, DOE/HQ enclosed a list of documents available

at CIC. On November 14, 1996, DOE/CH issued a final determination stating that no records exist regarding Memorial Hospital in New York. Aponte responded to DOE/CH in writing, referring to mention of total body irradiation (TBI) (3) experiments at Memorial Hospital in the *Final Report of the Advisory Committee on Human Radiation Experiments* (October 1995) [hereinafter Final Report]. He also expanded his request to include "documents of any kind pertaining directly or indirectly to such scientific work, from 1945 to 1959, even if no evidence exists that Dr. Rhoads was involved in them in any fashion." Letter from Aponte to Group Manager, Acquisition and Assistance, DOE/CH (November 20, 1996).

On May 2, 1997, DOE/CH acknowledged receipt of Aponte's November 20, 1996 letter, and apologized for the delay in receiving his request. DOE/CH conducted a search of MSK contracts in its office, but could not find any documents relating to TBI. Letter from DOE/CH to Aponte (May 15, 1997). On June 16, 1997, Aponte filed this Appeal of DOE/CH's final determination.

II. Analysis

In responding to a request for information under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). Accord Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Master v. F.B.I., 926 F.Supp. 193, 196 (D.D.C. 1996) (Master). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (Miller); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,132 (1988).

In reviewing the present Appeal, we first contacted DOE/CH to ascertain the scope of the search. The Contracts Division of DOE/CH promptly sent us copies of supporting documentation, including correspondence with the requester and internal memoranda relating to the searches performed. After a review of the file and conversations with employees at DOE/CH, it appears that the search focused on two areas: (1) current MSK research grants were reviewed for any responsive material, and (2) historical records were searched for responsive material relating to Memorial Hospital.

A. Search of Current MSK Research Grants

Two employees of DOE/CH were assigned to search the three active and one inactive MSK research grants currently administered by their office. They examined nine files of a 1986 MSK contract and found no reference to TBI, but admitted that they did not understand the technical jargon and had only perused the first few pages of each file. In addition, they did not know the meaning of TBI and were unable to locate the Final Report reference that Aponte submitted as evidence of TBI research at Memorial Hospital. Memorandum from David Ramirez (undated). We easily found the Final Report reference on the Office of Human Radiation Experiments (OHRE) web site, along with an entire chapter entitled "What is TBI?" Final Report, Chapter 8.(4) The employees readily admitted their lack of familiarity with the subject area, and referred the request to two scientists experienced with MSK research grants.

Both scientists in the Office of Energy Research (DOE/ER) stated that the current MSK research grants did not involve TBI. One wrote that the current grants were "non-existent during the period 1945 to 1959." Memorandum from Dr. Prem Srivastava, DOE/ER to David Ramirez (May 13, 1997). The oldest of the active grants could only be traced as far back as a parent grant initiated in 1977, many years after Memorial Hospital ceased to exist. Id. In addition, the Final Report explains that TBI research substantially decreased after the mid-1970s. Final Report, Chapter 8. Thus, we find that the scientists' statements are credible and their search was adequate.

B. Search for Historical Records of Memorial Hospital

Various groups in DOE/CH searched for records of Memorial Hospital, but found none. An employee of the Acquisition and Assistance Group was able to find a reference to two boxes containing files for Memorial Hospital, but these boxes were "closed out" in 1983 and destroyed in 1989. We contacted this group again to discuss the search and determine if any records from 1945 to 1959 might still exist. DOE/CH informed us that when files are no longer used on a regular basis, they are "closed out," or retired, and moved to an interim facility for destruction at the end of the retention period (six years and three months). An employee who uses the records storage facility told us that, although some records older than six years and three months do exist, the oldest records she has seen in the storage room are from the 1970s. Thus, it is highly likely that records of TBI research at Memorial Hospital from 1945 to 1959 were destroyed many years ago. DOE/CH believes, and we agree, that a search of the entire facility would not only be unreasonably burdensome, but would also be unlikely to locate any responsive material. See Lois Blanche Vaughan, 26 DOE ¶ 80,165 (1997) (unreasonable burden to require agency to search thousands of

files for records that are not likely to exist); Nation Magazine v. U.S., 71 F.3d 885, 892 (D.C. Cir. 1995) (concurring with the district court's determination that a request to search 23 years of unindexed files would impose an unreasonable burden on an agency).

Therefore, we find that DOE/CH performed a search reasonably calculated to uncover material relating to TBI research at Memorial Hospital from 1945 to 1959. The office reviewed current grants

with MSK, the successor to Memorial Hospital, and also looked for documents referring to Memorial Hospital during those years. Because DOE/CH has a policy of destroying unused documents after six years and three months, we find no reason to expect DOE/CH to retain Memorial Hospital records for over 40 years. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Pedro Aponte Vazquez on June 16, 1997, OHA Case Number VFA-0302, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a) (4) (B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 11, 1997

(1)Dr. Rhoads was director of Memorial Hospital from 1940 to 1943, and director of Sloan- Kettering Institute from 1945 to 1959. He was also a consultant to the Atomic Energy Commission. He died in 1959.

(2)Memorial Hospital and Sloan-Kettering Institute merged in 1960 to become Memorial Sloan- Kettering Cancer Center (MSK).

(3)Medically administered total-body irradiation involves the use of external radiation sources that produce penetrating rays of energy to deliver a relatively uniform amount of radiation to the entire body. *Final Report*, Chapter 8. TBI was used as a medical treatment prior to becoming the focus of experimentation from 1944 to 1974, and is still used today. By the late 1940s, TBI was accepted as a treatment for certain cancers. In the 1950s, chemotherapy was risky and only marginally effective against some cancers, so interest in TBI continued. However, this interest waned by the late 1960s as chemotherapy became more effective.

(4)This web site is located at http://www.ohre.doe.gov/. It provides Internet access to DOE's 3.2 million cubic feet of records related to Cold War radiation research on humans.

Case No. VFA-0303, 26 DOE ¶ 80,200

July 8, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mary J. Griffin Barnett

Date of Filing: June 9, 1997

Case Number: VFA-0303

On June 9, 1997, Mary J. Griffin Barnett filed an Appeal from a determination issued to her on May 22, 1997 by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE). That determination concerned a request for information submitted by Ms. Barnett pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OR would be required to conduct a further search for responsive material.

I. Background

In a December 18, 1996 letter, Ms. Barnett requested from DOE Headquarters any information pertaining her mother, Lillie Cora Griffin (Mrs. George B. Griffin). In her request, Ms. Barnett stated that sometime during 1948, 1949 or 1950, her mother was ill and a patient at a Harlan, Kentucky hospital.(1) In support of her belief that a DOE facility at Oak Ridge has records responsive to her request, Ms. Barnett related the following account of her mother's illness. She and her father were informed by her mother's physician that he was making arrangements to have her treated with a new drug at a government facility at Oak Ridge, Tennessee. Ms. Barnett's mother was subsequently transported to the Oak Ridge facility and was admitted for treatment. However, when Ms. Barnett and her father tried to escort her mother into the Oak Ridge facility, they were stopped and told they could not enter since Oak Ridge was a secret government facility. Ms. Barnett further stated that, after her mother's treatment at Oak Ridge, her mother could not remember much about her stay there other than she was asked to drink an "atomic cocktail."

DOE Headquarters could not find any records regarding Ms. Barnett's mother. However, since Ms. Barnett indicated in her request that her mother had been treated at Oak Ridge, DOE Headquarters suggested that Ms. Barnett contact OR and make a request for records pertaining to her mother.

On April 14, 1997, Ms. Barnett made a request for information regarding her mother to OR. The request contained Ms. Barnett's account of her mother's visit to the hospital at Oak Ridge. In a determination letter dated May 22, 1997, OR informed Ms. Barnett that it could find no information regarding Ms. Barnett's mother relating to her treatment as a patient at Oak Ridge.

OHA received Ms. Barnett's appeal of OR's determination on June 9, 1997. In her appeal, Ms. Barnett did not specifically state the grounds for her appeal but apparently challenges the adequacy of the search that was made for responsive documents.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted OR to ascertain the extent of the search that had been performed for responsive documents. OR informed us that the Oak Ridge Institute for Nuclear Studies (ORINS) operated a hospital that treated patients from 1950 through the mid-1980s. All of the patient records of this hospital are now maintained by Oak Ridge Associated Universities. All patient records for the ORINS hospital are indexed by patient name in a computer database. This database was searched using both of the names that Ms. Barnett provided for her mother. No records were found. (2) See Memorandum of telephone conversation between Linda Chapman, OR, and Richard Cronin, OHA Staff Attorney (June 18, 1997). Given the above facts, we believe OR conducted an adequate search for records. The only facility which would maintain relevant records was searched using a computer database by each name Ms. Barnett provided. We believe that this search was reasonably calculated to uncover responsive documents. Consequently, we must deny Ms. Barnett's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on June 9, 1997 by Mary J. Griffin Barnett, Case No. VFA-0303, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 8, 1997

(1)Ms. Barnett attempted to obtain records from the Harlan, Kentucky hospital where her mother was initially treated but was informed such records would have been destroyed since the hospital did not retain records over 15 years old.

(2)We were also informed that during World War II, Oak Ridge maintained a hospital which treated military and civilian personnel. After World War II, this facility and its records were turned over to the city of Oak Ridge and the facility subsequently became Methodist Medical Center of Oak Ridge. However, all of its patient records from the World War II period were destroyed in a fire. See Memorandum of telephone conversation between Linda Chapman, OR, and Richard Cronin, OHA Staff Attorney (June 18, 1997).

Case No. VFA-0304, 26 DOE ¶ 80,202

July 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tri-State Drilling, Inc.

Date of Filing: June 23, 1997

Case Number: VFA-0304

On June 23, 1997, Tri-State Drilling, Inc. (Appellant) filed an Appeal from a final determination issued on June 17, 1997 by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA withheld several documents in response to a June 4, 1997 Request for Information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the BPA to release the withheld information.

I. BACKGROUND

This Freedom of Information Act Appeal arises from a procurement action conducted by the BPA. The procurement in question was intended to obtain "Concrete Footings for Tower 110/4." Apparently the contract was awarded to the Appellant. On June 4, 1997, however, the Appellant submitted a FOIA request to BPA seeking copies of the unsuccessful bids for this contract. On June 17, 1997, BPA issued a determination in which it withheld each of the documents requested by the Appellant in their entirety under FOIA Exemption 4. BPA contended that release of the unsuccessful bids would cause substantial competitive harm to the firms that submitted the unsuccessful bids and would impair BPA's ability to obtain similar information in the future.

II. ANALYSIS

Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be exempt from mandatory disclosure under Exemption 4, a document supplied to the DOE on a non-voluntary basis must meet the following criteria: The document must contain either (A) "trade secrets" or (B) information that is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). Commercial or financial information is "confidential" for purposes of the National Parks test if disclosure of the information is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770. However, information provided to the government on a voluntary basis is subject to a broader standard of

confidentiality under Exemption 4. That type of information is confidential if it is the kind of information that the provider would not customarily make available to the public. Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). Information required to be submitted in order to obtain a DOE contract is considered to be submitted on a non-voluntarily basis for Exemption 4 purposes. Milton L. Loeb, 23 DOE ¶ 80,124 (1993). Therefore, its withholding must be analyzed under the National Parks test.

BPA has failed to explain why it determined that release of the withheld information could reasonably be expected to cause harm to the competitive position of the unsuccessful bidders. Accordingly, we are unable to determine whether this determination was appropriate. We are similarly unable to determine BPA's rationale for concluding that release of the unsuccessful bids would impair the government's ability to obtain similar information in the future.

A determination letter must be sufficiently informative to allow the requester to ascertain whether the claimed exemptions under which the documents were withheld reasonably apply to the documents, and to formulate a meaningful appeal. See, e.g, James L. Schwab, 22 DOE ¶ 80,164 (1992); Harold Fine, 17 DOE ¶ 80,136 at 80,588 (1988); Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984). The determination letter issued to the Appellant on June 17, 1997 by the BPA meets neither of these two requirements.

Accordingly, we are remanding this matter to the BPA. On remand, BPA should either (1) release the requested information to the Appellant or (2) provide a detailed explanation of why it found that the release of the unsuccessful bids would cause substantial competitive harm to their submitter or impair the government's ability to obtain future bids.

We note also that the unsuccessful bids were apparently withheld in their entirety. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, segregation and release of non-exempt material are not necessary when it is inextricably intertwined with the exempt material, such that release of the non-exempt material would compromise the confidentiality of the withheld material. Lead Industries Association v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

It would be unusual if release of all of the information contained in the unsuccessful bids would either cause substantial competitive harm or impair the ability of the Government to obtain future bids for goods and services. However, the determination letter does not indicate that any attempt to segregate and release non-exempt information. Accordingly, on remand, BPA must conduct an additional review of any information it seeks to withhold from the Appellant in order to determine whether it contains information that can be segregated and released to the public.

III. CONCLUSION

For the reasons set forth above, we are granting this Appeal in part, and remanding it to the Bonneville Power Administration.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Tri-State Drilling, Inc., on June 23, 1997, Case Number VFA-0304, is hereby granted in part as specified in Paragraph (2) below, and is denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall promptly issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial

review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 18, 1997

Case No. VFA-0306, 26 DOE ¶ 80,210

August 14, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David R. Berg

Date of Filing: July 16, 1997

Case Number: VFA-0306

On July 16, 1997, David R. Berg, through his attorney, filed an Appeal from a determination issued to him on May 28, 1997, by the Office of Human Resources (HR) of the Department of Energy (DOE). The determination responded to a request for information filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

The Privacy Act requires each federal agency to, *inter alia*, permit an individual to gain access to information about that individual which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). Also relevant to the present Appeal is the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 26, 1997, Mr. Berg filed a request under the provisions of the Privacy Act and the FOIA in which he sought information related to a conversation between himself and another individual. Specifically, Mr. Berg identified four documents written by employees of the Waste Policy Institute, a DOE contractor, and the DOE.

HR issued a determination on May 28, 1997, in which it stated that it located a number of documents responsive to Mr. Berg's request. However, HR withheld these documents in their entirety, citing subsection (d)(5) of the Privacy Act which exempts from disclosure "information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5); 10 C.F.R. §1008.9(a)(2). HR also withheld these documents under FOIA Exemptions 5, 6 and 7 and stated that it is not in the public interest to provide the requested documents. See Determination Letter at 1.

On July 16, 1997, Mr. Berg filed the present Appeal with OHA contending: (1) that HR did not adequately explain the basis upon which the responsive documents were withheld under subsection (d)(5) of the Privacy Act and (2) that HR improperly relied upon FOIA Exemptions 5, 6, and 7. Mr. Berg asks that the OHA direct HR to release the responsive documents.

II. Analysis

The Privacy Act exempts from release "any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5). The exemption "is not limited to an attorney's work product, but extends to any records compiled by counsel or other persons in reasonable anticipation of a civil action or proceeding." Hernadez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982) (citing Smietra v. Department of Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978)). Information that is exempt from disclosure under the Privacy Act must be released to a requester unless it is also exempt from disclosure under the FOIA. 5 U.S.C. § 552a(t)(2). Thus, it is the general practice of the DOE to process a request by an individual for information about that individual under both the Privacy Act and the FOIA. Even if a requester specifically requests records under the Privacy Act, it well serves administrative efficiency and the requester to process the request under the FOIA as well, rather than requiring the requester to file a separate FOIA request for the same record.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search, and if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(I). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of the searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. Burlin McKinney, 25 DOE ¶ 80,205 at 80,797 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. Id.

In the present case, HR withheld responsive documents under Exemptions 5, 6, and 7 of the FOIA as well as subsection (d)(5) of the Privacy Act. In its determination letter, HR provided Mr. Berg with generic explanations regarding the exemptions applied to the responsive documents. We find these explanations to be insufficiently informative and short of what is legally required.

It is well established that a FOIA determination must contain a reasonably specific justification for withholding material pursuant to a FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal. Instead, HR has merely restated the languages of Exemptions 5, 6, and 7 as well as subsection (d)(5) of the Privacy Act, without adequately explaining the reasons why HR concluded that the responsive documents are exempt from disclosure under the provisions of the FOIA and the Privacy Act. Furthermore, we note that there does not appear to have been any attempt to segregate and release possibly non-exempt information from exempt information in any of the withheld documents.

Accordingly, we shall remand this matter to HR to either release to Mr. Berg all of the documents responsive to his request or to issue a new determination adequately supporting the withholding of the documents. If a new determination is issued, HR should include a statement of the reason for denial, a specific explanation of how the exemptions apply to the documents withheld and a statement why

discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). HR should further review each document for the possible segregation of non-exempt material. See 10 C.F.R. § 1004.7(b)(3).

It Is Therefore Ordered That:

(1) The Appeal filed by David R. Berg, OHA Case No. VFA-0306, on July 16, 1997, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Office of Human Resources and Administration of the Department of Energy which shall either release the responsive documents withheld in its May 28, 1997 Determination or issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 15, 1997

Case No. VFA-0307, 26 DOE ¶ 80,205

July 29, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Cincinnati Enquirer

Date of Filing: July 1, 1997

Case Number: VFA-0307

On July 1, 1997, The Cincinnati Enquirer (Appellant) filed an Appeal from a determination issued to it on June 13, 1997, by the Department of Energy's Ohio Field Office (DOE/OFO). That determination denied in part a request for information submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require DOE/OFO to release certain requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On May 14, 1997, the Appellant filed a request under the FOIA in which it sought, inter alia, copies of sole-source contracts and related procurement documents concerning the Fernald Environmental Management Project (FEMP).(1) FEMP is a DOE site currently operated under a contract between the DOE and Fluor Daniel Fernald (FDF). DOE/OFO issued a determination on June 13, 1997, in which it released some documents to the Appellant but stated that its search did not extend to the files of FDF since "[u]nder the terms of the contract between DOE and FDF, all procurement records are owned by the contractor. Until DOE acquires possession of such records, they are not agency records and, therefore, are not accessible under the FOIA." Letter from Robert D. Folker, Acting Manager, DOE/OFO, to Michael P. Gallagher, Journalist, The Cincinnati Enquirer (June 13, 1997).

In its Appeal, the Appellant argues that FDF should be considered an "agency" for FOIA purposes or, alternatively, the requested documents should be considered "agency records." It therefore asserts that DOE/OFO should be required to conduct a search of FDF and release any responsive documents. See Letter from Michael P. Gallagher to Director, Office of Hearings and Appeals (July 1, 1997) (Appeal Letter).

II. Analysis

Our threshold inquiry in this case is whether procurement records between a DOE contractor and sub-contractor which were generated by and in the possession of that DOE contractor are subject to the FOIA. First, we must determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Second, records that do not meet these criteria may nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and are not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as FDF, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at ¶ 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, FDF is the prime contractor responsible for maintaining and operating FEMP. The Appellant alleges that because FDF (i) has an organizational structure similar to that of governmental agencies subject to the FOIA, (ii) is subject to close governmental supervision and control, including federal audit and reporting requirements, and (iii) has the power to make its own procurement decisions, it should therefore be considered an "agency" for FOIA purposes. The Appellant relies on Dong v. Smithsonian Institution, 878 F. Supp. 244 (D.C. Cir. 1995) (Dong), for the proposition that FDF is a government agency. In that case, the D.C. Circuit found that because of the high degree of governmental control of the Smithsonian Institution, the Smithsonian should be considered an "agency" subject to the FOIA.

For several reasons, we do not find the Appellant's argument persuasive. First, FDF is in no way similar to the Smithsonian Institution, the entity involved in the case on which Appellant so heavily relies. The Smithsonian was chartered by an Act of Congress, members of its Board of Directors are federal officials or selected by governmental officials, and it has extensive financial ties to the federal government. Dong, 878 F. Supp. at 248-249. While there are extensive financial ties between FDF and DOE, the other facts are not true for FDF. Further, this Office has frequently held that management and operating contractors are not "agencies" for FOIA purposes. See, e.g., Diane C. Larson, 26 DOE ¶ 80,112 (1996) (Westinghouse Hanford Company); William Kuntz III, 25 DOE ¶ 80,157 (1995) (Lockheed Martin Corporation); Cowles Publishing Co., 24 DOE ¶ 80,102 (1994) (Battelle Memorial Institute). The Appellant has shown neither that these cases should be overruled nor that the present case is significantly different from them. Like

those other cases, the DOE obtained FDF's services and exercises general control over the contract work, but it does not supervise FDF's day-to-day operations. Therefore, FDF does not meet the test set forth in the Orleans and Forsham decisions and we therefore conclude that FDF is not an "agency" subject to the FOIA.

Although FDF is not an agency for the purposes of the FOIA, its records which are responsive to the Appellant's request could become "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, the documents in question had not been obtained by the DOE and were not in the agency's possession at the time of the Appellant's request.(2)

However, the Appellant relies on Burka v. Department of Health & Human Serv., 87 F.3d 508 (D.C. Cir. 1996) (Burka) and Chicago Tribune Co. v. Department of Health & Human Serv., 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (Chicago Tribune) for the proposition that the requested records are within DOE's control. In Burka, four factors were used to determine whether a record in a private contractor's possession was an "agency record" because sufficient agency control was present: (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; (4) the degree to which the document was integrated into the agency's record system or files. Burka, 87 F.3d at 515. In Burka and Chicago Tribune, it is clear that the agency controlled the requested information in a myriad of ways that are not present in this case. In Burka, the agency ordered creation of the materials, planned to take physical possession at the conclusion of the project, intended to disclose the information and read and relied on the requested information to write articles and develop agency policy. In Chicago Tribune, the government ordered the contractor to produce analyses from the requested information, owned the underlying data comprising the requested information, instituted a panel to resolve ambiguities in the requested information and published articles based on the requested information. None of these control-indicating facts has been shown to be present in the case at issue. As explained infra, the procurement records relevant to this case were explicitly excluded from the DOE's ownership and ability to dispose of such records and have remained exclusively in the contractor's control. Accordingly, the requested procurement records in this case do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if a contractor-acquired or contractor-generated record fails to qualify as an "agency record," it may still be subject to voluntary release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and FDF to determine the status of the withheld records. That contract states:

Except as provided in paragraph (b) below, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government . . . .

Contract DE-AC24-92OR21972, Modification No. M053, Section H, Clause H.20. Paragraph (b) excludes from this provision "all records related to any procurement action by the contractor." Thus, because procurement records are not among the records which are property of the Government under

the DOE's contract with FDF, these records are not subject to release under the DOE regulations.(3) Id. at Clause H.20(b)(7).

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA, nor subject to release under DOE regulations. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Cincinnati Enquirer on July 1, 1997, Case Number VFA-0307, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 29, 1997

(1)1/ A sole-source contract is one that is entered into without first taking bids from competitors.

(2)2/ OFO has informed us that some contracts between FDF and its subcontractors over a certain dollar amount are approved by the DOE. However, all copies of such contracts are then immediately returned to the contractor. Thus, while some responsive documents may have once been in the DOE's possession, any such documents had been returned by the time of the Appellant's request. See Record of Telephone Conversation between Dawn Goldstein, Staff Attorney, Office of Hearings and Appeals, and Marian Schomaker, FOIA Officer, DOE/OFO (July 8, 1997).

(3)3/ The Appellant notes that 10 C.F.R. § 1004.3(e)(3) does not affect "DOE's rights under contract to obtain any contractor records and to determine their disposition including public dissemination. " See Appeal Letter at 4 (emphasis added by OHA). However, while DOE may inspect and copy the contractor-owned documents at issue here, it has no such contractual right to dispose of the documents or to publicly disseminate them.

The Appellant also refers to the statement in 10 C.F.R. § 1004.3(e)(3) that the policies stated in this paragraph "will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment. . . ." See Appeal Letter at 4. However, that statement does not confer either ownership or a right of disposition of contractor documents upon DOE. The statement is instead referring to an important DOE policy concern to be considered in the case of DOE-owned records.

Case No. VFA-0309, 26 DOE ¶ 80,206

August 4, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arter & Hadden

Date of Filing: July 7, 1997

Case Number: VFA-0309

On July 7, 1997, the Office of Hearings and Appeals (OHA) received an Appeal filed by Arter & Hadden (A&H), a private law firm, from a determination issued to it by the Freedom of Information Officer at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "the Officer"). The Officer's determination was issued in response to a request for information that was submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. The Appeal, if granted, would require the Officer to conduct a further search for documents responsive to the request.

I. Background

In its FOIA request, A&H sought access to a copy of a July 10, 1974 report pertaining to the ownership of ponds at a Uranium Mill Tailings Remediation Action Project site (UMTRA site) located at Falls City, Texas, and any other documents relating to that report.(1) This report was prepared by the Atomic Energy Commission (AEC), a predecessor agency of the DOE, in conjunction with the Environmental Protection Agency and the Texas Department of Health.

In the determination, the Officer stated that the search for responsive documents encompassed the Albuquerque Office's Environmental Restoration Division (ERD) and Office of Chief Counsel, and that no documents responsive to A&H's request could be located.

In its Appeal, A&H has submitted documents that refer to the July 10, 1974 report. The appellant contends that the Albuquerque Office has jurisdiction over the UMTRA site, and that the requested document should therefore be in the possession of that Office.

II. Analysis

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the

requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

We have reviewed the scope of the search that was performed, and we find that search encompassed each part of the Albuquerque Office in which the requested report and any related documents could reasonably be expected to be found. The ERD, which had oversight responsibilities for the UMTRA site, and the Chief Counsel's Office were searched. The Chief Counsel's Office handled licensing proceedings before the Texas Department of Health. See memorandum of July 28, 1997 telephone conversation between Woody Woodworth, ERD, and Robert Palmer, OHA Staff Attorney. Furthermore, in addition to the search described in the determination letter, the request was referred to two DOE contractors that were involved in operations at the UMTRA site. See memorandum of July 24, 1997 telephone conversation between James Snyder, Albuquerque Operations Office, and Robert Palmer, OHA Staff Attorney. Despite these efforts, no responsive documents were found. Based on the record in this proceeding, we find that the search conducted by the Albuquerque Office was reasonably calculated to find the requested report and any related documents, and was therefore adequate. A&H's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Arter & Hadden on July 7, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 4, 1997

(1) */ Uranium mill tailings are the waste product that is produced during the processing of uranium ore. An UMTRA site is a location where corrective actions have been taken to ensure that such tailings are stored in an environmentally safe manner. The "ponds" in question consist of pits resulting from the mining of the ore that have become filled with water.

Case No. VFA-0310, 26 DOE ¶ 80,214

August 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Information Focus on Energy, Inc.

Date of Filing:July 22, 1997

Case Number:VFA-0310

On July 22, 1997, Information Focus on Energy, Inc. (IFE) filed an Appeal from a June 17, 1997 determination by the Director of the Office of Public Affairs (Director) of the Albuquerque Operations Office of the Department of Energy (DOE). In that determination, the Director partially granted a request for information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented in 10 C.F.R. Part 1004. In its Appeal, IFE asks that we order a search for additional responsive documents. In addition, IFE requests that the DOE release the names of Sandia National Laboratories employees that the DOE redacted from documents it provided to IFE.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, IFE sought copies of documents containing "[t]he initial written notification and/or report from Sandia National Laboratory contractor of the December 7, 1996 shutdown of the Annular Core Research Reactor" and "[a]ny Albuquerque Operations Office notes, memos, letters or electronic records reflecting initial receipt of verbal and written information of the event." In the June 17, 1997 determination letter, the Director enclosed two copies of a December 20, 1996 Occurrence Report No. ALO-KO-SNL-9000-1996-0009 (the copies originated from different offices), and a copy of a December 23, 1996 letter from Sandia National Laboratories-

New Mexico (SNL/NM) to Mike Zamorski, Area Manager of the Kirtland Area Office of the DOE, with names of SNL/NM employees deleted pursuant to 5 U.S.C. § 552(b)(6).

In its appeal, IFE first argues that the Director did not identify any information responsive to the second item of its request for "notes, memos, letters or electronic records." IFE contends that the DOE facility representative whose name the DOE redacted in the SNL/NM letter may have made notes relating to the information in the letter. Second, IFE objects to the deletion of names. IFE argues that the DOE should release the names since the public must be able to hold Sandia employees personally and publicly accountable for potentially important safety and health infractions. IFE states that withholding names protects culpable employees and their managers when they have failed to provide adequate safety.

II. Analysis

A. Adequacy of the Search

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted a representative of the Director to ascertain the validity of IFE's contention that there may exist responsive information because the Director did not address in his determination letter any information related to the portion of the IFE request concerning "Albuquerque Operations Office notes, memos, letters or electronic records." A representative for the Director informed us that, in the Director's determination letter, the Director did not separately address the second item because he believed the documents provided to IFE were responsive to both parts of IFE's request, not exclusively IFE's first item. The Director stated that he provided all of the responsive documents found after searching six Albuquerque Operations Office divisions. Since IFE has given us no further information in support of its position, and we have no reason to believe that additional responsive documents exist, we must deny this portion of IFE's Appeal.

B. Exemption 6

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Pursuant to established legal precedent, there is no doubt that the names of individuals redacted in this case qualify as "similar files" under Exemption 6.

In order to determine whether a record may be withheld pursuant to Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not its disclosure of the records would invade a significant privacy interest. If the agency does not identify a privacy interest, it may not withhold the record pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (Reporters Comm.). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

We have consistently found that names, by themselves, reveal nothing private about a person and, therefore, are not the type of information that creates a protected privacy interest for the purpose of Exemption 6. See, e.g., The News Tribune, 25 DOE ¶ 80,181 at 80,700 (1996). A privacy interest exists only when an individual's name is linked with some other piece of information that "reveals something personal about an individual." Id. at 80,699. In an Exemption 6 analysis, we must examine any linkage of information involved to determine the extent of any privacy interest. In this case, the link concerns DOE and contractor employee names and their knowledge or actions surrounding the December 7, 1996 shutdown of the Annular Core Research Reactor.

We find that the Director has not sufficiently demonstrated a link between the redacted names and any identifiable privacy interest for each of these individuals. It appears that some of the redacted names are DOE personnel whose only connection with the December 20, 1996 responsive report concerning the reactor shutdown may have been that their names were on the distribution list to receive a copy of the report. If our speculation is correct, then it would be difficult to imagine that these individuals would have an identifiable privacy interest concerning the reactor shutdown since they may have only read the report. Other redacted names appear to be of individuals who had direct knowledge of the reactor shutdown. Even these individuals must have a link to information that "reveals something personal" about them in order for there to be a privacy interest. Id. Since the Director did not articulate a privacy interest for each of the individuals whose names he redacted, we must remand this case to him to either release the names of these individuals or provide a detailed explanation for withholding that includes a description pursuant to Exemption 6 of the applicable privacy interest for each of the individuals whose names he withheld. Once the Director has performed this privacy interest analysis, he must then perform the public interest test as described above. Finally, also as described above, the Director must perform the balancing test to weigh any privacy interests he has identified against the public interest in disclosure of the names.

It Is Therefore Ordered That:

(1) The Appeal filed by Information Focus on Energy, Inc. on July 22, 1997 is hereby granted as set forth in paragraph (2) below.

(2) This matter is remanded to the Director of the Office of Public Affairs of the Albuquerque Operations Office for further action in accordance with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 19, 1997

Case No. VFA-0311, 26 DOE ¶ 80,219

September 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Greenpeace USA

Date of Filing: July 25, 1997

Case Number: VFA-0311

On July 25, 1997, Sherry Lee Meddick (Meddick) of Greenpeace USA filed an Appeal from a determination issued on June 2, 1997 by the Department of Energy's Idaho Operations Office (DOE/ID). The determination concerned a request submitted by Meddick under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Meddick requests that the Office of Hearings and Appeals (OHA) order the release of the information withheld by DOE/ID.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.A. § 1004.10(b). DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Meddick, an Energy and Radioactive Waste Campaigner for Greenpeace USA, sought information from DOE/ID in a March 26, 1997 FOIA request. She wrote that DOE literature stated that "[t]he National Low Level Waste Management Program (NLLWMP) at the Idaho National Engineering Laboratory (INEL) assists the U.S. Department of Energy in fulfilling its responsibilities under the Low-Level Radioactive Waste Policy Amendments Act of 1986 by providing technical assistance to states and compact regions as they develop new commercial low-level radioactive waste management systems." Letter from Meddick to Carl Robertson, FOIA Officer, DOE/ID (March 26, 1997) [hereinafter Request Letter]. In an effort to understand the type of assistance that INEL provides to DOE, Meddick requested that DOE/ID provide her with copies of:

"[a]ll contracts, grants and agreements for such assistance from the DOE and DOE/ID contractors to :

1. The State of California and any of its agencies or departments
2. The California Department of Health Services
3. The Southwestern Low Level Radioactive Waste Compact and the Compact

Commission

4. Any and all contractors for any of the entities listed above in (1-3)

5. Any other entities, organizations or groups not specifically listed above

Such contracts, grants, agreements by DOE may include any of the entities listed in (1-5) above or may be for work directly performed by DOE or their contractors or subcontractors."

Request Letter at 1-2.

Lockheed Martin Idaho Technologies Company (LMITCO), INEL's management contractor, performed an extensive search of its files, and forwarded responsive documents along with recommended redactions to DOE/ID. DOE/ID made further redactions. On June 2, 1997, DOE/ID sent Meddick the documents it determined to be responsive, a file index listing document folders by name and the LMITCO employees maintaining the documents, and a 25-page list describing each redaction made and exemption applied to the documents. DOE/ID withheld some material under FOIA Exemption 3 as exempt under the National Defense Authorization Act, under Exemption 4 as confidential commercial information, and under Exemption 6 as personal information the disclosure of which would invade personal privacy.(1) Letter from Carl Robertson, FOI Officer, DOE/ID to Meddick (June 2, 1997).

On July 25, 1997, Meddick filed the present Appeal requesting the release of withheld documents, removal of redactions, and explanations of seeming inconsistencies in disclosures.(2) She also included a list of 12 specific types of information desired (e.g., contract requisitions, supporting documentation, cost information, proposals, organization charts, guidelines, correspondence) and requested information on media assistance workshops conducted in California. Letter from Meddick to DOE/ID (July 25, 1997) [hereinafter Appeal]. This Appeal, if granted, would require DOE/ID to release the withheld material to Meddick.

II. Analysis

A. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information if specifically authorized by another federal statute. An agency properly invokes Exemption 3 only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). A statute falls within the exemption's coverage if it satisfies either of these standards. See Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984). The Supreme Court has established a two-prong standard of review for Exemption 3 cases. See CIA v. Sims, 471 U.S. 159, 167 (1985); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (applying the Sims test). First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. Sims at 167. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute.

According to DOE/ID, the withheld documents were proposals submitted in response to a competitive solicitation, and thus exempt under the National Defense Authorization Act for Fiscal Year 1997 (NDAA), Pub. L. No. 104-201, § 821, 110 Stat. 2609 (1996) (to be codified at 41 U.S.C. § 253b(m)). We have previously determined that the NDAA is a statute of exemption as contemplated by Exemption 3. Chemical Weapons Working Group, Inc., 26 DOE ¶ 80,170 (1997) (Chemical Weapons). The NDAA(3) is a federal statute that contains language specifically prohibiting the FOIA official from releasing protected information. The pertinent part of the NDAA states that "[e]xcept as provided . . . , a proposal(4) in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code." 110 Stat. 2609. The NDAA also declares that it "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." Id.

To satisfy Exemption 3, the documents withheld from Meddick must meet the criteria laid out above in the NDAA. The FOI Officer informed us that the final contracts between the DOE and the various contractors do not set forth or incorporate by reference any part of the proposals submitted in response to the solicitations. Letter from FOI Officer, DOE/ID to Valerie Vance Adeyeye, Staff Attorney, OHA (August 1, 1997). We reviewed the material withheld from Meddick and found that most were proposals submitted in response to a competitive solicitation. Thus, for those proposals that meet the requirements of the statute, i.e., proposals that were submitted in response to a competitive solicitation, the FOI Officer has no discretion to release this material.

However, the FOI Officer also asserted that "[p]roposal information, whether solicited or unsolicited, sole-source or otherwise appears to be witholdable under the statute." Letter from FOI Officer, DOE/ID to Valerie Vance Adeyeye, Staff Attorney, OHA (August 1, 1997). He was joined in this opinion by the LMITCO FOI Officer, who declared that "proposal information, whether solicited or unsolicited, is withholdable under the statute." Letter from LMITCO FOI Officer to DOE/ID FOI Officer (August 7, 1997). We do not agree that the NDAA provides a blanket exemption for all proposal information. Rather, the NDAA exempts only material that was "submitted by a contractor in response to the requirements of a *solicitation for a competitive proposal*." 110 Stat. 2609; 41 U.S.C. § 253b(m)(3) (emphasis added). In our review, we discovered one document in File Index Number 9 referring to Unsolicited Proposal #P8509011. We find that unsolicited proposals are not covered by the NDAA. In addition, Meddick argues that many of the documents were "sole sourced at the request of the California Department of Health Services." Appeal at 4, 6. Although she has not provided us any evidence that this is true, there may be such documents and we find that the FOIA may apply to that material. According to the FOI Officer, there were no responsive sole source documents. Nonetheless, in view of the previous statements of the FOI Officers that they believe that sole source proposal information is exempt from disclosure under Exemption 3, we find that a new search should be made, keeping in mind that the NDAA exempts only proposals submitted in response to a competitive solicitation. Accordingly, we shall remand this matter to DOE/ID for the release of the non-exempt portions of all relevant unsolicited or non-competitive proposals, or issuance of a justification for further withholding under any other applicable FOIA exemption.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993). We have consistently held that a submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

DOE/ID cited Exemption 4 as a basis for withholding details regarding contract cost estimating. We reviewed unredacted copies of the withheld documents and found that they contain commercial information within the meaning of Exemption 4. Furthermore, the submitters created and provided all these documents to the DOE specifically for the purpose of acquiring a contract. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996) (Industrial); Tri-City Herald, 16 DOE ¶ 80,114 (1987). The DOE also obtained this material from a "person" as required by Exemption 4, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke &

Associates, 12 DOE ¶ 80,149 (1985). We also conclude that much of the information withheld is confidential because its release would substantially harm the submitter's competitive position. We have stated in the past that release of cost and financial information could be used by a competitor to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See Industrial; International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, were the submitter to release, for example, its labor cost estimates for completing specific tasks and reveal its unique methods and procedures to accomplish these tasks, any competitor could easily determine how to adjust its own costs and method to arrive at a lower contract price and gain unfair advantage in a future bid process. See Chemical Weapons, 26 DOE ¶ 80,170 (1997).

However, we believe that some information in these documents is not exempt. For example, File Index 7c contains a chart entitled "Independent Cost Estimate " that was withheld under Exemption 4. LMITCO recommended redacting only detailed cost breakouts for labor prior to release to Meddick. We agree that this material should be withheld. DOE/ID, however, withheld the entire chart, which also included, inter alia, travel costs and rental car prices. (In our review of the unredacted Exemption 4 material, we found that DOE/ID consistently withheld entire documents despite LMITCO's recommendation of partial redactions.) We are not convinced that release of this material would cause substantial harm to the contractors' competitive position, or impair DOE's ability to obtain such data in the future. Rental car charges, airfares, and postage are not "unique methods and procedures" that the submitters use to accomplish their tasks, nor do the contractors control these prices. If this material is non-exempt and "reasonably segregable," the FOIA requires its release. See Tri-State Drilling, Inc., 26 DOE ¶ 80,202 (1997); Dr. A. Victorian, 25 DOE ¶ 80,166 (1994). However, we remind DOE/ID that segregation and release of non-exempt material are not necessary when it is inextricably intertwined with exempt material, such that release of the non- exempt material would compromise the confidentiality of the withheld material. Id. Accordingly, we shall remand this matter to DOE/ID for review of the redacted and withheld material under the standards set forth above.

C. The Public Interest in Disclosure

The DOE regulations direct the DOE to release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. We have determined that Exemption 3 and the NDAA require the continued withholding of the various contractor proposals. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, we are not permitted such consideration where, as in the application of Exemption 3, the applicable statute requires non-disclosure.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we also do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by Greenpeace on July 25, 1997, Case No. VFA-0311, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Officer of the DOE/ID who will promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are

situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 11, 1997

(1)Meddick does not appeal the redactions made under Exemption 6. Appeal at 8.

(2)LMITCO indicated that some information was released in error. Letter from Dale Claflin, FOIA Officer, LMITCO, to FOI Officer, DOE/ID (August 7, 1997). DOE/ID is currently reviewing alleged inconsistencies in its disclosure of contractor fees, and will respond to the requester directly. In response to allegations of illegible copies and missing materials, DOE/ID will send Meddick the missing material and the best available copies of the illegible documents. Letter from FOI Officer, DOE/ID, to Valerie Vance Adeyeye, OHA Staff Attorney (August 1, 1997).

(3)Meddick contends that the NDAA only applies to defense acquisitions. We reject this interpretation. In fact, the introduction to the law declares that it authorizes appropriations for the fiscal year 1997 defense activities of the Department of Energy. 110 Stat. 2422. The statute itself contains subsections pertaining to both civilian and armed forces acquisitions. NDAA at 110 Stat. 2609.

(4)The NDAA defines a proposal as "any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a *solicitation for a competitive proposal*." 110 Stat. 2609; 41 U.S.C. § 253b(m)(3) (emphasis added).

Case No. VFA-0312, 26 DOE ¶ 80,208

August 8, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Charles L. Wilkinson, III

Date of Filing: July 14, 1997

Case Number: VFA-0312

On July 14, 1997, Charles L. Wilkinson (Wilkinson) filed an Appeal from a final determination the Savannah River Operations Office (SR) of the Department of Energy (DOE) issued to him on June 11, 1997. In that determination, SR partially granted a request for information that Wilkinson filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In his request for information, Wilkinson sought all records in 70 categories of information relating to the utilization of non-union labor at the landfill and the "D-Area Powerhouse" at the DOE's Savannah River Site near Aiken, South Carolina, as well as information regarding layoffs and cost savings effected at those sites.(1) In its final determination, SR identified over 500 responsive documents and released numerous documents in their entirety. SR withheld portions of 21 documents pursuant to Exemptions 3, 4, 5 and 6. SR also withheld 69 documents in their entirety pursuant to Exemption 5. With regard to the documents withheld in their entirety pursuant to Exemption 5, SR stated that these documents are predecisional documents protected by the deliberative process privilege and that the public interest in disclosure would be outweighed by the chilling effect such disclosure would have on the willingness of DOE or DOE contractor employees to make honest and open recommendations in the future. In addition, for 33 of the categories of requested information, SR did not provide a list of any responsive documents.

In his Appeal, Wilkinson challenges the determination made regarding 17 of the documents withheld in their entirety pursuant to Exemption 5. (2) Specifically, Wilkinson asserts that one of the documents, Document No. 3/5, appears to be the minutes of a public meeting and can not be a predecisional deliberative document. Another document, Document No. 3/23, Wilkinson goes on to state, appears to be related to minutes of a "public authority" and thus was improperly withheld. With regard to Document No. 45/4, Wilkinson asserts that this draft letter was sent to the addressee, Mr. Edgar West, and that since the draft letter was deemed important enough to keep it should be provided to him. Additionally, Wilkinson asserts that SR withheld Document Nos. 64/1, 64/2, 64/5, 64/15, 64/16, 64/18, 64/21, 64/28, 64/29 and 64/30, all inter-office memoranda, simply to prevent embarrassment due to their subject matter. With regard to the remaining withheld documents, Wilkinson argues that each is directly relevant to his request and should thus be released. Wilkinson also challenges the adequacy of the search made for 17 categories

of requested documents. (3)For these categories, Wilkinson states that SR did not issue any response regarding the existence of responsive documents in its final determination letter.

II. Analysis

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

(i) Document Nos. 3/19, 3/23, 11/1a.1, 19/2, 45/4, 64/1, 64/2, 64/5, 64/15, 64/16, 64/18, 64/21, 64/28, 64/29 and 64/30

With regard to Document Nos. 3/19, 3/23, 11/1a.1, 19/2, 45/4 64/1, 64/2, 64/5, 64/15, 64/16, 64/18, 64/21, 64/28, 64/29 and 64/30, we have reviewed each of these documents and find that they contain information that is predecisional and deliberative pursuant to Exemption 5. As discussed below, each of these documents contains opinions of various DOE employees, the disclosure of which would discourage open, frank discussions by these individuals. Nevertheless, each of these documents, with the exception of Document No. 11/1a.1, also has a small amount of releasable information such as memorandum headings and/or segregable non-deliberative factual information. On remand, SR must release this information or provide a detailed explanation for its withholding. Because we have determined that Exemption 5 was properly applied to most of the material in these documents, we must reject Wilkinson's argument that no valid reason exists to withhold these documents.

Document No. 3/19 contains a summary of a committee meeting of DOE personnel at which comments were made regarding the suitability of various sites at SR for construction of a landfill and related facilities. Document No. 3/23 consists of an inter-office memorandum titled "Subject: Meeting Minutes" regarding a meeting a DOE employee had with the TRA and the Lower Savannah Council of Governments (LSCOG) and the events that transpired at that meeting. Wilkinson is correct that Document No. 3/23 discusses a meeting involving a public agency. However, this document also contains the DOE

employee's impressions and opinions regarding various TRA proposals regarding the creation of a regional landfill on property supplied by DOE. These opinions are predecisional and deliberative and protected by Exemption 5. Document No. 19/2 contains a DOE employee's opinion regarding the potential effect on DOE contractor employee jobs of the DOE privatizing power production at SR. In sum, each of the documents described above is predecisional and deliberative.

Document Nos. 64/2 and 64/5 contain DOE employee opinions concerning the possible involvement of the State of South Carolina in regulating OSHA functions at the D-Area Powerhouse. Document Nos. 64/16, 64/18 and 64/21 contain DOE employee comments and opinions regarding issues pertaining to privatizing the SR Powerplant operations. Document Nos. 64/1, 64/28, 64/29 and 6/30 contain DOE employee comments and opinions regarding various potential environmental issues involving the D-Area Powerhouse. Document No. 6/15 contains comments from a DOE employee regarding a proposed draft version of a lease agreement with SCE&G. All of these documents are clearly predecisional and deliberative in their nature and their release could inhibit honest communication and evaluations by DOE employees in the future.

Document Nos.11/1a.1 and 45/4 are draft copies of various documents. Document No. 11/1a.1 is a draft of a proposed cost sharing agreement to be entered into between the DOE and the TRA to establish a waste management center. This cost sharing agreement, as described by Document No. 11/1a.1, was not adopted into a final agreement. As such, Document No. 11/1a.1 consists of a proposed version of a cost sharing agreement. Thus, the entire document represents a predecisional, deliberative, recommendation that is protected by Exemption 5. Document No. 45/4 is a draft of a letter to be sent to Edgar West pertaining to the applicability of the Davis-Bacon Act (DBA) to projects at DOE's Savannah River Site. This document presents analysis regarding whether different projects fall within the ambit of the DBA. The letter, contrary to Mr. Wilkinson's assertion, was never put in final form to be sent to the addressee. Thus, the analysis represents a predecisional, deliberative, recommendation as to the DOE's position at the time of the draft letter regarding the applicability of the DBA. However, this draft document does contain segregable non-deliberative factual material that SR should release or provide a detailed explanation for withholding. See Anibal L. Taboas, 25 DOE ¶ 80,207 (1996).

(ii) Document No. 3/5

SR has requested that it be given another opportunity to review Document No. 3/5 and to issue another determination regarding that document. We will grant that request.

(iii) The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that SR properly applied Exemption 5 to most of the requested information, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested information consists of the opinions of individuals regarding different aspects of DOE's decisions regarding the privatization of power production from the D-Area Powerhouse and construction of a landfill by the TRA on DOE property. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion. Employees and managers would be less likely to communicate their

opinions if they knew or suspected that an agency would release their opinions to the public. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest.

B. Document No. 60/1g.2

Document No. 60/1g.2 is a copy of a completed Westinghouse Savannah River Company (WSRC) Make or Buy Decision Form for the production of steel burial boxes which SR withheld in its entirety pursuant to Exemption 5. The document contains financial information supplied by WSRC relating to the decision whether to contract for or make steel burial boxes. In investigating the facts of this case, however, we were informed that this document was found at the WSRC office at the Savannah River Site and that the document was not in the possession of SR. See memorandum of telephone conversation between Pauline Conner, SR, and Richard Cronin, OHA (August 1, 1997). Further, we were informed that the financial information contained in this document was confidential and proprietary. Id. Given these facts, it appears that there is a possibility that this document may not be an agency record for the purposes of the FOIA. If the document is not an agency record, then it is not subject to release pursuant to the FOIA and all arguments pertaining to the applicability of Exemption 5 are moot. Consequently, we will review this document to determine if it is an agency record subject to release under the FOIA.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents that did not originate with the federal government are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination of (i) whether the entity that is in possession of the documents is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, WSRC is responsible for managing and operating the facilities at the DOE's Savannah River Site. While the DOE exercises general control over WSRC's management of those facilities, it does not supervise WSRC's day-to-day operations. We therefore conclude that WSRC is not an "agency" subject to the FOIA.

Although WSRC is not an agency for the purposes of the FOIA, Document No. 60/1g.2 could become an agency record if the DOE obtained the document and it was within the DOE's control at the time that Wilkinson made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989);

see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that the DOE never obtained the document at issue, and the document was not in the agency's control at the time of the appellant's request. See memorandum of telephone conversation between Pauline Conner, SR, and Richard Cronin, OHA (August 1, 1997). Based on these facts, Document No. 60/1g.2 clearly does not qualify as an "agency record" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even though Document No. 60/1g.2 is not an agency record, it may still be subject to release if the contract between DOE and WSRC provides that the document in question is the property of the DOE. 10 C.F.R. 1004.3(e)(1). We must therefore look to the contract between SR and WSRC to determine the status of this document. That contract states that "[e]xcept as is provided in paragraph b of this clause, all documents acquired or generated by the Contractor in the performance of this contract shall be the property of the Government. . . ." Paragraph (b) sets forth nine categories of records that are the property of WSRC, including "Confidential Contractor financial information. . . ." and "Non-accounting records relating to any procurement action by the Contractor. . . . " Contract No. DE-AC09-96SR18500, Section H.27. Thus, because Document No. 60/1g.2 is a document containing confidential WSRC financial information as well as information relating to a procurement action, it is a WSRC record under the contract and is not subject to release under the DOE regulations.

C. Adequacy of Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

As stated earlier, Wilkinson challenged the search that was made for documents in 17 categories listed in Appendix A, stating that he received no response from SR regarding these categories. As an initial matter, we contacted SR to determine if a determination had been made on the categories specified in Wilkinson's Appeal. SR informed us that for any request category that did not have responsive documents listed under it, SR could find no responsive documents. SR noted that the categories of requests were very similar and that several of the documents listed as being responsive for one category were also responsive for other categories although not so noted. See Memorandum from Timothy Fisher, Attorney-Advisor, SR, to Richard Cronin, OHA Staff Attorney (July 25, 1997).

As part of our review, we contacted a representative of SR to inquire about the details surrounding her search. The SR official informed us that she had initiated a search of all of the departments at SR that would be likely to possess responsive documents. Each of the following SR Program Offices' files were searched for responsive documents described in each of the 70 categories listed in the request: Manager; Deputy Manager; Assistant Manager for Environmental Restoration and Solid Waste; Assistant Manager for High Level Waste; Assistant Manager of Environment, Safety, Health, and Quality; Assistant Manager for Engineering and Projects; Assistant Manager for Business and Human Resources Utilization; Office of

Field Chief Financial Officer; Assistant Manager for Defense Programs; Office of Community Outreach; Office of External Affairs; and Office of Chief Counsel. See Memorandum of telephone conversation between Pauline Conner, SR, and Richard Cronin, OHA Staff Attorney (July 25, 1997); Memorandum from Timothy Fisher, Attorney-Advisor, SR to Richard Cronin, OHA Staff Attorney (July 25, 1997). The SR official stated the search comprised essentially all of the offices at the SR and that she knew of no other SR office that might possess responsive documents. Given the extent of the search described above, we believe that the search conducted by SR for the categories of requested documents described in Appendix A was adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Charles L. Wilkinson, III, on July 14, 1997, Case No. VFA-0312, is hereby granted as set forth in Paragraph (2), and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Savannah River Operations Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 8, 1997

APPENDIX A

Request No. Request

12 All rosters and lists of employees who were employed or assigned to the D-Area Powerhouse during the period from January 1, 1990, to the time SCE&G assumed responsibility for operation and maintenance of the powerhouse.

13 All lists, reports, budgets, and financial statements showing the cost of labor and personnel for the D-Area Powerhouse since January 1, 1990.

14 All cancelled checks, drafts, or other evidence of payment of monies made by DOE or WSRC to any utility company, including SCE&G, for electricity for SR purchased from that utility company, including SCE&G, since January 1, 1990.

15 All post August 8, 1995 amendments, changes or letters or understanding pertaining to the contract between DOE and SCE&G for the operations and maintenance of the D-Area Powerhouse.

27 All lists indicating the names, positions, and salaries or wages of those employees of WSRC and DOE who had been employed at the D-Area Powerhouse prior to the effective date of the lease with SCE&G, who have been laid off and terminated as a result of SCE&G assumption of the operations and maintenance of the powerhouse.

28 All documents indicating that the projected savings by having SCE&G operate and maintain the D-Area Powerhouse have been achieved.

44 All documents, letters, correspondence, memoranda upon which DOE basis its contention that the Davis-Bacon Act does not apply to the landfill or waste technology center.

47 All documents reflecting the qualification for SCE&G employees who will be operating the D-Area Powerhouse.

49 All documents indicating DOE criteria for laying off salaried employees by WSRC and BSRI.

50 All DOE documents or documents furnished DOE by WSRC and BSRI reflecting savings on the out-sourcing of work at SR.

51 All DOE documents, directives, memoranda, and policy statements as to what is considered to be Davis-Bacon work and what is considered to be service contract work.

52 All documents reflecting the results of studies or audits on the overhead costs for DOE at SR and for contractors at SR, including WSRC and BSRI.

53 All studies which compare the costs, efficiency, labor costs, productivity, safety, of SR with other DOE sites.

54 All studies that compare the utilization of union labor at SR to other DOE sites, including the percentage of construction performed using collective bargaining agreements.

56 All documents, directives, letters. memoranda, and policy between DOE Headquarters and DOE SR concerning utilization of craftsmen and workers furnished through collective bargaining agreements at SR.

57 All documents, directives, letters and policy between DOE Headquarters and DOE SR concerning utilization or non-utilization of union workers at SR.

61 All documents relating to the out-souring of "barrel boxes" and the modifications that were required to be done on site to allow them to be used, including the cost of on-site modification.

APPENDIX B

Document

No. Document Title

3/5 Minutes of the Three Rivers Solid Waste Authority, unsigned copy.

3/19 Inter-office Memorandum, J.B. Gladden to Distribution, Subject: Regional Landfill Advisory Committee Meeting - April 11.

3/23 Inter-office Memorandum, James A. Wright to Distribution, Subject: Meeting Minutes.

11/1.a.1 Draft Cost Sharing Agreement.

19/2 Handwritten Memo, Lee Watkins to Mario Flori, Subject: SCE&G Contract and Potential Effect on M&O Employees.

45/4 Draft Letter to Edgar West, Subject: Davis-Bacon Act Applicability to Projects at DOE's SR.

60/1.g.2 WSRC, Make or Buy.

64/1 Inter-office Memo, John R. Shaffer to Distribution, Subject SCE&G Environmental Claims and Concerns.

64/2 Inter-office Memo, Brenda T. Hays to John R. Shaffer, Subject: OSHA Issue.

64/5 Inter-office Memo, Brenda T. Hays to John R. Shaffer and Carol R. Elliot, Subject: OSHA Oversight.

64/15 Inter-office Memo, John R. Shaffer to Perry E. Dukes and Brenda T. Hays, Subject: Comments on July 10, 1995 Version of SCE&G Lease.

64/16 Inter-office Memo, Brenda T. Hays to John R. Shaffer and Perry E. Dukes, Subject: Power Privatization.

64/18 Inter-office Memo, Brenda T. Hays to Distribution, Subject: Power Privatization.

64/21 Inter-office Memo, Brenda T. Hays to John R. Shaffer and Perry E. Dukes, Subject: Power Privatization.

64/28 Inter-office Memo, Richard H. Rustad to Brenda T. Hays, Subject: Back to Square One.

64/29 Inter-office Memo, Brenda T. Hays to Richard H. Rustad, Subject: D Area Alternative Strategy.

64/30 Inter-office Memo, Greta C. Fanning to John R. Shaffer, Subject: Comments on EBS for D-Area Powerhouse.

(1)SR entered into a lease of its on-site powerhouse (D-Area Powerhouse) and its transmission lines with South Carolina Electric and Gas (SCE&G) effective October 1995. In 1995, DOE entered into a Memorandum of Understanding with the Three Rivers Solid Waste Authority (TRA), a consortium of eight local counties, in which TRA would build and operate a regional landfill. This is the landfill referred to by Wilkinson.

(2)Wilkinson did not appeal the withholding of material under Exemptions 3, 4 and 6. The withheld Exemption 5 documents challenged in the present case are listed by document number in Appendix B of this Decision. The Document numbers themselves are two numbers separated by a slash. The number to the left of the slash indicates which number request category the document was responsive to. The number to the right indicates the given identification number of the document within a particular category of requested documents.

(3)The categories of requested information for which Wilkinson asserts that an inadequate search was made are listed by request number in Appendix A to this Decision.

Case No. VFA-0313, 26 DOE ¶ 80,218

September 9, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janice C. Curry

Date of Filing: July 24, 1997

Case Number: VFA-0313

On July 24, 1997, Janice C. Curry filed an Appeal from a determination issued on June 20, 1997, by the Office of Environmental Management (EM) of the Department of Energy (DOE). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Curry challenges the withholding of information from her, as well as the adequacy of EM's search for documents responsive to her request.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On March 6, 1997, Ms. Curry requested from the DOE

any and all documents relating to my employment as a contractor at the Department of Energy. Specifically a letter that was submitted around the week of February 3, 1997, stating that I was a threat to public health and safety. . . .

Also there was a report made on February 14, 1997, that I was beating up an Office Director within [EM]. I do not know if there was a formal written report given to security, but Trina Porter of EM was informed of the incident.

Letter from Janice C. Curry to Freedom of Information and Privacy Act Office, DOE (March 6, 1997). On June 20, 1997, EM issued a determination to Ms. Curry in which it stated that

a search of the files of the Office of Intergovernmental and Public Accountability, [EM], was conducted for responsive documents. The search identified one document responsive to your request, a memorandum to Cynthia Brawner-Gaines, in the Office of Minority Affairs, dated February 6, 1997. The document discusses a request to remedy a personnel problem that created an unsafe working environment within the Office of Intergovernmental and Public Accountability (EM-22). Their document, however, is exempt from disclosure pursuant to Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6).

Letter from Barry R. Clark, Acting Deputy Assistant Secretary for Management and Evaluation, EM, to Janice C. Curry (June 20, 1997). Accordingly, EM withheld this document in its entirety from Ms. Curry. After receiving Ms. Curry's Appeal, we obtained and reviewed a copy of the withheld memorandum.

II. Analysis

A. The Applicability of FOIA Exemption 6 to the Information Withheld by OFO

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

In its determination, EM stated that the disclosure of the memorandum withheld from Ms. Curry "would reveal the identity of its author and subject that individual to unwanted communications and harassment, . . ." Letter from Barry R. Clark, EM, to Janice C. Curry at 1. Ms. Curry counters in her Appeal that she already knows the author of the document. Appeal at 1.

The case before us is much like that of Fine v. Department of Energy, 823 F. Supp. 888 (D.N.M. 1993). In that case, the requester was a former DOE employee who sought documents from the agency, and in particular from the office where he used to work. Id. at 888. The DOE withheld some of the requested documents pursuant to Exemption 6. Id. The court disagreed with the agency's invocation of Exemption 6.

> Defendant [DOE] consistently justifies invoking Exemption 6 by claiming that disclosure of the document in question would subject the author and/or persons mentioned in the document to possible harassment or intimidation by plaintiff. . . .
>
> Where a person's fear of reprisals from the subject of a communication is "reasonable" based on either demonstrated fact or inferences supported by reasonable claims, privacy interests support the application of Exemption 6. . . .
>
> Defendant has offered neither facts nor supported inferences tending to show plaintiff might be inclined to harass or intimidate persons. Plaintiff is no longer employed by the defendant so he is not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors. The Court, therefore, does not find justifiable defendant's repeated invoking of Exemption 6 to prevent harassment or intimidation by plaintiff.

Id. at 895-96. The court also took into account information the requester already knew in determining the degree of privacy invasion that would be caused by the release of the information in the specific documents at issue. Id. at 896.

The facts to be considered in the present case are quite analogous to those the court deemed significant in Fine. Ms. Curry no longer works at the DOE, and she has asserted that she already knows the identities of the authors of the documents she is seeking. Based on our communications with EM regarding the present Appeal, we do not believe these factors were adequately considered in reaching its determination. We therefore will remand this matter to EM for the purpose of issuing a new determination to Ms. Curry. With reference to the relevant factors described above, the new determination shall explain the basis for any conclusion that release of the document would expose its author to unwanted communications and harassment.(1)

B. The Adequacy of EM's Search for Responsive Documents

Ms. Curry also challenges the adequacy of EM's search for documents responsive to her request. Memorandum of telephone conversation between Janice Curry and Steven Goering, OHA (August 20, 1997). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In the present case, Ms. Curry specifically requested "any and all documents relating to my employment as a contractor" at the DOE. In light of this broadly worded request, we believe that EM's search for documents should have been more thorough than it apparently was. EM has informed us that it consulted with two EM employees in its search for responsive documents. See Memorandum of telephone conversation between Jeffrey J. Williams, EM, and Steven Goering, OHA (August 20, 1997). We subsequently contacted these two persons to ascertain the extent of their contribution to the search for documents. Though we believe that these two employees provided copies of any responsive documents in their possession, we also learned that there may be other locations where documents related to Ms. Curry's employment may be found, including the office responsible for the contract between the DOE and Ms. Curry's former employer. See Electronic mail from Melinda Downing, EM, to Steven Goering, OHA (August 26, 1997). In addition, portions of the document withheld from Ms. Curry refer to other documentation that was provided to EM officials other than those consulted in EM's processing of Ms. Curry's request. We will therefore remand this matter to EM for a further search for documents responsive to Ms. Curry's request. Any responsive documents shall be released to Ms. Curry, or the basis for their withholding explained with specific reference to one or more FOIA exemptions.(2)(3)

It Is Therefore Ordered That:

(1) The Appeal filed by Janice C. Curry on July 24, 1997, Case Number VFA-0313, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Office of Environmental Management, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 9, 1997

(1) It is possible that information in the memorandum at issue may also be subject to withholding under the deliberative process privilege of FOIA Exemption 5. However, if the information may be withheld under that Exemption, the information should be released unless EM "reasonably foresees that disclosure would be harmful to an interest protected" by the Exemption. Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies (October 4, 1993).

(2) On remand, EM should bear in mind that the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

(3) If EM locates any responsive documents that are contained in a "system of records" as defined in the Privacy Act, 5 U.S.C. § 552a, EM should process Ms. Curry's request under both the Privacy Act and the FOIA. See 10 C.F.R. Part 1008 (DOE Privacy Act regulations).

Case No. VFA-0314, 26 DOE ¶ 80,209

August 12, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:W.L. McCullough

Date of Filing:July 22, 1997

Case Number: VFA-0314

On July 22, 1997, W.L. McCullough (Appellant) completed the filing of an Appeal from a determination issued on July 8, 1997, by the Department of Energy's Oak Ridge Operations Office (DOE/OR). This determination was issued in response to a request for information submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Decision and Order, we will determine whether the DOE must conduct a further search for documents responsive to the Appellant's FOIA request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I BACKGROUND

On June 24, 1997, the Appellant submitted a FOIA request to DOE/OR seeking copies of records regarding a particular grant issued by DOE to the Community Reuse Organization of East Tennessee (CROET). The Appellant specifically requested the total dollars spent in the grant; the names, addresses and telephone numbers of the 101 persons who obtained jobs through the grant (according to the Appellant); and the names and addresses of the nine businesses started through the grant (according to the Appellant). On July 8, 1997, DOE/OR issued its determination, releasing one document showing the total dollars spent in the grant and stating that it could locate no other responsive documents. On July 22, 1997, the Appellant completed the filing of the present Appeal in which he contends that DOE's search for documents was inadequate.

II ANALYSIS

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the

case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The

standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted DOE/OR to determine how it conducted the search. We learned that the DOE/OR searched the contracts and procurement office and the office of the assets manager. The contracts and procurement office is the office that supervises the type of grant with which the Appellant is concerned. However, that office has no documentation with the type of detail that the Appellant requested. The office of the assets manager was able to supply the one document the Appellant received, showing that, in sum, 101 new jobs and nine new businesses were created. But it did not contain the detail desired by the requester. DOE/OR believes that detailed information of the type sought by the individual is in the possession of the grantee, CROET.

We then inquired whether documents in the possession of CROET might be subject to release. If responsive documents exist and are in the possession of CROET, they may be subject to voluntary release if the grant between the DOE and the grantee (the contractor) provides that the document in question is the property of the DOE. DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next examined the provisions of the grant between DOE and CROET to determine the status of the requested records. That grant does not provide for the ownership by DOE of any grantee-owned or grantee-generated documents. Grant DE-FG05-94OR22364, Clause 27, Public Access to Information. Thus, if the requested documents exist and are in the possession of CROET, these records are not subject to release under the DOE regulations. In sum, we find that DOE/OR searched all of its offices where it had an expectation of finding responsive documents. Any possibly responsive documents which might exist at CROET are not subject to release.(1) Because we find that DOE/OR conducted a reasonable search, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by W.L. McCullough on July 22, 1997, Case No. VFA-0314, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 12, 1997

(1)*/ Under 10 C.F.R. § 600.153(e), DOE has a right of access to the type of documents requested here. However, the right to access alone does not give DOE the ability to release such documents under the FOIA or 10 C.F.R. § 1004.3. See The Cincinnati Enquirer, 26 DOE ¶ 80,___, Case No. VFA-0307 (July 29, 1997).

We further note that the DOE does not exercise day-to-day control over CROET sufficient to render it an "agency" for purposes of the FOIA. See Telephone Memorandum between Dawn Goldstein, Staff

Attorney, OHA, and Amy Rothrock, FOIA Officer, DOE/OR (August 7, 1997); Forsham v. Harris, 445 U.S. 169, 180 (1980); United States v. Orleans, 425 U.S. 807, 815 (1976).

Case No. VFA-0315, 26 DOE ¶ 80,213

August 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: July 21, 1997

Case Number: VFA-0315

On July 21, 1997, William H. Payne filed an Appeal from a determination issued to him by the Director of the Department of Energy's Freedom of Information and Privacy Acts Division (hereinafter referred to as "the Director"). This determination was issued on June 23, 1997 in response to a request for amendment of records that Mr. Payne submitted under the Privacy Act, 5 U.S.C § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require the DOE to amend a document pertaining to Mr. Payne that he claims is located in a system of records that is covered by the Privacy Act.

The Privacy Act permits individuals to gain access to their records or to information pertaining to them that is contained in systems of records maintained by the agencies. 5 U.S.C. § 552a(d)(1). The Act further provides that individuals may request amendment of records pertaining to them. 5 U.S.C. § 552a(d)(2). Under the Privacy Act, agencies may refuse to amend such records, but must provide a reason for their refusal. 5 U.S.C. § 552a(d)(2)(B)(ii). The DOE regulations implementing the Privacy Act set forth the criteria for reviewing requests for amendment. 10 C.F.R. § 1008.10.(1)

I. Background

Mr. Payne was an employee of Sandia Corporation (Sandia), which operates Sandia National Laboratories as a DOE contractor. In his Privacy Act request, Mr. Payne seeks to amend the minutes of a Sandia Disciplinary Review Committee (SDRC) Meeting that occurred on July 16, 1992. These minutes contain allegations of improper behavior by Mr. Payne. In general, Mr. Payne contends that the allegations of misconduct are false, or that the circumstances surrounding his acts are different than those set forth in the minutes.

In a response issued on June 23, 1997, the Director denied Mr. Payne's request for amendment. The Director stated that, pursuant to the contract between Sandia and the DOE, the minutes are the property of Sandia, and are not maintained in a system of records that is subject to the Privacy Act.

II. Analysis

The Privacy Act generally applies only to certain systems of records maintained by federal agencies. 5 U.S.C. § 552a(a)(1). However, when an agency provides by contract for the operation of a system of records to accomplish an agency function, that agency must follow the provisions of the Privacy Act with respect to that system. 5 U.S.C. § 552a(m).

Article B-XXVI of Sandia's contract with the DOE requires Sandia to comply with the Privacy Act in the design and operation of any identified system of records on individuals when that system of records is involved in the performance of a DOE function. Section H-15 requires Sandia to design and operate a number of systems of records to accomplish a list of agency functions pursuant to the Privacy Act contract clause. Among these systems of records are: DOE-5, Personnel Records of Former Contractor Employees; DOE-47, Security Investigations; and DOE-48, Security Education and/or Infraction Reports.

In her determination, the Director stated that the document that Mr. Payne seeks to amend is not maintained in a system of records pursuant to the Privacy Act, and is the property of Sandia according to the provisions of Sandia's contract with the DOE. However, we have been informed that Sandia's Privacy Act systems of records using Mr. Payne's identifier were not searched to locate a copy of the SDRC minutes, and that the Director's statement that the minutes are not part of a Privacy Act system of records was based only on her general conclusion that document is the property of Sandia pursuant to Section H-18(b) of Sandia's contract with the DOE. See memorandum of August 12, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Chris Morris, FOIA/Privacy Acts Division.

We find that the Director has misinterpreted Section H-18(b). That provision states, in pertinent part, that:

The following records acquired or generated by the Contractor in its performance of the contract (to the extent not listed and maintained as a Privacy Act record pursuant to the Section H provision entitled ? Privacy Act System of Records') are the property of the Contractor. . . . (4) Employee relations records and files such as records and files pertaining to . . . (ii) Allegations, investigations, resolution of employee misconduct. . . .

Sandia contract, Section H-18(b) (emphasis added). The SDRC minutes are clearly a record relating to the resolution of alleged employee misconduct. However, as the italicized language confirms, this listing of contractor records that are not subject to federal control is explicitly made subject to the provisions of Section H-15, which, as we previously stated, requires Sandia to maintain certain identified systems of records that are covered by the Privacy Act. Therefore, if the SDRC minutes are part of a Privacy Act system of records, they are subject to the provisions of that Act, including those pertaining to the amendment of documents.

In view of these circumstances, we will remand this matter to the Director so that a thorough search of Sandia's Privacy Act systems of records may be performed. If the SDRC minutes are located in a Privacy Act system of records utilizing Mr. Payne's personal identifiers, the Director or her designee should evaluate the request for amendment pursuant to the provisions of 10 C.F.R. Part 1008.10. A revised determination indicating the results of the search and including any evaluation of the request for amendment should be issued to Mr. Payne within 30 days of the date of this Decision.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on July 21, 1997 is hereby granted as set forth in paragraph (2) below.

(2) This matter is remanded to the Director of the FOIA/Privacy Act Division for further proceedings in accordance with directions set forth in this Decision.

(3) This is a final Order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 18, 1997

(1)Those criteria are (i) the sufficiency of the evidence submitted by the individual, (ii) the factual accuracy of the information, (iii) the relevance and necessity of the information in relation to the purpose for which it was collected, (iv) if such information is used in making any determination about the individual, whether the information is as accurate, relevant, timely, and complete as is reasonably necessary to assure fairness to the individual in such determination, (v) the degree of possibility that denial of the request could unfairly result in a determination adverse to the individual, (vi) the nature of the record sought to be corrected or amended, and (vii) the propriety and feasibility of complying with the specific means of amendment requested by the individual.

Case No. VFA-0316, 26 DOE ¶ 80,212

August 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Los Alamos Study Group

Date of Filing: July 21, 1997

Case Number: VFA-0316

On July 21, 1997, the Los Alamos Study Group (LASG) filed an Appeal from a determination issued to it on June 16, 1997, by the Freedom of Information Officer of the Office of Public Affairs of the Department of Energy's Albuquerque Operations Office (FOIA Officer). The FOIA Officer issued that determination in response to a request for information submitted by the LASG under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the DOE's Albuquerque Operations Office to release the requested information.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and that it is in the public interest. 10 C.F.R. § 1004.1.

Background

On May 6, 1997, the LASG filed a request under the FOIA in which it sought copies of "a list or lists of all Los Alamos National Laboratory's contractors, consultants, associates, fellows - all individuals and companies other than regular University of California [UC] employees who received funds for services or goods provided - for the calendar year 1996 and the amount paid to them in FY 1996." The FOIA Officer issued a determination on June 16, 1997 stating that the records requested are procurement records in the possession and control of UC. Thus, the FOIA Officer determined that the requested records are not agency records subject to the provisions of the FOIA. In its Appeal, the LASG requests that the OHA direct the FOIA Officer to release the requested information. Specifically, the LASG makes the following three arguments to support its contention that the FOIA Officer must release the requested information:

1. The requested documents are "agency records" since the DOE obtained the records from the Los Alamos National Laboratory, exercised control and possession over the documents, and used the documents in the conduct of its official duties.
2. The University of California contract provides for government ownership of procurement records.
3. The Los Alamos National Laboratory is an "Agency" within the meaning of the FOIA.

Analysis

Our threshold inquiry in this case is whether the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf., 5 U.S.C. § 552(f) (describing the scope of

the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as UC, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at ¶ 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, UC is the contractor responsible for maintaining and operating the Los Alamos National Laboratory. While the DOE obtained UC's services and exercises general control over the contract work, it does not supervise UC's day-to-day operations. See Contract No. W-7405-ENG-36. We therefore conclude that UC is not an "agency" subject to the FOIA.

Although UC is not an agency for the purposes of the FOIA, its records relevant to the LASG request could become "agency records" if DOE obtained them and they were within the DOE's control at the time the LASG made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that no responsive documents were in the agency's control at the time of the appellant's request.(1) Based on these facts, the requested procurement documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and UC to determine the status of the requested

records. That contract generally states,

Except for those records owned by the University pursuant to paragraph (b) below, all records acquired or generated by the University's employees at the Laboratory or at the University's Laboratory Administrative Management Oversight Unit in the performance of this contract, shall be the property of the Government . . . .

Contract No. W-7405-ENG-36. Paragraph (b)(8) (modified September 23, 1994) states that the excluded category of Contractor's records includes "[a]ll records related to any procurement action by the Laboratory. . . ." Thus, because records pertaining to procurement actions by the Laboratory are not among the records that are property of the Government under the DOE's contract with UC, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny the LASG Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by the Los Alamos Study Group on July 21, 1997, Case Number VFA- 0316, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 18, 1997

(1)See August 13, 1997 Fax transmission from Terry Apodaca, Albuquerque Operations Office, to Leonard M. Tao, OHA Staff Attorney.

Case No. VFA-0317, 26 DOE ¶ 80,220

September 12, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ralph C. Elkins

Date of Filing: August 15, 1997

Case Number: VFA-0317

On August 15, 1997, Ralph C. Elkins completed the filing of an Appeal from a determination issued to him on June 27, 1997, by the Freedom of Information and Privacy Act Division (FOIA Division) of the Department of Energy. That determination concerned a request for information Elkins filed pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. If the present Appeal were granted, the DOE would be required to conduct a further search for the requested information.

The Privacy Act requires that each federal agency permit individuals access to records pertaining them that are contained in a system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name or the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

In his request, Elkins sought documents pertaining to a security clearance he held between 1962 and 1979. According to Elkins, he was employed by a contractor involved with nuclear powered U.S. Naval vessels. In its determination, the FOIA Division stated that a search for responsive documents was conducted, and that no responsive records were found. The appellant asks that a new search for documents responsive to his request be conducted.

We have stated on numerous occasions that Freedom of Information and Privacy Act requests deserve thorough and conscientious searches for responsive documents, and we have not hesitated to remand cases where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980).

In reviewing the present Appeal, we contacted the person who conducted the search to ascertain the extent of the search that had been performed and the basis for the conclusion that no relevant documents exist. He stated that DOE maintains a listing of everyone who is known to have held a security clearance under DOE or any of its predecessor agencies on

microfiche and in a computerized database, the Central Personnel Clearance Index. He also stated that both the microfiche and the database were searched, and Elkins' name was not found. He further noted that most inactive security clearance files are discarded after 10 years. Consequently, even if Elkins had been identified as having held a DOE clearance, his actual clearance file would probably not have been available. Memorandum of Telephone Conversation between V. Hawkins, Office of Security Affairs, and B. MacPherson, Office of Hearings and Appeals (September 5, 1997). See also Gretchen Lee Coles, 26 DOE ¶ 80,151 (1997) (inactive security clearance files discarded after 10 years). We also contacted the

Office of Naval Reactors, which confirmed that it did not have any responsive documents. Memorandum of Telephone Conversation between J. Kiell, Office of Naval Reactors, and B. MacPherson, Office of Hearings and Appeals (September 8, 1997).

We are convinced that the FOIA Division followed procedures which were reasonably calculated to uncover the material sought by Elkins. See Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). That the search did not uncover the records that Elkins believed may be in the possession of DOE does not mean that it was inadequate. The FOIA Division searched the indexes that would locate the Elkins security file if it existed within DOE. This search found no indication that Elkins had ever held a DOE security clearance.(1) Consequently, we find that the search for responsive documents was adequate and that no documents responsive to Elkins' request exist at DOE. Accordingly, the Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ralph C. Elkins on August 15, 1997, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 12, 1997

(1)Elkins has not cited any evidence that he had held a DOE clearance. In fact, in his Appeal he states that he understood that the program he was cleared for was within the Defense Department's purview. If that were the case, the Defense Department and not DOE would be most likely to have the documents requested. Mr. Elkins explained in a telephone conversation that he requested the documents from the Defense Department, but they found none and suggested that he try DOE.

Case No. VFA-0318, 26 DOE ¶ 80,207

August 6, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Egan & Associates

Date of Filing: July 21,1997

Case Number: VFA-0318

On July 21, 1997, Egan & Associates (the Firm) filed an Appeal from a partial determination issued on July 9, 1997, by the Director of the FOIA/Privacy Act Division of the Office of the Executive Secretariat (Headquarters FOIA Office) of the Department of Energy (DOE). This partial determination was issued in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to (1) release or explain the reason for withholding an attachment to a document, and (2) release all other documents responsive to the Firm's FOIA request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a FOIA request dated February 24, 1997, the Firm sought documents submitted to or sent by any DOE Headquarters office concerning Envirocare of Utah, Inc., or Waste Control Specialists LLC (WCS) of Pasadena, Texas. In a letter dated March 14, 1997, the Firm narrowed the scope of the FOIA request by designating the offices that DOE should search for responsive records.

On July 9, 1997, the Director of the Headquarters FOIA Office issued a partial response to the Appellant's FOIA request. In this partial response, the Director indicated that a data

system that tracks the correspondence of three different offices had been searched, and that ten documents responsive to the FOIA request had been identified. She further indicated that, except for an attachment to Document No. 8, these documents were being provided to the Firm without deletion. No reason was provided for withholding the attachment to Document No. 8. The Director also stated that other documents responsive to the FOIA request were being reviewed for a "releasability determination," and other offices were still searching for additional documents. Finally, the Director said that the Firm would be contacted when the search and review were complete.

On July 21, 1997, the Firm appealed this partial determination on two grounds. First, it argues that DOE should release all documents responsive to its FOIA request immediately because DOE had failed to

process the request within the time required by law, and has still not issued a complete response.(1) Second, the Firm alleges that the Headquarters FOIA Office improperly failed to explain its reason for withholding the attachment to Document No. 8.(2)

In reviewing this Appeal, we contacted Joan Ogbazghi, FOIA Officer, Headquarters FOIA Office, to learn the reason that the attachment to Document No. 8 had not been released. Ms. Ogbazghi stated that this attachment was being reviewed for a "releasability determination." Ms. Ogbazghi further stated that a determination will issue that either releases the attachment or provides a reason for withholding it. See Memorandum of Telephone Conversation between Joan Ogbazghi, FOIA/Privacy Act Specialist, and Linda Lazarus, OHA Staff Attorney (July 24, 1997).

II. ANALYSIS

As this Appeal is based on DOE's alleged failure to process a FOIA within the time specified by law, and an Authorizing Official has not made a final determination concerning the records at issue, OHA does not have the jurisdiction to decide the matters raised by the Firm. Accordingly, we will dismiss the Appeal.

The Firm's arguments are based on DOE's failure to issue a complete and timely response to its FOIA request. In its first argument, the Firm has clearly requested relief because DOE had not complied with the time requirements for processing a FOIA request, and had still not issued a complete determination. The Firm's second argument, concerning DOE's failure to provide a reason for withholding the attachment to Document No. 8, is also rooted in the fact that DOE has not issued a final determination. As detailed above, the Headquarters FOIA Office did not release this attachment or provide a reason for withholding it because a "releasability" determination had not yet been made. See Memorandum of Telephone Conversation between Joan Ogbazghi, FOIA/Privacy Act Specialist, and Linda Lazarus, OHA Staff Attorney (July 24, 1997).

Section 1004.8(a) of the DOE regulations grants OHA jurisdiction to consider FOIA appeals only in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees.

Section 1004.8(a) has been construed to confer jurisdiction on OHA only when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when the requester has not received an initial determination from an Authorizing Official, or when an appeal is based on the agency's failure to process a FOIA within the time specified by law. John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (no administrative remedy for agency's non- compliance with a timeliness requirement).(3)

It Is Therefore Ordered That:

(1) The Appeal filed by Egan & Associates on July 21, 1997, is hereby dismissed.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 6, 1997

(1)Ordinarily DOE is required to respond to a FOIA request within ten working days. The DOE may take another ten days to respond if "unusual circumstances" delay processing. Section 1004.5(d)(1), (2).

(2)Both the FOIA and DOE regulations require the agency to provide a reasonably specific justification for withholding documents or portions of documents. Mead Data Central v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Data Technology Industries, 4 DOE ¶ 80,118 (1979).

(3)Because it did not receive a timely response to its FOIA request, the Firm is considered to have exhausted its administrative remedies. 10 C.F.R. §1004.5(d)(4); 5 U.S.C. §552 (a)(6)(c). Accordingly, under the FOIA, the Firm may seek the release of the requested documents in federal district court. 5 U.S.C. §552 (a)(4)(B). However, the agency's failure to comply with the ten day time limit does not result in a waiver of any FOIA exemptions. See Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988) ; James E. Davis, 11 DOE ¶ 80,151 at 80,689 (1983).

Case No. VFA-0319, 27 DOE ¶ 80,220

August 4, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:National Security Archive

Date of Filing:July 24, 1997

Case Number: VFA-0319

The National Security Archive filed an Appeal from a determination that the Department of Defense's Director of Freedom of Information and Security Review (the Director) issued to it on June 6, 1997. In that determination, the Director denied in part a request for information that the National Security Archive filed on August 29, 1996, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the documents released to the National Security Archive in that determination was withheld after the Department of Energy's Office of Declassification, as well as the Department of Defense (DOD), reviewed the documents to determine whether they contained classified information. This Appeal, if granted, would require the Department of Energy (DOE) to release the information that it withheld in its June 6, 1997 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 29, 1996, William Burr of the National Security Archive submitted a request under the FOIA to the DOD. The Director responded to the request by providing a copy of "MIRV: A Brief History of Minuteman and Multiple Reentry Vehicles," dated February 1976, with information deleted pursuant to a DOE determination that the withheld information warranted protection from disclosure under Exemption 3 of the FOIA. The DOD had found that Exemptions 1 and 3 dictated the withholding of certain portions of the document, but those portions were contained within the portions withheld by the DOE. As a result, the Director stated that the deleted information was

withheld because the DOE determined it to be classified pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the requested documents. In its Appeal, the National Security Archive contends that to the extent the information withheld pertains to the "technical characteristics . . . and numbers of ICBMs, target types, anti-ballistic missiles, intelligence information on Soviet ABMs, and military strategies," it was improperly withheld, because the Atomic

Energy Act and Exemption 3 do not protect that type of information.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., National Security Archive, 26 DOE ¶ 80,118 (1996); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

In performing his review the Director of SA determined that the original determination letter was worded imprecisely, and created the impression that all of the information originally redacted from the requested document was Restricted Data or Formerly Restricted Data and was withheld, by the DOE, under Exemption 3 of the FOIA. To correct this impression, the Director has now clearly distinguished such information, marked on the document now being released as "DOE b(3)," from other information which is being withheld by the DOD under Exemption 1 (marked as "DOD b(1)") or Exemption 3 (marked as "DOD b(3)"). The Director has affirmed that all of the information being withheld by the DOE is related to nuclear weapons design. He concludes that this information is Restricted Data as defined under the Atomic Energy Act of 1954, and it is therefore exempt from mandatory disclosure under Exemption 3. Although the Director has not declassified any information in his review of this matter, more precise redaction reduces the extent of the previously deleted portions, and permits releasing the maximum amount of information consistent with national security considerations.

The Director has also informed us that the material identified and redacted as "DOD b(1)" information is related to military plans, weapons systems, or operations. As such, it is defined as National Security Information under Executive Order 12958, and the DOD therefore determined that it is exempt from mandatory disclosure under Exemption 1 of the FOIA, which exempts from mandatory disclosure matters that are classified under criteria established by an Executive Order. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1). The material identified and redacted as "DOD b(3)" information is related to the military utilization of nuclear weapons. The DOD has determined this information to be Formerly Restricted Data under the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3. The denying official for the information redacted by the DOD is Fred S. Celec, Deputy Assistant to the Secretary of Defense (Nuclear Matters), Office of the Secretary of Defense.

Based on the review performed by the Director of SA, we have determined that the Atomic Energy Act requires the continued withholding of much of those portions of the document that the DOE previously identified as containing classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Director of SA has now determined to be properly classified must be withheld from disclosure. However, because some previously deleted information may now be released as a result of the Director of SA's review, a newly redacted version of the requested document will be provided to the National Security Archive under separate cover. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on June 24, 1997, Case No. VFA-0319, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the document entitled "A Brief History of Minuteman and Multiple Reentry Vehicles," dated February 1976, in which additional information is released, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 4, 1999

Case No. VFA-0321, 26 DOE ¶ 80,211

August 18, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Curry Contracting Co., Inc.

Date of Filing: July 30, 1997

Case Number: VFA-0321

On July 30, 1997, Curry Contracting Co., Inc. (Curry) filed an Appeal from a determination issued to it on June 30, 1997 by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE). That determination concerned a request for information submitted by Curry pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OR would be required to conduct a further search for responsive material.

I. Background

In a March 3, 1997 FOIA Request to OR, Curry, a contractor at the Office of Scientific and Technical Information (OSTI) facility at OR, asked for copies of the following documents:

(1) All OSHA Reports filed "against" the DOE at the OSTI Building in the last three years;

(2) All documents used or "not used" to determine or "not determine" award fees/incentive fees for Curry;

(3) All complaints pertaining to Curry at the OSTI Building for the last two years;

(4) All reports regarding Curry originating from certain named individuals or from any other person having written documentation regarding Curry; and

(5) All award fee/incentive fee contracts at the OSTI Building over the past three years to the present date, including award fee/incentive fee criteria on time and material contracts and cost plus basis.

See Letter from Curry Contracting Co. to Nancy McGinty, OR (March 3, 1997). In its determination letter dated June 30, 1997, OR provided Curry with documents pursuant to request category nos. 2

and 3. With regard to request category nos. 1, 4 and 5, OR stated that it could not find any responsive documents.

In its July 30, 1997 Appeal, Curry asserts that OR must have documents responsive to request category nos. 1, 4 and 5 and that they should be easily accessible to OR. Consequently, Curry maintains that the search for these three request categories was inadequate.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted OR to ascertain the extent of the search that had been performed for responsive documents. OR informed us that with regard to Curry's request for OSHA Reports (request category no. 1), OR and the OSTI facility have not been subject to inspections by OSHA and that DOE itself has the responsibility for enforcement of its own safety and health regulations. Thus, because OR officials knew that OR's offices did not receive such OSHA Reports, a search was not conducted. See Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, OR, and Richard Cronin, OHA Staff Attorney (August 6, 1997). OR did conduct a search for reports concerning Curry (request category no. 4) at the offices at OSTI as well as the only OR office that might possess relevant documents, the OR contract administration office. (1) Id. Additionally, the files in the offices of each of the individuals listed by Curry in its request were searched for responsive documents. Id. No responsive documents were discovered in any of these searches. Id. As for Curry's request for copies of all award fee/incentive fee contracts at the OSTI Building (request category no. 5), OR informed us that there are no award fee/incentive fee contracts at the OSTI Building other than the contract with Curry and that Curry has a copy of that contract. Id.

Given the facts reported above, we find that OR conducted a search reasonably calculated to find responsive documents. As for request category nos. 1 and 5, the requests for OSHA Reports and incentive fee/award fee contracts, OR had definitive factual knowledge that such documents do not

exist (other than Curry's own OSTI contract). With regard to request category no. 4, the request for reports concerning Curry, OR made an appropriate search of offices of all relevant individuals. Because we believe that OR conducted an adequate search for responsive documents, we must deny Curry's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on July 30, 1997 by Curry Contracting Co., Inc., Case No. VFA-0321, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 18, 1997

(1)OR informed us that while OSTI is operated by DOE Headquarters, any responsive documents that might exist regarding Curry's appeal would be located at OSTI and/or OR since OR handles all contract administration functions for OSTI. See Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, and Richard Cronin, OHA Staff Attorney (August 6, 1997).

Case No. VFA-0322, 26 DOE ¶ 80,215

August 28, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Burlin McKinney

Date of Filing: August 1, 1997

Case Number: VFA-0322

On August 1, 1997, Burlin McKinney filed an Appeal from a determination issued on July 23, 1997, by the Department of Energy's Oak Ridge Operations Office (DOE/OR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

Mr. McKinney is an employee of Lockheed Martin Energy Systems, Inc., (LMES) at the DOE's Y-12 plant in Oak Ridge, Tennessee. In 1996, in response to a request from Mr. McKinney, LMES conducted a search and made an inventory of documents located in Building 9201-5E of the Y-12 plant that relate to beryllium. See Memorandum from J.L. Jenkins, Jr. to B.G. Ashdown (June 3, 1996). Mr. McKinney subsequently submitted a FOIA request to DOE/OR for all of the documents appearing on the inventory (with the exception of six boxes). In DOE/OR's July 23, 1997 determination, it stated,

A determination has been made that to process your request at this time would be a burdensome effort on the part of the Department of Energy and the contractor. Prior to copying the responsive records, a review would have to be conducted to identify any classified documents and/or material protected by the Privacy Act. We cannot justify the high costs and burdensome effort to review the records at this time.

Letter from Amy L. Rothrock, DOE/OR, to Burlin McKinney (July 23, 1997).

II. Analysis

In responding to the present appeal, DOE/OR stated that it is "not ?withholding' documents and invited Mr. McKinney to narrow his search to a more reasonable scope. As yet, he has not offered to narrow the scope of this request." Electronic mail from Amy Rothrock, DOE/OR to Steven Goering, OHA (August 12, 1997). However, the FOIA places no limit on the scope of a request for records. Requests only must

"reasonably describe" the records being requested and comply with an agency's procedures for the submission of the request. 5 U.S.C. § 552(a)(3)(A), (B). Because Mr. McKinney's request was quite specific in identifying the records he is seeking (by reference to an inventory of those records which LMES has already compiled), we cannot find that he has not reasonably described these records, and we have no reason to conclude that the Appellant's request failed to satisfy the procedural requirements of the DOE regulations.

A determination issued in response to a properly submitted FOIA request is required by the DOE FOIA regulations to include a

statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

10 C.F.R. § 1004.7(b).

Because DOE/OR clearly did not in its determination release the documents reasonably described and requested by Mr. McKinney, we do not agree that DOE/OR has not withheld documents from the Appellant. We conclude, therefore, that DOE/OR's determination that it could not "justify the high costs and burdensome effort to review the records at this time" is inadequate justification for withholding the documents in light of the requirements of the FOIA and the DOE regulations. Cf. Ruotolo v. Department of Justice, 53 F.3d 4, 10 (2d Cir. 1995) (rejecting as inadequate agency's response that requesters "? restructure' their request in order to ?narrow[ ] its scope and hence, its cost.'").

It is true that a *search* for documents in response to a FOIA request can be unduly burdensome. The FOIA requires that a search for responsive documents be reasonable, not exhaustive. Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord, Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). We see no evidence, however, that an unreasonable search would be required to locate the records requested by Mr. McKinney, as the copy of the inventory produced by LMES indicates that the location of these records has already been determined. See Attachment to memorandum from J.L. Jenkins, Jr. to B.G. Ashdown (June 3, 1996); Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding valid request encompassing over 1,000,000 computerized records: "The linchpin inquiry is whether the agency is able to determine ?precisely what records [are] being requested'" (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974)).

Accordingly, we will remand this case to DOE/OR, which shall issue a new determination releasing to Mr. McKinney the records he has requested or explaining the basis for withholding information from the Appellant, with specific reference to one or more FOIA exemptions.

For the reasons explained above, the present Appeal will be granted as specified above. In all other respects, the Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Burlin McKinney, Case No. VFA-0322, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE's Oak Ridge Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 28, 1997

Case No. VFA-0323, 26 DOE ¶ 80,216

September 2, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Hanford Advisory Board

Date of Filing:August 7, 1997

Case Number: VFA-0323

On August 7, 1997, the Hanford Advisory Board (Appellant) filed an Appeal from a July 25, 1997 determination by the Richland Operations Office (ROO) of the Department of Energy (DOE). In that determination, ROO denied the Appellant's request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, the Appellant asks that we order ROO to release the withheld material.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, the Appellant sought a portion of the successful proposal that Fluor Daniel Hanford, Inc. (FDH) made in competition for the management and operations contract at the Hanford facility. Specifically, the Appellant sought the portions of the proposal dealing with the amount of money FDH claimed it could save the DOE, as well as the Executive Summary portion of the proposal. In the determination letter, ROO, pursuant to the provisions of 5 U.S.C. § 552(b)(3) (Exemption 3) and Subtitle B, Section 821 of the National Defense Authorization Act of 1997 (NDAA), 41 U.S.C. § 253b(m), withheld the proposal. ROO stated that Section 821 of the NDAA bars release of any portion of the proposal. Under the NDAA, a proposal may not be made available to any person under the FOIA when the proposal has not been set forth or incorporated by reference in the contract. ROO stated that since the FDH proposal has not been set forth or incorporated by reference in the contract between DOE and FDH, it must withhold the requested information.

In its appeal, the Appellant makes three arguments. First, it argues that the NDAA should not be applied retroactively to a proposal and resulting contract, each of which was issued prior to the

NDAA's effective date. Second, it argues that the ROO determination letter was not signed by a FOIA Officer. Third, it argues that because the amount of projected savings and other facts were already released to the public by DOE, the agency has waived its right to withhold the requested information.

II. Analysis

Exemption 3 of the FOIA, cited by ROO, allows agencies to withhold information if the withholding is specifically authorized by another federal statute. However, the withholding statute must meet strict statutory guidelines. An agency properly invokes Exemption 3 only where the withholding statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3). This Office has found the NDAA to be an Exemption 3 statute, because it meets the subpart (A) requirement of that exemption. Chemical Weapons Working Group Inc., 26 DOE ¶ 80,170 at 80,730 (1997); see also Fried, Frank, Harris, Shriver & Jacobson, 26 DOE ¶ 80,163 (1997) (Fried, Frank).(1)

We first examined whether ROO applied the NDAA correctly. Under the NDAA, proposals must be withheld, except if a proposal has been set forth or incorporated by reference into a contract. In that case, the proposal must be released. Under Fried, Frank, this exception also includes the case in which portions of the proposal (as opposed to the entire proposal) are set forth or incorporated by reference into the contract. Id. at 80,709. Upon review of the FDH/DOE contract, we find that no relevant portions of the proposal fall within this exception. We further note that the ROO determination letter was properly signed by a Denying Official, in accordance with the regulations governing determination letters denying requests for records. See 10 C.F.R. § 1004.7(b)(2).

Next, we find that it was proper for ROO to apply the NDAA to a document created prior to the effective date of the Act. The text of the statute does not in any way limit its authority to documents created after the Act's effective date of September 23, 1996. Congress clearly has the power to change the scope of the FOIA at any time, and to do so with respect to all federal agency records in existence at the time. Further, as a policy matter, it would be logistically quite complicated to apply the Act to some proposals and not others.

Nevertheless, we find merit in the Appellant's argument that the DOE has waived its right to withhold the requested information by releasing certain information about the FDH proposal. In various newspaper articles the Appellant submitted, the Appellant has demonstrated that the DOE stated publicly at press conferences and press releases surrounding the awarding of the contract that, inter alia, FDH has pledged to save approximately $200 million each year for the next five years and that FDH will not receive any fee should it fail to meet certain objectives.

In our view, FOIA principles such as waiver extend to material covered by Exemption 3 and the NDAA. The D.C. Circuit has extended waiver principles in Exemption 3 cases involving other statutes. E.g., Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755 (D.C. Cir. 1990) (Fitzgibbon) (waiver principle applied but 50 U.S.C. § 403(d)(3) found to protect foreign intelligence information

since publicly disclosed information pertained to later time period). Thus, we see no reason not to apply the waiver principle in the NDAA context.(2)

The extent to which the DOE has waived FOIA exemptions depends on the circumstances of the disclosure. Carson v. United States Department of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980); Marlene Flor, 26 DOE ¶ 80,104 (1996). Under Fitzgibbon, the prior released information must meet three criteria to be considered to have waived Exemption 3 applicability: (1) the information requested must be as specific as the information previously released; (2) the information must match the information previously disclosed; and (3) and the information requested must already

have been made public through an official and documented disclosure. 911 F.2d at 765 (citing Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (Afshar)). In this case, we find that the publicly released statements by the DOE meet the Afshar criteria and are sufficient to waive the applicability of Exemption 3. Since even "off-the-record" disclosures to the press have been found to

create a waiver, Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), a major national announcement by the DOE must do the same. However, the waiver of information in the proposal only extends to the precise facts that the DOE released publicly and that are duplicative of facts contained in the proposal. Therefore, we are remanding this case to ROO to determine which precise facts the DOE released are contained in the proposal and responsive to the Appellant's request. ROO should then release these portions, unless they are subject to an exemption,(3) in which case ROO should provide adequate justification for withholding any portion of them.

It Is Therefore Ordered That:

(1) The Appeal filed by the Hanford Advisory Board on August 7, 1997, Case No. VFA-0323, is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Richland Operations Office, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 2, 1997

(1)1/ The NDAA provision likely also meets the requirements of subpart (B) of Exemption 3 since it refers to a particular type of matter to be withheld, i.e., proposals.

(2)We note however that we are not deciding whether waiver principles apply to information covered by other statutes, such as information classified as Restricted Data pursuant to the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, or information covered by the Trade Secrets Act, 18 U.S.C. § 1905.

(3)ROO should consider whether Exemption 4 or the Trade Secrets Act applies to any material for which it determines waiver has occurred.

Case No. VFA-0324, 26 DOE ¶ 80,217

September 8, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Bruce Darrow Gaither

Case Number: VFA-0324

Date of Filing: August 7, 1997

Bruce Darrow Gaither files this appeal from a determination letter issued by the Director of the Department of Energy's (the Department) Freedom of Information Act and Privacy Act Division (the Director). The determination letter replied to Gaither's request for information submitted to the Department under the Freedom of Information Act (FOIA).(1) In the determination letter, the Director said that no documents responsive to Gaither's request had been found. Gaither's appeal, if granted, would require the Department to conduct a further search for responsive documents.

Background

Pursuant to the FOIA, Gaither had requested "documents, photographs, and reports relating to operational space-borne laser systems to be used as antiballistic defense systems wherein the laser beams heat incoming enemy missiles." In his appeal, Gaither asserts that the records he requested do exist. Gaither has not provided a basis for this assertion.

The FOIA generally requires federal agencies to release agency records to the public upon request. If a requester has reasonably described the information he is seeking and has complied with the DOE's FOIA regulations, 10 C.F.R. Part 1004, the Department must conduct a thorough and conscientious search for responsive documents.

Adequacy of the Department's Search

In responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard requires that the search be reasonable, however, not exhaustive. "The issue is *not* whether any further documents might conceivably exist, but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

The Office of Hearings and Appeals will remand a case where a search was inadequate. *E.g., Petrucelly & Nadler, P.C.*, 25 DOE ¶ 80,187 (1996); *Dennis McQuade*, 25 DOE ¶ 80,158 (1996). To evaluate the adequacy of the search, we telephoned staff members of the Department's offices for Defense Programs and Energy Research, who had been tasked with the original search. An official at the Office of Defense Programs informed us that employees of the office searched for material responsive to the request and found no records. An official of the Office of Energy Research told us that a search had been made for

any materials relating to lasers and found two projects concerning x-ray laser microscopes. Neither project, however, was responsive to Gaither's request for information about space-borne laser missile defense systems.

In addition, the official from Defense Programs suggested that we contact the Department's Office of Nuclear Energy, Science, and Technology (Nuclear Energy), which had not previously been tasked with the request. We contacted the Office of Nuclear Energy, and an official from that office subsequently informed us that its files had been search and no records responsive to the request had been found. None of the Department's employees whom we contacted knew of any other office that might contain responsive records.

Conclusion

We believe that the Department has conducted a search that was reasonably calculated to uncover all materials relevant to Gaither's request. Consequently, we find no reason to remand this request for a further search. We will therefore deny Gaither's appeal.

It Is Therefore Ordered That:

(1) The appeal filed by Bruce Darrow Gaither, Case No. VFA-0324, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business; or in which the agency records are situated; or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 8, 1997

(1) 5 U.S.C. § 552.

Case No. VFA-0326, 26 DOE ¶ 80,221

SEPTEMBER 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: August 21, 1997

Case Number: VFA-0326

On August 21, 1997, the Office of Hearings and Appeals (OHA) received an Appeal filed by William H. Payne from a determination that the Department of Energy's (DOE) Albuquerque Operations Office (Albuquerque) issued to him. Albuquerque issued this determination in response to a request for information that Mr. Payne submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Albuquerque to release certain legal invoices to Mr. Payne in unredacted form.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public unless the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 16, 1996, Mr. Payne submitted a FOIA request for: (I) invoices submitted by private law firms to Sandia National Laboratories (Sandia), a DOE contractor, for the defense of a sexual harassment lawsuit involving Sandia employees, (ii) investigative reports concerning the plaintiff's allegations of sexual harassment in the Sandia litigation, and (iii) records indicating whether a former DOE official had been accused of sexual harassment or was the subject of a "security clearance action."

In its response to Mr. Payne's request, Albuquerque provided the names of two law firms that Sandia had retained to defend the

harassment litigation and provided the dollar amounts paid to these firms. The actual invoices were withheld in their entirety under Exemption 5 of the FOIA. Albuquerque further stated that any investigative reports concerning the harassment allegations made in the litigation were the property of Sandia and were not agency records. Finally, based on Exemptions 6 and 7© of the FOIA, Albuquerque refused to confirm or deny the existence of records that would indicate whether a former DOE official had been accused of sexual harassment or had been the subject of a "security clearance action."

Mr. Payne appealed Albuquerque's determination to this Office on January 22, 1997. In his submission, Mr. Payne argued that the legal invoices are not subject to Exemption 5 because they are not internal governmental records. He also contested Albuquerque's findings with regard to investigative reports

concerning the alleged harassment and records pertaining to whether the former DOE official had been accused of sexual harassment or had been the subject of a "security clearance action."

In a Decision and Order issued on February 20, 1997, William H. Payne, 26 DOE ¶ 80,161 (1997), the OHA rejected Mr. Payne's contentions and upheld Albuquerque's determination except for that Office's finding that the legal invoices are exempt from mandatory disclosure in their entirety pursuant to Exemption 5. We found that although the invoices consist largely of information that is privileged under the attorney work product component of Exemption 5 and therefore shielded from mandatory disclosure, such as the descriptions of the legal services provided, the monthly and daily totals of hours billed by each attorney and the dates on which their services were provided, they also contain non-privileged information, such as the attorneys' identities, their hourly rates, the total fees charged for the litigation, and the costs of expenses such as photocopying, reporting services and mileage, that cannot be withheld under Exemption 5. Accordingly, we remanded this matter to Albuquerque with instructions to segregate non-exempt material from the invoices and release that material to Mr. Payne.

In response to our Decision, Albuquerque issued a new determination to Mr. Payne on July 18, 1997. In this determination, Albuquerque released portions of the invoices indicating the names of the law firms retained by Sandia, the dates of the invoices, the dates that they were received by Sandia, the name of the person whose suit the firms were defending, and the names of the individual attorneys of record in the case. However, citing Exemption 4 of the FOIA, Albuquerque withheld the name of an attorney who worked on the case but whose participation is not a matter of public record, the attorneys' hourly rates and the costs of expenses such as photocopying, reporting services and mileage. Exemption 4 protects from mandatory disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). In support of its determination, Albuquerque stated that release of the information would likely cause financial harm to the legal firms involved by revealing their pricing strategy and the attorneys' thought processes and theories in defending cases of this nature. That Office also stated that information of this type is generally closely guarded by the firms, and that disclosure would impair the competitive position and ability of the legal firms to provide low- cost, quality legal services to government contractors.

On August 21, 1997, Mr. Payne filed the current Appeal. In this submission, he again argues that Exemption 5 does not apply to the invoices because they are not inter-agency or intra-agency memorandums. Mr. Payne also contests the Albuquerque Office's application of Exemption 4 in this case.

II. Analysis

A. Exemption 5

Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552(b)(5). In the February 20, 1997 Decision issued to Mr. Payne, we addressed and rejected his contention that Exemption 5 does not apply to the invoices. We stated that when documents have been created outside of an agency but pursuant to agency initiative, courts have held that such documents are intra-agency documents. See Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971). See also Joyce E. Economus, 23 DOE ¶ 80,182 (1994); Tri-City Herald, 18 DOE ¶ 80,115 (1989); Rio Grande Sun, 15 DOE ¶ 80,132 (1987) (Exemption 5 applies to invoices prepared by law firm representing DOE contractor). Mr. Payne has not presented any arguments that convince us that our previous holding in this regard is incorrect. We therefore conclude that Albuquerque properly applied Exemption 5 in withholding portions of the invoices.

B. Exemption 4

Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or

financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be exempt from mandatory disclosure under Exemption 4, a document supplied to the DOE on a non-voluntary basis must meet the following criteria: the document must contain either (A) "trade secrets" or (B) information which is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). Cf. Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992) (information voluntarily provided to the Government is confidential under Exemption 4 if it is the kind of information that the provider would not customarily make available to the public).

We have previously stated that a determination by the DOE that information is exempt from disclosure pursuant to Exemption 4 must include a reasonably specific explanation of how the withheld material meets the foregoing tests. Davis, Wright & Jones, 19 DOE ¶ 80,104 (1989) (Davis); Arnold & Porter, 12 DOE ¶ 80,108 (1984). Such an explanation should indicate the type of competitive injury which would result from disclosure or the manner in which the information, if disclosed, could be utilized by a competitor to damage the firm's market position. Davis.

Applying these criteria to the determination under review, we do not believe that Albuquerque has adequately explained its reasons for withholding the attorney's name, the hourly rates, and the copying, reporting service and mileage expenses under Exemption 4. Although the determination generally concludes that release of this information would impair the firms' competitive positions, Albuquerque has not indicated what competitive harm would result from the release of each of these three categories of information, or how this information might be used by the law firms' competitors. For example, it is unclear from Albuquerque's determination how release of the expense information would compromise the firms' competitive positions, or how release of the attorney's name might be used by the firms' competitors.

We will therefore remand this matter to Albuquerque. On remand, Albuquerque should, if necessary, confer with the law firms and then issue a new determination in which it either releases the attorney's name, the hourly rates and the expense information to Mr. Payne, or describes the specific competitive harms that will result from the release of each of these categories of information.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on August 21, 1997 is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further proceedings in accordance with the directions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 19,1997

Case No. VFA-0327, 27 DOE ¶80,145

June 11, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Dates of Filing: August 25, 1997

December 23, 1997

Case Numbers: VFA-0327

VFA-0365

The National Security Archive filed appeals from determinations issued to it on July 1 and October 14, 1997, by the Deputy Director for Communications and Information of the Headquarters Air Combat Command, Department of the Air Force (Air Force). In those determinations, the Air Force denied in part a request for information that the National Security Archive filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Air Force specified that certain information deleted from the documents released to the National Security Archive in each determination was withheld after a review of the documents had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This appeal, if granted, would require the Department of Energy (DOE) to release information that it withheld through the Air Force's July 1 and October 14, 1997 determinations.

The FOIA requires that federal agencies generally release to the public, upon request, documents in their possession and control. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 22, 1994, the National Security Archive submitted a request to the Air Force for a number of documents, all of which pertained to annual or short-term histories of specified elements of the United States Air Force. Because three of these documents contained DOE information, the Air Force referred the three documents to the DOE's Office of Declassification (OD) for a determination concerning their possible release. OD responded by returning the documents to the Air Force after marking the information to be withheld and providing an explanation of each withholding. The Air Force released to the National Security Archive portions of the deleted versions of the requested materials in interim determinations it issued on July 1 and October 14, 1997.

Although the DOE withheld a number of passages from the materials the Air Force released in its July 1, 1997 determination letter, the National Security Archive has appealed only the DOE's withholding of the

information deleted on page 120 of Volume I of Historical Study Number 117, History of Strategic Air Command, FY 1970 (Case No. VFA-0327). Similarly, although the DOE withheld a number of passages from the materials the Air Force released in its October 14, 1997 determination letter, the National Security Archive has appealed only the DOE's withholding of the information deleted on page 112 of Volume I of Historical Study Number 116, History of Strategic Air Command, FY 1969 (Case No. VFA-0365). In its determination letters, the Air Force explained that the information withheld from these two pages could not be released under the Atomic Energy Act of 1954 and therefore was withheld under Exemption 3 of the FOIA. The information withheld from these pages reveals, for fiscal years 1969 and 1970, the number of nuclear weapons, by weapon type and weapon yield, that were required for support of Strategic Air Command alert forces.

The present appeals seek the disclosure of these withheld portions from the reports that the Air Force provided to the National Security Archive. In its appeals, the National Security Archive states that the Government has declassified related information concerning earlier years, and contends that comparable data for the years at issue could now be declassified and released to the public "without damaging U.S. interests in nuclear non-proliferation or otherwise violating statutory requirements."

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Glen Milner, 27 DOE ¶ 80,115 (1998); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992). According to the Office of Declassification, the portions of the two pages that the DOE deleted under Exemption 3 were withheld on the grounds that they contain information that has been classified as Formerly Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the two pages at issue for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

The Director of SA considered the concerns the National Security Archive specifically raised in his appeal, and performed as well a general review of the material under the current classification guidance. Based on the review that the Director of SA performed, the DOE has determined that the Atomic Energy Act requires the continued withholding of the information withheld in the initial determinations. In accordance with current joint Department of Defense/DOE classification guidance, the withheld information, which reveals nuclear weapon quantity by weapon type and yield, is classified as Formerly Restricted Data. Section 142 of the Atomic Energy Act, 42 U.S.C. § 2162, prohibits the disclosure of such information. Consequently, this information was and is properly withheld pursuant to Exemption 3 of the FOIA.

A finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information. Nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the two pages at issue that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. Accordingly, the National Security Archive's appeals will be denied.

It Is Therefore Ordered That:

(1) The appeals that the National Security Archive filed on August 25 and December 23, 1997, Case Nos. VFA-0327 and VFA-0365, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 11, 1998

Case No. VFA-0329, 26 DOE ¶ 80,222

September 26, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:William H. Payne

Date of Filing: September 2, 1997

Case Number: VFA-0329

On August 14, 1997, William H. Payne made a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004, and at the same time, sought a fee waiver for this request from the Freedom of Information Officer of the Office of Public Affairs of the DOE's Albuquerque Operations Office (FOIA Officer). On September 2, 1997, Mr. Payne filed a FOIA Appeal requesting that the Office of Hearings and Appeals (OHA) of the DOE grant a fee waiver for his August 14, 1997 FOIA request and respond to his allegation that the FOIA Officer violated federal law when she did not issue a determination concerning his FOIA request within ten days.

In an August 15, 1997 letter titled "RECEIPT OF FREEDOM OF INFORMATION ACT REQUEST," the FOIA Officer informed Mr. Payne that "[i]f the estimated cost of fulfilling your FOIA request exceeds what you are allowed [without charge], we will correspond with you again addressing your request for a fee waiver." The FOIA Officer informed us that she did not consider this letter to be a denial of Mr. Payne's fee waiver request. See September 3, 1997 Record of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Elva Ann Barfield, FOIA Officer, Albuquerque Operations Office. Since the FOIA Officer acknowledged that she did not make a determination regarding Mr. Payne's fee waiver request nor has she completed her search for documents, Mr. Payne's fee waiver appeal is not ripe for our review. See 10 C.F.R. § 1004.8(a). Thus, we must dismiss the fee waiver portion of this appeal. However, we encourage the FOIA Officer to issue a determination concerning Mr. Payne's fee waiver request as quickly as possible.

Mr. Payne also asks us to describe "the steps . . . [OHA is] taking to bring . . . [the FOIA Officer] to justice for violating federal law." Under the FOIA, OHA has jurisdiction to review agency determinations related to information access. The unspecified relief that Mr. Payne seeks against the FOIA Officer is not part of OHA's jurisdiction. When a FOIA Officer fails to respond to a FOIA request within ten days, we can only request that the FOIA Officer act on this matter expeditiously. If Mr. Payne chooses, he has the right under the regulations to seek judicial review on this issue in federal district court. See Association of Public Agency Customers, 26 DOE ¶ 80,103 (1996).

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on September 2, 1997, Case Number VFA-0329, is hereby dismissed.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be

sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 26, 1997

Case No. VFA-0330, 26 DOE ¶ 80,223

September 29, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wilburn T. Dunlap

Date of Filing: September 2, 1997

Case Number: VFA-0330

On September 2, 1997, Wilburn T. Dunlap (Dunlap) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) from a determination that DOE's Albuquerque Operations Office (DOE/AL) issued to him on August 8, 1997. That determination concerned a request for information that Dunlap submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE/AL would be required to conduct a further search for responsive material.

I. Background

Dunlap was employed by the War Department, U.S. Engineers at McDonald Ranch in New Mexico during 1944 and 1945. In his request, Dunlap argued that the employees of the U.S. Engineers should be recognized for their part in this country's history, and requested a "complete list of the U.S. Engineer's force stationed at McDonald Ranch, test site of the first atomic bomb, in 1944 and 1945." Letter from Dunlap to Bradbury Science Museum, Los Alamos National Laboratory (LANL) (May 29, 1997).

Upon receipt of the request, LANL searched their files and located a listing of personnel of the U.S. Engineers Office for the year 1945, but found no responsive material for 1944. LANL sent the responsive material to DOE/AL. However, the personnel list was considered a Department of Defense (DOD) document, and DOE/AL forwarded the document to DOD to determine its releasability and respond directly to Dunlap.(1) DOE/AL advised Dunlap of this result in a final determination letter. Letter from FOI Officer, DOE/AL, to Wilburn Dunlap (August 8, 1997). On September 2, 1997, Dunlap filed the present Appeal, challenging the adequacy of LANL's search.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted DOE/AL to ascertain the scope of the search it performed for the responsive documents. In response to the original request, LANL searched all of its files and found the 1945 U.S. Engineers Office personnel listing. After the Appeal was filed, DOE/AL requested another search. LANL searched all of its files again, but was still unable to find the 1944 listing or any other responsive material. Because the first search successfully located the 1945 listing, it was reasonable to expect that the 1944 listing, if still in existence, would be found in the same database. The FOIA does not require an exhaustive search, only a reasonable one. On the basis of the facts provided above, we find that LANL conducted a search reasonably calculated to uncover responsive documents. Accordingly, we must deny Dunlap's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on September 2, 1997 by Wilburn T. Dunlap, Case No. VFA-0330, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 29, 1997

(1)DOD forwarded the responsive material to the National Archives. The Records Declassification Unit of the National Archives searched its files, was unable to locate any further responsive documents, and released the material to Dunlap on September 11, 1997.

Case No. VFA-0331, 26 DOE¶ 80,224

October 1, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard R. McNulty

Date of Filing: September 2, 1997

Case Number: VFA-0331

On September 2, 1997, Richard R. McNulty (Appellant) filed an Appeal from a final determination issued to him on July 28, 1997, by the Department of Energy's (DOE) Richland Operations Office (Richland). In that determination, Richland released two documents responsive to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. Richland deleted and withheld portions of the documents under FOIA Exemptions 5 and 6, however. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

In response to an extensive request filed by the Appellant, Richland has issued a number of determinations. The present Appeal concerns only the determination letter issued to the Appellant on July 28, 1997. That determination letter released two documents to the individual, herein referred to as "Attachments A and B." Extensive portions of both documents were redacted and withheld under Exemptions 5 and 6. (1) *See* Determination Letter at 1. On September 2, 1997, the Appellant filed the present Appeal, challenging Richland's withholdings.

II. ANALYSIS

The FOIA generally requires that documents held by federal agencies be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). Only Exemptions 5 and 6 are at issue in the present case.

A. Attachment A

Attachment A consists of notes taken at a DOE meeting held on April 1, 1997. The names of most of the individuals that participated in the meeting appear in the top portion of this document, while the remainder of the document summarizes the comments made by the meeting's participants in apparent chronological order. Richland released this document but redacted the portions of the document that indicated who made each statement under Exemption 6. Richland also withheld other portions of the document which did not indicate identities under Exemption 5's deliberative process privilege.

Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6 an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld under Exemption 6. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 109 S. Ct. 1468, 1481 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

Richland has found a privacy interest in information revealing the identities of individuals contained in Attachment A. Determination Letter at 1. The identities of the individuals were withheld because of a concern that their release might subject the individuals to harassment, intimidation, or other personal intrusions. In such circumstances, the courts have consistently recognized significant privacy interests. *See Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY- TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990). The potential for harassment, intimidation or other personal intrusions is obvious from the context of Attachment A since it contains numerous derogatory (and possibly inflammatory) statements concerning the Appellant. Accordingly, we find a significant privacy interest exists in the present case.

In *Reporters Committee*, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. *Reporters Committee*, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." *Id.* at 1483. Consequently, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner,* 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). Release of the individuals' identities linked with particular statements would not likely contribute to the public's understanding of the operations or activities of the Government. Accordingly, we find that there is little or no public interest in their release.

Because release of the individuals' identities in that context could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for the individuals. After weighing the significant privacy interests present in this case against an insubstantial or non- existent public interest, we find that release of information revealing their identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Accordingly, we find that their identities were properly withheld under Exemption 6.

Exemption 5

Our review of the unredacted copy of Attachment A reveals that Richland withheld a great deal of information other than that which could link individuals to particular statements at the meeting. That information was withheld under Exemption 5. Exemption 5 exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In the present case, only the "deliberative process privilege" is at issue.

The deliberative privilege covers only the subjective, deliberative portion of the document. *EPA v. Mink*, 410 U.S. 73, 87-91 (1973). Moreover, the FOIA, as implemented by 10 C.F.R. § 1004.10(c), requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The only exceptions to the requirement of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, *Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin.*, 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Id.*

Our review indicates that Richland has withheld more information than necessary under the rules which govern this area. In our view, release of the vast majority of the information withheld under Exemption 5 in these documents would pose no tangible risk to interests protected under the FOIA. Specifically, we find that by redacting identities of individuals who either made comments at the meeting or whose names were mentioned at the meeting the privacy of the speakers as well as the deliberative process may be preserved while allowing the individual access to the substance of the conversation.

Accordingly, we find that Richland must review all of its withholdings under Exemption 5 to ensure that they are appropriate under the "reasonably foreseeable harm" standard set forth by the Attorney General in 1993. This standard applies a presumption in favor of disclosure which, in the absence of a reasonably foreseeable harm to an interest protected by an exemption, should result in a determination by the agency that the public interest lies with disclosure. See J. Reno, Memorandum for Heads of Departments and Agencies (October 4, 1993). Therefore we are remanding this portion of the Appeal to Richland. On remand, Richland should conduct a further review, under this standard, of all information withheld pursuant to Exemption 5.

B. Attachment B

The Determination Letter indicates that only the names of individuals were withheld from Attachment B, pursuant to Exemption 6. Our initial review of the redacted version of Attachment B indicated that a good deal more than the names of individuals had been deleted. In fact, virtually all of the text of this document had been deleted. Accordingly, we contacted Richland to obtain an unredacted copy of that document in order to facilitate our review. We were then informed by Richland's FOIA Officer that, despite its requests, the FOIA office was never provided with an unredacted copy of Attachment B. Instead, we were informed that the document was in the possession of the DOE employee who had created it, Jackson Kinzer, Richland's Assistant Manager for Tank Waste Remediation. We contacted Mr. Kinzer in order to obtain an unredacted copy of Attachment B. However, we were informed by Mr. Kinzer that he had taken the document to his residence and had been unable to locate it.

Without this document we are unable to conduct a meaningful review of Richland's withholdings from this document. Therefore we are also remanding this portion of the Appeal to Richland. On remand, Richland shall immediately conduct an exhaustive search for a complete copy of Attachment B. Promptly upon

locating Attachment B, Richland should either release it to the Appellant in its entirety or conduct a further review of the document in accordance with the guidance set forth above before issuing a new determination letter.

III. CONCLUSION

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. By releasing Attachment A with only those redactions necessary to prevent linking of specific individuals with specific statements, the agency can provide as much information as possible while safeguarding individual privacy rights.

For the reasons set forth above, we are remanding this matter to the Department of Energy's Richland Operations Office for completion of the expanded search for Attachment B, an additional review of Attachment A, and the issuance of a new determination letter.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Richard R. McNulty on September 2, 1997 (Case Number VFA-0331) is hereby granted to the extent set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is hereby remanded to the Richland Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 1, 1997

(1)* The determination letter indicates that the information was withheld from Attachment A under Exemptions 5 and 6, while information was withheld from Attachment B under only Exemption 6.

Case No. VFA-0332, 26 DOE ¶ 80,226

October 14, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Dr. Daniel D. Eggers

Date of Filing:September 16, 1997

Case Number: VFA-0332

On September 16, 1997, Dr. Daniel D. Eggers (Appellant) completed the filing of an Appeal from a determination issued on April 14, 1997, by the Department of Energy's Oak Ridge Operations Office (DOE/OR).(1) This determination was issued in response to a request for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Decision and Order, we will determine whether the DOE must conduct a further search for documents responsive to the Appellant's FOIA request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I BACKGROUND

On March 20, 1997, the Appellant submitted a FOIA request to DOE/OR seeking copies of records regarding a particular World War II-era patent which the Appellant believes belonged to his father, an employee at the Oak Ridge site in that era. The Appellant specified an "S-number," S-5443,

connected with this patent and explained that the patent related to the electromagnetic separation process. He also stated that a person named S.W. Scott worked with his father on the patent. On April 14, 1997, DOE/OR issued its determination, stating that it could not locate any responsive documents. On September 16, 1997, the Appellant completed the filing of the present Appeal in which he contends that DOE's search for documents was inadequate.

II ANALYSIS

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files;

instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted DOE/OR to determine how it conducted the search. DOE/OR informed us that it searched the patent and intellectual property records databases of both the Office of Chief Counsel (OCC) of DOE/OR, as well as the Office of General Patent Counsel of DOE/OR's management and operating contractor of the Y-12 plant, Lockheed Martin Energy Systems (LMES).(2) We learned that the OCC database contains records of the World War II era, but the Y-12 database only contains records originating in 1984 or later. See Records of Telephone Conversations between Dawn Goldstein and Amy Rothrock (September 16 and 18, 1997).

Subsequent to issuing its determination, DOE/OR found an entry listed for "Eggers" in patent logbooks kept by OCC in the DOE/OR offices and dating back to the 1940's. (3)According to this entry, the patent was applied for on May 25, 1949 and abandoned on August 3, 1951, meaning that there was never a final patent issued. Using this new information, DOE/OR requested that the DOE Headquarters Office of General Counsel (OGC) conduct a search of its patent database and other patent records, and that LMES conduct a further search of its Y-12 records. See Record of Telephone Conversation between Dawn Goldstein and Amy Rothrock (September 18, 1997). According to Betty Winchester of OGC, the patent referred to in the logbook had an S-number of S-5443, therefore confirming that this patent is the same patent referred to in the Appellant's request. However, OGC's paper file on this matter would have been destroyed due to its age. See Electronic Mail Message from Amy Rothrock to Dawn Goldstein (September 26, 1997) (including electronic mail message from Betty Winchester to DOE/OR). Also, no further documents could be located at the Y-12 plant. See Electronic Mail Message from Amy Rothrock to Dawn Goldstein (September 25, 1997).

Ms. Rothrock explained the difficulty of finding patent and other research records created prior to 1984. These records are dispersed over approximately 300 buildings at Y-12 and apparently are not indexed in any way. In addition, the subject matter of the patent, the electromagnetic separation process, is extremely broad. DOE/OR stated that if the Appellant could inform DOE/OR of a more specific title of his father's project or references to any papers his father had written, or the name of his father's office, DOE/OR might be able to find responsive records. See Record of Telephone Conversation between Dawn Goldstein and Amy Rothrock (September 18, 1997).

We find that the search as previously conducted was adequate. Without more specific information, a search through thousands of unindexed files for records that might not exist due to their great age would have imposed an unreasonable burden on DOE/OR. See Nation Magazine v. U.S., 71 F.3d 885, 892 (D.C. Cir. 1995) (to search 23 years of unindexed files would impose an unreasonable burden on an agency); Lois Blanche Vaughn, 26 DOE ¶ 80,165 at 80,713 (1997). However, the Appellant has now informed us that he is able to provide specific information to DOE/OR which may prove helpful to them in conducting a further search. See Record of Telephone Conversation between Dawn Goldstein and Appellant (October 1, 1997). If the Appellant had not provided such information, we would have upheld DOE/OR's determination. However, since this Office has helped to uncover this additional information, we are able to promote a quick, responsive resolution by remanding this case to DOE/OR for an additional search for responsive documents. On remand, DOE/OR shall identify all documents responsive to the Appellant's reformulated request and either release them or provide adequate justification for withholding any portion of them.(4)

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Daniel D. Eggers on September 16, 1997, Case No. VFA-0332, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Oak Ridge Operations Office, which shall conduct a search for documents responsive to the Appellant's reformulated request as described in

the above Decision and Order, and shall promptly issue a new determination regarding those documents.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 14, 1997

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(1)The Appellant initially filed a submission with the Office of Hearings and Appeals (OHA) on September 3, 1997. The OHA held the submission in abeyance until September 16, 1997, when we received a copy of the April 14, 1997 determination. The Appellant informed us that he did not receive the determination letter until August 30, 1997. See Record of Telephone Conversation between Dawn Goldstein, Staff Attorney, OHA, and Appellant (October 1, 1997). Therefore, we will consider the Appeal as being filed within the regulatory deadline of thirty calendar days after receipt of the determination letter. See 10 C.F.R. § 1004.8(a).

(2)According to DOE/OR's records, the Appellant's father worked only at the Y-12 plant. See Record of Telephone Conversation between Dawn Goldstein and Amy Rothrock, FOIA Officer, DOE/OR (October 1, 1997).

(3)DOE/OR sent a copy of that logbook entry to the Appellant. See Record of Telephone Conversation between Dawn Goldstein and Amy Rothrock (September 18, 1997).

(4)In addition, we suggest that the Appellant submit a FOIA request to the U.S. Patent and Trademark Office (located within the Department of Commerce) for information regarding this patent.

Case No. VFA-0333, 26 DOE ¶ 80,225

October 7, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Dennis Kirson

Date of Filing: September 10, 1997

Case Number: VFA-0333

On September 10, 1997, Dennis Kirson (Kirson) filed an Appeal from a final determination the Albuquerque Operations Office (AL) of the Department of Energy (DOE) issued to him on September 3, 1997. In that determination, AL denied a request for information that Kirson filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In his request for information, Kirson sought a copy of the "list of impacted positions at AL which was required to be delivered to Field Management (FM) on August 15, 1997." (1) In its September 3, 1997 determination letter (Determination Letter), AL identified one document responsive to Kirson's request. AL stated that this document was a copy of a preliminary assessment of federal staff employee positions to be eliminated which was forwarded to the DOE's Offices of Human Resources and Field Management on August 20, 1997. AL withheld the document in its entirety pursuant to Exemption 5 of the FOIA. The Determination Letter further stated that because AL has not reached any decision and was still negotiating with the DOE Office of Defense Programs (DP) regarding the positions to be eliminated (in the event of limits imposed by Congressional

funding), the document was an intra-agency predecisional document protected by Exemption 5. The Determination Letter also concluded that release of the document would not be in the public interest.

In his Appeal, Kirson argues that Department of Energy Headquarters elements such as DP and the Office of the Assistant Secretary for Environment, Safety and Health have already released lists of targeted positions to be abolished. Additionally, Kirson asserts that the DOE Operations Offices in Nevada and Idaho have also released their targeted position lists. Consequently, Kirson argues that because other DOE offices have released their targeted positions lists, AL may not now withhold its list pursuant to Exemption 5. Kirson also asserts that Office of Personnel Management (OPM) regulations seek to establish uniform and fair employment practices for all federal employees in all federal agencies. He apparently argues that AL's action in withholding the document contravenes the spirit of these regulations.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The document at issue contains a list of positions at AL which AL officials proposed for elimination pursuant to a scheduled reduction in force beginning on September 5, 1997 if Congressional funding were enacted. This document was submitted to HR so that it could review the positions which were proposed to be eliminated at AL. AL's Office of Chief Counsel has informed us that no final decision has been made regarding which, if any, positions should be eliminated and that AL and DP are still considering the issue. See Memorandum of telephone conversation between Ron O'Dowd, Office of Chief Counsel, AL, and Richard Cronin, OHA Staff Attorney (September 16, 1997). Additionally, an official at HR has informed us that given the fact that no RIF was conducted on September 5, 1997, new lists of targeted positions would probably have to be created if Congress were now to enact funding reductions for DOE. See Memorandum of telephone conversation between Pam Jeckell, Assistant Director of Workforce Reinvention and Staffing and Richard Cronin, OHA Staff Attorney (September 22, 1997). Given the facts presented to us, we find that the document is a pre- decisional, intra-agency document. Consequently, we have determined that Exemption 5 was properly applied to the document at issue. However, there is a very small amount of segregable factual material, consisting of column headings, which can be released to Kirson.

Kirson's arguments supporting his position that the entire document should be released are not persuasive. We have discovered that the Nevada and Idaho DOE Operations Offices and at least one DOE Headquarters office each discretionarily released to their employees, outside of the FOIA, a list of targeted positions to be eliminated. See Memorandum of telephone conversation between Kara Rickey, Office of Public Affairs, Nevada Operations Office and Richard Cronin, OHA Staff Attorney (September 22, 1997); Memorandum of telephone conversation between Carl Robertson, Idaho Operations Office and Richard Cronin, OHA Staff Attorney (September 22, 1997); Memorandum of telephone conversation between Ann Broker, Office of General Counsel, DOE Headquarters and Richard Cronin, OHA Staff Attorney (September 19, 1997). We are unaware of any lists of targeted positions that have been released by the

DOE pursuant to the FOIA. See Memorandum of telephone conversation with GayLa Sessoms, Director, Freedom of Information and Privacy Group and Richard Cronin, OHA Staff Attorney (September 22, 1997). The fact that a DOE office has exercised its discretion to release similar documents outside of the FOIA process is not determinative of whether a particular document may properly be withheld pursuant to the FOIA. Similarly, Kirson's general argument that withholding the document would violate the spirit of the OPM regulations is also irrelevant to the determination of whether a document may properly be withheld pursuant to the FOIA and the DOE regulations which implement it.

III. The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that AL properly applied Exemption 5 to most of the requested information, we must consider whether the public interest nevertheless requires disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested information consists of a preliminary opinion by AL officials regarding which positions could be eliminated in the eventuality of reduced funding by Congress. The release of this information would in our opinion have a chilling effect on the willingness of DOE Operations Office officials to make candid statements of opinion regarding a very sensitive issue potentially affecting the jobs of DOE employees. Employees and managers would be less likely to communicate their opinions on this and similar issues if they knew or suspected that an agency would release their opinions to the public. Additionally, AL officials have informed us that, in their opinion, release of the preliminary information contained in the list could cause serious confusion among employees at AL since the list is not final. We believe that in some workplace environments release of a preliminary list such as the one in the present case could cause significant employee distress. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest.(2)

It Is Therefore Ordered That:

(1) The Appeal filed by Dennis Kirson on September 10, 1997, Case No. VFA-0333, is hereby granted as set forth in Paragraph (2), and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Albuquerque Operations Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 7, 1997

(1)At the time of Kirson's request, DOE was making provisional plans to reduce its workforce by issuing Reduction-in-Force (RIF) notices on September 5, 1997 to various DOE personnel due to limits imposed by proposed Congressional funding reductions. DOE's Office of Human Resources (HR) and Administration requested lists of the positions proposed to be eliminated at each DOE office and facility.

(2)This determination is not made less valid by the fact that other DOE offices have exercised their discretion to release lists of targeted positions outside of the FOIA context, especially since agencies may decide to disclose information under those circumstances without any assessment of the effect of the disclosure on the public interest.

Case No. VFA-0335, 26 DOE ¶ 80,235

November 26, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Rural Alliance for Military Accountability

Date of Filing: September 29, 1997

Case Number: VFA-0335

On September 29, 1997, the Rural Alliance for Military Accountability (RAMA) filed an Appeal from a determination issued to it under the Freedom of Information Act (FOIA) on September 3, 1997, by the Albuquerque Operations Office of the Department of Energy (DOE/AL). In its Appeal, RAMA challenges the adequacy of DOE/AL's response to its FOIA request.

I. Background

On September 22, 1996, RAMA requested from the DOE

a copy of all documents pertaining to the transportation routes DOE and/or their contractors are utilizing to transport materials/wastes from DOE's Rocky Flats facility in Colorado to Los Alamos National Laboratory in New Mexico[, i]ncluding but not limited to maps, Records of Decision, NEPA documentation, risk analysis documentation, accident procedures, emergency preparedness training materials and all written policies pertaining to the transportation of materials/wastes.

Letter from Grace Bukowski, RAMA, to DOE (September 22, 1996). This request was referred to the DOE's Rocky Flats Field Office and DOE/AL, who were asked to respond directly to RAMA. On September 3, 1997, DOE/AL issued a determination in which it listed each location under its jurisdiction in which a search for responsive documents was conducted. In five of the locations searched, DOE/AL located no documents responsive to RAMA's request. Responsive documents were located in four locations. All of these documents were released to RAMA in their entirety, with the exception of two classified documents that were sent to the DOE's Office of Declassification for further review.

RAMA appeals what it characterizes as a "totally inadequate response" from DOE/AL "on the grounds that the partial response does not address the FOIA request, is unresponsive, and contradictory in the information provided. The fact that the Los Alamos National Laboratory, the destination and recipient of nuclear materials, did not provide requested information reflects the

unresponsiveness of the partial response." Appeal at 1.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon

request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To ascertain the extent of the search conducted for documents responsive to RAMA's request, we contacted DOE/AL. The DOE/AL FOIA Office (FOIA Office) identified nine offices under its jurisdiction that it believed might have documents responsive to the request, and therefore had forwarded a copy of the request to each office for a search and identification of relevant documents. Our inquiry in response to the present Appeal revealed the following.

A. Offices That Located Responsive Documents

The DOE/AL's Operations Management Division (OMD) informed the FOIA Office that it would not be involved in the transport of material/wastes to which the request referred unless an accident occured. See Electronic mail from Geneva Stevenson, OMD, to Terry Apodaca, FOIA Office (November 18, 1997). Therefore, OMD did not conduct a formal search of its files. However, the office did locate a document entitled "Radiological Assistance Program Transportation Emergency Response (RAPTER), Training Course Lesson Plan," which was released to the appellant in its entirety. Id.

The Environmental Protection Division (EPD) of DOE/AL states that in response to the appellant's request, it

first searched our NEPA database querying for information about Rocky or Rocky and LANL. From this listing, we made a physical search of the files in the EPD filing system and those in long term storage. These files provide the detail of the more general topic. By individually reading the information in the file, we then discover the associated activities. It was through this method that we ascertained the information that was sent to your office [a memorandum with attachments that was released to the appellant in its entirety]. We also searched through the NEPA EPD library for documents that related to material movement between Rock[y Flats] and LANL. Most of these documents are EAs and EISs with backup environmental study documents. No information was derived from this effort.

Electronic mail from Joseph F. Robbins, EPD, to Terry Apodaca, FOIA Office (November 19, 1997).

The DOE/AL's Environmental Impact Statement Projects Office (EISPO) stated that "the LANL SWEIS [Site-Wide Environmental Impact Statement] project has been the only one that has specifically been involved with the question of transportation routes for waste/materials from RF to LANL," and that all of the information in EISPO's files on this subject were forwarded to the FOIA Office. Electronic mail from Corey Cruz, EISPO, to Terry Apodaca, FOIA Office (November 18, 1997). These documents were released to the appellant in their entirety.

The Transportation Safety Division (TSD) of DOE/AL stated that the request was forwarded for searches to the Chief of the Operations Branch and the Chief of the Support Branch of TSD. Electronic mail from Roseann M. Trujillo, TSD, to Terry Apodaca, FOIA Office (November 20, 1997). A document entitled "Federal Agent Job Analysis" and four documents from TSD's Transportation Safeguards Training Center were released to the appellant in their entirety. Id. In addition, two responsive documents were identified

as classified and were therefore forwarded to other DOE offices for further review.(1)

B. Offices That Located No Responsive Documents

DOE/AL's Contracts and Procurement Division (CPD) stated that it searched the contract files it maintains for the contract between the DOE and University of California for the management and operation of the Los Alamos National Laboratory, but found no responsive documents. Electronic mail from Timothy R. Coalson, CPD, to Terry Apodaca, FOIA Office (November 14, 1997).

The Safeguards and Security Division (SSD) (formerly Security and Nuclear Safeguards Division) of DOE/AL stated that it identified its "Survey of TSD Shipments" as potentially containing responsive documents, but that these files only encompass TSD's review of how couriers follow procedures (e.g., communication, deployment) relating to protection of materials en route, and therefore did not contain responsive documents. Electronic mail from Terry Apodaca, FOIA Office, to Steven Goering, OHA (November 17, 1997).

DOE/AL's Waste Management Division (WMD) stated that it searched its files under the topics "Radioactive waste, Los Alamos National Laboratory, and Transportation. In addition, a search was conducted of the Los Alamos National Laboratory Site Engineer's files and the Waste Management Division Library. No documentation on the above subject was found." Electronic mail from John M. Evett, WMD, to Terry Apodaca, FOIA Office (November 12, 1997).

The DOE's Los Alamos Area Office (LAOO) referred the appellant's request to its Office of Environment and Projects (OEP) and its Office of Facility Operations (OFO). OEP "searched its NEPA files, ER project files, project management files, and four employees of [OEP] searched their personal files." Electronic mail from Pat Wolford, LAAO, to Terry Apodaca, FOIA Office (November 19, 1997). OFO "searched its files under the subjects of accident procedures and emergency preparedness." Id. Neither search revealed responsive documents.

The DOE's Los Alamos National Laboratory (LANL) stated that it "performed an extensive search for [responsive] materials in the following areas: the CIC [Computing, Information, and Communications]-10 CARLA [Computer-Aided Retrieval Los Alamos] Databases; the CIC-14 Reports Collection, and the FSS [Facilities Safeguards and Security]-16 Authors' Database." Letter from Mary Edgett, Information Practices Office, LANL, to Elva Barfield, FOIA Office (January 27, 1997). LANL further stated that it contacted personnel in LANL's Nuclear Materials Technology Division Office, Facilities Safeguards and Security Division, and Environment, Safety, and Health Division. Id. LANL's search revealed no responsive documents. Id.

LANL's January 27, 1997 letter to the FOIA Office referenced a memorandum from its Business Operations Division stating that it

has exhausted every possible LANL organization that may have any maps, routing decision papers, risk analysis, NEPA documentation, accident procedures, emergency preparedness training, policies and procedures, etc., without any success. The type of documents requested are usually the responsibility of the originator of the shipments. It is my recommendation that you refer this request to Rocky Flats.

Id.

Based on the information detailed above, we find that the DOE/AL FOIA Office made a conscientious effort to address each element of the appellant's request and conducted a search reasonably calculated to uncover the materials sought by the appellant. However, based on information obtained subsequent to the filing of the present Appeal, we will remand this matter to DOE/AL to conduct a further search for responsive documents in two offices under DOE/AL's jurisdiction. First, the DOE/AL's Environmental Impact Statement Projects Office (EISPO) informed the FOIA Office that,

in the process of preparing the LANL SWEIS, we are analyzing transportation, including transportation between RF and LANL. However, at that time (and indeed, at this time) these analyses have not been completely peer reviewed and approved as part of the Draft LANL SWEIS; as such, they are considered predecisional. When the Draft LANL SWEIS is published, this information will be publicly accessible.

Electronic mail from Corey Cruz, EISPO, to Terry Apodaca, FOIA Office (November 18, 1997). On remand, DOE/AL should contact EISPO to determine whether it had any responsive materials, including any notes or drafts, at the time of the appellant's request. Any such material should be identified and released, unless subject to a FOIA exemption. In addition, subsequent to the present Appeal, DOE/AL's Waste Management Division suggested to the FOIA Office that its search include the DOE/AL's Office of Technology and Site Programs (OTSP). Electronic mail from John M. Evett, WMD, to Terry Apodaca, FOIA Office (November 12, 1997). DOE/AL has agreed to contact OTSP to search for responsive documents. Memorandum of telephone conversation between Terry Apodaca, DOE/AL, and Steven Goering, OHA (November 20, 1997).

Therefore, though we recognize that DOE/AL has already gone to great lengths to locate documents responsive to the appellant's request, we will remand this matter for the limited purpose of conducting a further search for responsive documents in these two offices. Any responsive documents shall be released to the appellant, or the basis for their withholding explained with specific reference to one or more FOIA exemptions.

It Is Therefore Ordered That:

(1) The Appeal filed by the Rural Alliance for Military Accountability on September 29, 1997, Case Number VFA-0335, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Albuquerque Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 26, 1997

(1) Once this review has been completed and DOE/AL determines whether these two documents can be released, the appellant will be notified and given the opportunity to appeal DOE/AL's determination to this office.

Case No. VFA-0336, 26 DOE ¶ 80,230

November 3, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Oregonian

Date of Filing: September 30, 1997

Case Number: VFA-0336

On September 30, 1997, The Oregonian filed an Appeal from a determination issued to it on September 10, 1997, by the Department of Energy's (DOE) Bonneville Power Administration (BPA). In that determination, BPA denied in part a request for information the Oregonian filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information the Oregonian requested.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 14, 1997, The Oregonian filed a Request for Information with BPA in which it sought the following information:

> ". . . any records showing the amounts and receipts of such fees [paid] to Bonneville from individual utilities; any agreements between Bonneville and individual utilities regarding or establishing exit fees; the amount of load that individual utilities diversified, prompting them to be subject to exit fees; any and all correspondence between Bonneville and individual utilities regarding exit fees; and any and all agreements (sic) that purport to invoke ? confidentiality' agreements between Bonneville and individual utilities regarding diversification and exit fees."

BPA issued a determination on September 10, 1997, in which it identified several responsive documents which included contract amendments containing the amounts of load (the amounts of power BPA is obligated to supply to its customers) diversified by individual BPA customers and the applicable exit fees. However, BPA withheld the amounts of load and the specific exit fees under Exemption 5 of the FOIA because it determined that this information is confidential commercial information and that disclosure would harm BPA's ability to compete for future business. (1) See Determination Letter at 1.

On September 30, 1997, The Oregonian filed the present Appeal with the Office of Hearings and Appeals (OHA) contending: that BPA improperly withheld the requested information from disclosure and that the public has an overriding right to know the terms under which BPA has released public utilities from their financial obligations to the government. See Appeal Letter at 3. The Oregonian asks that the OHA direct BPA to release the responsive documents.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149; 95 S. Ct. 1504, 1515 (1975) (Sears). The courts have identified three traditional privileges that fall within this exemption: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184; 95 S. Ct. 1491, 1500 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be ? routinely' or ?normally' disclosed upon a showing of relevance." F.T.C. v. Grolier, 462 U.S. 19, 26; 103 S. Ct. 2209, 2214 (1983) (citing Sears, 421 U.S. at 148-49; 95 S.Ct. at 1515 (1975)). Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 797, 799-801; 104 S. Ct. 1488, 1492-93 (1984).

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." See, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340; 99 S. Ct. 2800 (1979) (Merrill) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982) (Land Bank) (withholding a government generated real estate appraisal).

"The Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." Merrill, 443 U.S. at 356; 99 S. Ct. at 2810. The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. Id., 443 U.S. at 360; 99 S. Ct. at 2812. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." Land Bank , 671 F.2d 665 (footnote omitted).

However, the protection afforded by this privilege is limited in scope and lasts only as long as necessary to protect the government's commercial interests. Id. Moreover, the application of this privilege is not automatic. Merrill, 443 U.S. at 362; 99 S. Ct. at 2813. The burden is upon the agency to show that the records it seeks to withhold under the privilege are confidential and that their disclosure might be harmful. American Standard v. Pfizer, Inc., 828 F.2d 734, 746 (Fed. Cir. 1987) (applying the privilege in the civil discovery context). In the civil discovery context, once these burdens are met, the burden shifts to the party seeking disclosure to prove that disclosure should occur by establishing a substantial need for those documents. R&D Business Systems v. Xerox Corp., 152 F.R.D. 195; 196-197 (D. Colo. 1993) (Xerox). In the FOIA context, however, the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. See Merrill, 443 U.S. at 362-63; 99 S. Ct. at 2813, and cases cited therein. Accordingly, courts have found that documents which are immune from discovery absent a showing of substantial need are not "routinely" or "normally" available to parties in litigation and therefore are exempt from mandatory disclosure under Exemption 5. F.T.C. v. Grolier, Inc., 462 U.S. 19, 27; 103 S. Ct. 2209, 2214 (1983).

Accordingly, if the agency has shown that it has maintained the confidentiality of the withheld records and that their release might result in harm to the government's commercial interests, the agency could properly withhold records under Exemption 5. In the present case, there is no indication in the record that BPA has not maintained the confidentiality of the documents in question. We therefore turn to the next issue before us: whether release of the amounts of load and the specific exit fees would likely result in harm to BPA's commercial interests or its ability to consummate future contracts.

In the past, we have analyzed whether the disclosure of confidential commercial information would harm BPA's commercial interests. See Ball, Janik and Novack, 25 DOE ¶ 80,197 (1996) (Ball). In Ball, the documents in question involved marketing research such as customer lists. Id. In that case, our office found that release of this information would provide BPA's competitors with otherwise unavailable insight into BPA's potential future marketing strategies. Id. at 80,744. OHA further found that if BPA's customers obtained the marketing information, "it would provide them with undue leverage in future contract negotiations." Id. Likewise, in the present case, we find that BPA has met its burden of showing that the customer information at issue would result in harm to its commercial interests and its ability to consummate future contracts. BPA has indicated that it is "currently competing against other suppliers for short-term sales to the same customers that elected to pay exit fees and reduce their long-term obligation to purchase from BPA." See Memorandum from Timothy A. Johnson, Office of General Counsel, BPA, to Kimberly Jenkins Chapman, Attorney- Examiner, OHA (October 15, 1997). In light of the fact that BPA calculated their customers' exit fees based on market conditions, we agree that the amounts of load and the specific exit fees are commercial information that would provide BPA's competitors with valuable insight into its view of the market and its pricing strategy over the next several years. The release of the withheld information would provide competitors with an unfair advantage to compete for BPA's customers. Accordingly, BPA has established a likelihood that significant competitive harm would result from release of the amounts of load and specific exit fees. We therefore find that this information was properly withheld under Exemption 5.

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. In its Appeal, The Oregonian argues, *inter alia*, that the public has an overriding right to know whether BPA is adequately fulfilling its financial responsibility. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information consists of confidential commercial information that if released would affect BPA's ability to compete for future business. Any slight benefit that would accrue from the release of the withheld information is far outweighed by the likelihood of harm to BPA's commercial interests. Accordingly, we conclude that release of the withheld information would result in foreseeable harm to the interests that are protected by the confidential commercial information privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5.)

It Is Therefore Ordered That:

(1) The Appeal filed by The Oregonian, OHA Case No. VFA-0336, on September 30, 1997, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 3, 1997

(1)BPA has entered into a number of power contracts with public utilities. However, some of these utilities have found cheaper sources of power on the market. BPA allowed these customers, through provisions in their contracts, to diversify their loads. Thus, diversification occurs when customers purchase some of their power needs from other sources. In turn, customers pay fees (exit fees) to BPA for the right to diversify their loads, that is to buy some of their power elsewhere and to reduce their contractual obligations.

Case No. VFA-0337, 26 DOE ¶ 80,227

October 30, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Patricia C. McCracken

Date of Filing: October 1, 1997

Case Number: VFA-0337

On October 1, 1997, the Office of Hearings and Appeals (OHA) received an Appeal filed by Patricia C. McCracken from a determination that the Manager of the Department of Energy's (DOE) Savannah River Operations Office issued to her. The Manager issued this determination in response to a request for information that Ms. McCracken submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Manager to release certain documents and to conduct a further search for responsive materials.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In her FOIA request, Ms. McCracken sought access to a copy of the contract between Westinghouse Savannah River Company (WSRC), the Management and Operations contractor at the DOE's Savannah River facility, and BNFL Savannah River Corporation (BNFL), and any documents concerning BNFL's qualifications or setting forth BNFL's current duties at the site. In his response, the Manager provided Ms. McCracken with a copy of BNFL's contract with WSRC and a copy of WSRC's contract with the DOE.

The Manager also identified as responsive to Ms. McCracken's request a combined proposal that WSRC, BNFL, and two other subcontractors submitted to the DOE in response to a solicitation for proposals. This proposal led to the awarding in 1996 of the current Management and Operations contract to WSRC. The Manager withheld the proposal in its entirety under Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3). In so doing, he found that release of the proposal would violate Section 821 of the National Defense Authorization Act of 1997, P.L. 104-201 (NDAA).

In her Appeal, Ms. McCracken contends that the Manager improperly applied Exemption 3 in withholding the proposal. She also contests the adequacy of the search for responsive documents.

II. Analysis

A. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information if specifically authorized by another federal statute. However, the authorizing statute must satisfy one of two criteria. It must either (i) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establish particular criteria for withholding or refer to particular types of information to be withheld. 5 U.S.C. § 552(b)(3). The Supreme Court has established a two-prong standard of review for Exemption 3 cases. See CIA v. Sims, 471 U.S. 159, 167 (1985). First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. Id. at 167. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute.

We have previously found that the recently enacted NDAA is a statute of exemption for purposes of 5 U.S.C § 552(b)(3). In Chemical Weapons Working Group Inc., 26 DOE ¶ 80,170 (1997) (Chemical Weapons), we stated that the NDAA is a federal statute that contains language specifically prohibiting agencies from releasing contractor proposals under the FOIA. Id. at 80,730. That statute states, in pertinent part, that "a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code." NDAA, § 821(b). We therefore stated in Chemical Weapons that since the NDAA allows agencies no discretion in withholding certain types of information, it satisfies the first criterion of Exemption 3. Ms. McCracken has presented no arguments that convince us that this holding is incorrect. We therefore conclude that the NDAA is a statute of exemption for purposes of the FOIA.

We must next determine if the proposal that was withheld by the Manager is included within the coverage of section 821(b) of the NDAA. By its terms, this provision applies to "any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." Id. (1) We find that section 821(b) is applicable to the proposal in question, and that the Manager properly withheld that document under Exemption 3. In its solicitation for proposals for the Savannah River Management and Operations contract, the DOE sought submissions from integrated teams of companies that could perform the various functions associated with operating that facility. In response to this solicitation, WSRC, BNFL and two other companies submitted a joint proposal that was reviewed and accepted by the DOE Source Evaluation Board (SEB). (2) Although technically BNFL is a subcontractor to WSRC, BNFL was named as part of the performing entity in the joint proposal. BNFL's qualifications were reviewed by the SEB and were a factor in the SEB's acceptance of the joint proposal. Moreover, BNFL cannot be replaced as a member of the performing entity without the DOE's approval. See memorandum of October 27, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Tom Reynolds, Director, Department of Contracts, Savannah River Operations Office. Therefore, we conclude that BNFL is a contractor for purposes of section 821(b) of the NDAA, and that the joint proposal was properly withheld under Exemption 3.

B. Adequacy of the Search

In responding to a request for information under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

In order to determine the scope of the search, we contacted the Savannah River Office. We were informed that the request was referred to WSRC, and that the DOE Offices of Contract Management, Environmental

Quality, and Materials and Facilities were also searched. See memorandum of October 23, 1997 telephone conversation between Mr. Palmer and Pauline Connor, Savannah River Operations Office. In addition, at Ms. McCracken's request, her inquiry was forwarded to the DOE's Richland, Washington Operations Office for information concerning BNFL's activities at other DOE sites. Based on the information before us, we conclude that the search was reasonably calculated to uncover the materials sought, and was therefore adequate.

C. Conclusion

We have found that the Manager properly withheld the joint proposal under Exemption 3, and that the search for responsive documents was adequate. We will therefore deny Ms. McCracken's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Patricia C. McCracken on October 1, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 30, 1997

(1)1/ Section 821(b) does not, however, "apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." Id. We have examined the contract between BNFL and WSRC, and we find that the joint proposal is not set forth or incorporated by reference in that contract. Moreover, we have been informed by the Savannah River Operations Office that the proposal is not set forth or incorporated by reference in the contract between WSRC and the DOE. See memorandum of October 27, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Tom Reynolds, Director, Department of Contracts, Savannah River Operations Office.

(2)2/ There was no separate proposal submitted by BNFL to WSRC. See memorandum of October 27, 1997 telephone conversation between Robert Palmer, OHA Staff Attorney, and Tom Reynolds, Director, Department of Contracts, Savannah River Operations Office.

Case No. VFA-0338, 26 DOE ¶ 80,229

October 31, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Natural Resources Defense Council

Date of Filing:October 2, 1997

Case Number:VFA-0338

On October 2, 1997, the Natural Resources Defense Council (NRDC) filed an Appeal from a September 4, 1997 determination by the Freedom of Information Officer (FOI Officer) of the Albuquerque Operations Office of the Department of Energy (DOE). In that determination, the FOI Officer partially granted a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented in 10 C.F.R. Part 1004. In its Appeal, the NRDC asks that we order a search for additional responsive documents.

The FOIA requires that federal agencies generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that an agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. Background

In its request for information, the NRDC sought copies of documents containing information on the number of nuclear warheads disassembled since 1945. In a June 27, 1997 "partial response" letter, the FOI Officer enclosed responsive documents and informed the NRDC that the Los Alamos National Laboratory (LANL) was in the process of searching for more responsive documents. In her September 4, 1997 determination letter, the FOI Officer informed the NRDC that LANL completed its search and found no additional responsive material.

In its Appeal, the NRDC argues that the Albuquerque Operations Office provided it with data for nuclear warhead dismantlements at the Pantex plant, but provided no data for any other DOE facilities involved in dismantlements, including Los Alamos, Sandia, Burlington, Medina, Clarksville,

and Y-12 at Oak Ridge. The NRDC states "[i]t would be extraordinary if DOE did not maintain records of the dismantlements of some 27,000 nuclear warheads that are believed to have been dismantled prior to 1975, at plants other than Pantex."

II. Analysis

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted several DOE employees and a representative of the FOI Officer to ascertain the validity of the NRDC's contention that there must exist additional responsive information. As a result of these discussions, several facts came to light. First, the FOI official at the Oak Ridge Operations Office informed us that several facilities, including Oak Ridge, Savannah River, the Mound facility, and Kansas City, were involved in the dismantlement of various weapon components, but not the actual nuclear warheads. From our discussions, it appears that the DOE disassembled the warheads at Pantex.

Second, it appears that other records may exist at Sandia which, if reviewed cumulatively, could lead to the summary totals the NRDC seeks. These other records, if they exist, may be in the form of annual summaries of assemblies and dismantlements of individual weapons. We will require the Albuquerque Operations Office to search for these records and, if they exist, determine if they are responsive.

Finally, there is a chance that responsive archived records may exist. The representative of the FOI Officer informed us that the Albuquerque Operations Office is continuing to search for records that the DOE may have archived. Since the Albuquerque Operations Office search is ongoing, we will require the Albuquerque Operations Office to complete this search and issue a new determination to the NRDC to confirm whether or not responsive material exists in the archives.

It Is Therefore Ordered That:

(1) The Appeal filed by the Natural Resources Defense Council on October 2, 1997 is hereby granted as set forth in paragraph (2) below.

(2) This matter is remanded to the Freedom of Information Officer of the Office of Public Affairs of the Albuquerque Operations Office for further action in accordance with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 31, 1997

Case No. VFA-0339, 26 DOE ¶ 80,232

November 10, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeals

Name of Petitioner:F.A.C.T.S.

Dates of Filing: October 2, 1997

October 10, 1997

Case Numbers: VFA-0339

VFA-0343

On October 2 and 10, 1997, the Appellant, F.A.C.T.S. (For A Clean Tonawanda Site), filed Appeals from final determinations issued by the Office of the Executive Secretariat (ES) and the Oak Ridge Operations Office (OR) of the Department of Energy (DOE) on September 2 and September 9, 1997 respectively.(1) In their determinations, ES and OR partially granted a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Additionally, OR denied the Appellant's request for a fee waiver.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request for information dated February 4, 1997 (Request), the Appellant sought records relating to five categories of information pertaining to the DOE's Formerly Utilized Sites Remedial Action Program (FUSRAP) and a FUSRAP site in Tonawanda, New York.(2) In this Request, the

Appellant additionally requested a waiver of fees based upon a favorable ruling on a prior request by a James Rauch. The Request was initially sent to OR, which processed the Request regarding one of the categories of requested information (Category 1). OR also forwarded the Request to ES so that it could issue a determination regarding the remaining four categories of requested information (Categories 2, 3, 4 and 5). In an interim determination dated April 2, 1997, ES provided the Appellant with documents responsive to three of the categories of requested information (Categories 3, 4 and 5). Subsequently, ES issued a final determination letter dated September 2, 1997 (ES Determination Letter), in which it identified documents responsive to Category 2 of the Appellant's request, namely, documents pertaining to "[t]he legal basis, both in general terms and in terms specific to the Tonawanda, NY FUSRAP Site, of the policy outlined in the second paragraph of the March 8, 1995 memorandum, James W. Wagoner II to L. Price, OR, Subject: Ownership of 11(e)(2) Byproduct Material."

The documents responsive to Category 2 of the request were identified as an informal note from an official at the DOE's Former Sites Restoration Division to DOE Headquarters' Office of Chief Counsel and "the responding legal advice." ES Determination Letter at 1. ES withheld all of these documents pursuant to Exemption 5 of the FOIA. In the ES Determination Letter, ES asserted the documents were subject to the attorney-client privilege since the note concerned a request to the Office of Chief Counsel regarding the DOE's interpretation of the March 8, 1995 memorandum referenced in the Appellant's Category 2 request. Thus, ES asserted that each document was protected from disclosure by Exemption 5.

OR also sent a letter dated February 6, 1997 to the attorney who was then representing the Appellant, Robert J. Rauch. In that letter, OR rejected the Appellant's request for a fee waiver. The February 6 letter stated that while James Rauch had been granted a fee waiver for material relating to the Tonawanda site in 1995, the current request had been made by a different requester and the materials requested were "broader in scope" than the material requested in 1995. Consequently, OR classified the requester as "commercial" and asked that the Appellant either affirm that he would pay costs associated with the processing or submit additional justification supporting his request for a fee waiver. The Appellant did not submit any additional information.

On September 9, 1997, OR issued a final determination regarding documents responsive to Category 1 of the Request (OR Determination Letter). Category 1 of the Request asked for documents relating to:

> "[a] meeting requested by Niagara Landfill, Inc. and its affiliate, Browning-Ferris Gas Services, Inc., in a letter dated June 7, 1995, from Ralph L. Halpern, attorney, Jaeckle, Fleischmann & Mugel, to Lestor [sic] K. Price, Director, Technical Services Division, U.S. Department of Energy (DOE), Oak Ridge Operations (ORO), Subject: "Re: Radioactive Contamination at Seaway Landfill in Tonawanda, New York. . . ."

Request at 1-2. In the OR Determination Letter, OR released seven documents in their entirety to the Appellant. OR also provided the Appellant with an index of 38 documents which were responsive to Category 1 of the Request but were being withheld in their entirety pursuant to Exemption 5 of the FOIA. (3) OR asserted that the documents contained material which would be protected by the deliberative process, attorney-client and attorney-work product privileges. OR further asserted that DOE decision-making processes would be seriously harmed by the release of these documents. Additionally, the OR charged the Appellant $428.39 to process the Request.

II. The Appeals

In its Appeal of ES's determination (Case No. VFA-0339), the Appellant challenges the application of Exemption 5 to the documents identified in the ES Determination Letter. The Appellant argues that DOE should, in its discretion, release the documents notwithstanding their being subject to the attorney-client privilege given the significant public interest in the subject matter of the documents. In support of this argument, the Appellant claims that the Tonawanda Site is contaminated with 11(e)(2) Byproduct Material and that ownership of this material is relevant to who is responsible for the release of such material into the environment.(4) Consequently, release of information concerning the legal basis of the DOE's position regarding ownership of 11(e) Byproduct Material is necessary for informed public opinion in the environmental review process for the Tonawanda Site. Thus, according to the Appellant, release of the information in the documents would serve the public interest.

The Appellant also argues that the Category 1 documents withheld by the OR Determination Letter pursuant to Exemption 5 should also be released. The Appellant asserts that the index does not lists the originators and addressees of the withheld OR documents. Consequently, in light of the vague descriptions given in the index, some of the documents may not be intra- or inter-agency documents protected by the

deliberative process privilege. Additionally, the Appellant requests that we order OR to provide it with an index which clearly indicates originators and addressees of the documents listed in the index. The Appellant further argues that, notwithstanding the possible applicability of Exemption 5, each of the documents should be discretionarily released. The Appellant asserts that these documents would reveal if any agreements were reached regarding indemnification of Niagara Landfill, Inc. (NLI) or Browning Ferris Gas Services, Inc. (BFG) for costs incurred in complying with New York state environmental regulations regarding the monitoring of radon and for lost revenues pertaining to the Seaway Landfill at Tonawanda, New York. The Appellant asserts that the amount of money at issue is greater than $20 million and would have a significant impact on the nature and extent of the FUSRAP cleanup proposed for the Tonawanda site. Consequently, according to the Appellant, release of the documents would be in the public interest since they are necessary for informed public participation in the environmental review process at the Tonawanda site.

The Appellant also asserts that the DOE conducted an inadequate search for documents responsive to Categories 1, 2 and 3 of the Request. With regard to the search for documents responsive to Category 1, the Appellant asserts that the June 7, 1995 letter referred to in Category 1 states that the author of the letter believed that his indemnification proposal should form the basis for further discussions and requested that DOE contact him for further discussions. The Appellant asserts that no documents have been identified by OR which relate to subsequent meetings and that consequently additional documents must exist pertaining to those meetings.

The Appellant asserts that the two documents which were released by ES pursuant to Category 2 of the Request indicate that it searched only for documents concerning the legal basis for DOE's position regarding ownership of 11(e)(2) Byproduct Material at the Tonawanda site alone. The Appellant asserts that its request was for information pertaining to the DOE's position regarding ownership of 11(e)(2) Byproduct Material at each of its FUSRAP sites, not just the Tonawanda site. Because the Appellant believes that 11(e)(2) Byproduct Material is an issue at all of the DOE's FUSRAP sites, it believes that ES's search was inadequate.

The next argument on appeal relates to Category 3 of the Request. In that category F.A.C.T.S. asks for documents "of the Atomic Energy Commission establishing the creation of the Formerly Utilized MED/AEC Sites Remedial Action Program (FUSRAP) in 1974." The Appellant notes that the only document it received responsive to this request was a document with four attached memoranda, none of which mentions FUSRAP by name. The Appellant points out that the document contains several comments such as "this appears to be the earliest document which can be tied to what FUSRAP is currently doing." However, the Appellant asserts that its request does not ask for the earliest documents which can be "tied" to FUSRAP, but rather documents which created or established the program in substantially the form it exists today. The Appellant argues that a reasonable interpretation of the Category 3 request would encompass, among other items, materials relating to the formal designation of the program, the authority pursuant to which it was created, its statement of purpose and its organizational structure and operating budget. Consequently, the Appellant believes the search OR conducted for Category 3 documents was inadequate.

Lastly, the Appellant challenges OR's denial of a fee waiver. The Appellant asserts that OR had granted it a fee waiver in earlier requests. The Appellant also asserts that in the present request, it stated that it was requesting a fee waiver for the same reasons outlined in a prior April 12, 1995 letter (1995 letter) to OR concerning a prior FOIA request. The Appellant asserts that the documents would not serve to further any commercial, trade or profit interest. Further, the Appellant argues that the fact that the subject of its present request may be broader than its earlier requests is irrelevant to the determination as to whether it should be granted a fee waiver. The Appellant also challenges its classification as "commercial" by OR for fee calculation purposes and asserts that the requested documents would further no commercial purpose.

III. Adequacy of OR's Determination

After conducting a search for responsive documents under the FOIA, the agency is required by statute to provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intention to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. Id.

The written determination serves to inform the requester of the results of the agency's search for responsive documents and of any information that the agency has withheld. In doing so, the determination letter allows the requester to decide if the agency's response was adequate and proper and provides this Office a record upon which to base its consideration of an administrative appeal. Research Information Services, Inc., 26 DOE ¶ 80,139 (1996) (RIS).

It therefore follows that the agency has an obligation to ensure that its determination letters : (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. Burlin McKinney, 25 DOE ¶ 80,205 at 80,767 (1996); RIS at 80,592. Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. Paul W. Fox, 25 DOE ¶ 80,150 (1995). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. Id. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. RIS at 80,592.

The index of documents that OR provided does not meet these standards. The references to documents provided in the index do not provide any description of the authors or recipients of the document. Nor does the OR Determination Letter or index contain an explanation as to which specific privileges are being asserted with regard each of the withheld documents. Consequently, we will remand this matter to OR so that it can issue another, more detailed determination letter regarding the 38 withheld documents.(5) Armed with a more specific determination letter and index, the Appellant may be able to narrow the issues if it subsequently seeks to appeal the new determination.(6)

IV. Adequacy of Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

To examine the adequacy of the search which was conducted for documents responsive to Category 1 of the Request we contacted the FOIA Officer at OR. She informed us that OR conducted a search of the

offices most likely to possess responsive documents: the Prime Contractor of the FUSRAP at OR, Bechtel National, Inc.; the OR FUSRAP program office; and the DOE Headquarters' FUSRAP office. See Memorandum of telephone conversation between Amy Rothrock, FOIA Officer, OR, and Richard Cronin, OHA Staff Attorney (October 17, 1997). Given the facts presented above, we believe that the search which was conducted for Category 1 documents was adequate. OR officials conducted a search of all of the offices in which it believed responsive documents might exist. Further, all responsive documents were either listed in the index provided to the Appellant or referred to another DOE Operations Office so that a final determination could be issued.

We contacted an official at ES to ascertain the extent of the search which was conducted for documents responsive to Category 2 and 3 of the Request. We were informed that ES determined the DOE FUSRAP office at DOE Headquarters would be the office most likely to possess responsive documents. See Memorandum of telephone conversation between Tonya Woods, ES, and Richard Cronin (October 16, 1997). We contacted an official at the DOE Headquarters' FUSRAP office to determine the extent of the search which had been made for documents pertaining to ownership of 11(e)(2) Byproduct Material (Category 2). That official informed us that to the best of his knowledge the only document which the DOE had ever created regarding ownership issues of 11(e)(2) Byproduct Material was the March 8 memorandum referenced in the Category 2 request. While he possessed a copy of the March 8 memorandum, he had no knowledge of any other 11(e)(2) Byproduct Material ownership document which ever existed regarding any FUSRAP site. See Memorandum of telephone conversation between W. Alexander Williams, Office of Eastern Area Programs, FUSRAP Team, and Richard Cronin, OHA Staff Attorney (October 16, 1997). Because the official had detailed knowledge regarding documents pertaining 11(e)(2) Byproduct Materials and concluded on the basis of his experience that no other documents existed, we find that the search for responsive documents for Category 2 of the Request was adequate.

With regard to Category 3, ES requested that the DOE Headquarters' FUSRAP office conduct a search for responsive documents. An official at that office informed us that all documents pertaining to the earliest origins of the program which would become FUSRAP had previously been compiled into one file and the Appellant was given copies of each of the responsive documents in the file. The Appellant's argument that the search was inadequate because other organizational documents, such as formal descriptions of FUSRAP, the authority pursuant to which FUSRAP was created, the purpose statement, the organizational structure and the operating budget, were not discovered is unavailing. The wording of the Appellant's Request, "[t]he document of the Atomic Energy Commission establishing the creation" of the FUSRAP, indicates to us that it only sought documents pertaining to the initial establishment of the FUSRAP program and not documents relating to the items mentioned in the Appellant's Appeal. The Appellant's argument seeks to broaden the scope of its Request by means of an Appeal and as such must fail. See Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529-30 (1992). If the Appellant seeks documents relating to the items mentioned in its Appeal, it may make another FOIA request for such documents.

Given the extent of the search described above, we find that the searches conducted by OR and ES for the documents requested in Categories 1, 2 and 3 were adequate.

V. Fee Waiver

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the

operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.). The burden of satisfying this two prong test is on the requester.

Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam) (Larson).

In the present Appeal, the Appellant argues that in its Request, it specifically sought a fee waiver for the same reasons enumerated in an April 12, 1995 letter from James Rauch, who the Appellant apparently claims was representing it. The Appellant asserts that because a fee waiver was granted to James Rauch in 1995, a fee waiver should have been granted for the present request. OR has asserted that the fee waiver granted in 1995 was granted to James Rauch as an individual and not as a representative of the Appellant. OR further asserts that it requested that Robert Rauch, the attorney representing the Appellant at the time of the present request, submit further information to justify the Appellant's fee waiver request but that Robert Rauch declined to do so.

We have reviewed James Rauch's April 12, 1995 letter. The justification for a fee waiver given in that letter recounts the individual qualifications of James Rauch and his motivation for obtaining the requested documents. In addition, James Rauch mentions that he is a member of two organizations, one of which is the Appellant. He further states that he and the two organizations have no commercial interest in the requested documents. It is apparent that James Rauch was making a fee waiver request on his own behalf and not as a representative of the Appellant. Consequently, OR properly requested from the Appellant a justification for its present fee waiver request. Because the Appellant failed to provide any justification other than James Rauch's 1995 letter, OR properly denied the Appellant's fee waiver request.(7)

With regard to OR's classification of the Appellant as a "commercial" requester, we note that a requester may be classified as "commercial" if the records requested "are requested for commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(I); see also 10 C.F.R.§ 1004.9(b)(1). The classification of a requester as "commercial" thus depends on how the requested documents are to be used. In this Appeal, the Appellant has offered a detailed narrative as to why it seeks the requested documents. Because OR did not have the benefit of the Appellant's explanation as to why it sought the documents, we will remand this matter to OR so that it may reconsider its classification of the Appellant for fee calculation purposes.

In summary, because OR's determination letter was inadequate and further in order that we may give the Appellant a chance to be reclassified for fee calculation purposes, we will remand this matter to OR for another determination. Consequently, we will grant the Appellant's Appeal (Case No. VFA- 0343) in part. With regard to the Appellant's Appeal of ES's determination (Case No. VFA-0339), because we found that ES had conducted an adequate search for documents responsive to Categories 2 and 3 and because OR will issue another determination for the documents ES withheld, we will deny the Appellant's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by F.A.C.T.S., on October 2, 1997, Case No. VFA-0339, is hereby denied.

(2) The Appeal filed by F.A.C.T.S. on October 10, 1997, Case No. VFA-0343 is hereby granted as set forth in Paragraph (3), and is denied in all other respects.

(3) This matter is remanded to the Department of Energy's Oak Ridge Operations Office for further consideration in accordance with the instructions contained in the foregoing decision.

(4) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 10, 1997

(1)The Office of Hearings and Appeals assigned Case No. VFA-0339 to the Appellant's Appeal of ES's determination and Case No. VFA-0343 to its Appeal of OR's determination.

(2)The Atomic Energy Commission (AEC) instituted a program which would eventually become FUSRAP in 1974 to study former Manhattan Engineering District (MED) and AEC sites. Most of these sites had been used in the early period of the domestic atomic energy program and had been initially cleaned up under the environmental standards in effect during that period. FUSRAP seeks to determine which sites need additional cleanup and effect further clean up of those sites.

(3)In addition, OR referred two other responsive documents to the Savannah River Operations Office so that it could issue a determination to the Appellant regarding those documents.

(4)11(e)(2) Byproduct Material is byproduct material produced from the extraction of uranium or thorium ores.

(5)If OR believes that the identity of the individuals named in the documents is privileged information, it may choose, in lieu of naming the authors and recipients, to include in its index general information terms, such as "a DOE official," which describe the authors and recipients. However, at this time we do not rule on the issue as to whether such names may be properly withheld under these circumstances pursuant to Exemption 5 of the FOIA.

(6)Because of the inadequate description of the documents provided to the Appellant, we are unwilling at this time to decide on the appropriateness of the application of Exemption 5 to the documents. Moreover, it is unclear from the OR Determination Letter if OR considered a discretionary release of the withheld documents notwithstanding its preliminary determination that Exemption 5 was applicable to the documents. Consequently, on remand OR should make a specific finding as to whether a discretionary release of the documents, Exemption 5 notwithstanding, is appropriate. See 10 C.F.R. § 1004.1.

We also note that with regard to the documents that ES withheld, the description of the documents withheld suffers from the same defects present in the OR Determination Letter. However, we will not require ES to issue another determination letter because all of the documents withheld by ES are included in the documents withheld by OR.

(7) Because we find that the 1995 letter failed to provide sufficient fee waiver information in support of the Appellant's fee waiver request, we need not decide on the Appellant's other arguments regarding OR's failure to grant it a fee waiver. However, we note that OR has informed us that it would reconsider the Appellant's fee waiver request upon the Appellant's submission of additional information.

Case No. VFA-0340, 26 DOE ¶ 80,231

November 7, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Convergence Research

Date of Filing: October 9, 1997

Case Number: VFA-0340

On October 9, 1997, Convergence Research (CR) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) from a determination that DOE's Bonneville Power Administration (BPA) issued to CR on September 16, 1997. That determination concerned a request for information CR submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, BPA would be required to release the responsive material to CR.

I. Background

The BPA, a federal agency within the DOE, was created by Congress in 1937 to market low-cost hydroelectric power generated by the Federal Columbia River Power System, a series of dams along the Columbia River in Oregon and Washington. 16 U.S.C. §§ 832-832m. Congress later expanded BPA's mandate to include marketing authority over almost all electric power generated by federal facilities in the Pacific Northwest. 16 U.S.C. §§ 838b, 838f. In 1980, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839, to ensure that BPA's low cost power would continue to be marketed to existing BPA customers. Congress also required the BPA to offer initial long-term (20 year) firm power sales contracts to all existing BPA public body and cooperative customers (public agency customers). 16 U.S.C. § 839c(g)(1)(A). By 1982, BPA had executed contracts with approximately 140 public agency customers. Memorandum from Timothy Johnson, Office of General Counsel, BPA, to Valerie Vance Adeyeye, OHA Staff Attorney (October 27, 1997) (BPA Memo).

Prior to 1994, BPA published annually customer sales and generation statistics, containing data derived from customer power bills. This data consisted of annual energy demand, deliveries, and revenues generated by customer. However, after the passage of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), deregulation of the wholesale electricity market resulted in competitors entering BPA's existing market. BPA Memo at 2. BPA began to feel the effects of this new competition by 1994. Id. One intent of the Energy Policy Act was to promote greater competition in bulk power marketing by encouraging new entrants. Association of Public Agency Customers, Inc. v. Bonneville Power Administration, 1997 WL 586809, at *3 (9th Cir. Sept. 24, 1997). Congress sought to encourage wholesale power marketing competition between utilities and independent power producers and thereby reduce the cost of electricity to consumers. Id. at *4. As a result, the price of wholesale power in the Pacific Northwest dropped, and BPA faced price competition for the first time in its history. Id. With the published annual statistics, BPA's new competitors had access to the market profile of any BPA customer, and thus armed "are assumed to have been able to undercut BPA in its attempt to either retain customers

or compete for those customers with access to the market." BPA Memo at 2. BPA then began "a process of re- engineering itself to resemble more closely a private sector utility. As part of this process, BPA has engaged in an ongoing process of analyzing the markets in which it now competes, its potential customer base and its pricing strategy." Ball, Janik and Novack, 25 DOE ¶ 80,197 (1996) (Ball). See also The Oregonian, Case No. VFA-0336, 26 DOE ¶ (November 3, 1997) (The Oregonian). Consequently, BPA has determined that the annual customer sales statistics have become commercial information and are treated as confidential. BPA Memo at 2. In August 1997, CR requested that BPA release on an ongoing basis:

Copies of capacity and energy sales and revenue information for each BPA customer, for calendar year 1995, fiscal year 1995, calendar year 1996, fiscal year 1996, and all future fiscal and calendar years. The data should identify all BPA customers and show, by customer, the HLH firm Demand in kW for each customer, Energy Deliveries in kWh for each customer, Dollar Revenues from each customer, the mills/kWh rate paid by each customer, and all applicable rate schedules in effect for each customer.

Letter from Kevin Bell (Bell), Principal, Convergence Research, to FOIA Compliance Officer, BPA (August 6, 1997). Bell attached a sample containing information "from the publicly available BPA Calendar Year 1994 Generation and Power Sales document." Id. Bell indicated that the material was required for "ongoing detailed research, public education and advocacy on the policies and practices of BPA in a restructured electric market environment." Id.

On August 18, 1997, BPA acknowledged the receipt of CR's request and stated, correctly, that the FOIA applies only to documents already in existence and cannot be used on an "ongoing" basis. Letter from FOI Officer, BPA, to CR (August 18, 1997). On August 22, 1997, BPA informed CR that the Generation and Power Sales document had been discontinued. Letter from Senior Vice President, Power Business Line, BPA to CR (August 22, 1997). However, BPA provided CR with a copy of the replacement document, "Generation and Sales Statistics," an aggregation of sales information by fiscal year, similar in content and format to a corporate income statement. Id. On September 16, 1997, BPA indicated that it had identified a responsive customer sales document containing demand, average rates, and revenue for each customer. Letter from Steven Hickok, Senior Vice President, Power Business Line, BPA, to CR (September 16, 1997). Nonetheless, BPA withheld this information under Exemption 5 because it was now considered confidential commercial information in view of the post-Energy Policy Act business environment. Id. On October 9, 1997, Bell filed this Appeal on behalf of CR.

II. Analysis

The FOIA generally requires that federal agencies release documents to the public upon request. However, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S. Ct. 1504, 1515 (1975) (Sears). However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184, 95 S.Ct. 1491, 1500 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be ?routinely' or ?normally' disclosed upon a showing of relevance." F.T.C. v. Grolier, 462 U.S. 19, 26, 103 S. Ct. 2209, 2214 (1983) (citing Sears, 421 U.S. at 148-49, 95 S. Ct. at 1515 (1975)). Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 797, 799-801, 104 S. Ct. 1488, 1492-93 (1984).

A. The Confidential Commercial Information Privilege

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." See, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340, 99 S. Ct. 2800 (1979) (Merrill) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982) (Land Bank) (withholding a government generated real estate appraisal); Hack v. Department of Energy, 538 F. Supp. 1098 (D.D.C. 1982) (holding that conceptual design reports utilized in procuring architectural services were confidential commercial information properly withheld under Exemption 5 prior to selection of the successful bidder) (Hack).

"The Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." Merrill, 443 U.S. at 356, 99 S. Ct. at 2810. In fact, the Supreme Court looked to Rule 26(c)(7) of the Federal Rules of Civil Procedure, which provides that a district court may prevent or restrict discovery of confidential commercial information, and concluded that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract. Id. The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. Id., 443 U.S. at 360, 99 S. Ct. at 2812. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." Land Bank, 671 F.2d at 665 (footnote omitted).

B. The Agency's Burden Under the Privilege

The protection that this privilege affords is limited in scope and lasts only as long as necessary to protect the government's commercial interests. Merrill, 443 U.S. at 360, 99 S. Ct. at 2812; Hack, 538 F. Supp. at 1104. Moreover, the application of this privilege is not automatic. Merrill, 443 U.S. at 362, 99 S. Ct. at 2813. The burden is upon the agency to show that the records it seeks to withhold under the privilege are confidential and that their disclosure might be harmful. American Standard v. Pfizer, Inc., 828 F.2d 734, 746 (Fed. Cir. 1987) (applying the privilege in the civil discovery context). In the civil discovery context, once these burdens are met, the burden shifts to the party seeking disclosure to prove that disclosure should occur by establishing a substantial need for those documents. R&D Business Systems v. Xerox Corp., 152 F.R.D. 195, 196-197 (D. Colo. 1993) (Xerox). In the FOIA context, however, the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. See Merrill, 443 U.S. at 362-63, 99 S. Ct. at 2813, and cases cited therein. Accordingly, courts have found that documents which are immune from discovery absent a showing of substantial need are not "routinely" or "normally" available to parties in litigation and therefore are exempt from mandatory disclosure under Exemption 5. F.T.C. v. Grolier, Inc., 462 U.S. 19, 27, 103 S. Ct. 2209, 2214 (1983). Therefore, if the agency has shown that it has maintained the confidentiality of the withheld records and that their release might result in harm to the government's commercial interests, the agency could properly withhold the records under Exemption 5.

1. Confidentiality

In the present case, there is no indication in the record that BPA has not maintained the confidentiality of the documents in question. In fact, BPA states in its "Billing Data Request Guidelines" that customer-specific data are released only to the customer or to authorized BPA personnel. See Attachment C to BPA Memo. We therefore turn to the next issue before us: whether release of the customer lists would likely result in harm to BPA's commercial interests, including its ability to consummate contracts.

2. Harm to Agency's Commercial Interests

Bell argues that "[t]here is no particular reason why information readily available in 1994 should suddenly

be a vital secret in 1995. The information requested has no relation to current operations. It is history with no residual time value." Appeal at 3. He further submits that because BPA's financial structure and revenue requirements are public information, competitors already know how much BPA must charge to recover its costs. Id.

We conclude that, contrary to Bell's assertions, the change in the wholesale electricity market that occurred after the passage of the Energy Policy Act justifies BPA's current withholding of confidential commercial information developed after this market transformation. BPA began to feel the effects of the new law in 1994, and consequently took steps to protect customer information that it had previously shared with the public. BPA Memo at 2. Release of the withheld information would provide BPA's new competitors with otherwise unavailable insight into BPA's potential future marketing strategies. BPA developed this information for the purpose of enabling it to formulate a marketing strategy for securing its existing customer base and possibly broadening that base as well. If BPA's competitors obtained this marketing information, it would provide them with valuable insights into BPA's future marketing strategy, hindering BPA's ability to compete in the manner of a private sector actor. See Xerox, 152 F.R.D. at 197 (disclosure of marketing strategy and research would cause competitive harm); In Re Adobe Systems, Inc. Securities Litigation, 141 F.R.D. 155, 162 (disclosure of documents containing marketing information would educate competitors and would adversely affect negotiating leverage with customers); Weed Associates, 24 DOE ¶ 80,159 at 80,645 (1994) (disclosure of future marketing plans would likely cause substantial harm to competitive position); Ball, 25 DOE at 80,744 (release of BPA customer lists would provide BPA competitors with insight into potential BPA marketing strategy); The Oregonian (release of BPA customer information would compromise BPA's market strategy). If BPA's present and potential customers obtained this information, it would provide them with undue leverage in future contract negotiations for the purchase of electrical services from BPA. Id. Accordingly, BPA has established a likelihood of significant competitive harm that would result from release of the sales statistics. We therefore find that they are properly withheld under Exemption 5.

C. Public Interest in Disclosure

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requestor. DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Bell argues that the public interest in this information lies in its importance to customers trying to obtain cost-based rates. Although release of this data would provide some benefit to such customers, it would be far outweighed by the harm that BPA would suffer from the disclosure of confidential commercial information to its competitors. Accordingly, we conclude that release of the withheld material protected under Exemption 5 would result in foreseeable harm to the interests that are protected by the confidential commercial information privilege. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

It Is Therefore Ordered That:

(1) The Appeal filed by Convergence Research, OHA Case No. VFA-0340, on October 9, 1997, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 7, 1997

Case No. VFA-0341, 26 DOE ¶ 80,233

November 13, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: James R. Hutton

Date of Filing: October 14, 1997

Case Number: VFA-0341

On October 14, 1997, James R. Hutton (Appellant) filed an Appeal from a final determination issued on September 23, 1997, by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge withheld one and released another of the documents that the Appellant requested under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. It refused to confirm or deny the existence of a third document. This Appeal, if granted, would require the DOE to release any withheld documents.

I. BACKGROUND

On September 9, 1997, the Appellant submitted a request for information to Oak Ridge concerning a Reduction in Force (RIF) expected to occur at Oak Ridge on September 5, 1997 (the September RIF). (1) The Appellant sought copies of the complete "retention register" in effect on September 5, 1997 (Document 1); the listing of the positions to be affected by the September RIF (Document 2); and a copy of the RIF notice that was going to be sent to the Appellant (Document 3). September 9, 1997 Request. On September 25, 1997, Oak Ridge issued a determination in response to this request releasing Document 2 to the Appellant, withholding Document 1 in its entirety under Exemption 6, and refusing to confirm or deny the existence of any document matching the description of Document 3. On October 14, 1997, the Appellant filed the present Appeal, contending that Oak Ridge's determinations concerning Documents 1 and 3 were improper.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemptions 5 and 6 are at issue in the present case.

Document 1

Document 1 is a copy of the retention register for the Oak Ridge Operations Office which was in effect at the time of the proposed RIF. Oak Ridge withheld Document 1 in its entirety under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10

C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 109 S. Ct. 1468, 1481 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. See generally Ripskis, 746 F.2d at 3.

Oak Ridge found that the release of Document 1 would result in the invasion of individual privacy interests. Specifically, Oak Ridge found that:

Releasing job series classifications could reasonably identify Federal Employees who are the subject of a pending RIF and lead to unwarranted intrusions into both the personal and professional lives of those employees.

Determination Letter at 1. This determination fails to adequately explain why the retention register was withheld in its entirety. After reviewing portions of a similar retention register, we are convinced that by segregating and withholding only that information in the retention register that would reveal the identities of specific individual, the information contained in the retention register can be released without invading any individual privacy interests. Based on the record before us, we find that the only portions of the retention register in which there are privacy interests are the names of individuals and their position numbers. (2) Release of such information would reveal the identities of particular federal employees. A third party might then link the names or position numbers (each of which corresponds to a particular employee) to the rest of the information contained in the retention register, which in turn could be used to publicly reveal individual employee's performance appraisals and vulnerability to a reduction in force. Performance appraisals and vulnerability to reductions in force are types of personnel information Congress sought to protect when it created Exemption 6.

Because we have found a privacy interest in the names and position numbers of federal employees contained in retention registers, we must next determine the public interest in their disclosure. In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 109 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 1483. Consequently, the Court held, only that information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

We find that the names and position numbers contained in the retention register reveal little or nothing about the operations and activities of the government. Therefore, after weighing the evident privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing the identities of federal employees could reasonably be expected to constitute an

unwarranted invasion of personal privacy. We are therefore remanding this portion of the Appeal to Oak Ridge with instructions to release, to the Appellant, a copy of the requested retention register with the names and position numbers of all employees other than the Appellant redacted.

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. By releasing the responsive document with only those redactions necessary to prevent identification of specific individuals, the agency can provide as much information as possible while safeguarding individual privacy rights.

Document 3

The Appellant requested a copy of any RIF notice that would have been sent to him if the September 1997 RIF had occurred. Oak Ridge would neither confirm nor deny the existence of any document meeting this description, claiming that if it were to do so, its deliberative process would be revealed.

An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response. A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under an applicable FOIA exemption, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983); William H. Payne, 26 DOE ¶ 80,144 (1996). However, the use of Glomar responses should be limited to those instances where it is absolutely necessary.

Exemption 5 exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 54, 862 (D.C. Cir. 1980). In the present case, only the "deliberative process privilege" is at issue.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The document at issue was clearly predecisional (if it existed) since it was never formally adopted as an expression of the agency's policy. However, the document does not appear to be deliberative. Instead, the agency would have drafted documents of this type after it had produced a retention register which reflected the agency's assignment of employees to specific competitive areas and ranking of those employees' dates of entry, as well as a list of positions to be subject to the reduction in force. Since

employees subject to the proposed RIF in Oak Ridge were given an opportunity to review the retention register for their competitive areas and since a list of positions to be subject to the RIF was made publicly available, confirming or denying the existence of a particular RIF notice would not reveal any information not already made available to the individual to whom it was directed or to the world at large. Therefore, Oak Ridge should not have used a Glomar response in this case. Confirming or denying the existence of Document 3 would not inhibit the agency's deliberative process. (3) Accordingly, we find that Oak Ridge could not properly refuse to confirm or deny the existence of the RIF notice under Exemption 5. We are therefore remanding this portion of the Appeal to Oak Ridge with instructions to issue a new determination letter concerning the requested RIF notice.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James R. Hutton on October 14, 1997 (Case Number VFA-0341) is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) This case is hereby remanded to the Oak Ridge Operations Office for future processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 13, 1997

(1) The September RIF never took place.

(2) The Appellant's name and position number cannot be withheld from the Appellant because releasing information to the Appellant about himself would not invade his privacy interests.

(3) It is important to note that we are not ruling on whether or not the information contained in the RIF notice, if it exits, could properly be withheld under Exemption 5 or any other FOIA Exemption.

Case No. VFA-0342, 26 DOE ¶ 80,228

October 31, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: ChemData, Inc.

Date of Filing: October 14, 1997

Case Number: VFA-0342

On October 14, 1997, ChemData, Inc. (Appellant) filed an Appeal from a determination issued to it on September 9, 1997, by the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE). That determination denied a request for information submitted by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require RFFO to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 10, 1997, the Appellant filed a request under the FOIA in which it sought "a copy of the selected Bid Prices for Data Validation work, under [Kaiser-Hill Company's] current TechLaw contract." This FOIA request was incorrectly filed with RFFO's management and operating contractor, Kaiser-Hill Company (Kaiser-Hill), instead of with RFFO as required by 10 C.F.R. § 1004.4. The request was, however, forwarded to RFFO, and RFFO issued a determination to the Appellant on September 9, 1997. In that determination, RFFO found that the records sought by the Appellant are not "agency records" because they were not in the possession and control of the agency at the time of the FOIA request. RFFO further explained that under the terms of the contract between DOE and Kaiser-Hill, all procurement records are owned by the contractor and therefore not subject to release under DOE regulations. Electronic Mail from Mary Hammack, FOIA Officer, RFFO, to Appellant (September 9, 1997).

In its Appeal, the Appellant claims that all taxpayer-funded records are subject to release under the FOIA. It also argues that all contracting or subcontracting records under DOE procurement are DOE property.(1) See Letter from Ann Mary Nefcy, Senior Chemist, to Director, Office of Hearings and Appeals (October 14, 1997) (Appeal Letter).

II. Analysis

Our threshold inquiry in this case is whether procurement records between a DOE contractor and sub-contractor which were in the possession of the DOE contractor at the time of the request are subject to the FOIA. Contrary to the Appellant's unsupported assertion, not all "taxpayer-funded records" are subject to review under the FOIA. Rather, we must first determine whether such records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Records that do not meet these criteria may nonetheless be subject to release under the DOE regulations if they are owned by the government. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and are not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as Kaiser-Hill, are subject to the FOIA. See, e.g., The Cincinnati Enquirer, 26 DOE ¶ 80,205 (1997); Diane C. Larson, 26 DOE ¶ 80,112 (1996); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974); cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Kaiser-Hill is the prime contractor responsible for maintaining and operating the Rocky Flats Environmental Technology Site. This Office has frequently held that DOE management and operating contractors are not "agencies" for FOIA purposes. See, e.g., The Cincinnati Enquirer, 26 DOE ¶ 80,205 (1997) (Fluor Daniel Fernald); Diane C. Larson, 26 DOE ¶ 80,112 (1996) (Westinghouse Hanford Company); William Kuntz III, 25 DOE ¶ 80,157 (1995) (Lockheed Martin Corporation); Cowles Publishing Co., 24 DOE ¶ 80,102 (1994) (Battelle Memorial Institute). As in those other cases, the DOE has obtained Kaiser-Hill's services and exercises general control over the contract work, but it does not supervise Kaiser-Hill's day-to- day operations. See Record of Telephone Conversation between Mary Hammack and Dawn Goldstein, Staff Attorney, OHA (October 20, 1997). Therefore, Kaiser-Hill does not meet the test set forth in the Orleans and Forsham decisions and we therefore conclude that Kaiser-Hill is not an "agency" subject to the FOIA.

Although Kaiser-Hill is not an agency for the purposes of the FOIA, records in its possession which are responsive to the Appellant's request could be deemed "agency records" if they were obtained by the DOE and were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. However in this case, the documents in question had not been obtained by the DOE and were not in the agency's possession at the

time of the Appellant's request. See Record of Telephone Conversation between Mary Hammack and Dawn Goldstein (October 20, 1997).

Even if a contractor-acquired record fails to qualify as an "agency record," it may still be subject to voluntary release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations state that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and Kaiser-Hill to determine the status of the withheld records. That contract states:

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government . . . .

Contract DE-AC34-95RF00825, Section H.4. Paragraph (b) excludes from this provision "all records related to any procurement action by the Contractor." Id. at Clause H.20(b)(8). Thus, contrary to the Appellant's assertion, not all procurement records of DOE contractors are owned by the DOE. In this case, because procurement records are not among the records which are property of the Government under the DOE's contract with Kaiser-Hill, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by the Appellant are neither "agency records" within the meaning of the FOIA, nor subject to release under DOE regulations. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by ChemData, Inc. on October 14, 1997, Case Number VFA-0342, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 31, 1997

(1)*/ In its Appeal, the Appellant also requests all prices for all Data Validation contract or subcontract awards to TechLaw, Inc., under any contracts between DOE and Kaiser-Hill. Documents regarding TechLaw, Inc. contracts other than the current contract with Kaiser- Hill Company are clearly outside the scope of the Appellant's initial FOIA request. The OHA will therefore not consider this request in the context of the present Appeal. Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992). Accordingly, the Appellant should, if it so wishes in light of our result below, file a new request for information regarding other contracts.

The Appellant also asserts in its Appeal that although it had requested information pertaining to the current DOE/Kaiser-Hill contract, RFFO's determination concerned only the DOE/Kaiser-Hill contract covering

the period July 1, 1995 to June 30, 1996. That assertion is incorrect. In its response, RFFO referred to the contract which has been in continuous effect between DOE and Kaiser-Hill from April 4, 1995 to the present.

Case No. VFA-0345, 26 DOE ¶ 80,236

December 2, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen M. Jameson

Date of Filing: November 4, 1997

Case Number: VFA-0345

On November 4, 1997, Glen M. Jameson filed an Appeal from a determination that the Office of Headquarters Procurement Services (PS) of the Department of Energy (DOE) issued to him on September 17, 1997. In that determination, PS denied in part a request for information Mr. Jameson filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require PS to release the information that Mr. Jameson requested.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 21, 1996, Mr. Jameson filed a Request for Information with the Eastern Region Defense Contract Audit Agency. A portion of that request was referred to PS. That portion of the request sought a copy of a DCAA audit report number 1211-91Q28000856, "Application of Agreed-Upon Procedures For Review of Proposed Direct Labor and Indirect Expense Rate" for PAI Corporation.

PS issued a determination on September 17, 1997, in which it identified a responsive document, but concluded that portions of this document were exempt from mandatory disclosure pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). The withheld portions included proposed and audit- adjusted rates, proposed labor overhead rates, percentage increase in officers' salaries, amount of relocation expense, contractor's historical relocation expense, 1992 proposed labor overhead rate, proposed full or part-time fringe and tax rates, general and administrative (G&A) rates and employee names. According to PS, a release of the information relating to costs or fees would "disclose the submitter's plan for renumeration of its employees, its methods of allocating costs, its indirect rate

structures, its allocation of resources and insight into its approach to the proposed work." See Determination Letter at 1.

On November 4, 1997, Mr. Jameson filed the present Appeal with the Office of Hearings and Appeals (OHA) contending that the disclosure of the requested DCAA audit report is not likely to impair the Government's ability to obtain similar information in the future and also that its disclosure is not likely to

cause substantial harm to the competitive position of PAI Corporation. See Appeal Letter at 1-5.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have held consistently that information submitted in response to a request for proposal is submitted involuntarily and therefore is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

DOE regulations further outline the criteria for determining the applicability of Exemption 4. Such criteria include whether (1) the information has been held in confidence by the person to whom it pertains, (2) the information is customarily [and reasonably] held in confidence by the person to whom it pertains, (3) the information was transmitted to and received by the DOE in confidence, (4) the information is available from public sources, (5) the disclosure of the information is likely to impair the [g]overnment's ability to obtain similar information and (6) the disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. 10 C.F.R. § 1004.11(f)(1)-(6). The DOE regulations further provide that the DOE must solicit the submitter's views regarding the impact of release of the information if the DOE is considering release. 10 C.F.R. § 1004.11(c). The submitter's view of the impact of the release of the information is only one factor to be evaluated and weighed in the analysis, which must involve a balancing of the objective standards set forth in 10 C.F.R. § 1004.11(f). PS obtained comments from PAI Corporation in this case. PAI Corporation claims that all of the redacted information is proprietary and that its release would competitively harm PAI Corporation.

Regarding whether portions of the document at issue are "confidential," we have consistently held that information submitted in connection with a Request for Proposal is not submitted voluntarily and is therefore to be considered confidential only if it meets the test set out in National Parks. E.g., Glen M. Jameson, 25 DOE ¶ 80,191 (1996). The federal courts have reasoned that even though such submissions are voluntary in the sense that no company is forced to do business with the government, information required by the terms of a Request for Proposal must be submitted if "contractors want to win lucrative government contracts . . . " McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at (D.D.C. June 30, 1995).

Similarly in the present case, the information submitted by PAI Corporation was required to be submitted in order for the company to do business with a government project, and specifically in order to receive reimbursement once that project was terminated. Indeed, PAI Corporation did not argue, nor did PS conclude, that information in the document at issue was submitted voluntarily. Accordingly, we will find the information at issue to be "confidential" only to the extent that its disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the submitter, PAI Corporation.

PS's decision to withhold portions of the DCAA audit report is based upon its assertion that PAI Corporation would be placed at a competitive disadvantage in the marketplace. Specifically, it asserts that release of the withheld cost and fee information would provide PAI Corporation's competitors with an advantage in anticipating contractors' responses in future competitions and would aid in attempting to hire away contractors' employees. Determination Letter at 2. We agree with PS that release of this information is likely to cause competitive harm to PAI Corporation.

The United States Court of Appeals for the District of Columbia has held that, in a competitive market, information that would reveal the profit rates, general and administrative rates, and overhead of a competitor company is exempt from release under the FOIA. Gulf & W. Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979). Courts have further recognized this information as "competitively sensitive information" which is protected under Exemption 4. General Dynamics Corp., Space Sys. Div. v. Department of the Air Force, 822 F. Supp. 804 at 806 (D.D.C. 1992); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287 (D.D.C. 1980) (profit and overhead protected under Exemption 4). Similarly in the present case, the withheld employee cost and fee information is the kind of information that is typically withheld under Exemption 4. Release of this information could enable rival companies to learn detailed information about the submitter's profit margins and to adopt a strategy to undercut the submitter and eliminate it from effective competition. Although we agree that release of this information could cause competitive harm to PAI Corporation, we shall consider whether more responsive information could be segregated from the requested document and released without competitive harm.

The Appellant has indicated that he is particularly interested in the pension cost component of the overhead and G&A rates of PAI Corporation's employees. See Memorandum of Telephone Conversation between Mr. Glen M. Jameson and Kimberly Jenkins-Chapman, OHA (November 21, 1997). In light of this fact, PS has informed us that it may be possible to release this specific information to Mr. Jameson. Therefore, we will remand this matter to PS for further segregation and release of possibly non-exempt material. We believe that PS is in the best position to make a determination as to whether the release of the information that Mr. Jameson has described would cause substantial harm to the competitive position of PAI Corporation.

The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See e.g. Painters District Council No. 55, 24 DOE ¶ 80,149 (1994). Accordingly, we may not consider whether the public interest warrants discretionary release of the information in this case.

III. Conclusion

For the reasons explained above, we will remand this case to PS, which shall promptly issue a new determination releasing non-exempt information to the Appellant in accordance with this decision, or shall explain in detail its reasons for withholding any of the information at issue. In all other respects, the present appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen M. Jameson, OHA Case No. VFA-0345, on November 4, 1997, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is remanded to the Department of Energy's Office of Headquarters Procurement Services for further consideration in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 2, 1997

Case No. VFA-0346, 26 DOE ¶ 80,234

November 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Los Alamos Study Group

Date of Filing: October 21, 1997

Case Number: VFA-0346

On October 21, 1997, the Los Alamos Study Group (the Study Group) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The Study Group appeals from a determination issued by the Albuquerque Operations Office (Albuquerque) on October 7, 1997, in response to a request for information filed by the Study Group under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Appeal, the Study Group has requested that OHA direct Albuquerque to conduct an additional search for responsive records and prepare an index of responsive, classified documents.

BACKGROUND

On June 2, 1997, the Study Group submitted a FOIA request seeking unclassified documents relating to projects that it claims have been planned or conducted at the Los Alamos Neutron Science Center (LANSCE), the Dual-Axis Radiographic Hydrodynamic Testing (DARHT) facility, the Pulsed-High-Energy Radiographic Machine Emitting X-Ray (PHRMEX) facility, the Flash X-Ray (FXR) facility, and a fifth named facility. The Study Group also indicated that "[f]or classified documents, we request a listing of document titles."

On October 7, 1997, Albuquerque issued a determination letter in response to the Study Group's FOIA request. This letter stated that:

The Los Alamos National Laboratory, at the request of the Los Alamos Area Office, searched for responsive unclassified records to your request and no records were located. There is no listing of classified document titles.

On October 21, 1997, the Study Group appealed this determination on the grounds that Albuquerque failed to conduct a search reasonably calculated to uncover the requested documents. In this Appeal, the Study Group stated that it had obtained three unclassified documents from another governmental source that Albuquerque would have uncovered if it had done a reasonable search. The Study Group has also requested that OHA order Albuquerque to prepare a "Vaughn-type" index of withheld documents.

ANALYSIS

As detailed below, we are remanding this matter to Albuquerque because the determination letter issued in response to the Study Group's FOIA request was based upon (1) a misunderstanding of the scope of the Study Group's request for classified documents, and (2) the incorrect assumption that the five facilities

named in the Study Group's FOIA request were located at the Los Alamos National Laboratory (LANL). We nevertheless find that the staff of the DOE Los Alamos Area Office and LANL performed an adequate search for responsive, unclassified documents.

The Study Group's Request for a List of Titles of Classified Documents

In its FOIA request, the Study Group had stated that "[f]or classified documents, we request a listing of document titles." This language is unclear. It could be interpreted to mean that the Study Group was seeking an existing document containing a list of titles of classified documents, or that the Study Group was requesting that Albuquerque search for responsive classified documents, and then prepare an index of the titles of classified documents that were being withheld.

Because of this ambiguity, we contacted counsel for the Study Group to ascertain the intended scope of this portion of the FOIA request. Counsel informed us that the Study Group had intended that Albuquerque search for an existing document containing a list of titles of classified documents. Counsel further stated that if such a list were not located, the Study Group had intended that Albuquerque search for all responsive classified documents, and prepare a "Vaughn" index of the classified documents that were being withheld. See Memorandum of Telephone Conversation between Ruth Prokop and Linda Lazarus, OHA Staff Attorney (October 29, 1997).

We then contacted Albuquerque's Assistant Chief Counsel for Legal Affairs to ask how Albuquerque had construed this portion of the Study Group's FOIA request. Counsel stated that Albuquerque had understood this language to mean that the Study Group was seeking a document that contained a list of classified document titles. Counsel also stated that a search had been conducted for this document, and that no such document had been discovered. See Memorandum of Telephone Conversation between Ronald B. O'Dowd and Linda Lazarus (October 27, 1997).

Based on this information, we find that there had been a misunderstanding between Albuquerque and the Study Group concerning the scope of the FOIA request for classified documents.(1) For this reason, we will remand this matter to permit a search for classified documents to be conducted. We further instruct Albuquerque that, to the extent possible, it must provide the Study Group with an index of the classified documents being withheld after the search for responsive classified documents has been completed.(2)

The Adequacy of the Search

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we find that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive: "[t]he standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d. 1378, 1384-85 (8th Cir. 1985).

The Search Was Limited to the DOE Los Alamos Area Office and LANL

In reviewing the Appeal, we contacted Albuquerque to discuss the search conducted in response to the Study Group's FOIA request. We were informed that the FOIA staff at Albuquerque had assumed that the five facilities named in the Study Group's FOIA request were located at LANL. Based on this assumption, the FOIA staff at Albuquerque had requested that only the DOE Los Alamos Area Office and LANL search for records that were responsive to the Study Group's FOIA request.(3) See Memorandum of Telephone Conversation between Linda Lazarus and Elva Barfield (November 14, 1997).

However, in reviewing this Appeal, we discovered that two of the five facilities named in the Study Group's FOIA request are not located at LANL. The Flash X-Ray (FXR) facility is at Lawrence Livermore

National Laboratory, and we are unable to ascertain whether the fifth named facility even exists. We also learned that there is a possibility that responsive documents may be located at DOE Headquarters. See Memorandum of Telephone Conversation between William Schwartz, Staff Attorney, OHA, and Joyce Laeser, Area Counsel for the DOE Los Alamos Area Office (November 12, 1997).

For this reason, we will remand this matter to Albuquerque to permit the FOIA staff to request that the staff at the Lawrence Livermore National Laboratory and DOE Headquarters search for documents responsive to the Study Group's FOIA request. On remand, the Albuquerque FOIA staff should attempt to determine whether the fifth named facility listed in the Study Group's FOIA request exists, and whether it is under the control of DOE. If appropriate, the Albuquerque FOIA staff should request that the staff at this facility search for responsive records.

The Searches Actually Conducted were Adequate

The searches conducted for unclassified documents by the staff of the DOE Los Alamos Area Office and LANL were adequate. The FOIA staff at Albuquerque forwarded the Study Group's FOIA request to Perrie T. Wolford, the FOIA Coordinator at the DOE Los Alamos Area Office. Ms. Wolford concluded that the DOE Los Alamos Area Office would not have responsive records because it does not maintain records of programs being conducted at LANL. Ms. Wolford determined that responsive records, if they exist, would be at LANL. Accordingly, Ms. Wolford forwarded the FOIA request to the Information Practices Office at LANL, and requested that a search be conducted for government-owned records responsive to the request. See Memorandum of Telephone Conversation between Linda Lazarus and Perrie Wolford (November 10, 1997).

After LANL received this request, a LANL official convened a meeting attended by representatives of the three departments that were most likely to have records responsive to the Study Group's FOIA request. After this meeting, these departments were searched for unclassified documents responsive to the Study Group's FOIA request, but no such documents were found. See Memorandum of Telephone Conversation between Linda Lazarus and Chris Chandler, Laboratory Counsel at LANL (November 14, 1997). Based on these statements, we are convinced that the staff at the DOE Los Alamos Area Office and LANL followed procedures that were reasonably calculated to uncover unclassified documents responsive to the Study Group's FOIA request.

In its Appeal, the Study Group argued that Albuquerque could not have performed an adequate search for the requested records because the Study Group had obtained three unclassified documents from another governmental source that would have been uncovered by Albuquerque if a reasonable search had been done. We asked counsel for the DOE Los Alamos Area Office to respond to the Study Group's claim. Counsel stated that she was familiar with the documents at issue, and that these documents were not responsive to the Study Group's FOIA request. See Memorandum of Telephone Conversation between William Schwartz, Staff Attorney, OHA, and Lisa Cummings, Area Counsel for the DOE Los Alamos Area Office (November 12, 1997). As these documents are not responsive to the Study Group's FOIA request, the existence of these documents does not support the Study Group's claim that the searches performed by the staffs of the DOE Los Alamos Area Office and LANL were inadequate. We therefore are not convinced by the Study Group's argument.

It Is Therefore Ordered That:

(1) The Appeal filed by the Los Alamos Study Group on October 21, 1997, is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2) This matter is remanded to Albuquerque with instructions to (1) request that personnel at the Los Alamos National Laboratory conduct a search for classified documents responsive to the Study Group's FOIA request; (2) request that personnel at the Lawrence Livermore National Laboratory and DOE Headquarters conduct a search for classified and unclassified documents responsive to the Study Group's FOIA request; (3) determine whether the fifth facility named in the Study Group's FOIA request exists and

is under the control of DOE, and, if appropriate, request that personnel at this facility conduct a search for records responsive to the Study Group's FOIA request; and (4) issue a new determination that reflects the results of the above-described searches and, if possible, provides an index that contains a general description of all withheld documents and the reason that these documents have been withheld.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 19, 1997

(1)We find that Albuquerque's construction of this portion of the Study Group's FOIA request was reasonable, and that it was not responsible for this misunderstanding.

(2)Although case law requires that an agency prepare a Vaughn index only during the judicial review of a FOIA matter, OHA has required that determinations issued by DOE contain a general description of withheld material, and a statement of the reason for withholding each document. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990).

(3)LANL is operated by a government contractor, the University of California. The DOE Los Alamos Area Office is the DOE Office that is most closely connected with the LANL. The DOE FOIA regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. §1004.3(e)(1).

Case No. VFA-0348, 27 DOE ¶ 80,103

January 9, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Patricia C. McCracken

Date of Filing: December 9, 1997

Case Number: VFA-0348

This Decision and Order concerns an Appeal that Patricia C. McCracken filed from a determination issued by the Department of Energy's (DOE) Richland Operations Office (Richland). The Richland issued this determination in response to a request for information that McCracken submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Richland to release certain documents to McCracken.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In her FOIA request, Ms. McCracken sought access to a copy of the contract awarded by the DOE to BNFL, Inc. for the Tank Waste Remediation Systems Project, and a copy of BNFL's winning proposal. In her response, the Director stated that the contract was available for public viewing and reproduction at the Richland Public Reading Room and on the Internet at the following website: http://twins.pnl.gov:8001twrs_rfp/contract.htm. However, Richland withheld BNFL's proposal in its entirety under Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3). In so doing, it found that release of

the proposal would violate Section 821 of the National Defense Authorization Act of 1997, P.L. 104-201 (NDAA).

In her Appeal, McCracken contends that the Director improperly applied Exemption 3 in withholding the proposal. In addition, she requests access to additional information under the FOIA. Specifically, she requests documents setting forth the job descriptions or qualifications of the "person ... or persons who have made the determination" in this Appeal. She also seeks copies of all checks issued by the DOE to BNFL, a "running total" of the funds disbursed, and the numbers of the contracts under which each of the checks was issued.

II. Analysis

Exemption 3 of the FOIA allows agencies to withhold requested information if specifically authorized by another federal statute. However, the authorizing statute must satisfy one of two criteria. It must either (i) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establish particular criteria for withholding or refer to particular types of information to be withheld. 5 U.S.C. § 552(b)(3). The Supreme Court has established a two-prong standard of review for Exemption 3 cases. See CIA v. Sims, 471 U.S. 159, 167 (1985). First, the agency must determine whether the statute in question is a statute of exemption as contemplated by Exemption 3. Id. at 167. Second, the agency must determine whether the withheld material satisfies the criteria of the exemption statute.

In a Decision and Order previously issued to McCracken, we found that the recently enacted NDAA is a statute of exemption for purposes of 5 U.S.C § 552(b)(3). Patricia C. McCracken, 26 DOE ¶ _____ (Case No. VFA-0337, October 30, 1997). Citing Chemical Weapons Working Group Inc., 26 DOE ¶ 80,170 at 80,730 (1997), we stated that the NDAA is a federal statute that contains language specifically prohibiting agencies from releasing contractor proposals under the FOIA. That statute states, in pertinent part, that "a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code." NDAA, § 821(b). We therefore found that since the NDAA allows agencies no discretion in withholding certain types of information, it satisfies the first criterion of Exemption 3. McCracken has presented no arguments that convince us that this holding is incorrect. We therefore conclude that the NDAA is a statute of exemption for purposes of the FOIA.

We must next determine if the proposal that was withheld by the Director is included within the coverage of section 821(b) of the NDAA. By its terms, this provision applies to "any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." Id. (1) We find that BNFL's proposal was submitted in response to a solicitation for a competitive proposal, and that section 821(b) is therefore applicable. Accordingly, the Manager properly withheld that document under Exemption 3.

In her Appeal, Ms. McCracken contends that segregable portions of the proposal exist that could be released without compromising any significant national interests. Indeed, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). See, e.g., Greenpeace, 26 DOE ¶ 80,106 (1996). However, this provision is inapplicable here, since the proposal is exempt in its entirety from mandatory release under the FOIA. In enacting section 821(b) of the NDAA, Congress clearly intended to prohibit release under the FOIA of any part of proposals submitted in response to solicitations for competitive proposals. We therefore reject Ms. McCracken's claim that segregable portions of the proposal exist that should be released.

Finally, we note that Ms. McCracken's Appeal includes a request for information that she did not seek in her original FOIA request. We have consistently held that FOIA appellants may not broaden the scope of their requests for information on appeal. See, e.g., Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529-30 (1992); Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992). Consequently, Ms. McCracken's request for information concerning the qualifications of DOE personnel and any disbursements of funds to BNFL is dismissed. Ms. McCracken may refile this request with the Acting Director, FOI and Privacy Acts Division, Office of the Executive Secretariat. For the reasons set forth above, Ms. McCracken's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Patricia C. McCracken on December 9, 1997, Case No. VFA-0348, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 9, 1998

(1)*/ Section 821(b) does not, however, "apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal." Id. We have examined the contract between BNFL and the DOE, and we find that the proposal is not set forth or incorporated by reference in that contract.

Case No. VFA-0349, 26 DOE ¶ 80,237

December 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dykema Gossett, PLLC

Date of Filing: November 12, 1997

Case Number: VFA-0349

On November 12, 1997, the law firm of Dykema Gossett (Appellant) filed an Appeal from a final determination issued on October 20, 1997, by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge withheld a document entitled "Part III Prime Item Development Specification" (Part III). The Appellant had requested a copy of Part III under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release Part III.

I. BACKGROUND

On September 9, 1997, the Appellant submitted an extensive request to Oak Ridge for information relating to the Superconducting Super Collider Laboratory (SSCL). Among the items sought by the Appellant was DOE Contract No. SSC-91B-01701 between University Research Associates (URA) and General Dynamics Space Systems Division (GDSSD). On October 20, 1997, Oak Ridge issued a partial determination in response to this request releasing most of the requested contract to the Appellant. However, Oak Ridge withheld several portions of the contract under FOIA Exemption 4, including a document entitled "Part III Prime Item Development Specification" (Part III), which was withheld in its entirety. On November 12, 1997, the Appellant filed the present Appeal, contending that Oak Ridge's determination fails to explain how release of the information contained in Part III could reasonably be expected to result in substantial competitive harm. Appeal at 2.

II. ANALYSIS

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks).

In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government *involuntarily* is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993). It is well settled that information required to be submitted in order to obtain a DOE contract is considered to be submitted on a non-voluntary basis for Exemption 4 purposes. See, e.g., Milton L. Loeb, 23 DOE ¶ 80,124 (1993). Since the information contained in Part III was submitted to the DOE specifically for the purpose of acquiring a contract, it was clearly submitted involuntarily. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996). Since the information contained in Part III was submitted involuntarily, it is "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

Both the FOIA and the DOE regulations implementing it require reasonably specific justifications for the withholding of documents or portions of documents. Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Data Technology Industries, 4 DOE ¶ 80,118 (1979). Conclusory and generalized claims by agency officials that material is exempt from disclosure are not acceptable. Thus, an agency determination that material should be withheld under Exemption 4 because its disclosure is likely to cause substantial competitive harm must include the reasons for believing that such harm will result to the competitive position of the person from whom the information is obtained. Federal Information Tools, 3 DOE ¶ 80,163 at 80,807 (1979). An adequate explanation would, for example, indicate the type of competitive injury which would result from disclosure, and the manner in which the information, if disclosed, could be utilized by a competitor to damage the firm's market position. Exxon Co., U.S.A., 8 DOE ¶ 80,162 at 80,794-95 (1981).

Oak Ridge’s Determination Letter does not meet these standards. The Determination Letter does not contain a sufficient explanation of why Oak Ridge determined that release of Part III would cause competitive harm to the information’s submitters. In order to facilitate our review, we obtained a copy of Part III from Oak Ridge. After reviewing this document, it still was not readily apparent to us that release of the information contained in Part III could reasonably be expected to cause substantial harm to the competitive position of its submitters. Consequently, we will remand this matter to Oak Ridge so that it can issue another, more detailed determination letter regarding Part III. On remand, Oak Ridge should fully explain why releasing any information it is withholding in Part III could reasonably be expected to cause competitive harm to that information’s submitters.

We note that it appears that two important steps in applying Exemption 4 were omitted in Oak Ridge’s determination to withhold Part III. Oak Ridge should have solicited the comments of the submitters in accordance with 10 C.F.R. § 1004.11. Instead, Oak Ridge apparently relied on comments submitted in response to a somewhat similar FOIA request filed by the Appellant in 1995. Our review of those comments indicates that they are not on point. On remand, Oak Ridge should offer the submitters an opportunity, pursuant to 10 C.F.R. § 1004.11, to submit comments on the releaseablity of Part III.

Moreover, our review suggests that much of the information contained in Part III could be released without causing harm to the submitters’ competitive position. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, Oak Ridge should also review the withheld material under the standard set forth in 5 U.S.C. § 552(b).

The DOE regulations direct the DOE to release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the

material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dykema Gossett, PLLC on November 12, 1997 (Case Number VFA-0349) is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) This case is hereby remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 11, 1997

Case No. VFA-0350, 26 DOE ¶ 80,239

December 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Convergence Research

Date of Filing: November 14, 1997

Case Number: VFA-0350

On November 14, 1997, Convergence Research (CR) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) from a determination that DOE's Bonneville Power Administration (BPA) issued to CR on October 16, 1997. That determination concerned a request for information CR submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, BPA would be required to release the responsive material to CR.

I. Background

BPA, a federal agency within the DOE, was created by Congress in 1937 to market low-cost hydroelectric power generated by the Federal Columbia River Power System, a series of dams along the Columbia River in Oregon and Washington. 16 U.S.C. §§ 832-832m (1997). Congress later expanded BPA's mandate to include marketing authority over almost all electric power generated by federal facilities in the Pacific Northwest. 16 U.S.C. §§ 838b, 838f (1997). In 1980, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839, to ensure that BPA's low cost power would continue to be marketed to existing BPA customers. Congress also required BPA to offer initial long-term (20 year) firm power sales contracts to all existing BPA public body and cooperative customers (public agency customers). 16 U.S.C. § 839c(g)(1)(A) (1997). By 1982, BPA had executed contracts with approximately 140 public agency customers. Memorandum from Timothy Johnson, Office of General Counsel, BPA, to Steve Goering, OHA Staff Attorney (December 3, 1997) (BPA Memo).

Prior to 1994, BPA published annually customer-specific sales and generation statistics, containing data derived from customer power bills. This data consisted of annual energy demand, deliveries, and revenues generated by customer. However, after the passage of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), deregulation of the wholesale electricity market resulted in competitors entering BPA's existing market. BPA Memo at 2. BPA began to feel the effects of this new competition by 1994. Id. One intent of the Energy Policy Act was to promote greater competition in bulk power marketing by encouraging new entrants. Association of Public Agency Customers, Inc. v. Bonneville Power Administration, 126 F.3d 1158, 1165 (9th Cir. Sept. 24, 1997). Congress sought to encourage wholesale power marketing competition between utilities and independent power producers and thereby reduce the cost of electricity to consumers. Id. at 1165-66. As a result, the price of wholesale power in the Pacific Northwest dropped, and BPA faced price competition for the first time in its history. Id. at 1166. With the published annual statistics, BPA's new competitors had access to the market profile of any BPA customer, and thus armed "are assumed to have been able to undercut BPA in its attempt to either retain

customers or compete for those customers with access to the market." BPA Memo at 2. BPA then began "a process of re-engineering itself to resemble more closely a private sector utility. As part of this process, BPA has engaged in an ongoing process of analyzing the markets in which it now competes, its potential customer base and its pricing strategy." Ball, Janik and Novack, 25 DOE ¶ 80,197 (1996) (Ball). See also The Oregonian, Case No. VFA-0336 (November 3, 1997). Consequently, BPA has determined that the annual sales and revenue statistics on a customer by customer basis have become commercial information and are treated as confidential. BPA Memo at 2.

In September 1997, CR requested that BPA "make available for examination and selective copying, at a mutually convenient time and location, all bills for products and services provided by BPA to wholesale customers dating from January 1, 1994, to September 24, 1997." Letter from Kevin Bell, CR, to BPA (September 24, 1997).

BPA responded to CR's request on October 16, 1997, stating that

[i]n addition to the amount due, individual customer power bills contain several pieces of information that in the aggregate constitute market sensitive information. Such information, if released and subsequently provided to [BPA]'s competitors, would give them otherwise unavailable insight into [BPA]'s immediate future marketing opportunities and strategy. Consistent with Exemption 5 under FOIA, [BPA] has determined that the information contained in its wholesale power bills is confidential and that the release of such information may result in harm to [BPA]'s commercial interest.

Letter from Sharon Zenner, Power Billing Manager, BPA, to Kevin Bell, CR (October 16, 1997) (citation omitted).

II. Analysis

The FOIA generally requires that federal agencies release documents to the public upon request. However, the FOIA lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be ?routinely' or ? normally' disclosed upon a showing of relevance." F.T.C. v. Grolier, 462 U.S. 19, 26 (1983) (citing Sears, 421 U.S. at 148-49 (1975)). Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 797, 799-801 (1984).

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." See, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979) (Merrill) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982) (Land Bank) (withholding a government-generated real estate appraisal); Hack v. Department of Energy, 538 F. Supp. 1098 (D.D.C. 1982) (holding that conceptual design reports utilized in procuring architectural services were confidential commercial information properly withheld under Exemption 5 prior to selection of the successful bidder) (Hack).

"The Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other

confidential commercial information." Merrill, 443 U.S. at 356. In fact, the Supreme Court looked to Rule 26(c)(7) of the Federal Rules of Civil Procedure, which provides that a district court may prevent or restrict discovery of confidential commercial information, and concluded that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract. Id. The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. Id., 443 U.S. at 360. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." Land Bank, 671 F.2d at 665 (footnote omitted).

A. Whether the Documents at Issue are Inter-Agency or Intra-Agency Memorandums

The Appellant contends that the power bills withheld by BPA are not inter-agency or intra-agency memorandums and thus not within the scope of FOIA Exemption 5. CR first argues that the bills are not memoranda, as they "do not contain opinions, recommendations, analyses, or anything else relating to the thought process of any agency employee. They do not record information for internal purposes or contain any input for later decisional use." Appeal at 5. CR further contends that the bills are not *inter-agency* memoranda because they are "sent outside the BPA to non-agencies." Id. at 5-7. BPA states that the power bills are used for internal purposes in that they provide the source data for generating internal customer sales reports. Memorandum of telephone conversation between Timothy A. Johnson, BPA, and Steven Goering, OHA (December 8, 1997). In a recent decision on an Appeal filed by CR, we upheld BPA's withholding of these reports, which contained demand, average rates, and revenue for each of BPA's customers, under the confidential commercial information privilege of Exemption 5. See Convergence Research, Case No. VFA-0340 (November 7, 1997).

We find that the documents at issue in this case are intra-agency memoranda within the scope of Exemption 5 of the FOIA. Exemption 5 protects "communications outside the agency so long as those communications are part and parcel of the agency's deliberative process." Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990). In the present case, it appears that BPA's power bills are not only sent to customers outside the agency, but also serve an internal agency purpose of communicating the data necessary to create customer sales reports that in turn inform BPA's decision-making process. Given this additional internal use of the power bills, we conclude that the bills qualify as intra-agency memoranda and meet the threshhold test for protection under FOIA Exemption 5.

B. Whether the Documents at Issue are Shielded by the Exemption 5 Confidential Commercial Information Privilege

1. The Agency's Burden Under the Privilege

The protection that the confidential commercial information privilege affords is limited in scope and lasts only as long as necessary to protect the government's commercial interests. Merrill, 443 U.S. at 360; Hack, 538 F. Supp. at 1104. Moreover, the application of this privilege is not automatic. Merrill, 443 U.S. at 362. The burden is upon the agency to show that the records it seeks to withhold under the privilege are confidential and that their disclosure might be harmful. American Standard v. Pfizer, Inc., 828 F.2d 734, 746 (Fed. Cir. 1987) (applying the privilege in the civil discovery context). In the civil discovery context, once these burdens are met, the burden shifts to the party seeking disclosure to prove that disclosure should occur by establishing a substantial need for those documents. R&D Business Systems v. Xerox Corp., 152 F.R.D. 195, 196-197 (D. Colo. 1993) (Xerox). In the FOIA context, however, the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. See Merrill, 443 U.S. at 362-63, and cases cited therein. Accordingly, courts have found that documents which are immune from discovery absent a showing of substantial need are

not “routinely” or “normally” available to parties in litigation and therefore are exempt from mandatory disclosure under Exemption 5. F.T.C. v. Grolier, Inc., 462 U.S. 19, 27 (1983). Therefore, if the agency has shown that it has maintained the confidentiality of the withheld records and that their release might harm the government’s commercial interests, the agency could properly withhold the records under Exemption 5.

2. Confidentiality

In the present case, there is no indication in the record that BPA has not maintained the confidentiality of the documents in question. In fact, BPA states in its “Billing Data Request Guidelines” that customer-specific data are released only to the customer or to authorized BPA personnel. See Attachment A to BPA Memo. We therefore turn to the next issue before us: whether release of the customer lists would likely result in harm to BPA’s commercial interests, including its ability to consummate contracts.

3. Harm to Agency’s Commercial Interests

In two very recent decisions, we found that BPA properly withheld customer-specific commercial information under the Exemption 5 confidential commercial information privilege, based upon the harm to BPA’s commercial interests that would likely result from release of the information. See Convergence Research, Case No. VFA-0340 (November 7, 1997) (demand, average rates, and revenue); The Oregonian, Case No. VFA-0336 (November 3, 1997) (load amounts and exit fees). The same considerations discussed in those decisions lead us to conclude in the present case that the release of the customer-specific information contained in the power bills withheld by BPA, including the amounts of electricity purchased and the rates at which it was sold, would likely cause competitive harm to BPA in the hands of its competitors, who could use the information in their marketing of electricity to BPA’s customers.

In reaching these conclusions, we reject as irrelevant the Appellant’s argument that our decision should be guided by Congress’ decision to “include government entrepreneurial and business-like activities (such as Amtrak and the United States Postal Service) within the reach of the FOIA . . . .” Appeal at 8. As certainly as Congress chose which entities would be subject to the FOIA generally, Congress also chose to include in the FOIA certain exemptions. And the issue before us is not whether BPA is subject to the FOIA, as it undeniably is, but whether the information in question is exempt from release under the Act.

We similarly are not persuaded by the Appellant’s assertion that any “truly determined competitor of BPA’s could obtain access to most of [the] customer bills if it were willing to make the data requests to the 170 or more customers which would be obliged to respond,” thus making it “economically feasible for a multimillion dollar power marketer to expend resources to make requests . . . upon 170 entities but extremely burdensome for a member of the public to do the same widespread gathering.” Appeal at 8-9. Assuming, arguendo, the accuracy of the Appellant’s unsupported assertion, the fact that competitors of BPA would have to expend significant resources to track down this information from “170 or more” sources merely illustrates the advantage that these same competitors would gain if BPA were to make the information publicly, and much more easily, available from one source.

Nonetheless, BPA withheld the documents at issue in their entirety, and the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

In the present case, we find that reasonably segregable portions of the power bills withheld by BPA can be released to the Appellant. The rationale BPA advances, and which we accept, to justify withholding the power bills goes to the customer-specific nature of the information contained in them. BPA Memo at 2-5. Based on our review of samples of the withheld documents, we believe that BPA should, without facing an inordinate burden, be able to redact any information in the bills that identifies particular customers. We will therefore remand this matter to BPA for a new determination releasing the remainder of the information in the documents or explaining in detail its reasons for withholding any of this information.(1)

In making its new determination, BPA should also take into account the fact that it has already made publicly available customer-specific information regarding its electricity sales through September 30, 1995. We find such information in a document, a copy of which was submitted by the Appellant, entitled "Generation and Power Sales," which lists sales in Calendar Year 1994. BPA has also provided us with a copy of BPA's Fiscal Year 1995 report, which contains customer-specific sales information for the period ending September 30, 1995. BPA's determination should specifically address the basis, if any, for withholding any portion of bills for sales prior to this date.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Convergence Research on November 14, 1997, Case Number VFA-0350, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration, who shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 1997

(1)In its response to the present Appeal, BPA also contends that certain of the information withheld is exempt under Exemption 4 of the FOIA, though BPA did not cite this Exemption in its determination to the Appellant. BPA Memo at 5-6. If BPA wishes to claim Exemption 4 as a basis for withholding any of the information at issue, it should do so when it issues its new determination to the Appellant.

Case No. VFA-0351, 26 DOE ¶ 80, 238

December 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tod Rockefeller

Date of Filing: November 17, 1997

Case Number: VFA-0351

On November 17, 1997, Tod Rockefeller (Appellant) filed an Appeal from a determination that the Department of Energy (DOE) issued to him on October 14, 1997. In that determination, DOE's Albuquerque Operations Office (AOO) denied in part a request for information that the Appellant filed on July 29, 1997 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. See Letter from David L. Geary, Director, AOO, Office of Public Affairs, to Appellant (October 14, 1997) (Determination Letter). In his request, the Appellant sought from AOO all documents listing written allegations about the Appellant that George Dials, Manager of the DOE's Carlsbad Area Office, had received and which Mr. Dials had informed the Appellant he possessed.

In response to that request, AOO released two documents to the Appellant under the FOIA, but under Exemption 6 of that Act, redacted portions of both of those documents. This Appeal, if granted, would require the DOE to release the withheld information.(1)

ANALYSIS

Although the Appellant made his request under the FOIA, AOO initially considered whether the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008, applied to this case. The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her that is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). In this case, the two documents at issue were not a part of the Appellant's personnel file (or any other file) at either the Carlsbad Area Office or the Albuquerque Operations Office. Instead the documents were kept solely on Mr. Dials' desk. Therefore, the documents were never in a "system of records" subject to the Privacy Act.(2)See Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19, 1997). Therefore, AOO correctly determined that only the FOIA and not the Privacy Act applies to this case. See Greentree v. United States Customs Service, 674 F.2d 74 (D.C. Cir. 1982); Jeffrey L. Turek, 11 DOE ¶ 80,149 at 80,678 (1983).

Exemption 6 of the FOIA shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). Furthermore,

the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." Washington Post, 456 U.S. at 602. Thus, since there is no doubt that the documents at issue in this case include information that applies to the Appellant, they qualify as "similar files" under Exemption 6. See Jeffrey R. Leist, 25 DOE ¶ 80,159 at 80,651 (1996).

In order to determine whether an agency may withhold a record under Exemption 6, it must undertake a three step analysis. First, the agency must determine whether or not a substantial privacy interest would be invaded by the disclosure of the record. If the agency identifies no privacy interest or a de minimis privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

In this case, AOO redacted identifying portions of two different memoranda. Each memorandum contains reports prepared by various individuals as well as accounts of other individuals' reported allegations of "aberrant behavior" by the Appellant, as described in the Determination Letter. According to the Determination Letter, disclosure of the withheld information would result in a clearly unwarranted invasion of personal privacy of these individuals within the meaning of Exemption 6.

The DOE withheld identifying information from these memoranda because of a concern that its release might subject the individuals involved to harassment, intimidation, or other personal intrusions. In such circumstances, the courts have consistently recognized significant privacy interests. See Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, as in prior, similar cases, we have followed the courts' lead. See, e.g., James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,129 (1990). The potential for harassment, intimidation or other personal intrusions is obvious from the context of each memorandum since each contains numerous derogatory (and possibly inflammatory) statements concerning the Appellant. In fact, AOO has informed us that the Appellant has already engaged in extreme verbal harassment of co-workers based on the release of just the redacted information, see Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19, 1997), thereby making the need for protection in this case most compelling. See William Hyde, 18 DOE ¶ 80,102 at 80,508 (1988). Accordingly, we find a significant privacy interest exists in the withheld information.

In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in the FOIA context, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 489 U.S. at 773. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 775. Consequently, the Court held, only information that contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

In this case, the Appellant asserts that there is a public interest at stake in upholding civil service protection laws and in permitting him to clear his name of false allegations. Neither asserted public interest meets the requirements of Reporters Committee. While there is a general governmental interest in

upholding civil service protection laws, releasing the identifying portions of these allegations would not shed any light on whether DOE has taken any action that would violate these laws. Further, clearing an individual employee's reputation regarding his interpersonal skills is too narrow and not within the concept of public interest as laid out in Reporters Committee, which is to "shed light on an agency's performance of its statutory duties." 489 U.S. at 773. Accordingly, we find that there is little or no public interest in the release of the withheld information.

Because release of the identifying information in the context at issue could reasonably be expected to subject the individuals involved to harassment, intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest in releasing the information, we find that release of information revealing the co-workers' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Accordingly, we find that the identifying information was properly withheld under Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Tod Rockefeller on November 17, 1997 (Case Number VFA-0351) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 11, 1997

(1) 1/ The Appellant made three further arguments in his Appeal, none of which this Office can consider. First, the Appellant challenged the AOO's statement in the Determination Letter that the redacted documents were not being used in an administrative action against him. This issue is irrelevant to the FOIA and therefore beyond the scope of this Office's jurisdiction. Second, the Appellant claimed that he is already aware of the identity of at least one person whose name the DOE redacted. However, that claim also does not affect our FOIA analysis, since speculation as to the identity of a confidential source is irrelevant to the question of whether the records are exempt. Otherwise, the privacy of persons making confidential reports would be harmed by a mere guess. In addition, the ability of the government to obtain material which would not be made available absent a promise of confidentiality would be seriously compromised. See The Die-Gem Company, Inc., 19 DOE ¶ 80,124 at 80,570 (1989) (Exemption 7(D)); cf. Jeffery L. Turek, 11 DOE ¶ 80,142 at 80,662 (1983) (Privacy Act). Third, the Appellant asserted that the two redacted documents released to him "were not produced on the dates annotated" and that "their content is demonstrable misinformation." See Electronic Mail from Appellant to Dawn Goldstein, Staff Attorney, OHA (November 20, 1997). Neither claim is relevant to the FOIA, because the FOIA is only concerned with providing agency records to the public, regardless of the accuracy of the contents. Moreover, although there is a limited right to correct wrong information about oneself under the Privacy Act, the Privacy Act is not involved in this case for the reasons explained infra.

(2) 2/ Although the DOE stamped each redacted document, "CAO [Carlsbad Area Office] Confidential Personnel File," Mr. O'Dowd assured us that the marking was done only to signify the confidential nature of the documents. See Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd,

Assistant Chief Counsel for Legal Affairs, AOO (November 19, 1997).

Case No. VFA-0353, 26 DOE ¶ 80,240

December 19, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Information Focus on Energy

Date of Filing: November 20, 1997

Case Number: VFA-0353

On November 20, 1997, the Office of Hearings and Appeals (OHA) received an Appeal filed by Information Focus on Energy (IFOE) from a determination that the Assistant Inspector General for Resource Management of the Department of Energy's (DOE) Office of Inspector General (OIG) issued to it. The OIG issued this determination in response to a request for information that IFOE submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OIG to conduct a further search for responsive materials.

I. Background

In its FOIA request, IFOE sought access to "the titles, report numbers, and issue dates of all DOE Inspector General Reports" for the years 1988 through 1996. In its initial response to this request, dated February 18, 1997, the OIG provided IFOE with a listing of all reports from this period that had previously been distributed to the public. IFOE appealed this response to the OHA, and in a Decision and Order dated April 17, 1997, the OHA remanded this matter to the OIG with instructions to search for and release all such reports, regardless of whether they had previously been made available to the public, or provide a detailed explanation for withholding such information. Information Focus on Energy, 26 DOE ¶ 80,179 (1997).

Upon remand, OIG conducted another search for responsive documents. Two additional documents were located. Document 1 is a listing of Office of Inspections reports for fiscal years 1987 through 1997. This document was released in its entirety. Document 2 is a

listing of OIG cases closed during fiscal years 1988 through 1996. The OIG withheld portions of this document pursuant to 5 U.S.C. §§ 552(b)(6) and 552(b)(7)(C). It is this response that forms the basis for IFOE's current appeal.

In its submission, IFOE does not contest the OIG's withholding of portions of Document 2 under the FOIA. Instead, IFOE contends that the OIG's response is inadequate because it does not explain the contents of Document 2. Specifically, IFOE inquires as to the significance of the date at the top of this document and the meanings of the headings of the last three columns of information: "DATE CLOSED"; "REF TYPE"; and "REF DATE." In addition, IFOE contests the adequacy of the search for responsive documents.

II. Analysis

A. Adequacy of the OIG's Response

The FOIA does not require that an agency explain the contents of the documents that it releases. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (FOIA does not require agency to produce explanatory materials); Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985) (The "FOIA creates only a right of access to records, not a right to personal services."). However, as a courtesy to IFOE, we contacted OIG to ascertain the answers to the questions posed in IFOE's appeal.(1) We were informed that the "DATE CLOSED" column of Document 2 sets forth the date that each case was closed; that the "REF TYPE" column refers to whether the case was resolved through administrative or judicial means; and that the "REF DATE" column sets forth the date that each case was placed on an administrative or judicial resolution track. In addition, the "Tue Jun 24" heading refers to the date that Document 2 was created. See memorandum of December 15, 1997 telephone conversation between Mr. Palmer and Jenise Fonville-Noels, OIG.

B. Adequacy of the Search

The FOIA requires that an agency "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

During our communications with the OIG, we also inquired as to the scope of that Office's search for responsive documents. We were informed that the OIG's computerized records system was searched, and that it is unlikely that additional responsive documents exist outside of that system. See December 16 memorandum.

In its appeal, IFOE contends that the search was inadequate because, although Document 2 purportedly lists all OIG cases that were closed during fiscal years 1988 through 1996, there are no entries in the "DATE CLOSED" column for the years 1988 through 1990. According to IFOE, this implies the existence of OIG reports during those years that are not included in the information provided to IFOE.

This contention is without merit. As an initial matter, Document 2 is a listing of cases closed during fiscal years 1988 through 1996, not a listing of OIG reports during that period. Most of these cases were closed without the issuance of a report. See December 16 memorandum. Moreover, Document 1 lists 39 OIG reports generated during the years 1988 through 1990. There is no indication in the record that additional OIG reports from those years exist. (2) We therefore reject IFOE's claim that the OIG's search for responsive documents was inadequate. We will accordingly deny IFOE's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Information Focus on Energy on November 20, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 1997

(1)The OIG attempted, without success, to contact IFOE to answer these questions. See memorandum of December 16 telephone conversation between Robert Palmer, OHA Staff Attorney, and Pam Langer, OIG Attorney (December 16 memorandum).

(2)Because of the OIG's record retention policies, cases that were closed during these years are not included in the OIG's database.

Case No. VFA-0355, 26 DOE ¶ 80,241

December 22, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Homesteaders Association of the Pajarito Plateau

Date of Filing: November 21, 1997

Case Number: VFA-0355

On November 21, 1997, the Appellant, the Homesteaders Association of the Pajarito Plateau, filed an Appeal from a final determination issued by the Albuquerque Operations Office (AO) of the Department of Energy (DOE) on October 20, 1997. In its determination, AO partially granted a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request for information dated January 30, 1997 (Request), the Appellant sought records relating to five categories of information pertaining to various DOE transfer of lands to public entities in New Mexico and the legal rationale behind such transfers. (1) In a determination letter dated October 20, 1997 (Determination Letter), AO provided the Appellant with copies of 25 documents in their

entirety. AO also identified six other responsive documents. AO provided the Appellant with a redacted copy of one of the six documents but withheld the other five in their entirety. AO stated that the material withheld in each of the six documents was withheld pursuant to Exemption 5. AO asserted that the information withheld in the six documents consisted of predecisional personal opinions and recommendations. Release of such opinions could, AO believed, stifle open communications between decision makers and their advisors. AO further informed the Appellant that it had transferred to DOE Headquarters the Appellant's request regarding one of the categories of requested documents (Category 5).

Additionally, the Determination Letter provided a specific response to a question posed in the text of Category 3 of the Appellant's Request. Category 3 of the Request stated:

Because there are so many parcels of land that are already developed either by the County or by commercial developers in years past, why were none of the original homesteaders/legal heirs ever contacted if the DOE was involved in either the sale or transfer of such land. Some of these properties include the rifle range, the golf course, and other parcels of land? [sic] Please answer this question and

provide the legal basis (Documents) under which these parcels of land were transferred to the county or sold to private developers/individuals.

Determination Letter at 1. With regard to Category 3, the Determination Letter stated that while the FOIA did not require agencies to answer questions, AO had asked the Los Alamos Area Office (LAAO) to respond to the question posed in Category 3. The Determination Letter went on to state that LAAO had informed AO that "they [LAAO] believe that in previous responses to you provided in meetings with Mr. Todd, the LAAO Manager, and in responses to your letters to Mr. Todd, Senator Domenici, Secretary Peña, and President Clinton, they have answered your questions in this regard."

In its Appeal, the Appellant argues that AO did not conduct an adequate search for responsive documents. Specifically, the Appellant asserts that the Determination did not provide a response to Category 2 of the Request. Category 2 specifically asked for documents "that the DOE relied upon that apparently made it legal for the DOE to give land back to the Pueblo of San Ildefonso." The Appellant further asserts that he was not provided with any of the documents referred to in the LAAO response to the question contained in Category 3. The Appellant also challenges the application of Exemption 5 to the withheld material and argues that AO should have attempted to segregate releasable material from the documents withheld in their entirety.

II. Adequacy of Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

To examine the adequacy of the search which was conducted for documents responsive to Category 2 of the Request we contacted the FOIA Officer at AO. We were referred to an official at LAAO, the field office most likely to possess responsive documents. The official informed us that there had been no transfer of land to the Pueblo of San Ildefonso. See Memorandum of telephone conversation between Lisa Cummings, Office of General Counsel, LAAO, and Richard Cronin, OHA Staff Attorney (December 5, 1997). Consequently, no search was undertaken since documents would not exist. Given that LAAO determined that there had not been a transfer of land to the Pueblo of San Ildefonso and that consequently, no documents relating to such a transfer existed, we believe that the search conducted was adequate.

With regard to the search for documents pertaining to Category 3, AO informed us that LAAO was the field office most likely to contain responsive material. An official at LAAO informed us that documents responsive to Exemption 3 may exist. See Memorandum of telephone conversation between Lisa Cummings, Office of General Counsel, LAAO and Richard Cronin, OHA Staff Attorney (December 5, 1997). Consequently, we will remand this matter to AO so that it may coordinate another search for documents responsive to Category 3 of the Appellant's request.

III. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The six documents at issue in this case are listed in Appendix A. After reviewing each document, we have determined, as more fully explained below, that five of the documents have certain additional segregable information which could be released to the Appellant. On remand, AO should release this material to the Appellant or issue another determination explaining why the material is being withheld. With regard to Document 2, because much of Document 2, a draft land utilization plan, did not originate within the agency, the Exemption 5 issues are distinct and require special treatment. Consequently, we find that AO should issue another determination specifically regarding the applicability of Exemption 5 or other exemptions to that document.

A. Document 1

Document 1 consists of a memorandum from a DOE official to various other DOE officials along with six attachments (Enclosures 1 and 2 and Tabs A, B, C and D). AO provided the Appellant with a redacted version of the memorandum and identified two of the attachments (Enclosures 1 and 2) as non-responsive to the Appellant's Request. (2) AO also identified three attachments which were withheld in their entirety. However, AO has informed us that it inadvertently stated in the Determination Letter that there were only three instead of four attachments which were withheld in their entirety pursuant to Exemption 5. AO also informed us that it had in fact reviewed all four remaining attachments and had decided to withhold all four in their entirety pursuant to Exemption 5. See Memorandum of telephone conversation between Elva Barfield, FOIA Officer, AO, and Richard Cronin, OHA Staff Attorney (December 9, 1997).

The memorandum in Document 1 contains analysis and recommendations regarding DOE's possible divestment of the Los Alamos Airport. The redacted portions of the memo contain specific recommendations regarding possible disposition of the Airport. The deleted portions are predecisonal and

deliberative material concerning DOE options regarding the Los Alamos Airport. Consequently, we believe that Exemption 5 was properly applied to the redacted portions of the memorandum.

Tab A to Document 1 consists of a proposed departmental position regarding an OIG report on AO's compliance with aviation safety orders, standards and regulations along with general management and accounting for the AO air services program. After reviewing this material, we do not find it to be responsive to the Appellant's Request since it consists of a proposed departmental response to the OIG report and does not deal with any land transfer issues. Given that this document is non- responsive to the Appellant's Request, we need not consider whether the document could be withheld pursuant to Exemption 5.

Tab B consists of a memorandum outlining various issues regarding the possible transfer of the Los Alamos Airport to the County of Los Alamos. The documents outlines various arguments for and against the transfer of the property and as such is a predecisional and deliberative document. While almost all of the information contained in Tab B was properly withheld pursuant to Exemption 5, there is a small amount of non-deliberative information consisting of headings and titles and some segregable factual information which can be released to the Appellant. Specifically, the first paragraph on the first page of the memo as well as the signature block on page 3 and all material below it contains segregable factual information which can be provided to the Appellant.

Tab C consists of a one-page memorandum concerning the possible transfer of the Los Alamos Airport. The memorandum provides a brief history of events leading up to the DOE's decision to start consideration of the possibility of transferring land to the County of Los Alamos along with a brief summary regarding recommended options for land transfers. While the portion of the memorandum describing recommendations is predecisional and deliberative, much of the memorandum consists of segregable factual material. Specifically, the second and third paragraphs of the memorandum consists of segregable factual material which could be provided to the Appellant along with various headings and titles on the page and the signature block and the material below the signature block.

Tab D consists of two copies (on different types of paper) of a memorandum regarding the proposed transfer of the Los Alamos Airport to Los Alamos County along with a copies of documents in Tabs B and C. The vast majority of the material in the memorandum itself consists of various considerations and recommendations regarding a possible transfer of the Los Alamos Airport. This material is predecisonal and deliberative and thus properly withheld pursuant to Exemption 5. There is a small amount of segregable non-deliberative material consisting of most of the titles and headings which can be released. Additionally, the first paragraph on the first page of the memo appears to consists of segregable factual material which can be released to the Appellant.

B. Document 2

Document 2 consists of a one-page handwritten note to a DOE official with an attached letter from a Los Alamos County official (Los Alamos Letter) and a draft land utilization plan for DOE property created by Los Alamos County. The initial question arising from the application of Exemption 5 to this document is whether the portion of the document consisting of the Los Alamos Letter and a draft land utilization plan drafted by Los Alamos County can be considered an "inter-agency or intra- agency" document. Clearly the Los Alamos Letter and the draft land utilization plan were not created by a federal agency. However, courts have extended Exemption 5 protection for documents created outside of federal agencies under certain circumstances. In this regard, the Court of Appeals of the District of Columbia Circuit has held that "Exemption 5 permits an agency to protect the confidentiality of communications outside the agency so long as those communications are part and parcel of the agency's deliberative process. As such they remain intra-agency documents." Dow Jones & Co., Inc. v. Dep't of Justice, 917 F. 2d 571, 575 (D.C. Cir. 1990). Consequently, in light of the fact that the Los Alamos Letter and the draft land utilization plan were created outside of a federal governmental agency, we must specifically examine the role Document 2 played in DOE deliberations in order to determine whether it can appropriately be deemed an "intra-

agency" document for Exemption 5 purposes. However, the Determination Letter does not provided any indication as to the role Document 2 played in the DOE's deliberative process other than a generalized assertion that the document sets forth "personal opinions and recommendations of the authors and are antecedent to the adoption of agency policy." Given the unique non-agency origin of most of the withheld material in Document 2 and to afford the Appellant an opportunity to formulate an effective appeal, we will remand this matter back to AO so it can issue another determination to address the considerations discussed above and to explain why Document 2 should be withheld under Exemption 5 and/or another exemption. Additionally, on remand AO should consider if any of the material in Document 2 can be segregated from withholdable material and provided to the Appellant. (3)

C. Document 3

Document 3 is a copy of a memorandum to the Assistant Manager for Projects and Facility Modernization with attached comments concerning the potential sale or donation of land to the Los Alamos County. The majority of the document consists of opinions and analysis of issues concerning the potential transfer of land to Los Alamos County. It contains recommendations as to steps the DOE should take if the decision is to be made to transfer property to the County. The document is predecisonal and deliberative. Thus, the majority of the material in this document was properly protected pursuant to Exemption 5. However, there is a small amount of segregable factual material which could be released to the Appellant. Specifically, the headings and titles on the first page of the memorandum are not deliberative material and should be released. Additionally, the first paragraph and the first sentence of the second paragraph of page one of the memorandum consist of segregable

factual material which should be released to the Appellant. Additionally the entire second page of the memorandum consists of segregable factual material which should be released. Lastly the top two title lines on the first page of the attachment are non-deliberative material that should also be released to the Appellant.

D. Document 4

Document 4 is a memorandum that outlines the specific land tracts which DOE would propose to offer to Los Alamos County along with an assessment of Los Alamos County's expected response to the offer. This document therefore is predecisonal and deliberative since it outlines DOE's negotiating position vis-a-vis Los Alamos County. While most of the material in this document is properly protected by Exemption 5, there is some segregable factual material. Specifically, the titles and headings along with the first paragraph on the first page of the memo should be released. The title and headings on page two and the signature block and the "cc" block are segregable factual material and should also be released.

E. Document 5

Document 5 consists of a memorandum with an attached draft lease agreement between the County of Los Alamos and the DOE. The vast majority of this predecisional document, such as the draft lease agreement itself, consists of predecisional, deliberative material. However, there is a small amount of non-deliberative or segregable factual material. The headings and titles on the memorandum page (first page of the document) are segregable factual material and should be released. Further, the first two sentences of the first paragraph of the memorandum page consist of segregable factual material which should also be released. In addition, the signature block and all material below the signature block on the memorandum page consists of segregable factual material which should also be released to the Appellant.

F. Document 6

Document 6 consists of a copy of a one-page letter sent to the Director of Real Estate at the University of New Mexico with an attached draft letter of intent to transfer a parcel of land from the DOE to the

University of New Mexico. The entire draft letter of intent is deliberative and predecisonal and thus was properly withheld pursuant to Exemption 5. However, the one-page letter contains no deliberative material and is in itself not predecisional. Consequently, in the absence of further justification, Exemption 5 does not apply to the one-page letter. On remand, AO should either release the one-page letter portion of Document 6 or issue another determination explaining why the document is being withheld.

G. The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that AO properly applied Exemption 5 to most of the requested information, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. In the present case, the requested information consists of the opinions of individuals concerning different aspects of DOE decisions regarding the possible transfer of DOE property to the County of Los Alamos. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion. Employees and managers would be less likely to communicate their opinions if they knew or suspected that an agency would release their opinions to the public. Consequently, we find that the existence of this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest.

III. Summary

As discussed above, we will remand this matter to AO so that another search may be conducted for documents responsive to Category 3 of the Appellant's Request. Additionally, we will remand this matter to AO so that it may release the material described above concerning Documents 1, 2, 3, 4, 5 and 6 or issue another determination explaining why the material should be withheld. Consequently, the Appellant's Appeal will be granted in part. (4)

It Is Therefore Ordered That:

(1) The Appeal filed by the Homesteaders Association of the Pajarito Plateau on November 21, 1997, Case No. VFA-0355 is hereby granted as set forth in Paragraph (2), and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Albuquerque Operations Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 22, 1997

APPENDIX A

Document No. Tittle

1. Memorandum to Larry Kirkman, etc., from Don Landry, Subject: A Plan for Negotiating with Los Alamos County Concerning Land, Buildings, Airport, Water Systems, and Assistance Payments.
2. Letter to Jerry Bellows from James M. Flint dated October 6, 1993.
3. Memorandum to Assistant Manager for Projects and Facilities Modernization from Richard W. Earl, Subject: Los Alamos Visit, dated August 23, 1993.
4. Memorandum to Bernard van der Hoeven from Larry Kirkman, Subject: Transfer of DOE Lands to Los Alamos County, dated February 13, 1995.
5. Memorandum to Jane Griego from E. Dennis Martinez, Subject: Lease of the 9th Street Apartment to the Incorporated County of Los Alamos, dated January 31, 1996.
6. Letter to Kim D. Murphy from Corville J. Nohava dated February 7, 1997.

(1)Specifically, the Appellant requested documents concerning: (1) the legal theories under which the land of the original homesteaders in the Los Alamos area were taken; (2) the legal justification for the DOE's transfer of land to the Pueblo of San Ildefonso; (3) the legal basis justifying the sale or transfer of various parcels to County of Los Alamos; (4) any correspondence and real estate information sent between the DOE, Los Alamos County, the State of New Mexico and other entities as it relates to the transfer of land from the Los Alamos National Laboratory (LANL) to the County of Los Alamos; and (5) the identification of DOE sites where DOE has transferred land to another entity along with documentation that enabled the DOE to effect the transfer.

(2)While the Appellant has not challenged the identification of Attachments 1 and 2 as non- responsive, we have reviewed those Attachments. Attachment 1 is a collection of two charts concerning Los Alamos Airport aircraft operations and a map of the Los Alamos Airport. Attachment 2 is a DOE Office of the Inspector General Report (OIG) regarding Aircraft Management at AO. Neither attachment is responsive to the Appellant's Request.

(3)Document 2 also contains the home phone number of a DOE employee, to which Exemption 6 might be applicable. See Information Focus on Energy, Inc., 26 DOE ¶ 80,191 (1997) (home phone numbers protectable pursuant to Exemption 6).

(4)We have also been informed that AO has discovered another responsive document, a memorandum to various DOE officials dated February 15, 1995, that was not previously disclosed to the Appellant. On remand AO shall also issue a determination regarding this document.

Case No. VFA-0356, 27 DOE ¶ 80,102

January 8, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: K&M Plastics, Inc.

Date of Filing: December 9, 1997

Case Number: VFA-0356

On December 9, 1997, K&M Plastics, Inc. (K&M) filed an Appeal from a determination that the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE) issued to it on November 13, 1997. That determination denied a request for information that K&M submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require RFFO to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the type of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 30, 1997, K&M filed a request under the FOIA in which it sought "a copy of the bid abstract for Kaiser-Hill Company, L.L.C., Rocky Flats Environmental Tech. Site, Golden, Colorado, Solicitation No. DC 706517 CE dated June 19, 1997." This FOIA request was initially filed with the DOE's Albuquerque Operations Office (AO). AO informed K&M that the requested records were at RFFO, and transferred the request to RFFO for processing. Letter from FOI Officer, AO, to K&M (August 5, 1997). RFFO issued a determination to K&M on November 13, 1997. In that determination, RFFO found that the records sought by K&M were not "agency records" because they were not in the possession and control of the agency at the time of the FOIA request. RFFO further explained that under the terms of the contract between DOE and Kaiser-Hill, the procurement records requested are the property of the contractor and therefore not subject to release under DOE regulations. Letter from Mary Hammack, FOIA Officer, RFFO, to C. Poellet, President, K&M (November 13, 1997) (Determination Letter).

In its Appeal, K&M argues that the records should be made public because they do not affect national security or public safety. In addition, K&M further alleges that it requested similar information in the past, (1) and that this request was honored. See Letter from C. Poellet, President, K&M, to Director, Office of Hearings and Appeals (December 9, 1997) (Appeal Letter).

II. Analysis

Our threshold inquiry in this case is whether procurement records of a DOE contractor which were in the possession of the DOE contractor at the time of the request are subject to the FOIA. Contrary to K&M's assertion, the FOIA does not direct that all records that do not affect national security or public safety are subject to disclosure. Rather, we must first determine whether the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. See 5 U.S.C. § 552(f). Records that do not meet these criteria may nonetheless be subject to release under the DOE regulations if they are owned by the government. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and are not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information required to be made available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-stage analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as Kaiser-Hill, are subject to the FOIA. See, e.g., The Cincinnati Enquirer, 26 DOE ¶ 80,205 (1997); Diane C. Larson; 26 DOE ¶ 80,112 (1996); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA, and if not (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

A. Kaiser Hill Is Not An Agency Under The FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether an entity should be regarded as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case which involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976); Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered).

Under its contractual relationship with the DOE, Kaiser-Hill is the prime contractor responsible for maintaining and operating the Rocky Flats Environmental Technology Site. This Office has frequently held that DOE management and operating contractors are not "agencies" for FOIA purposes. See, e.g., The Cincinnati Enquirer, 26 DOE ¶ 80,205 (1997) (Fluor Daniel Fernald); Diane C. Larson, 26 DOE ¶ 80,112 (1996) (Westinghouse Hanford Company); William Kuntz III, 25 DOE ¶ 80,157 (1995) (Lockeed Martin Corporation). We have previously determined that the DOE has obtained Kaiser-Hill's services and exercises general control over the contract work, but it does not supervise Kaiser-Hill's day-to-day operations. See ChemData, Inc., 26 DOE ¶ 80,228 (1997). Therefore, Kaiser-Hill does not meet the test set forth in the Orleans and Forsham decisions, and we find that Kaiser-Hill is not an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control

Although Kaiser-Hill is not an agency for the purposes of the FOIA, records in its possession which are responsive to K&M's request could be deemed "agency records" if they were obtained by the DOE and

were within the DOE's control at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. However in this case, the documents in question had not been obtained by the DOE and were not in the agency's possession at the time of K&M's request. See Determination Letter.

C. Procurement Records Are The Property Of The Contractor

Even if a contractor-acquired record fails to qualify as an "agency record," it may still be subject to voluntary release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations state that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore look next to the contract between DOE and Kaiser-Hill to determine the status of the withheld records. That contract states:

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government . . . .

Contract DE-AC34-95RF00825, Section H.4. Paragraph (b) excludes from this provision "[r]ecords related to any procurement action by the Contractor." Id. at Clause H.20(b)(8). Thus, because procurement records are not among the records which are property of the Government under the DOE's contract with Kaiser-Hill, these records are not subject to release under the DOE regulations.

For the reasons set forth above, we find that the records sought by K&M are neither "agency records" within the meaning of the FOIA, nor subject to release under DOE regulations. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by K&M Plastics, Inc. on December 9, 1997, Case Number VFA-0356, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 8, 1998

(1)Prior to 1995, RFFO released bid abstracts on request because that information was considered government property. However, in 1995 Kaiser-Hill became the prime contractor responsible for the Rocky Flats Environmental Technology Site, and pursuant to the contract between DOE and Kaiser-Hill, those records became the property of the contractor. See Record of Telephone Conversation between Mary Hammack and Valerie Vance Adeyeye, OHA Staff Attorney (January 5, 1998).

Case No. VFA-0357, 26 DOE ¶ 80,242

December 22, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Rural Alliance for Military Accountability

Date of Filing: November 28, 1997

Case Number: VFA-0357

On November 25, 1997, the Rural Alliance for Military Accountability (RAMA) submitted an Appeal from a determination issued to it on October 31, 1997 by the Rocky Flats Field Office (RF) of the Department of Energy (DOE). (1) That determination concerned a request for information submitted by RAMA pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, RF would be required to conduct a further search for responsive material.

I. Background

In a September 22, 1996 Freedom of Information Act request (Request), RAMA asked for copies of all documents pertaining to the transportation routes DOE and its contractors utilize to transport materials and wastes from the DOE's Rocky Flats facility in Colorado to the Los Alamos National Laboratory in New Mexico. RAMA specified that it sought, among other items, maps, records of decisions, National Environmental Policy Act (NEPA) documentation, risk analysis documentation, accident procedures, emergency preparedness training materials and all written policies pertaining to the transportation of materials or wastes.

On October 31, 1997, RF issued a partial determination letter (Determination Letter) responding to RAMA's Request. The Determination Letter listed a number of documents it released in their entirety to the Appellant. Included in these documents were copies of maps with approved hazardous material transportation routes for the State of Colorado. The Determination Letter stated that no copies of

any approved hazardous material transportation routes for the State of New Mexico were found but RAMA was informed that the New Mexico Highway Department may possess such information.

In its Appeal, RAMA argues that RF conducted an inadequate search for documents responsive to its Request. Specifically, RAMA asserts that the partial response provided by RF was "unresponsive and contradictory in the information provided." As evidence of the inadequacy of RF's response, RAMA asserts that it is inconceivable that a federal agency would not have a map of approved hazardous material routes for the State of New Mexico. (2)

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., National Resources Defense Council, 26 DOE ¶ 80,229 (1997).

In reviewing the present Appeal, we contacted RF to ascertain the extent of the search that it performed for responsive documents. RF informed us that it conducted a search in the RF offices most likely to contain responsive documents. These offices included the offices of the various Assistant Managers for Government Operations, Environmental Compliance, Material Stabilization and Disposition, Program and Program Planning Integration and Performance Assessment. See Memorandum of telephone conversation between Mary Hammack, FOIA Officer, RF, and Richard Cronin, OHA Staff Attorney (December 10, 1997). Additionally, RF asked Kaiser-Hill Company, the main integrator contractor, to conduct a search. Kaiser-Hill Company determined that DynCorp, the contractor with responsibility for the shipment of hazardous materials and training of personnel, would most likely possess responsive documents. Kaiser-Hill subsequently requested that the offices of DynCorp be searched. In light of the above facts, we believe RF conducted a search of the DOE and contractor offices which would most likely contain responsive documents. The fact that RF did not possess a map of approved transportation routes in New Mexico does not convince us otherwise. The traffic manager for DynCorp informed us each state is responsible for determining the routes by which hazardous materials are shipped but that states need not actually select routes or print maps of such routes. He also informed us that to the best of his knowledge RF has never sought to obtain

a map of New Mexico State hazardous material routes or to determine whether the State of New Mexico had ever created a map or list of such routes. Further, he informed us that to transporting hazardous materials, RF would contract with a carrier and that the carrier is responsible for selecting an appropriate route. See Memorandum of telephone conversation between Mary Hammock, FOIA Officer, RF, Len Lenarcic, traffic manager, DynCorp, and Richard Cronin, OHA Staff Attorney (December 17, 1997). We were also informed that the DOE's Albuquerque Operations Office, which supervises the Waste Isolation Pilot Plant in Carlsbad, New Mexico, would be the DOE facility which would most likely possess a map or list of approved New Mexico hazardous material transportation routes, if such documents exist, and that RAMA's requested has been forwarded to that office. Id. Since we believe that RF conducted a search reasonably calculated to uncover responsive documents, we find that RF conducted an adequate search pursuant to the FOIA. Consequently, we must deny RAMA's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on November 28, 1997 by the Rural Alliance for Military Accountability, Case No. VFA-0357, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 22, 1997

(1)RAMA's initial submission did not include a copy of the determination letter it was appealing and which is required to be by DOE's FOIA regulations. See 10 C.F.R. § 1004.8(b). We deemed RAMA's appeal as filed as of the date when we received a copy of the RF determination letter on November 28, 1997.

(2)In its Appeal, RAMA also complains about the length of time RF took to process its FOIA Request and about an incident involving a RF official. We can address neither of these complaints. Our jurisdiction is limited to appeals of actions whereby an Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to a request or when a FOIA Officer has denied a request for a waiver of fees. See 10 C.F.R. § 1004.8(a).

Case No. VFA-0358, 26 DOE ¶ 80,243

December 29, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dykema Gossett, PLLC

Date of Filing: November 26, 1997

Case Number: VFA-0358

On November 26, 1997, the law firm of Dykema Gossett (Appellant) filed an Appeal from a final determination issued on November 3, 1997 by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). The Appellant had requested these documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, Oak Ridge withheld numerous requested documents, either partially or in their entirety, under FOIA Exemption 4. This Appeal contends that Oak Ridge's withholdings under Exemption 4 were improper. In addition, the Appellant also questions the adequacy of the search for documents responsive to his request that Oak Ridge conducted. This Appeal, if granted, would require the DOE to release the withheld documents and to conduct an additional search for responsive documents.

I. BACKGROUND

On June 26, 1996, the Appellant submitted an extensive request to Oak Ridge for information relating to the Superconducting Super Collider Laboratory (SSCL). This request was in turn composed of 14 sub-requests. On October 6, 1997, Oak Ridge released a number of responsive documents to the Appellant. Accompanying this release was a letter from Oak Ridge's FOIA Officer informing the Appellant that additional responses would be forthcoming. (1) On November 3, 1997, Oak Ridge issued a determination letter informing the Appellant:

This letter and enclosures complete our review of agency documents located in the U.S. Department of Energy (DOE) and contractor files of the Superconducting Super Collider Laboratory found responsive to your request . . . . Enclosed are amendments to contract SSC-91-B-01701 and SSC-91-B-01707, as well as additional records with deletions of commercial, financial information, settlement sensitive data, and trade secret information in accordance with 5 U.S.C. § 552(b)(4).

November 3, 1997 Determination Letter at 1.

On November 26, 1997, the Appellant filed the present Appeal, contending that Oak Ridge's search for responsive documents was inadequate and that Oak Ridge had not sufficiently justified its withholdings under Exemption 4.

II. ANALYSIS

A. Adequacy of the Search

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). We review the adequacy of an agency's search under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. Research Information Services, Inc., 26 DOE ¶ 80,139 (1996) (RIS); Burlin McKinney, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. Id.

While the determination letter issued to the Appellant generally indicates that responsive information was withheld under Exemption 4, the determination letter does not identify the specific information it is withholding under Exemption 4. As a result, the determination letter does not satisfy DOE's obligation under the applicable FOIA case law.

The Appellant contends that it has not received any documents from at least nine of the 14 subcategories in its FOIA request. Since the determination letter does not explain why no responsive documents were located for these nine subcategories, it is unclear whether documents responsive to these nine subcategories were identified and withheld under Exemption 4 or were never located at all.

We are therefore remanding this matter to Oak Ridge for clarification. On remand, Oak Ridge should issue a new determination letter in which it identifies each document responsive to the June 26, 1996 request, indicates whether any responsive document (or portion thereof) has been withheld, and justifies any withholding.

B. Exemption 4

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. §

1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks).

In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government *involuntarily* is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). It is well settled that information required to be submitted in order to obtain a DOE contract is considered to be submitted on a non-voluntarily basis for Exemption 4 purposes. See, e.g., Milton L. Loeb, 23 DOE ¶ 80,124 (1993). The federal courts have reasoned that even though such submissions are voluntary in the sense that no company is forced to do business with the government, information required by the terms of a Request for Proposal must be submitted if “contractors want to win lucrative government contracts . . .” McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. (D.D.C. June 30, 1995). Since the information was submitted to the DOE specifically for the purpose of acquiring a contract, it was clearly involuntarily submitted. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996) (Industrial). Since the information was submitted involuntarily, it is only "confidential" if it meets the test set out in National Parks. See Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

In the present case, the Appellant contends that Oak Ridge failed to adequately explain why it concluded that release of the withheld information could reasonably be expected to cause substantial competitive harm.

Both the FOIA and the DOE regulations implementing it require reasonably specific justifications for the withholding of documents or portions of documents. Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Data Technology Industries, 4 DOE ¶ 80,118 (1979). Conclusory and generalized claims by agency officials that material is exempt from disclosure are not acceptable. Thus, an agency determination that material should be withheld under Exemption 4 because its disclosure is likely to cause substantial competitive harm must include the reasons for believing that such harm will result to the competitive position of the person from whom the information is obtained. Federal Information Tools, 3 DOE ¶ 80,163 at 80,807 (1979). An adequate explanation would, for example, indicate the type of competitive injury which would result from disclosure, and the manner in which the information, if disclosed, could be utilized by a competitor to damage the firm's market position. Exxon Co., U.S.A., 8 DOE ¶ 80,162 at 80,794-95 (1981).

Oak Ridge’s determination letter does not meet these standards. The determination letter does not contain a sufficient explanation of why Oak Ridge determined that release of the information it is withholding would cause competitive harm to the information’s submitters. Accordingly, we shall remand this matter to Oak Ridge with instructions to issue a new determination letter. The new determination letter should specifically identify all information that the agency is withholding under Exemption 4. The determination letter should also explain why release of each document (or portion thereof) could reasonably be expected to cause competitive harm to the submitters if released. (2)

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to the Oak Ridge Operations Office with instructions to promptly issue a new determination letter that complies with the requirements discussed above.

It Is Therefore Ordered That:

1) The Freedom of Information Act Appeal filed by Dykema Gossett, PLLC on November 26, 1997 (Case Number VFA-0358) is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) This case is hereby remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 29, 1997

(1) On October 20, 1997, Oak Ridge issued another partial response to the June 26, 1996 request releasing more responsive documents to the Appellant. However, Oak Ridge withheld several portions of these documents under Exemption 4. In a previous appeal, VFA-0349, the Appellant contested Oak Ridge's withholding of one of these documents, entitled "Part III Prime Item Development Specification" (Part III), which was withheld in its entirety. Dykema Gossett PLLC, 27 DOE ¶ 80,__ (December 11, 1997).

(2) The DOE regulations direct the DOE to release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we also do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

Case No. VFA-0359, 27 DOE ¶ 80,101

January 5, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner:James R. Hutton

Date of Filing: December 3, 1997

Case Number: VFA-0359

On December 3, 1997, James R. Hutton (the Appellant) filed a Motion for Reconsideration of a Decision and Order issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on November 13, 1997. James R. Hutton, Case No. VFA-0341. For the reasons detailed below, we deny the Appellant's request that we reconsider our ruling that the names and position numbers of federal employees listed on a "retention register" are exempt from disclosure under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(6); 10 C.F.R. §1004.10(b)(6).

Background

On September 9, 1997, the Appellant submitted a FOIA request to the Oak Ridge Operations Office of the DOE (Oak Ridge) seeking a copy of a retention register prepared in anticipation of a "reduction in force" (RIF).(1) On September 23, 1997,

in response to the Appellant's FOIA request, Oak Ridge issued a determination in which it withheld the entire retention register on the grounds that disclosure of this document "would constitute a clearly unwarranted invasion of personal privacy" under Exemption 6 of the FOIA.

On October 14, 1997, the Appellant filed an appeal of this determination with OHA. On November 13, 1997, we issued a Decision and Order that remanded the case to Oak Ridge with instructions to redact the names and position numbers of the listed employees, and release the retention register to the Appellant. We ordered the redaction of data that identified the listed employees to avoid a clearly unwarranted invasion of personal privacy under Exemption 6.

On December 3, 1997, the Appellant filed the instant Motion seeking reconsideration of the Decision and Order issued on November 13, 1997. In this Motion, the Appellant contends that federal employees have no privacy interest in the disclosure of the details of their federal employment because this information is generally available to the public.(2) He further disputes that the listed employees have a privacy interest in their names in the context of the retention register because this document does not directly identify the employees who will be terminated, but only ranks and categorizes these employees. The Appellant further claims that the redacted information should be disclosed because employees have a "particularized need" to know how they are ranked in relation to others, and whether the agency is conducting the reduction in force in accordance with law.

Analysis

As detailed below, we will deny the Appellant's Motion for Reconsideration because he has failed to present evidence that we committed error by ruling that the names and position numbers of federal employees listed on a retention register are exempt from disclosure under Exemption 6 of the FOIA. (3)

As we indicated in our initial Decision, the purpose of Exemption 6 is to protect individuals from clearly unwarranted invasions of their personal privacy. To determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. See James R. Hutton, Case No. VFA-0341 (Nov. 13, 1997).

The Privacy Interest

After considering Appellant's arguments, we reaffirm our previous ruling that an employee has a privacy interest in his or her name and position number in the context of a retention register because the disclosure of this information might suggest the employee's vulnerability to a reduction in force.

We agree with the Appellant that a federal employee often has no privacy interest in his or her name or status as a federal employee. However, the Appellant has failed to recognize that a federal employee does have a privacy interest in his or her name when it is linked to personally sensitive information. See The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 80,768-69 (1996); William H. Payne, 25 DOE ¶ 80,190 at 80,726-27 (1996); The News Tribune, 25 DOE ¶ 80,181 at 80,699-700 (1996). See also Raymond T. Number & Patricia Ann Krauthaus, Information as a Commodity: New Imperatives of Commercial Law, 55 Law & Contemp. Probs., Spring 1992, at 103, 124 (under FOIA law, a person has an interest in "information about himself if the information is personally sensitive, if it is private, and if it is to be used or disclosed in a form related specifically to the individual.").

An individual's vulnerability to a reduction in force is sensitive information. Disclosure of this information may cause the individual to suffer embarrassment and financial harm. As such, a federal employee has a privacy interest in the disclosure of such information. See Rosenfeld v. HHS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,082 at 83,617 (D.D.C. Jan. 31, 1983), aff'd on other grounds, No. 83-1341 (D.C. Cir. Nov. 11, 1983) (employee has privacy interest in disclosure of name on proposed reduction in force list); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (federal annuitant has privacy interest in disclosure of status and receipt of pension); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 168-169 (D.D.C. 1976), aff'd on other grounds sub nom. National Org. for Women v. Social Sec. Admin., 736 F.2d 727 (D.C. Cir. 1984) (employee has privacy interest in disclosure of promotion prospects and reasons for termination).

The Public Interest in Disclosure

The Appellant has also failed to convince us that we committed error by ruling that the public interest in the disclosure of the names and position numbers of the employees listed in the retention register was insubstantial or nonexistent.

The Appellant's contention that other employees have a "particularized need to know" this information ignores the holding of the Supreme Court in Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee). In Reporters Committee, the Supreme Court reaffirmed that the public interest standard must be used in the balancing test to determine whether the disclosure of documents would constitute an unwarranted invasion of personal privacy under the FOIA. The Court indicated that information advances the public interest only if the information is likely to contribute "significantly to public understanding of the operations of the government." Reporters Committee, 489 U.S. at 775 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). See also Department of Defense v.

Federal Labor Relations Auth., 510 U.S. 487, 494-95 (1994). The Court also held that the requester's personal interest is irrelevant in determining whether documents should be released under the FOIA. Reporters Committee, 489 U.S. at 775.

Here Appellant has failed to demonstrate the existence of a significant public interest in the disclosure of the names of the employees. He claims that the names of the employees are needed to determine whether the agency is conducting the reduction in force in accordance with law. However, as we have noted in other situations, the release of names tells nothing about the operations and activities of government. See Michael A. Grosche, 26 DOE ¶ 80,146 at 80,644 (1996). Thus, here we find that both the public and privacy analyses support withholding the names of the employees listed on the retention register.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by James R. Hutton on December 3, 1997, Case Number VFA-0359, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 6, 1998

(1)The retention register contains information that permits the reader to rank each named employee in terms of his or her vulnerability to a reduction in force. It contains the names and position numbers of employees who are subject to a reduction in force, and sets forth, amongst other things, information concerning the employee's tenure, job classification series, and performance appraisal.

(2)The Appellant concedes that an employee has a privacy interest in his or her performance evaluation, and has indicated that he has no objection to the non- disclosure of such information.

(3)The DOE regulations governing FOIA requests and appeals do not contain a provision that permits a party to move for reconsideration of an appellate decision issued by OHA. 10 C.F.R. Part 1004. Nevertheless, based on 10 C.F.R.§1003.55(b)(1), we have, on occasion, reconsidered FOIA decisions based on significantly changed circumstances. Moreover, we have also reconsidered FOIA decisions when a party has provided specific, convincing evidence of error. See Robert Condra, 22 DOE ¶80,141 (1992); Chuck Hansen, 18 DOE ¶ 80,116 (1988).

Case No. VFA-0360, 27 DOE ¶ 80,105

January 23, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Ruth Towle Murphy

Date of Filing: December 22, 1997

Case Number: VFA-0360

On December 22, 1997, Ruth Towle Murphy completed the filing of an Appeal from a determination the Manager of the Oak Ridge Operations Office (Manager) of the Department of Energy (DOE) issued to her on November 14, 1997. In that determination, the Manager partially granted a request for information that Ms. Murphy filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In her request for information, Ms. Murphy sought a copy of the contract designated DE-AC05-95MA40110 and any modifications to that contract. In his determination, the Manager released a copy of the requested contract, but deleted “estimated costs, fixed fees, and names of key personnel in accordance with 5 U.S.C. § 552(b)(4).” Ms. Murphy contends that “only information obtained from an individual, a partnership, or a corporation, other than a government agency, qualifies under the fourth exemption” of the FOIA (emphasis in original). She argues that since both the DOE and the submitter signed the contract she seeks, in essence, the DOE obtained the contract from itself. Since Exemption 4 does not apply to documents obtained from a government agency, Ms. Murphy contends that the Manager improperly applied Exemption 4.

Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have consistently held that a

submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. See Glen M. Jameson, 25 DOE ¶ 80,191 (1996) (Jameson); Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

Ms. Murphy is incorrect when she argues that the DOE obtained the withheld information from itself. Simply because the DOE signed the contract is no indication that the DOE had anything to do with the creation of the information. In fact, the submitter, NCI Information Systems, Inc., created and provided the redacted information to the DOE voluntarily for the purpose of acquiring a contract. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 (1996) (Industrial); Tri-City Herald, 16 DOE ¶ 80,114 (1987).

We have carefully reviewed the redacted information and have confirmed that the DOE withheld only estimated costs, fixed fees, and the names of key personnel to implement the contract. We find that all of the redacted information is commercial information within the meaning of Exemption 4. The DOE obtained this material from a "person" as required by Exemption 4, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). We also conclude that each withheld item, the estimated costs, fixed fees, and the names of key personnel, is confidential because the release of any item would substantially harm the submitter's competitive position. We have stated in the past that release of cost and financial information could be used by a competitor to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See Industrial; International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, for example, if the submitter released its estimated costs and fees for completing specific tasks, any competitor could easily determine how to adjust its own costs and fees to arrive at a lower contract price and plan to undercut the submitter's best price and procedures in a future bid process. Furthermore, if the DOE were to release the names of key personnel involved in the contract, a competitor could offer employment to these people in an effort to make his firm more competitive in a future bid process at the expense of the submitter. See Jameson. Accordingly, we must deny Ms. Murphy’s Appeal.

The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by Ruth Towle Murphy on December 22, 1997, Case No. VFA-0360, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 23, 1998

Case No. VFA-0361, 27 DOE ¶ 80,106

January 28, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Charles G. Frazier

Date of Filing: December 29, 1997

Case Number: VFA-0361

On December 29, 1997,(1) Charles G. Frazier completed the filing of an Appeal from a determination issued to him on November 10, 1997, by the Chicago Operations Office (Chicago) of the Department of Energy (DOE). That determination concerned a request for information submitted by Mr. Frazier pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the DOE would be required to release a portion of the appointment books of certain Chicago employees.

I. Background

On October 16, 1997, Mr. Frazier submitted a Freedom of Information Act request to Chicago seeking copies of Cherri Langenfeld's and Tim Crawford's appointment books(2) reflecting all daily meetings for June 1997. Determination Letter dated November 10, 1997, from John P. Kennedy, Acting Manager, Chicago Operations Office, to Charles Frazier. In its November 10, 1997 Determination Letter, Chicago stated that the requested calendars constitute personal records and were not subject to the FOIA. Id.

Mr. Frazier appealed to this Office stating that he disagreed that the appointment calendars are personal records. He supports this claim by maintaining that Ms. Langenfeld's appointment book is still at Chicago although she no longer works for

DOE. He challenges Chicago's assertion that Mr. Crawford's appointment book is personal in nature by declaring that Mr. Crawford's secretary maintained an appointment book for the predecessor in Mr. Crawford's position, Manager of Argonne Group. Appeal Letter from Charles G. Frazier to Director, OHA, DOE.

II. Analysis

The issue we must address is whether the appointment books requested by Mr. Frazier are "agency records." The FOIA requires the disclosure only of "records" maintained by "agencies" within the executive branch of the federal government. 5 U.S.C. § 552(f). To support his claim that the requested information is an "agency record," Mr. Frazier relies on the following: (1) despite her departure from Chicago, Ms. Langenfeld's appointment book remains in the possession of her secretary, and (2) Mr. Crawford's secretary maintained an appointment book for his predecessor.

We are not convinced by these arguments. The U.S. Court of Appeals for the District of Columbia has

concluded that appointment calendars are not agency records. Bureau of National Affairs, Inc. v. Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984) (BNA). In making its determination, the court relied on Kissinger v. Reporters Comm. For Freedom of the Press, 445 U.S. 136 (1980) (Kissinger). In Kissinger, the Supreme Court focused on four factors to determine whether a document is an "agency record:" whether the documents were (1) in the agency's control; (2) generated within the agency; (3) placed into the agency's files; and (4) used by the agency "for any purpose." Kissinger, 445 U.S. at 157. The BNA court determined that the appointment calendars at issue were generated within the agency and prepared on government time, at government expense, and with government materials. BNA, 742 F.2d at 1494; see Kissinger, 445 U.S. at 157. The officials' secretaries maintained the appointment calendars as part of their official duties. BNA, 742 F.2d at 1494. The appointment calendars were not placed into agency files. Id. Also, the employees were permitted to discard the appointment calendars at their discretion. Id. at 1494-1495. After reviewing these factors, the BNA court determined that the appointment calendars at issue were not under agency control and had not been placed into the agency files, even though the calendars had been generated within the agency. Therefore, the first three factors listed in Kissinger were in conflict with each other. Thus, the court concluded that it should look at the fourth factor and analyze how the documents were used within the agency in question. Id. at 1495. If the appointment calendars were used by the agency for any purpose, they would be considered "agency records."

All the factors that were present in BNA are present here. Ms. Langenfeld's and Mr. Crawford's appointment books were generated within the agency and prepared on government time, at government expense, and with government materials. Similarly, Ms. Langenfeld's and Mr. Crawford's secretaries maintained the appointment books as part of their official duties. Neither Ms. Langenfeld's or Mr. Crawford's appointment books

have been placed in the agency files, and Ms. Langenfeld and Mr. Crawford were permitted to discard the books at their discretion. As the BNA court was compelled to analyze the purpose of the appointment calendars because the first three factors listed in the Kissinger opinion conflicted with each other, we must determine how the appointment books were used at Chicago.

The BNA court concluded that the appointment calendars at issue there were not "agency records" because (1) they were not distributed to other employees, but were retained solely for the convenience of the individual officials and (2) they were created for the personal convenience of the individuals to organize both their personal and business appointments. BNA, 742 F.2d at 1496. Similarly, Ms. Langenfeld and Mr. Crawford used their appointment books to organize both their business and personal activities. The appointment books facilitated the performance of their official duties by allowing them to keep their lives in order. See id. at 1494. Ms. Langenfeld's book contained doctor and dentist appointments, along with both personal and business dinner engagements. Her business meetings and schedule were placed in the book as well. Similarly, Mr. Crawford's appointment book contained both personal and business engagements. Other than their secretaries, no one but Ms. Langenfeld and Mr. Crawford had access to the appointment books. Neither of the appointment books was distributed to other employees; each was strictly for the use of Ms. Langenfeld and Mr. Crawford and their secretaries. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and Kim McMahon, Attorney, Chicago, January 14, 1998. Therefore, as the BNA court determined, we must conclude that these appointment books were created and maintained for the personal convenience of Ms. Langenfeld and Mr. Crawford so they could organize both their personal and business appointments.

The fact that Ms. Langenfeld's calendar is still at Chicago does not change our determination. Ms. Langenfeld's appointment book was merely a personal convenience. The only reason Ms. Langenfeld's secretary has retained the book is to refresh her memory of Ms. Langenfeld's schedule on occasion. We do not believe this action is enough to bring it up to the level of an "agency record." At no time was the book in the agency's control or was it placed into the agency's files. Further, we do not find the fact that Mr. Crawford's secretary kept his predecessor's appointment book convincing. The court in BNA found that even though the officials' secretaries maintained the appointment calendars, the books were maintained for

the convenience of the official, not for any agency purpose. BNA, 742 F.2d at 1494. The fact that both Mr. Crawford and his predecessor wished to keep appointment books does not raise Mr. Crawford's book to the level of an "agency record."

After reviewing the totality of the circumstances surrounding the creation, maintenance, and use of these appointment books, we find that they are not "agency records" under the FOIA and, therefore, are not subject to its disclosure provisions. OXY Inc., 23 DOE ¶ 80,161, at 80,647 (1993). Accordingly, Mr. Frazier's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on December 29, 1997, by Charles G. Frazier, Case No. VFA-0361, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 28. 1998

(1)The Office of Hearings and Appeals (OHA) received Mr. Frazier's letter on December 5, 1997. However, Mr. Frazier did not include a copy of Chicago's Determination Letter. A copy of that letter was received on December 29, 1997.

(2) In his initial request, Mr. Frazier also asked for a copy of Jim Hooper's appointment book. Determination Letter. He withdrew that part of his request in this Appeal. Appeal Letter from Charles G. Frazier to Director, OHA, DOE. Therefore, this Decision will address only Ms. Langenfeld's and Mr. Crawford's appointment books.

Case No. VFA-0364, 27 DOE ¶ 80,104

January 20, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Charlene Pazar

Date of Filing: December 22, 1997

Case Number: VFA-0364

On December 22, 1997, Charlene Pazar (Appellant) filed an Appeal from a determination issued to her by the Department of Energy's (DOE) Rocky Flats Field Office (RFFO). RFFO issued this determination on November 19, 1997 in response to the request for information the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that RFFO release in its entirety a document it withheld.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the

public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In her FOIA request, the Appellant sought access to a copy of the "Final Report that was prepared for the RFFO Office of Chief Counsel by David Frederickson of the Albuquerque Operations Office." In its response, RFFO withheld the requested report (the Frederickson report) pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Specifically, the Deputy Counsel stated that the Frederickson report is exempt from mandatory disclosure because it is privileged as attorney work product. The Appellant argues in

response that disclosure would serve the public interest because the Frederickson report was funded by taxpayers.(1)

II. Analysis

A. Adequacy of the Determination

Essentially, the RFFO determination contained one substantive sentence, "[t]his document is an ?attorney work-product privilege' [sic] and is withholdable under exemption (b)(5)." We find this determination to be inadequate. OHA has held that a description of a withheld document is adequate if it identifies the subject matter and, if available, the date upon which the document was produced and its authors and

recipients. Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984) (Arnold & Porter). The description need not, however, contain information that would compromise the privileged nature of the document. Id. at 80,527. A determination must also adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. Id.; Paul W. Fox, 25 DOE ¶ 80,150 (1995). With the exception of naming the author of the Frederickson report, none of the other descriptive items required by the Arnold & Porter decision were provided in the determination letter. More importantly, RFFO failed to provide any explanation of how the attorney work-product privilege applies to the Frederickson report. However, for reasons of administrative efficiency, we will decide this Appeal based on our own review of the Frederickson report and information regarding that document gathered from our discussions with RFFO.

B. Exemption 5

Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The U.S. Supreme Court has held that this exemption incorporates every civil discovery privilege that the government enjoys under statutory and case law. United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984) (Weber); FTC v. Grolier, 462 U.S. 19 (1983) (Grolier). See also Peter T. Torell, 15 DOE ¶ 80,127 (1987). Therefore, any material that is privileged in civil discovery is also shielded from mandatory disclosure under Exemption 5. Accordingly, if the Frederickson report falls within a civil discovery privilege, it may be withheld under Exemption 5.

As previously stated, RFFO relied upon the attorney work-product privilege in withholding the Frederickson report. The attorney work-product privilege serves to "provide working attorneys with a ? zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." Coastal States Gas Corp. v. DOE, 617 F.2d 854, 864 (D.C. Cir. 1980). It protects documents prepared by an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). This privilege is also applicable to material prepared by a non-attorney who was supervised by an attorney. Nishnic v. Department of Justice, 671 F. Supp. 771, 772-73 (D.D.C. 1987). Finally, because factual work-product is not "routinely" or "normally" discoverable, it is also protectable under Exemption 5. See Grolier, 462 U.S. at 26; Weber, 465 U.S. at 799.

We find that the Frederickson report meets each of the requirements for finding a document to be attorney work-product. The Frederickson report was prepared in contemplation of litigation because it was created solely in response to a Merit Systems Protection Board (MSPB) claim by a Mr. Ridenour. See Record of Telephone Conversation between Dawn L. Goldstein, Staff Attorney, OHA and James D. Long, Jr., Staff Attorney, Office of Chief Counsel, RFFO (January 5, 1998). The purpose of the Frederickson report was to provide the RFFO Office of Chief Counsel with a discussion of the factual bases for Mr. Ridenour's MSPB claims. Id. It was prepared by Mr. Frederickson, a non-attorney, who was functioning for this purpose under the direct supervision of the RFFO Office of Chief Counsel. Id. Further, the Frederickson report has been kept strictly confidential by the RFFO Office of Chief Counsel. Id. We conclude that the withheld Frederickson report is clearly attorney work-product.

C. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld Frederickson report would not be in the public interest. In her Appeal, the Appellant argues that the withheld Frederickson report should be released because it was funded by the taxpayers. However, many documents are produced by employees of the federal government with taxpayer

money that are nonetheless withholdable under the FOIA. In this case, the release of the Frederickson report would result in foreseeable harm to the interests protected by the attorney work-product privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5). As Justice Brennan stated in Grolier, "[i]t would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons . . . [H]e could gain insight into the agency's general strategic and tactical approach to deciding . . . on what terms [lawsuits] may be settled." Grolier, 462 U.S. 19 at 30 (Brennan, J., concurring).

The Frederickson report discusses facts and issues underlying several ongoing legal conflicts between DOE and Mr. Ridenour. See Record of Telephone Memorandum between Dawn L. Goldstein and James D. Long, Jr. (January 5, 1998). Further, although the MSPB action that was the catalyst for the creation of the Frederickson report has been dismissed, Mr. Long believes that because that case was dismissed on procedural grounds, it will likely be refiled. We therefore find that the release of the Frederickson report could conceivably compromise the DOE's strategy and tactics in the cases concerning Mr. Ridenour.

D. Conclusion

For the reasons set forth above, we find that RFFO correctly determined that the withheld Frederickson report is exempt from mandatory disclosure pursuant to Exemption 5, and that release of the report would not be in the public interest. The Appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Charlene Pazar on December 22, 1997 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 20, 1998

(1)*/ The Appellant also questioned the propriety of Mr. Frederickson preparing the report and his method of preparation. In addition, the Appellant wished to know the reason for the report and Mr. Frederickson's qualifications to prepare such a report. An Appeal under FOIA is not the proper forum for these questions, since the FOIA's object is to make available to the public non-exempt agency records. In addition, requests for documents that might answer these questions are outside the scope of the Appellant's initial FOIA request. The OHA will therefore not consider these questions in the context of the present Appeal. Cox Newspapers, 22 DOE ¶ 80,106 at 80,512 (1992).

Case No. VFA-0366, 27 DOE ¶ 80,109

February 11, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marjorie A. Jillson

Date of Filing: January 14, 1998

Case Number: VFA-0366

On January 14, 1998, Marjorie A. Jillson filed an Appeal from a determination issued to her on December 11, 1997, by the Freedom of Information and Privacy Act Division (FOIA Division) of the Department of Energy. That determination concerned a request for information Ms. Jillson filed pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. If the present Appeal were granted, the DOE would be required to conduct a further search for the requested information.

I. Background

On November 4, 1997, Ms. Jillson filed a request for information in which she sought records pertaining to the use of radioiodine (I-131) on her at the Harper Hospital in Detroit, Michigan in 1954. On December 11, 1997, the FOIA Division issued a determination which stated that the Coordination Information Center conducted a search of DOE-86, "Human Radiation Experiment Records," a system of records established pursuant to the Privacy Act. The search found no records maintained in that system of records that were responsive to Ms. Jillson's request. On January 14, 1998, Ms. Jillson filed the present Appeal with the Office of Hearings and Appeals (OHA). Ms. Jillson asks that the OHA direct the Authorizing Official to conduct a new search for responsive documents.

II. Analysis

The Privacy Act requires, *inter alia*, that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R.

§ 1008.2(m).

We have investigated the search undertaken by the FOIA Division in response to Ms. Jillson's request, and have been advised that a thorough search of the only relevant system of records has been conducted. Memorandum of telephone conversation between Kimberly Jenkins-Chapman, OHA Staff Attorney, and Tanya Woods, FOIA and Privacy Act Analyst, FOIA Division (January 16, 1998). In response to Ms. Jillson's request, the Coordination Information Center conducted a search of a system known as DOE-86, "Human Radiation Experiment Records." The FOIA Division has indicated that it searched this system of

records by Ms. Jillson's name and by a description of the experiment and found no information maintained in the system of records that was responsive to Ms. Jillson's request. The FOIA Division further indicated that DOE-86 is the only system of records likely to contain information of the type described in Ms. Jillson's request.

Based on the foregoing, we conclude that the FOIA Division has adequately searched all the systems of records under its control that might reasonably be expected to contain the material sought by Ms. Jillson. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed Marjorie A. Jillson on January 14, 1998, OHA Case No. VFA- 0366, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 11, 1998

Case No. VFA-0367, 27 DOE ¶ 80,110

February 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Diane C. Larson

Date of Filing: January 16, 1998

Case Number: VFA-0367

On January 16, 1998, Diane C. Larson (the Appellant) completed the filing of an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) under the Privacy Act of 1974, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In this Appeal, the Appellant requested that OHA review a determination issued on December 12, 1997, by the Office of Energy Intelligence, within the Office of Non-Proliferation and National Security, to ascertain whether an adequate search had been conducted for documents responsive to the Appellant's Privacy Act request. The Appellant also asked that OHA order the Office of the Inspector General (OIG) to expedite the issuance of a determination on her Privacy Act request.

BACKGROUND

In September, 1997, the Appellant submitted a Privacy Act request(1) to the Freedom of Information Act /Privacy Act Division of the Office of the Executive Secretariat (Headquarters FOIA Office) seeking copies of documents containing counter-intelligence information or pertaining to a certain investigation conducted by the OIG.(2) On October 10, 1997, a Management Analyst at the

Headquarters FOIA Office asked the staffs of the Office of Energy Intelligence and OIG to search their office files for responsive records. See Memorandum of Telephone Conversation between Tonya Woods and Linda Lazarus, OHA Staff Attorney (February 13, 1998).

On December 12, 1997, the Director of the Office of Energy Intelligence issued a determination letter to the Appellant. In this letter, the Director stated that his staff had searched the office files for responsive records, but that no records were found.

The Appellant has appealed the determination issued by the Office of Energy Intelligence on the grounds that the staff of this office had failed to conduct a search reasonably calculated to uncover the requested documents. The Appellant also requests that OHA order OIG to expedite the issuance of a determination in response to her Privacy Act request.

ANALYSIS

As detailed below, we shall deny this Appeal because we find that the search conducted by the staff of the Office of Energy Intelligence was adequate, and we lack jurisdiction to review the processing of Appellant's Privacy Act request by the OIG.

I. The Search Conducted by the Office of Energy Intelligence

This case involves a search for documents under the Privacy Act. The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information about himself that is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). Under the Privacy Act, an office that issues a determination to a requester must insure that it has searched for records that are retrieved by the name or other personal identifier of the requester in every relevant system of records under its control.

We have often reviewed the adequacy of a search conducted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. A Privacy Act request requires only a search of systems of records, rather than a search of all agency records, as is required under the FOIA. Nevertheless, the standard of sufficiency that we demand of a Privacy Act search is no less rigorous than that of a FOIA search. Therefore we will analyze the adequacy of the Privacy Act search conducted by the Office of Energy Intelligence using principles that we have developed under the FOIA. See Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,775 (1996).

Under the FOIA, an office must conduct a thorough and conscientious search for responsive documents. See Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). Although we require that a comprehensive search be conducted under the FOIA, we do not require that this search be exhaustive. We require only that a FOIA search be reasonable. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

To determine whether the search conducted in response to the Appellant’s Privacy Act request was reasonable, we contacted several members of the staff of the Office of Energy Intelligence. A Research Specialist of that office informed us that if documents responsive to this request were in the Office of Energy Intelligence, such documents would be found in the Division of Counterintelligence or the Intelligence Support Division. See Memorandum of Telephone Conversation between Loretta Lanier and Linda Lazarus (February 13, 1998).

An Intelligence Analyst assigned to the Division of Counterintelligence explained that he was responsible for the search that had been conducted in that Division. He explained that this Division maintains two systems of records, DOE-81, "Counterintelligence Administrative Analytical Records and Reports," and DOE-84, "Counterintelligence Investigative Records," that could contain responsive documents.(3) The Intelligence Analyst conducted a computerized search of DOE-81 using the Appellant’s name and found no responsive records. The Intelligence Analyst also stated that, at his behest, another employee searched DOE-84 for records containing the Appellant’s name, and that this employee had reported to him that no responsive records had been found. See Memorandum of Telephone Conversation between Gary Chidester and Linda Lazarus (February 6, 1998).

We also spoke to a Security Specialist in the Intelligence Support Division concerning the search conducted for records in that Division. The Security Specialist stated that the only records in her Division that could be responsive to the Appellant’s Privacy Act request would be located in file cabinets and notebooks containing non-disclosure agreements signed by individuals who have access to "Sensitive Compartmented Information" (SCI). She further explained that the non-disclosure agreements of individuals who currently have access to SCI are maintained in file cabinets, and the non-disclosure agreements of individuals who have had access to SCI in the past, but no longer have such access, are kept in notebooks. She stated that the Intelligence Support Division maintains both in alphabetical order. The Security Specialist told us that when the request came in for records involving the Appellant, she checked

the appropriate locations in the file cabinets and the notebooks, but found no documents involving the Appellant. See Memorandum of Telephone Conversation between Patricia Pettaway and Linda Lazarus (February 6, 1998).

Based on the above, the staff of the Office of Energy Intelligence has convinced us that it followed procedures that were reasonably calculated to uncover the materials that the Appellant sought in her Privacy Act request. Consequently, we shall deny the portion of the Appeal that relates to the adequacy of the search conducted by this office.(4)

II. OHA Lacks Jurisdiction to Order OIG to Expedite A Privacy Act Request

The Appellant requests that OHA order OIG to expedite the processing of her Privacy Act request. However, for the reasons detailed below, we must dismiss this portion of the Appeal because OHA does not have jurisdiction over this matter.

Section 1008.11(a) of the DOE regulations sets forth the circumstances under which an individual may file an appeal with OHA under the Privacy Act. It provides, in relevant part, that "[a]ny

individual may appeal the denial of a request made by him for information about or for access to or correction or amendment of records."

We have consistently construed regulations that set forth the circumstances under which an individual may file an appeal with OHA to be jurisdictional. See Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988) (Section 1004.8(a) construed to confer jurisdiction on OHA over a FOIA appeal only when an Authorizing Official has issued a determination); John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (no administrative remedy for agency's non-compliance with a timeliness requirement). We hold that the reasoning of these cases is fully applicable here. Accordingly, because Section 1008.11(a) permits Privacy Act appeals to be filed with OHA only after a denial has been issued by a Privacy Act Officer, OHA lacks jurisdiction to hear a Privacy Act appeal in the absence of the issuance of such a denial. For this reason, we must dismiss the portion of this Appeal in which the Appellant has requested that OHA order OIG to expedite the issuance of a determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Diane Larson on January 16, 1998, is hereby dismissed to the extent that it requests the Office of Hearings and Appeals to order the Office of Inspector General to expedite the processing of the Appellant's request under the Privacy Act, and in all other respects is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g)(1)(B) and (g)(5). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 17, 1998

(1)Although the Appellant requested later that DOE search for additional documents, this Appeal relates

only to matters that were requested in the original Privacy Act request.

(2)In her Privacy Act request, the Appellant asked for records from the OIG regarding Case No. I-96RS154. The Appellant had previously filed a FOIA request for these records, but this request was denied on the grounds that these documents were exempt from disclosure under Exemption 7(A) of the FOIA because release of these documents "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.§552(b)(7)(A). On October 10, 1997, after the Appellant had requested these records under the Privacy Act , the Director of the Headquarters FOIA Office wrote a letter to the Appellant stating that the law enforcement proceeding had been completed, and that "every effort will be made to process your request as quickly as possible."

(3)The Intelligence Analyst further explained that DOE-81 contains, among other things, analytical reports, travel reports, and reports on foreign contacts of certain current and former DOE and contractor employees, and that DOE-84 contains reports that relate to investigations of counter-intelligence matters. He indicated that although these two systems of records were created in 1994, they both encompass records that have been in existence since 1991.

(4)In support of her argument that the search performed by the Office of Energy Intelligence was inadequate, the Appellant indicated that responsive records may be located in the Albuquerque Operations Office (Albuquerque). However, the determination that is the subject of this Appeal was issued by the Office of Energy Intelligence, a Headquarters office, and not by Albuquerque. We understand, however, that the Headquarters FOIA Office is in the process of officially forwarding the Appellant’s Privacy Act request to Albuquerque, and will ask Albuquerque to issue a determination directly to the Appellant. See Memorandum of Telephone Conversation between Tonya Woods and Linda Lazarus (February 13, 1998).

Case No. VFA-0368, 27 DOE ¶ 80,108

February 3, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Oregonian

Date of Filing: January 5, 1998

Case Number: VFA-0368

On January 5, 1998, The Oregonian, a newspaper located in Portland, Oregon, filed an Appeal from a determination issued to it by the Department of Energy's Bonneville Power Administration (BPA). The BPA issued this determination in response to requests for information that the newspaper submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that documents that the BPA withheld be released in whole or in part.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA requests, The Oregonian sought access to all expense records and related correspondence pertaining to the defense of lawsuits filed by Chase Manhattan Bank and Tenaska Washington Partners II against the BPA. In response to the requests, the BPA released a wealth of material - mainly copies of contracts by which it has procured legal advice, analysis and assistance in contesting the lawsuits. The BPA withheld a number of documents, including travel vouchers, estimates of future litigation expenses, and invoices for shipping, travel, courier and legal expenses pursuant to the attorney-client and attorney work product privileges encompassed by Exemption 5 of the FOIA. In its determination, BPA

stated that release of these documents "might prejudice BPA in the current litigation with Tenaska by revealing BPA's litigation strategies." BPA Determination at 2.

In its Appeal, The Oregonian claims that BPA has applied Exemption 5 too broadly in withholding these expense-related documents in their entirety. Specifically, the newspaper contends that BPA has improperly withheld documents "which cannot possibly reveal attorney thought processes or truly confidential attorney-client communications." Appeal at 3.

II. Analysis

A. Applicability of Exemption 5

Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Exemption is generally recognized as encompassing the attorney-client, attorney work product and governmental deliberative process privileges. See, e.g., Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). As previously stated, the BPA relied upon the attorney- client and attorney work product privileges of Exemption 5.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. In Re: Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039 (11th Cir. 1990). Not all communications between attorney and client are privileged, however. The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Accordingly, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The attorney work product privilege protects from disclosure documents which reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). This privilege is applicable to documents that were prepared by an attorney "in contemplation of litigation." Coastal States at 864.

It is well settled that attorney fee information is generally not privileged. See, e.g., Clark v. American Commerce National Bank, 974 F.2d 1039 (9th Cir. 1992) (Clark); United States v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992); Indian Law Resource Center, 477 F. Supp. 144, 147 (D.D.C. 1979). However, in those cases where a party has been able to show that the attorney billing statements at issue reveal litigation strategy, substantive communications or the specific nature of the services provided by the attorneys, such as research into a particular area of the law, courts have found them to be privileged. Clark, 974 F.2d at 129. Accordingly, we have held that information in expense records pertaining to the total amount charged by a law firm for a litigation, the attorneys' identities, their hourly rates, and the costs of travel, reporting services and document reproduction are generally not exempt from disclosure pursuant to the attorney-client or attorney work product privileges. See, e.g., William H. Payne, 26 DOE ¶ 80,161 (1997); C.D. Varnadore, 24 DOE ¶ 80,123 (1994). Information that could reveal the litigation strategy, thoughts or impressions of the attorneys, however, such as dates and descriptions of the specific services provided and the monthly and daily totals of hours billed by each attorney, is protected from mandatory disclosure under these privileges. Id.

Applying these principles to the present case, we find that some of the material withheld by BPA is not subject to the attorney-client or attorney work product privileges. This non-exempt material includes information pertaining to travel, copying, communications, shipping and courier service expenses, as well as the attorneys' identities. Based on the record before us, we cannot conclude that release of this information would reveal BPA's litigation strategy or the mental impressions, conclusions, or legal theories of their attorneys.

These expense statements, however, also contain information which could reflect BPA's litigation strategy or the thoughts and conclusions of BPA's outside counsel. This information consists of the descriptions of the specific services performed by the attorneys, the dates on which those services were performed, the hours billed by each attorney, and the amounts charged for each attorney's services. Disclosure of this information would provide opposing counsel with insights into BPA's litigation strategy and would reveal the timing and intensity of the legal services provided. Release of the number of hours billed by the attorneys, as well as the dollar amounts charged, would indicate the manner in which the outside counsel's legal services were being allocated and could therefore reveal an important component of BPA's legal strategy. This information was therefore properly withheld under Exemption 5.

B. Segregability

Although the attorneys' billing statements contain some privileged information, BPA has not adequately segregated non-exempt material from these documents. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, segregation and release of non-exempt material are not necessary when it is inextricably intertwined with the exempt material, such that release of the non-exempt material would compromise the confidentiality of the withheld material. Lead Industries Association v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979).

In view of the foregoing, we will remand this matter to BPA. On remand, BPA should review the withheld material in accordance with the guidelines set forth above, and should make every reasonable attempt to segregate and release non-exempt material.

C. The Public Interest in Disclosure

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the exempt material would not be in the public interest. Disclosure of the exempt portions of these expense statements would harm the interests protected by the attorney- client and attorney work product privileges by revealing the BPA's litigation strategy and the thought processes of outside counsel. BPA's ability to conduct this litigation in an effective and efficient manner would therefore be compromised. Moreover, release of this information could discourage BPA's outside counsel from providing similarly detailed information in future billings, thus impeding BPA's ability to effectively monitor and control legal costs. Accordingly, we conclude that release of the withheld information would result in foreseeable harm to the interests that are protected by Exemption 5. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5).

D. Conclusion

For the reasons set forth above, we will remand this matter to BPA. On remand, BPA should withhold those portions of the expense information that we have found to be exempt from mandatory disclosure and then either release the remaining portions or provide specific justifications for withholding any additional material.

It Is Therefore Ordered That:

(1) The Appeal filed by The Oregonian on January 5, 1998 is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Bonneville Power Administration for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February, 3, 1998

Case No. VFA-0369, 27 DOE ¶ 80,111

February 18, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:FOIA Group, Inc.

Date of Filing:January 20, 1998

Case Number:VFA-0369

On January 20, 1998, FOIA Group, Inc. filed an Appeal from a determination the Acting Senior Vice President of the Power Business Line (VP) of the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued to it on November 10, 1997. In that determination, the VP partially granted a request for information that FOIA Group, Inc. filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In its request for information, FOIA Group, Inc. sought a copy of “the contract and any relevant attachments, including all task orders and deliverables, concerning agreement executed between BPA and New Energy Ventures (NEV) for wholesale of [sic] power from BPA.” In his determination, the VP released a copy of the requested contract, but deleted annual prices, pricing terms, delivery terms, annual demand amounts of power BPA would supply, and annual revenue amounts in accordance with Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). FOIA Group, Inc. contends that “contractors are aware that the disclosure of contract pricing data is a requirement of doing business with the Government.” Furthermore, FOIA Group, Inc. maintains that since the Government requires that firms submit contract pricing data, Exemption 4 does not protect the release of this information. Finally, FOIA Group, Inc. argues that “the failure to disclose the contract(s) [sic] pricing provides the incumbent contractor with a significant and unfair competitive advantage over other companies in any other comparable contract opportunity.”

Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is

"confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have consistently held that a submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. See Glen M. Jameson, 25 DOE ¶ 80,191 (1996) (Jameson); Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

FOIA Group, Inc. is incorrect when it argues that Exemption 4 does not protect the release of contract pricing data. In appropriate cases, Exemption 4 protects the release of the type of information the requester seeks. We have carefully reviewed the redacted information and have confirmed that the DOE withheld annual prices, pricing and delivery terms, annual demand amounts of power BPA would supply and total revenue amounts. We find that all of the contract pricing (including annual prices) and delivery terms, the annual power demand amounts, and revenue amounts are commercial information within the meaning of Exemption 4. The DOE obtained this material from a "person" as Exemption 4 requires, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). We also conclude that the contract pricing and delivery terms, the annual power demand amounts, and revenue amounts are confidential because the release of any item would substantially harm the submitter's competitive position. We have stated in the past that a competitor could use the release of cost and financial information to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, for example, if the submitter released its prices and delivery terms, annual power demand amounts, and revenue amounts, any competitor could easily determine how to adjust its proposal to offer more favorable terms than the submitter in a future bid process.

We do not find any merit to FOIA Group, Inc.'s other arguments. First, FOIA Group, Inc. argues that "contractors are aware that the disclosure of contract pricing data is a requirement of doing business with the Government." The courts have not reached as broad a conclusion. For example, the District Court for the District of Columbia held that "[d]isclosure of prices charged the Government is a cost of doing business with the Government," but only in the absence of a showing of competitive harm. Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981). In this case, we find that the DOE properly identified a competitive harm to the submitter if the DOE were to release the withheld information. Accordingly, we find that withholding the requested information is appropriate here. Second, FOIA Group, Inc. argues that "the failure to disclose the contract(s) [sic] pricing provides the incumbent contractor with a significant and unfair competitive advantage over other companies in any other comparable contract opportunity." We do not agree. Exemption 4 protects commercial information from disclosure when a contractor might experience competitive harm from that disclosure, but that protection is not set aside when a competitor claims that he has suffered a competitive disadvantage. As stated above, we find that the DOE properly applied Exemption 4. Therefore, FOIA Group, Inc.'s argument that they are at a competitive disadvantage with respect to the incumbent contractor is without merit. However, we find that the DOE should release some information, specifically, topic headings. Accordingly, we will direct the VP to release the topic headings on Revision No. 1, Exhibit C, Page 1 of 3, of Contract No. 96MS-95243 or provide a detailed explanation for withholding any of these headings.

The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by FOIA Group, Inc. on January 20, 1998, Case No. VFA-0369, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Acting Senior Vice President of the Power Business Line of the Bonneville Power Administration of the Department of Energy, who will release headings on Revision No. 1, Exhibit C, Page 1 of 3, of Contract No. 96MS-95243 or provide a detailed explanation for withholding any of these headings.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 18, 1998

Case No. VFA-0370, 27 DOE ¶ 80,116

March 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janice C. Curry

Date of Filing: January 23, 1998

Case Number: VFA-0370

On January 23, 1998, Janice C. Curry (Curry) filed an Appeal from a determination that the Office of Environmental Management (EM) of the Department of Energy (DOE) issued to her. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Curry challenges EM's withholding of responsive information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

Curry was employed by a DOE contractor at DOE headquarters in Washington, D.C. In January and February 1997, some of Curry's co-workers documented incidents in which Curry allegedly displayed aggressive, threatening behavior towards her colleagues. Curry was terminated in March 1997. On March 6, 1997, Curry requested that the DOE provide her "any and all documents relating to my employment as a contractor at the Department of Energy. Specifically a letter that was submitted around the week of February 3, 1997, stating that I was a threat to public health and safety." Letter from Curry to Freedom of Information and Privacy Act Office, DOE (March 6, 1997) (OHA Case No. VFA-0313). On June 20, 1997, EM responded that it had identified one responsive document, a February 6, 1997 memorandum to Cynthia Brawner-Gaines of EM's Office of Minority Affairs (EM/MA), discussing a request to remedy a personnel problem that created an unsafe working environment in EM. Letter from Barry Clark, EM, to Curry (June 20, 1997) (OHA Case No. VFA- 0313). However, EM withheld the document in its entirety pursuant to Exemption 6 of the FOIA. *Id.* Curry filed an Appeal with OHA on July 24, 1997. OHA reviewed the withheld document and remanded the matter to EM for reconsideration of the basis for withholding and for a further search for responsive documents. *Janice Curry*, 26 DOE ¶ 80,218 (1997) (C*urry*). On January 16, 1998,

EM issued a new determination, stating that it had located two additional responsive documents, but was withholding all three documents in their entirety also under FOIA Exemptions 6, 7(C) and 7(F). Letter from Barry R. Clark, EM, to Curry (January 16, 1998) (Determination Letter). On January 23, 1998, Curry filed this Appeal which, if granted, would require EM to release the responsive documents to her.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770.

1. Privacy Interest

In its determination, EM stated that the three withheld documents "allege that on numerous occasions [Curry] engaged in physically threatening and intimidating behavior and, as a result, . . . co-workers feared for their physical safety." EM withheld the documents because the allegations were "made by a relatively small number of individuals and concerned events in which [Curry] participated, . . . [which] could lead to ascertainment of the identity of the individuals." Determination Letter at 1. Where a person's fear of reprisals from the subject of a communication is "reasonable" based on either demonstrated fact or inferences supported by reasonable claims, privacy interests support the application of Exemption 6. *Fine v. DOE*, 823 F. Supp. 888, 895 (D. N. M. 1993) (*Fine*) (quoting *Holy Spirit Association for the Unification of World Christianity v. F.B.I.*, 683 F.2d 562, 565 (D.C. Cir. 1982) (upholding agency's nondisclosure of letters describing bizarre activities of plaintiff due to author's fear of reprisal)). However, after reviewing the withheld documents, we find that EM has not offered facts or supported inferences tending to show that Curry may be inclined to harass or intimidate her former colleagues. All of the incidents discussed in the memos occurred one year ago at DOE headquarters. EM presented no evidence that Curry has harassed, intimidated, or even attempted to communicate with her former colleagues since the allegations surfaced and she lost her job. As the court stated in *Fine*,

Defendant has offered neither facts nor supported inferences tending to show plaintiff might be inclined to harass or intimidate persons. Plaintiff is *no longer employed* by the defendant so he is not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors. The Court, therefore, does not find justifiable defendant's repeated invoking of Exemption 6 to prevent harassment or intimidation by plaintiff.

Fine, 823 F. Supp. at 895-96 (quoted in *Curry*, 26 DOE at 80,853). Curry is no longer employed at the DOE site where these incidents allegedly occurred, and thus is not in a position to harass the authors of the three documents at their offices. In fact, even though she claims to know who wrote the documents, she has had no contact with those individuals since her employment ended. Memorandum of Telephone Conversation between Curry and Valerie Vance Adeyeye, OHA Staff Attorney (February 23, 1998).

Therefore, we find that EM has not offered facts supporting its use of Exemption 6 to withhold the documents to prevent harassment or intimidation by the requester.

Nonetheless, there is a privacy interest in the names and identifying information of those individuals who provided information to their managers about the alleged threatening behavior. Information that identifies a specific individual can be protected under Exemption 6. *Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"). Even though there was no evidence of a formal investigation, we find a privacy interest in the opinions expressed in these documents. *See Dennis McQuade*, 25 DOE ¶ 80,158 (1996) (finding a privacy interest in the candid opinions of witnesses concerning their co-workers). Therefore, we find a significant privacy interest in the contents of the withheld documents.

2. Public Interest

The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; *Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We find that Curry has not met this burden, and that there is no public interest in the responsive material.

Curry contends that the release of the material being withheld is in the public interest because it describes the actions, taken or not taken, by government employees in response to the written complaints about her behavior. We do not agree. The release of the withheld material would not aid the public in understanding how EM/MA performs its statutory duties. The information is very specific to several incidents in the workplace, and does not shed light on the general operations or policy of EM. Thus, we conclude that there is no public interest in the responsive material, and EM properly invoked the protection of Exemption 6 in its withholding.

B. Exemption 7

EM also invoked the protection of Exemptions 7(C) and 7(F) in withholding the three documents from Curry. Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Exemption 7(F) permits an agency to withhold records or information compiled for law enforcement purposes "if such disclosure could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F); 10 C.F.R. § 1004.10(b)(7)(vi). We find that Exemptions 7(C) and 7(F) do not apply in this case.

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e. as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). An organization withholding material under Exemption 7 must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). For example, we have consistently found that the DOE's Office of the Inspector General (IG) compiles reports for law enforcement purposes within the meaning of Exemption 7. *See Richard Levernier*, 26 DOE ¶ 80,182 (1997) ("The IG is a classic example of an organization with a clear law enforcement mandate."); *Keci Corporation*, 26 DOE ¶ 80,149 (1997); *William Payne*, 26 DOE ¶ 80,144 (1996); *Burlin McKinney*, 25 DOE ¶ 80,149 (1995). After a review of the facts of this case, we find that EM/MA has not provided evidence that it has the "requisite law enforcement mandate" to invoke the protection of Exemption 7. *See, e.g., Church of Scientology*

International v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) (law enforcement mandate provided by enforcement provisions of federal tax code). Without evidence of the statutory foundation of the alleged law enforcement authority of EM/MA's ombudsman, we cannot apply Exemption 7 in this case. Even assuming, *arguendo*, that Exemption 7 applies, it would permit the withholding of no information other than that previously identified as exempt from disclosure under Exemption 6.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). We do not agree with EM that "virtually the entire content of each [document] would reveal the identity of the person providing it." Determination Letter at 4. EM writes in its determination that "names, dates, places, conversations, descriptions of events and information that would lead to the ascertainment of the positions of the authors" can be considered protected under Exemption 6. However, in *Fine* the court stated that although identifying information and personal opinions are exempt, a document should not be withheld in its entirety if it contains factual, non- private information. *Fine*, 823 F. Supp. at 898. The court did not extend the protection of Exemption 6 to a conversation that occurred while the requester was present. *Id.* ("No information of a private nature is contained therein, nor does the fact that this conversation was memorialized in a memorandum raise it to the level of a significant privacy interest.").

We find that there is non-exempt, reasonably segregable material in the withheld documents that can be disclosed under the FOIA. Specifically, the February 7, 1997 memorandum to Ms. Brawner- Gaines, released twice to OHA for review, contains information that is not identifiable to a specific individual. Paragraph 1 does not contain material that would "lead to the ascertainment of the position of the author." Paragraph 2 contains non-exempt material that could be released with appropriate redactions and still be meaningful to the requester. On page 2, Paragraph 1 contains a substantial amount of non-exempt, segregable material, as does Paragraph 2 and its three sub- paragraphs. (1) Those documents recounting conversations in which Curry participated are also subject to the analysis in the previous paragraph. Accordingly, we shall remand this matter to EM for the purpose of issuing a new determination to Ms. Curry.

It Is Therefore Ordered That:

(1) The Appeal filed by Janice C. Curry on January 23, 1998, Case Number VFA-0370, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy's Office of Environmental Management, which shall issue a new determination in accordance with the guidance set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 1998

(1)Some of the information in the memorandum to Ms. Brawner-Gaines may, however, be protected

under Exemption 5. *See Curry*, 26 DOE at 80,853 n.1 (1997).

Case No. VFA-0371, 27 DOE ¶ 80,112

February 20, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Ruth Towle Murphy

Date of Filing:January 26, 1998

Case Number: VFA-0371

On January 26, 1998, Ruth Towle Murphy (Appellant), filed an Appeal from a determination the Manager of the Oak Ridge Operations Office (Manager) of the Department of Energy (DOE) issued to her on November 14, 1997. In that determination, the Manager partially granted a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In her request for information, the Appellant sought copies of "[A]ll of the entire work/service contracts between OSTI [Office of Scientific and Technical Information] and SAIC [Science Applications International Corporation], from the initial contract up to the contract covering 1997." In his determination, the Manager released copies of the contract and various contract modification documents between SAIC and the DOE pertaining to OSTI, but deleted 'key personnel [names], hourly rates, profit and G&A [General and Administrative] percentages, and the total estimated amounts in accordance with 5 U.S.C. § 552(b)(4).” The Appellant contends that “only information obtained from an individual, a partnership, or a corporation, **other than a government agency**, qualifies under the fourth exemption” of the FOIA (emphasis in original). She argues that since both the DOE and the submitter signed the contract she seeks, in essence, the DOE obtained the contract from itself. Since Exemption 4 does not apply to documents obtained from a government agency, the Appellant contends that the Manager improperly applied Exemption 4. The Appellant also asserts that she does not seek SAIC marketing plans or profit and loss information, or other similar SAIC commercial information but only the information contained in the contract documents. Because the information withheld in the documents is not SAIC financial information, Appellant believes that the Manager improperly applied Exemption 4.

Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the

competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is "confidential" if it is of a kind that the provider would not customarily make available to the public. Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have consistently held that a submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. See Glen M. Jameson, 25 DOE ¶ 80,191 (1996) (Jameson); Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

The Appellant is incorrect when she argues that the DOE obtained the withheld information from itself. Simply because the DOE signed the contract is no indication that the DOE had anything to do with the creation of the information. In the present case, the submitter, SAIC, created and provided the redacted information in response to a request for proposal for the purpose of acquiring the contract. See Memorandum of telephone conversation with Amy Rothrock, FOIA Officer, Oak Ridge Operations Office, and Richard Cronin, OHA Staff Attorney (February 4, 1998).

The Appellant is also incorrect when she argues that essentially only information such as marketing plans, profit or loss statements or similar information can be construed as "commercial or financial information." The Court of Appeals for the District of Columbia Circuit has rejected the argument that the term "commercial" should be limited to records that "reveal basic commercial operations." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir 1983). We believe that the types of information withheld in the present case are "commercial" since the information was submitted specifically for the purpose of acquiring a contract. See Industrial Constructors Corporation, 25 DOE ¶ 80,196 at 80,739 (1996) (ICC).

With respect to the particular information withheld here, we have obtained copies of the relevant portions of the documents and conducted a review as to the appropriateness of the Manager's withholdings under Exemption 4.

In reviewing the redacted information, we confirm that the DOE withheld only hourly rates, profit and G&A percentages, total yearly estimated labor cost amounts for two facilities (the financial service center and the radiation exposure database), and the names of key personnel to implement the contract. As discussed above, we find that all of this redacted information is commercial information within the meaning of Exemption 4. The DOE obtained this material from a "person" as required by Exemption 4, since the FOIA considers corporate entities, such as SAIC, as persons for the purposes of that exemption. See ICC; John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). We also

conclude that each withheld item - the estimated yearly labor cost amounts, hourly rates, profit and G&A percentages, and the names of key personnel - is confidential because its release would substantially harm the submitter's competitive position. We have stated in the past that release of cost and financial information could be used by a competitor to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See ICC; International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, for example, if the submitter released its estimated costs for completing specific tasks, a competitor could easily determine how to adjust its own costs to arrive at a lower contract price and plan to undercut the submitter's best price and procedures in a future bid process. Furthermore, if the DOE were to release the names of key personnel involved in the contract, a competitor could offer employment to these people in an effort to make his firm more competitive in a future bid process at the expense of the submitter. See Jameson. Accordingly, the withheld information was properly found to be within the scope of Exemption 4.

The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public

interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Thus, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. Consequently, we must deny the Appellant's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Ruth Towle Murphy on January 26, 1998, Case No. VFA-0371, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 20, 1998

Case No. VFA-0372, 27 DOE ¶ 80,114

February 27, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Sandra M. Hart

Date of Filing: January 29, 1998

Case Number: VFA-0372

On January 29, 1998, Sandra M. Hart (Appellant) filed an Appeal from a final determination issued to her on January 13, 1998, by the Department of Energy's (DOE) Idaho Operations Office (Idaho). In that determination, Idaho released several documents responsive to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. However, Idaho withheld portions of one document under FOIA Exemption 6. This Appeal, if granted, would require the DOE to release the withheld information.

I. BACKGROUND

The present Appeal concerns a determination letter issued to the Appellant on January 13, 1998. In that letter, Idaho released three documents to the Appellant in their entirety but withheld portions of a fourth document, which was an Equal Employment and Opportunity (EEO) complaint filed with the DOE's Office of Civil Rights. Idaho withheld three portions of that complaint citing Exemption 6: (1) two portions of the EEO complaint in which the complaining individual explained why she believed that she was unfairly discriminated against, and (2) a witness statement supporting one of the complaining individual's allegations.

On January 29, 1998, the Appellant filed the present Appeal challenging Idaho's withholdings and contending that (1) she is entitled to the withheld information because it concerns her, (2) the DOE has released information concerning her to third parties, and she should should be treated in the same way as these third parties, and (3) the DOE has failed to segregate releaseable information contained in the withheld portions of the document.

II. ANALYSIS

As an initial matter, it is important to note that a FOIA requester's rights to access are neither increased nor decreased because she may have a greater interest in the records than a member of the general public has. Thus, although the Appellant has requested material concerning herself, her rights under the FOIA are no greater than those of any other requester. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 143 n.10 (1975) (*NLRB*). (1)

The FOIA generally requires that documents held by federal agencies be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be

withheld at the discretion of an agency. 5 U.S.C. § 552(b). Only Exemptions 6 and 7 are at issue in the present case. (2)

Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom., Donolon v. IRS*, 414 U.S. 1024 (1973). It is well settled that both the EEO counseling and investigatory stages are law enforcement proceedings. Thus, records of an EEO investigation are considered records compiled for law enforcement purposes within the context of the FOIA. *Raytheon Company*, 25 DOE ¶ 80,156 (1996).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 109 S. Ct. 1468, 1481 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

(1) Privacy Interest

Witnesses usually provide statements in law enforcement proceedings with an expectation of confidentiality. If this expectation of confidentiality were breached by release of the statements, a significant invasion of the privacy of the individuals providing such statements would occur. The complainant's explanation of why she believed that she had been discriminated against was provided with a similar expectation of privacy. The complainant's statements were made as part of a DOE EEO investigation. Under the DOE's EEO Management Directive, the complainant's statements to investigators are not made available to third parties, including those persons accused of allegedly discriminatory acts. EEO Management Directive at 5-12. Therefore, statements made by EEO complainants at the investigatory stage are, in essence, witness statements.

Moreover, because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (*KTVY-TV*) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770

F.2d 355, 359 (3d Cir. 1985) (*Cucarro*); *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,524 (1990). Accordingly, we find that the individuals whose statements are being withheld in this case have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In *Reporters Committee*, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. *Reporters Committee*, 1009 S. Ct. at 1481-84. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." *Id.* at 1483. Therefore, the Court held, only information that contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court accordingly found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." *See, e.g.*, *Safecard*, 926 F.2d at 1205; *KTVY-TV*, 919 F.2d at 1469. In the absence of a compelling reason for deviating from this body of precedent, we reach that conclusion in the present case.

(3) The Balancing Test

Because release of the withheld material could reasonably be expected to subject their authors to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of the withheld documents would constitute a clearly unwarranted invasion of personal privacy. Our findings are consistent with those reached by several appellate courts when presented with a similar set of facts. These courts have found that the privacy interests of individuals supplying information to government investigators clearly outweigh the negligible public interest in disclosure. *See*, *e.g.*, *Safecard*; *KTVY-TV*, 919 F.2d at 1469 (finding withholding necessary to avoid harassment of individual); *Cucarro*, 770 F.2d at 359. Accordingly, we find that the withheld information was properly withheld under Exemption 6 and can be properly withheld under Exemption 7(C) as well.

Segregability

The FOIA, as implemented by 10 C.F.R. § 1004.10(c), requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The only exceptions to the requirement of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, *Lead Industries Assoc., Inc. v. Occupational Safety and Health Admin.*, 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Id.*

As with any exemption, any reasonably segregable portions of the record must be provided to the requester. Nevertheless, for some documents subject to Exemptions 6 and 7(C), the deletion of personal identifying information is inadequate to protect personal privacy. This may be the case if the requested documents concern a small group of individuals who are known to each other and easily identifiable from information in the documents. For example, the deletion of names and other identifying data concerning a

small group of coworkers would be inadequate to protect them from embarrassment or reprisals if the requester could still possibly identify the individuals. *Alirez v. NLRB*, 676 F.2d 423, 428 (10th Cir. 1982). The records at issue in the present case are a perfect example of such a situation. If we were to release this information, the Appellant would have no difficulty in determining who provided the DOE with the withheld information, resulting in an invasion of significant privacy interests.

Exemption 7(A)

Although Idaho did not withhold the witness statements under Exemption 7(A), we have, upon our *de novo* review, determined that the exemption applies here. To warrant protection under Exemption 7(A), it must be shown that the release of the records could reasonably be expected to interfere with enforcement proceedings. The interference need not be established on a document-by-document basis, but can be shown generically as to the types of documents involved. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Release of the withheld information at issue in the present case could clearly interfere with the ongoing EEO investigation by affecting the testimony of witnesses, subjecting witnesses to potential reprisals, and deterring other witnesses from providing information. *See Dow Jones & Co. v. Department of Justice*, 880 F. Supp. 145, 150 (S.D.N.Y. 1995); *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309, 311 (D.C. Cir. 1988). It should therefore be withheld under Exemption 7(A) as well.

Finally, the Appellant contends that Idaho has inconsistently applied the FOIA to her detriment. Specifically, she suggests that other individuals involved in the EEO complaint have been provided with information that she has supplied to the DOE, while she is being denied access to the information that they have supplied to the DOE. While there is no evidence in the record indicating that this assertion is true, even if it is true it is irrelevant to the present Appeal. OHA's jurisdiction over the present Appeal is limited to determining whether or not the information she requested can be withheld under the FOIA.

III. CONCLUSION

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. We are satisfied that the agency is providing as much information here as possible while safeguarding individual privacy rights. For the reasons set forth above, we are denying the Freedom of Information Act appeal that Sandra M. Hart filed on January 29, 1998.

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Sandra M. Hart on January 29, 1998 (Case Number VFA-0372) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 27, 1998

(1) There is one notable exception to this rule. An agency cannot invoke a FOIA exemption in order to protect a requester's own privacy interest against release to himself. *Department of Justice v. Reporters*

Come. for Freedom of the Press, 489 U.S. 749, 771 (1989). None of the documents at issue in the instant case, however, was withheld to protect the Appellant's privacy interest.

(2) Idaho did not withhold the documents under Exemption 7(C). However, we have determined, *sua sponte,* that this exemption is relevant here and should be applied.

Case No. VFA-0373, 27 DOE ¶ 80,113

February 26, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: INEEL Research Bureau

Date of Filing: February 5, 1998

Case Number: VFA-0373

On February 5, 1998, the INEEL Research Bureau (IRB) filed an Appeal from a determination issued on January 26, 1998, by the Idaho Operations Office of the Department of Energy (DOE/ID). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. IRB challenges the adequacy of DOE/ID's search for documents responsive to its request.

I. Background

On January 13, 1998, IRB requested from DOE/ID a "declassified index of classified, confidential, secret, or otherwise restricted documents under the control of [DOE/ID] or its contractors." Letter from Chuck Broscious, Coordinator, IRB, to Information Access Officer, DOE/ID (January 13, 1998). On January 28, 1998, DOE/ID issued a determination to IRB, in which it stated that there "is no such index responsive to your request." IRB filed the present Appeal "based on DOE's inadequate search, and that the denial is contrary to the standard of law."

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In support of its Appeal, IRB submitted a letter from John E. Till, Ph.D., President of Radiological Assessments Corporation, whose "experience with DOE's archive system," according to IRB, "is unparalleled." Appeal at 2. In this letter, Dr. Till states, "Unless I am mistaken, all classified documents must be accounted for through an inventory system, and therefore a database must likely already exist."

Letter from John E. Till to Chuck Broscious (December 31, 1997). IRB also notes that in 1988 it received an index of documents from DOE/ID entitled "EG&G Internal Reports Index," and speculated that this index was created by querying a database that tracked all documents under the control of DOE/ID. Electronic Mail from Chuck Broscious to Steven Goering, OHA Staff Attorney (February 13, 1998).

Responding to IRB's Appeal, DOE/ID stated that it has

not had document accountability, with its associated index, since June 1992[,] and has never had accountability for all of its classified documents, such as those classified confidential. . . .

DOE-ID's search was adequate, because it is aware of the history associated with accountability systems for classified documents at DOE-ID, and it approached the personnel who are responsible for classified matter protection and control, who have verified that the requested lists do not exist.

Electronic mail from Carl Robertson, Freedom of Information Officer, DOE-ID, to Steven Goering (February 11, 1998). We further queried DOE/ID as to how it would go about finding a particular classified document if it needed to. Electronic mail from Steven Goering to Carl Robertson (February 11, 1998). DOE/ID responded, "When we have been requested to find documents in the last several years, we have had to do a safe by safe or custodian by custodian search. This has led us to argue for a return to accountability several times, but we have never been successful in doing so." Untitled statement from Carl Robertson to Steven Goering (February 18, 1998). Based on the above information, we are satisfied that DOE/ID took reasonable steps to verify that a current index of all classified documents under the control of DOE/ID does not exist.

However, DOE/ID acknowledges that indices had been maintained in the past for the holdings of the INEEL Technical Library and for documents in the possession of DOE/ID that were classified secret. DOE/ID states that because these indices have not been kept up to date, "any indices that we can produce will not reflect the classified document holdings in the possession of DOE-ID or its contractors. We think it would be counterproductive to give out an inaccurate or misleading list." Id. Nonetheless, because IRB's request was not limited to a current index, we believe these indices are responsive to IRB's request. We therefore will remand this matter to DOE/ID, which should release to IRB these indices and any other similar indices that would be responsive to IRB's request, or explain in detail its reasons for withholding responsive documents with reference to one or more FOIA exemptions. That these indices may not accurately reflect the current classified holdings of DOE/ID cannot be the basis for withholding these documents in response to a FOIA request.

We are aware that the request submitted by IRB is subject to more than one reasonable interpretation. To the extent that there is ambiguity as to which documents are being sought by IRB, we encourage DOE/ID and IRB to communicate and work together to resolve any such ambiguity. This type of cooperation assists the agency in fulfilling the intent of the FOIA to make agency records accessible to the public, and it increases administrative efficiency in handling these requests. See 10 C.F.R. § 1004.4(c)(2); see also Douglas L. Parker, 20 DOE ¶ 80,107 (1989); Hartford Courant, 15 DOE ¶ 80,133 (1987).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by INEEL Research Bureau, Case Number VFA-0373, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE's Idaho Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 26, 1998

Case No. VFA-0374, 27 DOE ¶ 80,118

March 10. 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: STAND of Amarillo

Date of Filing: February 9, 1998

Case Number: VFA-0374

STAND of Amarillo (STAND) files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (the Department), at 10 C.F.R. § 1004.(1) The subject of the Appeal is a determination letter issued to STAND by the Freedom of Information (FOI) Officer of the Department's Albuquerque Operations Office (AOO). The determination letter replied to STAND's request for material pursuant to the FOIA. As explained below, we will grant the Appeal and remand this matter to AOO to conduct a further search for documents responsive to STAND's request.

In its original request, STAND asked for materials regarding contamination associated with the dismantling of the W-55 nuclear weapon system from October 1995 to March 1996.(2) The request specified several types of documents that STAND was seeking.

AOO responded by releasing several documents and issuing a determination letter, which noted that these documents constituted AOO's final response to STAND's request. STAND then filed this Appeal, contending that AOO's response was inadequate.

STAND's contention is based on testimony from a hearing conducted by the Department of Labor, *Williams et al. vs. Mason & Hanger*

Corp., Case Nos. 97-ERA-14, 18-22, June 23-30, 1997. The hearing involved charges of retaliation against whistleblowers at the Pantex facility, which is under the jurisdiction of AOO. STAND's Appeal letter cites what it claims are statements by Pantex employees at the hearing, which indicate that other documents responsive to STAND's request may exist.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated often that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *E.g., National Resources Defense Council*, 26 DOE ¶ 80,229 (1997); *Acadian Gas Pipeline System*, 26 DOE ¶ 80,160 (1997); *James H. Stebbings*, 25 DOE ¶ 80,177 (1996); *Butler, Vines and Babb, PLLC*, 25 DOE ¶ 80,152 (1995); *In Defense of Animals*, 24 DOE ¶ 80,151 (1995); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993); *Eugene Maples*, 23 DOE ¶ 80,106 (1993); *Barton Kaplan*, 22 DOE ¶ 80,125 (1992); *James L. Schwab*, 21 DOE ¶ 80,138 (1991); *Glen Milner*, 17 DOE ¶ 80,132 (1988); *Hideca Petroleum Corp*., 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980).

We contacted the staff of the FOI office at AOO and discussed the Appeal with them. The staff agreed to conduct a new search for documents based on the information provided in STAND's Appeal letter. Therefore, though we recognize that AOO has already located documents responsive to STAND's request, we will remand this matter for the limited purpose of conducting a further search for the additional documents described in STAND's Appeal letter. Any additional responsive documents that AOO locates will be released to STAND, or the basis for their withholding will be explained in a new determination letter, with specific reference to one or more FOIA exemptions.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND of Amarillo, Case Number VFA-0374, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Albuquerque Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 1998

(1) STAND is an acronym for Serious Texans Against Nuclear Dumping. Appeal at 1.

(2) Letters dated August 19, 1997 and August 20, 1997 from STAND of Amarillo to the Albuquerque Operations Office Freedom of Information Officer.

Case No. VFA-0375, 27 DOE ¶ 80,126

April 14, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: FAS Engineering, Inc.

Date of Filing: March 3, 1998

Case Number: VFA-0375

On March 3, 1998, FAS Engineering Incorporated (FAS) filed an Appeal from a determination issued to it on January 5, 1998 by the Golden Field Office (Golden) of the Department of Energy (DOE). That determination concerned a request for information that FAS submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Golden would be ordered to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 1, 1997, FAS filed a FOIA request seeking copies of reviews prepared by members of the Geothermal Power Organization (GPO). These reviews discussed proposals for funding to be considered by the DOE's Geothermal Program. See Appeal Letter at 1. GPO is a non-profit industry organization which was fostered by the DOE in 1995 and whose purposes and objectives include providing the DOE with informed comments on industry-driven research and state-of-the-art geothermal energy technology. See Record of Telephone Conversation between Ray Lasala, Program Manager, Geothermal Energy Program and Kimberly Jenkins-Chapman, Staff Attorney, OHA. Pursuant to a Memorandum of Understanding (MOU) between GPO and Golden, GPO agreed that it would, *inter alia*, review proposals for industry projects related to geothermal energy and provide its comments and recommendations to the DOE for consideration.

On January 5, 1998, Golden issued a determination which identified documents responsive to FAS' request. Specifically, Golden identified several reviews that had been prepared by members of GPO and provided to Golden under the terms of the MOU. Golden stated that these documents were exempt from mandatory disclosure pursuant to Exemption 5 of the FOIA. Further, in its

determination, Golden stated that the requested information is both "predecisional and deliberative" and falls clearly within the deliberative process privilege of Exemption 5. See Determination Letter at 1.

On March 3, 1998, FAS filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, FAS challenges Golden's January 5, 1998 determination and asserts that there are "segregable portions [of the requested documents] which do not fall within the FOIA exemptions [sic] and which must be released." In addition, FAS contends that the requested records are not properly withholdable under Exemption 5. See Appeal Letter at 1. For these reasons, FAS requests that the OHA direct Golden to release the requested information.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding the requested reviews of geothermal energy proposals from FAS, Golden relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. Id.

After reviewing the requested documents at issue, we have concluded that the determination made by Golden in applying Exemption 5 was correct and consistent with the principles outlined above. Although the comments and recommendations contained in the reviews were prepared by non- governmental reviewers, they were submitted to DOE at its request and used only for internal DOE purposes. The fact that these reviews were prepared by a non-governmental entity does not alter the application of Exemption 5. It is well established that documents in an agency's possession which are prepared by persons outside the government may still qualify as "inter-agency or intra-agency records." Agencies, in the exercise of their functions, commonly have a special need for the opinions and recommendations of outsiders such as consultants. See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (recognizing the importance of outside consultants in deliberative process privilege context). Both the federal courts and this Office have recognized that where a private entity prepared documents for the government pursuant to a contract or agreement, that party is operating as an agent of the government. See Wu v. National Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (recommendations of volunteer consultants protected under Exemption 5). See also Environmental Policy Institute, 16 DOE ¶ 80,113 at 80,531 (1987); Toledo Coalition for Safe Energy, 18 DOE ¶ 80,109 at 80,528 (1988) (recommendations and opinions of DOE personnel and outside consultants fall within the scope of Exemption 5). Thus, for purposes of Exemption 5, the documents outside consultants produce and submit to DOE are treated as if they had been prepared by DOE employees. See Coalition for Safe Power, 16 DOE ¶ 80,134 at 80,598 (1987). Based on the foregoing, the information requested in this case properly falls within the definition of "intra-agency memoranda."

In addition, the comments and recommendations contained in the reviews are clearly predecisional and deliberative. They were created before the DOE adopted a final position on the geothermal proposals and consist of personal opinions which reflect the consultative process. Furthermore, we note that the release of these reviews could inhibit consultants from expressing their candid views if they believed that those views could become public knowledge. As such, the documents at issue are precisely the sort of documents which exemplify the deliberative and "group thinking" processes Exemption 5 is designed to protect. Sears, 421 U.S. at 153 (quoting Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967)). Accordingly, we hold that the reviews meet all the requirements for withholding material under the Exemption 5 deliberative process privilege.

However, both the FOIA and the implementing DOE regulations require that non-exempt material which may be reasonably segregated from withheld material be released to a requester. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(c). See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1972); Boulder Scientific Company, 19 DOE ¶ 80,126 at 80,577 n.3 (1989). Exemption 5 only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. Factual information contained in the protected document must be disclosed unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). There is no indication in Golden's determination letter that it considered this principle before withholding the reviews in full. Furthermore, after reviewing the documents ourselves, it appears that there may be some factual material which is non-exempt and reasonably segregable. Thus, we shall remand this case to Golden with instructions to review the requested documents and to release any reasonably segregable factual material or to issue a new determination explaining why this material should not be released.

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the comments and recommendations contained in the reviews of the geothermal energy proposals, which consist solely of the preliminary views and recommendations provided to DOE employees in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of persons consulted by DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If consultants were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. Fulbright & Jaworski, 15 DOE ¶ 80,122 at 80,560 (1987). Consequently, we conclude that release of the withheld material protected under Exemption 5 would result in foreseeable harm to the interests that are protected by the deliberative process privilege. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

IV. Conclusion

For the reasons stated above, the OHA finds that Golden properly applied the threshold requirements of Exemption 5 to the reviews of the geothermal proposals, and that there is no public interest in the release of any portion of the proposals that reflect the preliminary views and recommendations of their consultants. However, we are remanding this matter to Golden to issue a new determination, either releasing reasonably segregable factual material or explaining the reasons for withholding any factual material contained in the reviews.

It Is Therefore Ordered That:

(1) The Appeal filed by FAS Engineering Incorporated on March 3, 1998, Case Number VFA-0375, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Golden Field Office, which should issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 14, 1998

Case No. VFA-0376, 27 DOE ¶ 80,122

April 2, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David R. Berg

Date of Filing: February 10, 1998

Case Number: VFA-0376

On February 10, 1998, David R. Berg filed an Appeal from a determination issued to him by the Deputy Assistant Secretary for Human Resources (hereinafter referred to as "HR"). This determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Parts 1004 and 1008, respectively.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

The Privacy Act permits individuals to gain access to their records or to information pertaining to them that is contained in systems of records maintained by the agencies. 5 U.S.C. § 552a(d)(1).

I. Background

On February 26, 1997, Mr. Berg requested, under the provisions of the FOIA and the Privacy Act, that he be provided with all documents relating to a conversation between himself and another individual. Mr. Berg specifically requested access to four documents written by employees of the Waste Policy Institute, a DOE contractor, and the DOE.

HR issued a determination on May 28, 1997, in which it stated that it had located a number of documents responsive to Mr. Berg's request in the files denominated "DOE-2 DOE Personnel: Supervisor-Maintained Personnel Records," a system of records that is subject to the Privacy Act. However, HR withheld these documents

in their entirety, citing subsection (d)(5) of the Privacy Act, 5 U.S.C. § 552a(d)(5), and Exemptions 5, 6 and 7 of the FOIA, 5 U.S.C. § 552(b)(5), (b)(6) and (b)(7).

On July 16, 1997, Mr. Berg appealed HR's May 28, 1997 determination. In a Decision and Order dated August 14, 1997, the OHA found that HR had not adequately explained its reasons for withholding the documents under the FOIA and the Privacy Act and had not segregated and released non-exempt material. We therefore remanded this matter to HR with instructions to either release the documents in their entirety

or issue a new determination letter to Mr. Berg. See David R. Berg, 26 DOE ¶ 80,210 (1997) (Berg I).

Subsequent to this Decision and Order, HR issued a new determination to Mr. Berg on January 7, 1998. In this determination, HR released two documents in redacted form, and withheld other documents in their entirety. The withheld material pertains to allegations of improper or threatening workplace behavior by Mr. Berg. In support of its actions, HR cited subsection (d)(5) of the Privacy Act and Exemptions 6, 7(C) and 7(F) of the FOIA. Subsection (d)(5) of the Privacy Act states that the Act is not applicable to information compiled in reasonable anticipation of a civil action or proceeding. Exemption 6 of the FOIA protects from mandatory disclosure personnel, medical and similar files that, if disclosed, would result in a clearly unwarranted invasion of personal privacy. FOIA Exemptions 7(C) and 7(F) encompass information compiled for law enforcement purposes that, if released, could reasonably be expected to result in an unwarranted invasion of personal privacy or would endanger the physical safety any individual, respectively.

On February 10, 1998, Mr. Berg filed the current Appeal. (1) In his submission, he claims that HR's determination on remand "ignor(es)" our August 14 Decision and Order by "simply refusing to provide the identified documents." Brief at 2. Mr. Berg further contends that subsection (d)(5) of the Privacy Act is inapplicable because it refers only to information compiled for a civil action or proceeding by an attorney or someone acting at an attorney's behest. With regard to HR's findings under the FOIA, Mr. Berg argues that the withheld material is not protected from mandatory disclosure pursuant to Exemption 6 because the individuals involved have no viable privacy interest in that material, and that Exemptions 7(C)and 7(F) are inapplicable because there is no law enforcement proceeding at issue in this case.

II. Analysis

A. HR's Compliance with Berg I

As a preliminary matter, Mr. Berg contends that HR's determination on remand does not address the deficiencies that we discussed in Berg I. We do not agree. In fact, we find that HR's January 7, 1998 determination is in full compliance with our instructions in Berg I. As previously stated, we found HR's earlier determination to be deficient because it "merely restated the languages of Exemptions 5, 6, and 7 as well as subsection (d)(5) of the Privacy Act, without adequately explaining" the manner in which HR applied those provisions in withholding the documents in question. Berg I. We further found that HR had made no apparent attempt to segregate and release non-exempt material. Id.

In contrast, the January 7 determination fully explains HR's application of the relevant statutory provisions to the matter at hand. For example, in explaining its decision to withhold the requested material pursuant to subsection (d)(5) of the Privacy Act, HR stated that formal or informal proceedings to remedy complaints of individuals who consider themselves aggrieved by a coworker's conduct are initiated by written complaints such as those sought by Mr. Berg. HR further found that individuals bringing such complaints, such as the authors of some of the documents requested by Mr. Berg, do so in reasonable anticipation that some type of proceeding to resolve the complaint will result. January 7 Determination Letter at 1-2. We find that HR has adequately explained its reasons for denying Mr. Berg's request. Furthermore, we have examined the withheld material, and we conclude that HR has adequately segregated and released any non- exempt material to Mr. Berg. We therefore reject Mr. Berg's claim that HR has failed to follow the guidelines that we set forth in Berg I.

B. The Privacy Act

Mr. Berg also argues that HR improperly withheld the responsive documents under subsection (d)(5) of the Privacy Act. That subsection states, in pertinent part, that "nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. § 552a(d)(5).

Specifically, Mr. Berg contends that subsection (d)(5) is coextensive with the attorney work product privilege of Exemption 5 of the FOIA. Consequently, he argues, the subsection applies only to material compiled by an attorney or someone acting at the direction of an attorney. Since HR does not claim that the documents that it withheld were compiled by or under the direction of an attorney, Mr. Berg claims that subsection (d)(5) is not applicable. Moreover, he points out that the attorney work product privilege protects only those documents that would not normally or routinely be discoverable in civil proceedings. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154-155 (1975). Therefore, since the withheld documents would be discoverable in any disciplinary proceeding against him, he contends, those documents may not be withheld under subsection (d)(5). In support of his position, Mr. Berg cites Martin v. Office of Special Counsel, MSPB, 819 F.2d 1181 (D.C. Cir. 1987) (Martin). In that case, the court upheld the denial of Martin's request under the FOI and Privacy Acts for access to certain documents that were prepared by a government attorney during the investigation of Martin's claims of workplace harassment. In reaching this result, the court found the documents to be exempt from mandatory disclosure under Exemption 5 of the FOIA and subsection (d)(5) of the Privacy Act.

However, contrary to Mr. Berg's assertions, the Martin court did not find subsection (d)(5) to be coextensive with the attorney work product privilege. Indeed, in discussing the "deliberative process" civil discovery privilege, the court said that "[u]nlike FOIA Exemption (b)(5), Exemption (d)(5) in no way incorporates civil discovery law..." Martin at 1187. Similarly, in Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982), the court rejected a claim that subsection (d)(5) only exempts material that falls within the attorney work product privilege, stating that the exemption "is not limited to an attorney's work product, but extends to any records compiled by counsel or other persons in reasonable anticipation of a civil action or proceeding." Id. at 408 (citing Smietra v. Department of Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978)). We therefore reject Mr. Berg's claim that subsection (d)(5) of the Privacy Act applies only to material that may be withheld under the attorney work product privilege.

Documents, such as those HR has withheld, that detail allegations of workplace misconduct often lead to civil suits or administrative disciplinary proceedings. Based on the circumstances of this proceeding, we conclude that the withheld material was compiled in reasonable anticipation of a civil action or proceeding within the meaning of subsection (d)(5), and was therefore properly withheld under this provision. See Robert B. Freeman, 26 DOE ¶ 80,180 (1997) (information is compiled in anticipation of civil action or proceeding within meaning of (d)(5) when prospect of such a civil action or proceeding is primary reason for compilation of information).

C. The FOIA

A finding that the withheld documents are exempt under subsection (d)(5) of the Privacy Act does not end our inquiry. Unless the documents are also exempt from mandatory release under the FOIA, they must be released to Mr. Berg. Diane C. Larson, 26 DOE ¶ 80,112 (1996). As we previously stated, HR withheld the responsive documents pursuant to Exemptions 6, 7(C) and 7(F).

1. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the

agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); FLRA v. Department of Treasury Financial Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-770.

In his appeal, Mr. Berg contends that because the events that form the basis for the complaints against him occurred in the workplace, the complainants have no cognizable privacy interest in the withheld material. We do not agree. While it is true that the complainants have little or no privacy interests regarding their involvement in the workplace events underlying their allegations, we find that they retain a significant privacy interest in maintaining the confidentiality of their participation in actions against Mr. Berg's interests. As an initial matter, the complaints against Mr. Berg were captioned "Administratively Confidential." It is therefore evident that the complainants had a reasonable expectation that their communications would not be made public. Moreover, individuals who file complaints about co-workers could be subjected to harassment, retaliation or emotional distress if their identities were made public. See, e.g., Burlin McKinney, 25 DOE ¶ 80,149 (1995) (McKinney); Valley Times, 23 DOE ¶ 80,154 at 80,632 (1993); James L. Schwab, 21 DOE ¶ 80,117 (1991).

In contrast, we find that the public interest in the release of this material is negligible, because such a release would not contribute in any meaningful way to the public's understanding of the manner in which its government operates. We therefore conclude that release of the documents would constitute a clearly unwarranted invasion of personal privacy, and that HR properly withheld them pursuant to Exemption 6.

2. Exemptions 7(C) and 7(F)

HR also cited Exemptions 7(C) and 7(F) in withholding the responsive documents. Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Exemption 7(F) permits an agency to withhold records or information compiled for law enforcement purposes "if such disclosure could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F); 10 C.F.R. § 1004.10(b)(7)(vi). We find that Exemptions 7(C) and 7(F) do not apply in this case.

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e. as part of or in connection with an agency law enforcement proceeding. See F.B.I. v. Abramson, 456 U.S. 615, 622 (1982); William Payne, 26 DOE ¶ 80,144 (1996). An organization withholding material under Exemption 7 must have statutory authority to enforce a violation of a law or regulation within its authority. Church of Scientology v. Department of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remand to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). For example, we have consistently found that the DOE's Office of the Inspector General (IG) compiles reports for law enforcement purposes within the meaning of Exemption 7. See Richard Levernier, 26 DOE ¶ 80,182 (1997) ("The IG is a classic example of an organization with a clear law enforcement mandate."); Keci Corporation, 26 DOE ¶ 80,149 (1997); William Payne, 26 DOE ¶ 80,144 (1996); McKinney. Applying these principles to the matter at hand, we find no indication in the record that HR has the "requisite law enforcement mandate" to invoke the protection of Exemption 7. See, e.g., Church of Scientology International v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) (law enforcement mandate provided by enforcement provisions of federal tax code). Without evidence of such a statutory foundation, we cannot conclude that the withheld documents were compiled for law enforcement purposes within the meaning of Exemption 7.

III. Conclusion

For the reasons set forth above, we find that HR properly applied subsection (d)(5) of the Privacy Act and Exemption 6 of the FOIA. We further conclude that HR segregated and released all non-exempt material to Mr. Berg. His appeal will therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by David R. Berg on February 10, 1998 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:April 2, 1998

(1)*/ Mr. Berg also requested, and was granted, a 30-day extension of time to file a brief in support of his Appeal.

Case No. VFA-0377, 27 DOE ¶ 80,117

March 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Dr. Nicolas Dominguez

Date of Filings:February 10, 1998

Case Numbers:VFA-0377

VFA-0378

VFA-0379

On February 10, 1998, Dr. Nicolas Dominguez filed Appeals from three determinations the Authorizing Official of the Oak Ridge Operations Office of the Department of Energy (DOE) issued to him on January 6, 1998. In those determinations, the Authorizing Official partially granted requests for information that Dr. Dominguez filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In his October 21, 1997, November 2, 1997 and November 30, 1997 requests for information, Dr. Dominguez sought copies of the following documents:

(1) the monthly reports entitled “CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM” from January 1995 to October 1997 and for “upcoming” months;

(2) documents concerning interviews Peter Johnson conducted;

(3) documents concerning interviews Patricia Howse-Smith conducted;

(4) a document entitled “Employee Concerns Management System”;

(5) a notebook Lockheed Martin management allegedly prepared and used in a meeting with Dr. Dominguez on July 21, 1997; and

(6) a document with the names of the witnesses from which a “group of peers” of Dr. Dominguez heard testimony on July 21, 1997.

In her determinations, the Authorizing Official released copies of the following documents:

(1) the “CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM” reports from January 1997 through October 1997;

(2) all records contained in the “Employee Concerns Management System” pertaining to Employee

Concern 97-10, including interview notes; and

(3) the DOE Order 5480.29 Employee Concerns Management System and an explanation of the program found in the DOE Oak Ridge Employee Handbook.

The Authorizing Official stated that the "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM" reports generated prior to January 1997 no longer exist. Specifically, she stated that the DOE destroys these reports after 18 months, and since the DOE revised the database used to create these reports, she can no longer retrieve reports created prior to January 1997. With regard to the reports for "upcoming" months, the Authorizing Official stated that the DOE cannot provide information that it has not yet generated. Finally, the Authorizing Official stated that no agency records exist regarding the Lockheed Martin notebook or the document alleged to contain names of witnesses.

Dr. Dominguez makes the following arguments in his Appeals:

(1) The Authorizing Official did not provide all of the "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM" reports that exist. Specifically, he states that the DOE did not provide reports from March, May and August 1997 and June through December 1996.

(2) Dr. Dominguez reiterates his request for more information from interviews Peter Johnson and Patricia Howes-Smith conducted.

(3) Dr. Dominguez states that David Rupert, the Director of Lockheed Martin's Oak Ridge Office of Workforce Diversity, informed him that the notebook Lockheed Martin prepared with taxpayer money would be kept permanently in Mr. Rupert's office.

Analysis

A. Adequacy of the Search

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the Appeal, we contacted the Authorizing Official to ascertain the validity of Dr. Dominguez's contention that the Authorizing Official did not send him all of the available "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM" reports. The Authorizing Official informed us that the DOE generated these reports monthly beginning in June 1997. However, prior to June 1997, the DOE did not issue these reports in every month. For one month, March 1997, a report does not exist because the DOE never generated a report in that particular month. In another report, the DOE combined two months, May and June 1997, into a single report. Furthermore, the Authorizing Official confirmed that the DOE sent to Dr. Dominguez all of the reports in existence at the time of his request.

Additionally, the Authorizing Official stated that the data in the reports the DOE provided to Dr. Dominguez include data for the time beginning January 4, 1996 to the date of each particular report. However, as stated above, reports created prior to January 1997 no longer exist. Thus, the Authorizing Official stated that the DOE provided to Dr. Dominguez a complete set of data from the "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM." Since Dr. Dominguez states that he did not receive reports for May 1997 and August 1997, we will require the DOE to provide Dr. Dominguez with new copies of the May/June 1997 and August 1997 "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM" reports.

With regard to the documents concerning interviews Peter Johnson and Patricia Howse-Smith conducted, the Authorizing Official stated that she inspected every document in the employee concerns investigation file. This employee concerns investigation file duplicates files located in the offices of Rufus Smith, Patricia Howse-Smith, and Patricia Taylor (the FOIA contact who gathered information from Peter Johnson), and she confirmed from this search that the DOE does not have any additional responsive documents. However, the Authorizing Official stated that due to an oversight, the DOE did not release a document responsive to Dr. Dominguez's request. The DOE has agreed to provide Dr. Dominguez a copy of the "Employee Concerns Management System" guide.

B. Agency Records

Dr. Dominguez contends that the notebook Lockheed Martin prepared is an "agency record" because the Director of the Oak Ridge Office of the Workforce Diversity, David R. Rupert, told him that the notebook would be kept permanently at Oak Ridge. The Authorizing Official has confirmed that Mr. Rupert is an employee of the DOE contractor, Lockheed Martin Energy Research Corporation, and that Mr. Rupert compiled the notebook for use in an internal employee matter between Lockheed Martin and its employee, Dr. Dominguez.

Our threshold inquiry in this case is whether the notebook and witness list are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as Lockheed Martin, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans

standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Lockheed Martin is the contractor responsible for maintaining and operating the Oak Ridge Operations Office. While the DOE obtained Lockheed Martin's services and exercises general control over the contract work, it does not supervise Lockheed Martin's day-to-day operations. See Contract No. DE-AC05-960R22464. We therefore conclude that Lockheed Martin is not an "agency" subject to the FOIA.

Although Lockheed Martin is not an agency for the purposes of the FOIA, its records relevant to Mr. Dominguez's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time Dr. Dominguez made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that the notebook and list of witnesses Dr. Dominguez seeks were not in the agency's control at the time of the appellant's request.(1) Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and Lockheed Martin to determine the status of the requested records. That contract generally states,

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . .

Contract No. DE-AC05-960R22464, Section H.22 (a). Paragraph (b)(4) of the ownership of records section of the contract states that the excluded category of Contractor's records includes "Employee relations records and files . . . pertaining to . . . [i]nternal complaints, grievance records, . . . [a]rbitration proceedings, . . . [a]llegations, investigations and resolution of employee misconduct . . . ." Since the notebook and document alleged to contain names of witnesses that Dr. Dominguez requests are records the contract states are Contractor records, we find that the records sought by the appellant are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny this portion of Dr. Dominguez's Appeal.

It Is Therefore Ordered That:

(1) The Appeal Dr. Nicolas Dominguez filed on February 10, 1998, Case No. VFA-0377, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Authorizing Official of the Oak Ridge Operations Office of the Department of Energy, who will release copies of the May/June 1997 and August 1997 "CONTRACTOR EMPLOYEE COMPLAINT TRACKING SYSTEM" reports or provide a detailed explanation for withholding.

(3) The Appeals Dr. Nicolas Dominguez filed on February 10, 1998, Case Nos. VFA-0378 and VFA-

0379, are hereby denied.

(4) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 1998

(1)See March 4, 1998 Record of Telephone Conversation between Amy Rothrock, DOE Oak Ridge, and Leonard M. Tao, OHA Staff Attorney.

Case No. VFA-0380, 27 DOE ¶ 80,188

February 17, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:National Security Archive

Date of Filing:February 11, 1998

Case Number: VFA-0380

The National Security Archive filed an Appeal from a determination that the Department of Energy's Freedom of Information and Privacy Act Division (the FOIA Office) issued to it on January 22, 1998. In that determination, the FOIA Office denied in part a request for information that the National Security Archive filed on March 4, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the documents released to the National Security Archive in that determination was withheld after the Department of Energy's Office of Declassification reviewed the documents to determine whether they contained classified information. This Appeal, if granted, would require the FOIA Office to release the information that it withheld in its January 22, 1998 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On March 4, 1994, William Burr of the National Security Archive submitted a request under the FOIA to the Department of Energy (DOE) for copies of any reports prepared between September 1, 1961, and December 31, 1962, that analyzed the significance of the nuclear test series the Soviet Union conducted during the late summer and fall of 1961. The DOE identified 15 responsive documents. It determined that two of them could be released in their entirety and the remaining 13 documents could be released after extensive deletions were made. The deleted information was withheld because the DOE determined it to be classified as National Security Information pursuant to Executive Order 12958 and as

Restricted Data pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemptions 1 and 3, respectively, of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the requested documents. In its Appeal, the National Security Archive contends that release of at least some of those portions could no longer reasonably be expected to cause damage to the national security, particularly since Russia has itself released information about its 1961 tests.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. See National Security Archive, 26 DOE ¶ 80,118 (1996); Keith E. Loomis, 25 DOE ¶ 80,183 (1996); A. Victorian, 25 DOE ¶ 80,166 (1996). According to the Office of Declassification, the information withheld pursuant to Exemption 1 in this case relates to intelligence sources, methods, and activities, which is protected by Section 1.5(c) of the Executive Order and is therefore exempt from mandatory disclosure under the FOIA.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., National Security Archive, 26 DOE ¶ 80,118 (1996); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to the Office of Declassification, the portions that the DOE deleted from the requested documents under Exemption 3 were withheld because they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

In performing his review the Director of SA determined that the withheld material falls into three categories: yields of the Soviet nuclear tests, weapon design information, and intelligence matters. The following determinations were reached in consideration of the National Security Archive's contentions that the passage of time and the release of similar information by Russia have reduced the harm to the national security of the release of the information requested in this case. The DOE has re-evaluated the justification for classifying the withheld information under current classification guidance and determined that information related to the total yields of the Soviet tests, as well as some of the nuclear weapon design information, may now be released. Nevertheless, the DOE has determined that the information in those categories that continues to be withheld remains classified as Restricted Data. Moreover, the DOE has determined that one short phrase related to intelligence activities continues to be classified under the Executive Order. In addition, the vast remainder of the information concerning intelligence sources and methods has been reviewed by the Air Force Air Intelligence Agency, which has determined on appeal that the information remains sensitive and must continue to be withheld under the Executive Order. The denying official for the information that the Air Force continues to find necessary to withhold is James M. Enger, USAF, Director of Information Operations, Headquarters, Air Intelligence Agency.

Based on the review performed by the Director of SA, we have determined that Executive Order 12958 and the Atomic Energy Act require the continued withholding of some of those portions of the 13 documents that were previously identified as containing classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by statute or Executive Order. Therefore,

those portions of the documents that the Director of SA has now determined to be properly classified must be withheld from disclosure. However, because some previously deleted information may now be released as a result of the Director of SA's review, newly redacted versions of the 13 documents will be provided to the National Security Archive under separate cover. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on February 11, 1998, Case No. VFA- 0380, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of 13 documents responsive to its March 4, 1994 Freedom of Information Act request, in which additional information is released, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 17, 1999

Case No. VFA-0381, 27 DOE ¶ 80,119

March 12, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Masako Matsuzaki

Date of Filing: February 11, 1998

Case Number: VFA-0381

On February 11, 1998, Masako Matsuzaki (Matsuzaki) filed an Appeal from a determination issued to her in response to a request for documents she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The DOE's Richland Operations Office (DOE/RL) issued the determination on December 31, 1997. This Appeal, if granted, would require that DOE/RL perform another search for responsive documents.

I. Background

Matsuzaki states that she is a retired Army nurse who was stationed at the Hanford site in Richland, Washington between 1959 and 1961. She alleges that she was exposed to radiation at Hanford, and is suffering severe medical problems today as a result of this exposure. On September 30, 1997, Matsuzaki filed a request with DOE/RL for proof that she was stationed at the Hanford Site with the U.S. Army, and that while stationed at Hanford she was exposed to radiation. Letter from Matsuzaki to DOE/RL (September 30, 1997). DOE/RL responded that all records pertaining to military personnel stationed at Hanford were sent to Fort Lewis, Washington. Letter from DOE/RL to Matsuzaki (December 31, 1997) (Determination Letter). Unfortunately, a fire in the 1970s destroyed many of the military records stored at Fort Lewis, including retired military personnel identification. Nonetheless, DOE/RL conducted a search of its three main Privacy Act systems of records (employment, medical and radiation exposure) and found no records pertaining to Matsuzaki. Determination Letter. On February 11, 1998, Matsuzaki filed this Appeal. She argues that even though her military records were sent to Fort Lewis, the DOE possesses information that it has not disclosed to her. Letter dated February 11, 1998, from Matsuzaki to DOE's Office of Hearings and Appeals (OHA).

II. Analysis

The Privacy Act requires each federal agency to, *inter alia*, permit an individual to gain access to information about that individual which is contained in any "system of records" maintained by the agency. 5 U.S.C. § 552a(d); 10 C.F.R. § 1008.6(a)(2). Information that is exempt from disclosure under the Privacy Act must be released to a requester unless it is also exempt from disclosure under the FOIA. 5 U.S.C. § 552a(t)(2). Thus, it is the general practice of the DOE to process a request by an individual for information about that individual under both the Privacy Act and the FOIA. See David R. Berg, 26 DOE ¶ 80,210 (1997).

A Privacy Act request requires only a search of systems of records, rather than a search of all agency records, as is required under the FOIA. Nevertheless, the standard of sufficiency that we demand of a Privacy Act search is no less rigorous than that of a FOIA search. Therefore, we will analyze the adequacy of DOE/RL's Privacy Act search using principles that we have developed under the FOIA. See Diane Larson, 26 DOE ¶ , Case No. VFA-0367 (February 17, 1998); Anibal L. Taboas, 25 DOE ¶ 80,207 at 80,775 (1996).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. 5 U.S.C. § 552; 10 C.F.R. Part 1004. In responding to a request for information under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995); Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Matsuzaki challenges the adequacy of DOE/RL's search for documents responsive to her request. Memorandum of Telephone Conversation between Matsuzaki and Valerie Vance Adeyeye, OHA (February 19, 1998). However, Matsuzaki has admitted that she is aware that Hanford military records were sent to Fort Lewis. Memorandum of Telephone Conversation between Matsuzaki and Valerie Vance Adeyeye, OHA (February 19, 1998). In fact, she stated that she contacted an Army records center in Missouri, and they informed her of the fire at Fort Lewis. Id. Despite this information, we contacted DOE/RL to determine if any other records located at that office could contain responsive material. DOE/RL had indeed considered searching other Privacy Act systems of records (for example, Emergency Locator Records, Payroll and Leave Records, Firearms Qualifications, and EEO Complaints) as well as all other agency records under the FOIA. Memoranda of Telephone Conversations between Angela Lowman, DOE/RL and Valerie Vance Adeyeye, OHA (March 2, 1998 and March 5, 1998). However, because all records of military personnel stationed at Hanford had been transferred to Fort Lewis, DOE/RL concluded that it would be unlikely to locate any responsive material in agency files. Id.

Therefore, we find that DOE/RL has conducted a search reasonably calculated to uncover the requested information. Even though military records are not stored at Hanford, the agency conducted a conscientious search of the systems of records most likely to contain information related to Matsuzaki's tour of duty at Hanford. Accordingly, the Appeal is hereby denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Masako Matsuzaki on February 11, 1998, Case Number VFA-0381, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 12, 1998

Case No. VFA-0382, 27 DOE ¶ 80,121

March 30, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugene Maples

Date of Filing: March 2, 1998

Case Number: VFA-0382

On March 2, 1998, Eugene Maples completed the filing of an Appeal from determinations the Office of the Inspector General (OIG) and the Office of General Counsel (OGC) of the Department of Energy (DOE) issued on January 6 and 20, 1998, respectively. (1) The OIG determination, while releasing several responsive documents, also withheld information in a document responsive to a Request for Information (Request) which Mr. Maples submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The OGC determination provided several responsive documents to Mr. Maples pursuant to his FOIA Request. This Appeal, if granted, would require the DOE to release the information OIG withheld as well as order OIG and OGC to conduct additional searches for responsive documents.

The FOIA requires that agency records that are held by a covered branch of the federal government, and that have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). The FOIA also lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

In his March 4, 1997 FOIA Request to DOE Headquarters, Mr. Maples requested copies of all correspondence relating to the administrative recoupment of Petroleum Violation Escrow (PVE) funds, between the following parties:

(1) the DOE and the Governor's Office or Attorney General's Office of South Carolina;

(2) the DOE and the DOE's Atlanta Support Office as well as correspondence to Washington, D.C., regarding any PVE funds; and

(3) the DOE, the DOE's Office of General Counsel, the Department of Justice and the State of South Carolina;

March 4, 1997 Request Letter from Eugene Maples to GayLa D. Sessoms, Director, Freedom of Information and Privacy Act Division, DOE Headquarters (Request Letter), at 1. Mr. Maples also

requested that the DOE provide copies of all correspondence "assuring that any [PVE] funds ordered to be recovered are in fact being recovered as directed by DOE." Id. at 2. (2)

The Freedom of Information and Privacy Act Division referred Mr. Maples' Request to OIG and OGC. Responding to Mr. Maples' Request in a determination letter dated January 6, 1998, OIG released five documents to Mr. Maples. The OIG released all five documents in their entirety, except for a memorandum dated March 31, 1995, in which the OIG withheld three names in the attachment block of the memorandum. (3) OIG stated that it withheld the names pursuant to Exemptions 6 and 7(C) of the FOIA. In a determination letter dated January 20, 1998, OGC released a number of documents in their entirety to Mr. Maples. In his Appeal, Mr. Maples challenges the adequacy of the search that OIG and OGC used to locate responsive documents. Mr. Maples also challenges OIG's withholding of the names under Exemptions 6 and 7(C). (4)

ANALYSIS

A. EXEMPTIONS 6 and 7(C)

Exemptions 6 and 7(C) allow the withholding of information dealing with personal privacy. The former permits the non-disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Under Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both of these exemptions require balancing the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Under Exemption 7 (C), the information must have been compiled for law enforcement purposes. In addition, because information may be withheld where there is merely a reasonable expectation of an "unwarranted invasion of a personal privacy," there is a lower threshold of privacy interest employed in Exemption 7(C) than in Exemption 6, where the balance calls for information to be withheld only if there is a "clearly unwarranted invasion of privacy" (emphasis added).

The document from which the names were withheld is a memorandum dated March 31, 1995, from the Chief Financial Officer of DOE to the DOE Inspector General with an attached Departmental Position on Inspector General Report ER-B-92-06 (March Memorandum). The March Memorandum states that "[a]s required by DOE Order 2320.2B . . . attached is the Departmental position on Inspector General Report ER-B-92-06 . . . ." Since the DOE created this memorandum to transmit the DOE's response to a completed OIG audit report pursuant to a DOE order, it would not appear that the OIG compiled the memorandum for law enforcement purposes. Consequently, we will remand this matter to OIG so that it may issue a new determination giving a more detailed explanation regarding whether it compiled the March Memorandum for "law enforcement purposes" as Exemption 7(C) requires.

On remand, OIG should also consider whether there exists any significant privacy interest in the withheld names to justify its application of Exemptions 6 and 7(C). OIG withheld all of the names in the attachment block of the March Memorandum except for the name of an OIG employee. As we have stated previously, a name by itself does not create a privacy interest that can be protected for the purposes of FOIA exemption analysis. The News Tribune, 25 DOE ¶ 80,181 at 80,700 (1996). Rather, the privacy interest exists when a name is linked with information that reveals something personal or private about an individual. Id. at 80,699. The names withheld appear to be names of DOE employees to whom a copy of the March Memorandum was sent. Federal employees carrying out their official duties have no privacy interest in having their names linked with another employee's work-product unless it reveals something personal or private about that individual or there are other special circumstances. See Maples. Consequently, since the withheld names appear to be listed in the attachment block as a part of their

official duties, it does not appear that a privacy interest exists for the withheld names. On remand, OIG should determine, in light of the discussion above, whether Exemptions 6 and 7(C), or any other Exemption, are applicable to the withheld names and either release the withheld names or issue Mr. Maples another determination regarding any withheld names.

B. ADEQUACY OF THE SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Mary Towles Taylor, 26 DOE ¶ 80,114 (1996). As discussed below, we have reviewed the search conducted by OIG and OGC and find that each office conducted a reasonable search for documents responsive to Mr. Maples' Request.

1. OIG

We contacted officials at OIG to ascertain the extent of the search conducted for responsive documents. See Memorandum of meeting between Jacqueline Becker and Sanford Parnes, OIG Counsel, and Richard Cronin, OHA Staff Attorney (March 4, 1998); Memorandum of telephone conversation between Jacqueline Becker and Linda Duvall, OIG, and Richard Cronin (March 10, 1998). OIG counsel informed us that when OIG received Mr. Maples' Request, it undertook a computer database search to try to identify files containing responsive documents.(5) The computer database, which can index OIG's files, was searched using the terms "Maples," "PVE," "South Carolina," "Governor of South Carolina," "Stripper Well," "Exxon," "Warner Amendment" and "Escrow Funds." OIG's computer index search identified two investigatory files pertaining to the South Carolina projects, and OIG provided all responsive documents to Mr. Maples. OIG officials also informed us that, because the two investigatory files had been closed, they have no expectation that responsive documents exist outside of those files. Given the facts OIG presented to us, we believe the search it conducted was a reasonable search for responsive documents. OIG searched its files using a computer database and located the files most likely to possess responsive documents. Further, OIG officials had no reason to believe that other responsive documents would exist in locations other than the identified investigatory files. OIG provided all responsive documents it located to Mr. Maples. Consequently, we believe that OIG conducted an adequate search for responsive documents.

Mr. Maples' argument to the contrary is unavailing. With regard to the OIG search, Mr. Maples asserts that while he has previously identified 22 State of South Carolina projects as being improperly funded with PVE funds, information exists stating that only six of the projects had either been terminated or were the subject of remedial action. Mr. Maples argues that there should exist additional information regarding recoupment of monies from the other 16 projects he previously identified. Mr. Maples also asserts that over 200 State of South Carolina projects may have been improperly funded in the same manner as the six projects as to which remedial action was taken. Mr. Maples argues that the OIG released no documents to him regarding recoupment of monies regarding any of those projects.

To investigate Mr. Maples' claim, we contacted officials at OIG. OIG informed us that it has no information or knowledge regarding recoupment of PVE funds other than with respect to the six projects referenced in Mr. Maples' Appeal. Additionally, OIG informed us that, because of the nature of the office, OIG officials would be aware of any effort to obtain recoupment of PVE funds. See Memorandum of telephone conversation between Jacqueline Becker and Richard Cronin (March 12, 1998). Thus, notwithstanding Mr. Maples' allegations regarding the remaining 16 projects, the OIG had no reason to believe that correspondence exists regarding the recoupment of PVE funds for those projects or the 200 other State of South Carolina projects to which he referred. Given this information, we have no reason to

believe that OIG possesses further responsive documents.

2. OGC

We contacted officials at OGC to inquire about their search for responsive documents. See Memorandum of telephone conversation between Harold Goldsmith, OGC, and Richard Cronin (March 3, 1995); Memorandum of telephone conversation between Suzanne Odom, Special Assistant, Office of the General Counsel, and Richard Cronin (March 5, 1998). OGC stated that upon receipt of Mr. Maples' Request, it conducted a computer database search using the terms "South Carolina," "SC," "S. Car.," and "So. Car." (6) OGC examined the computer generated lists of files using these terms to determine if any of the files would have responsive documents. OGC discovered two potentially responsive documents and provided these documents to Mr. Maples. OGC contacted various individuals whose names Mr. Maples suggested to inquire if they had any further knowledge regarding the existence of responsive documents. OGC also contacted individuals it believed would most likely have knowledge regarding the existence of responsive documents. The OGC contacted the Department of Justice, the Assistant General Counsel for Federal Litigation, the Assistant General Counsel for the Office of Energy Efficiency and OHA to try to uncover information regarding the responsive documents. A number of the DOE officials informed OGC that if responsive documents exist they would be located at the Office of Energy Efficiency and Renewable Energy (EE). OGC officials then asked officials at EE to conduct a search. EE officials searched their files and determined that it had previously provided all of its responsive documents to Mr. Maples pursuant to an earlier FOIA request. (7) OGC also conducted a search of the correspondence of the General Counsel. Because the official from the DOE General Counsel's office was familiar with the inquiry regarding South Carolina's projects resulting from Mr. Maples' disclosures, she searched a computer database indexing the General Counsel's correspondence from 1990 to the present using the term "Maples." The official believed this term would most likely locate all responsive documents. Upon obtaining responsive documents using this search, she then searched the computer database using the name of the Department of Justice attorney referenced in the responsive documents. OGC then provided to Mr. Maples all responsive documents located in this manner.

Given this factual background, we believe that the search OGC conducted was reasonably calculated to discover responsive documents. OGC searched its files using a computer database to try to identify responsive documents. OGC then questioned the individuals at DOE most likely to have knowledge of responsive documents as well as individuals suggested by Mr. Maples. Upon discovering that EE might possess responsive documents, OGC asked EE to conduct a search. OGC also conducted a computer database search of the correspondence of the General Counsel's office. Consequently, we find that OGC's search for responsive documents was adequate.

Mr. Maples' argument that OGC did not conduct an adequate search is unpersuasive. As evidence that additional documents must exist within OGC, Mr. Maples refers to an undated and unsigned memorandum provided to him pursuant to his FOIA Request (Nordhaus Memorandum) indicating that then DOE General Counsel Robert Nordhaus recommended that officials at EE obtain "assurances from South Carolina that the Florence County project was selected using the appropriate State financial assistance regulations, including competitive requirements . . . ." Request Letter at 6 (citing Nordhaus Memorandum). Mr. Maples notes that none of the documents released to him contains assurances from the State of South Carolina regarding the Florence County project. Additionally, Mr. Maples also points out that the Nordhaus Memorandum also recommends "that the State of South Carolina provide the DOE with concrete written assurance that it will follow the State's financial assistance rules and regulations when managing and administering the State's Office of Energy Programs." Mr. Maples asserts that he did not receive any documents regarding such an assurance. In our inquiry of this appeal, we contacted an official with the DOE General Counsel's office who informed us that the Nordhaus Memorandum was an unsigned draft version of the memorandum. To the best of her knowledge, the DOE General Counsel never issued the Nordhaus Memorandum. See Memorandum of telephone conversation between Suzanne Odom and Richard Cronin (March 5, 1998). Consequently, we believe that the existence of the Nordhaus Memorandum does not provide a reliable indication that other responsive documents may exist.

CONCLUSION

We will remand this Appeal to OIG so that it may release the withheld names on the March Memorandum or provide Mr. Maples another determination providing a more detailed justification for withholding the names. With regard to the search for responsive documents OIG and OGC conducted, we find that each office performed an adequate search. Consequently, Mr. Maples' Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eugene Maples, OHA Case No. VFA-0382, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 30, 1998

(1)Mr. Maples' initial submission did not contain the required copies of the determination letters from which he was appealing. See 10 C.F.R. § 1004.8(b). We deemed Mr. Maples' appeal filed upon our receipt of the determination letters on March 2, 1998.

(2)PVE funds are monies the federal government collected from oil companies for violations of petroleum pricing regulations from 1973 to 1981. Funds not needed for direct restitution to injured persons are used to provide indirect restitution to overcharged customers. For this purpose, each state uses PVE funds to implement energy-related programs that benefit the citizens of that state. In 1993, Mr. Maples provided information to the OIG regarding the State of South Carolina's alleged misuse of PVE funds. See Eugene Maples, 26 DOE ¶ 80,159 (1997) (Maples).

(3)OIG identified one other document, originating with OGC, responsive to Mr. Maples' Request. OIG referred that document to OGC so that it could issue a determination regarding the document. In its January 20, 1998 determination letter, OGC released this document to Mr. Maples.

(4)Mr. Maples' submission reiterates his allegation that the State of South Carolina improperly managed PVE funds and requests that OHA direct OIG to make a more thorough investigation and audit of the State of South Carolina's wrongful use of federal funds. OHA does not have authority to order OIG to conduct an investigation. However, assuming arguendo that Mr. Maples has standing to request that OHA review the State of South Carolina's use of PVE funds and that such a review should be conducted, we examined the OIG investigatory files to determine if any further action should be contemplated regarding South Carolina's use of PVE funds. Cf. Denver Support Office, U.S. Dep't of Energy, A Report on State Expenditures of Oil Overcharges (1990) (OHA and Denver Support Office review of oil overcharge fund expenditures by 10 States prior to the enactment of Petroleum Overcharge Distribution and Restitution Act of 1986). These files indicate that there were some irregularities in the use of PVE funds by the State of

South Carolina. Action was taken by DOE with regard to certain of these irregularities. Nevertheless, based on our review of the information contained in the files, we are not convinced that sufficient evidence exists for us to consider further action beyond that which DOE has already taken.

(5)At our request, OIG conducted another computer database search for responsive documents. OIG could find no additional responsive documents. See Memorandum of telephone conversation between Jacqueline Becker and Linda Duvall, OIG, and Richard Cronin (March 10, 1998).

(6)The computer database used in the search contains listings for older Energy Regulatory Administration documents.

(7)At our request, EE conducted another search for responsive documents. EE again confirmed that it has already provided all responsive documents in its possession to Mr. Maples in earlier FOIA requests. See Memoranda of telephone conversations between Faith Lambert, EE, and Richard Cronin (March 5 and 9, 1998).

Case No. VFA-0384, 27 DOE ¶ 80,120

March 24, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Mary E. Burket

Date of Filing:February 24, 1998

Case Number: VFA-0384

This Appeal was filed by Mary E. Burket (the Appellant) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. § 1004. The Appellant seeks the review of a determination letter that DOE's Office of General Counsel (GC) issued to her, which indicated that the DOE did not possess any documents responsive to a FOIA request she submitted. As explained below, we have determined that the present Appeal be denied.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. If a requester has reasonably described the information he or she is seeking and has complied with the DOE's FOIA regulations, the agency is obliged to conduct a thorough and conscientious search for responsive documents. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., National Resources Defense Council*, 26 DOE ¶ 80,229 (1997); *Acadian Gas Pipeline System*, 26 DOE ¶ 80,160 (1997); *James H. Stebbings*, 25 DOE ¶ 80,177 (1996); *Butler, Vines and Babb, PLLC*, 25 DOE ¶ 80,152 (1995). However, the FOIA requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1985); *accord*, *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Accordingly, we review the adequacy of an agency's search under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983).

The Appellant's original appeal requested any journals or logs concerning her father's involvement in the decontamination and decommissioning of the SL-1 reactor at the Idaho National Engineering Laboratory. Although the DOE did not locate any documents responsive to this request, it provided the Appellant with a related document that might be of interest to her.

On February 24, 1998, the Appellant filed the present Appeal, providing additional information which she believed might assist the DOE in locating responsive documents and requesting that the DOE conduct a further search for responsive documents.

We contacted Ms. Tonya Woods of Headquarters' Office of Freedom of Information and Privacy and Mr. Carl Robertson, FOIA Officer, Idaho Operation Office. Idaho had performed a name search

on its records listing those individuals who were involved in the decontamination and decommissioning of the SL-1 reactor. GC's files were searched because the SL-1 reactor had been the subject of litigation.

These officials explained that an extensive search of Idaho's SL-1 decontamination and decommissioning files and the Office of General Counsel's files in Washington had been performed in response to the Appellant's request. However, no responsive documents had been located. These officials also indicated that the additional information provided by the Appellant would not likely lead to the location of additional responsive information.

We find that the search conducted by GC and Idaho was more than reasonably calculated to uncover responsive documents. Accordingly, we find that this appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mary E. Burket, Case Number VFA-0384, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 24, 1998

Case No. VFA-0386, 27 DOE ¶ 80,123

April 2, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Dr. Nicolas Dominguez

Date of Filings:March 5, 1998

Case Numbers:VFA-0386

VFA-0387

VFA-0388

VFA-0389

On March 5, 1998, Dr. Nicolas Dominguez filed Appeals from four determinations the Authorizing Official of the Oak Ridge Operations Office (ORO) of the Department of Energy (DOE) issued to him on February 19, 1998. In those determinations, the Authorizing Official denied requests for information that Dr. Dominguez filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In his four February 11, 1998 requests for information, Dr. Dominguez sought copies of the following documents:

(1) a January 20, 1996 memo from Dr. Robert I. Van Hook, president of LMERC, to Dr. Dominguez (Case No. VFA-0387);

(2) an October 30, 1995 memo from Dr. Van Hook to Dr. Dominguez (Case No. VFA-0389);

(3) the written description for Dr. Dominguez' job as listed in a response to the Tennessee Human Rights Commission from Lockheed Martin Energy Research Corporation (LMERC), his employer (Case No. VFA-0386);

(4) documents concerning an LMERC "group of peers" to which Dr. Dominguez gave testimony on July 21, 1997.(1) The particular information sought regarding the "peers" was their full names, their titles and positions as of July 21, 1997, their current titles and positions, and their companies and divisions as of July 21, 1997 (Case No. VFA-0388).

The Authorizing Official stated that no agency records exist regarding any of these requests since LMERC owned each of the requested records and her search had not extended to the files of LMERC. Therefore, she denied the four requests. Dr. Dominguez responds that each of these LMERC documents was created using taxpayers' funds, and thus should be releasable under the FOIA.

Analysis

Our threshold inquiry in this case is whether any of the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term “agency” under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). Contrary to Dr. Dominguez’ unsupported assertion, not all taxpayer-funded records are subject to release under the FOIA. For the reasons set forth below, we conclude that responsive “agency records” exist at ORO and that other portions of the requested records may be subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as LMERC, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595- 96.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976) (Orleans), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, LMERC is the contractor responsible for maintaining and operating the Oak Ridge Operations Office. While the DOE obtained LMERC’s services and exercises general control over the contract work, it does not supervise LMERC’s day-to-day operations. See Contract No. DE-AC05-960R22464. We therefore conclude that LMERC is not an "agency" subject to the FOIA. See Sheet Metal Workers’ International Association, 26 DOE ¶ 80,166 (1997).

Although LMERC is not an agency for the purposes of the FOIA, its records that are relevant to Dr. Dominguez’ request could be considered "agency records" if the DOE obtained them and they were within the DOE's control at the time Dr. Dominguez made his FOIA requests. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that, with one exception, none of the records Dr. Dominguez seeks was in the agency's control at the time of his requests.(2) See March 9, 1998 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).(3) We therefore next look to the contract between the DOE and LMERC to determine the status of the requested records. That contract generally states,

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . .

Contract No. DE-AC05-960R22464, Section H.22 (a). Therefore, unless each of the requested items reasonably falls within the excluded categories of documents described in Paragraph (b), they will be considered the property of the DOE and potentially releasable under 10 C.F.R. § 1004.3(e). We next examine those issues.

A. The Memos From Dr. Van Hook

Two of the requested items, the memos from Dr. Van Hook to Dr. Dominguez, fall within Paragraph (b)(4) of the ownership of records section of the contract. That provision excludes from government ownership the following items: “Employee relations records and files . . . pertaining to . . . [i]nternal complaints, grievance records, . . . [a]rbitration proceedings, . . . [a]llegations, investigations and resolution of employee misconduct, . . . [e]mployee discipline. . . [and] employee charges of discrimination . . . .” Since the memos are related to employment discrimination litigation between Dr. Dominguez and LMERC, Paragraph (b)(4) clearly applies. Moreover, these two memos are located only in LMERC’s employee relations files. See March 19, 1998 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. Accordingly, because LMERC owns the two memos, we find that the two memos are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny the two Appeals concerning those memos, Case Nos. VFA-0387 and VFA-0389.

B. Dr. Dominguez’ Job Description

According to LMERC, the job description falls within Paragraphs (b)(4)(i), (b)(4)(ii), (b)(4)(v) and (b)(5) of the contract. See March 12, 1998 Letter from Robert M. Stivers, Jr., Associate General Counsel, Lockheed Martin Energy Systems, Inc., to Amy Rothrock. Additionally, ORO believes that the job description falls within Paragraph (b)(6) of the contract. See March 10, 1998 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. For the following reasons, we conclude that these records do not fall within any of the provisions of the contract delineating contractor-owned records.

First, Paragraph (b)(4)(i) refers to “[e]mployee relations records and files such as records and files pertaining to [q]ualifications or suitability for employment of any employee, applicant or former employee.” LMERC argues that the job description is used in evaluating an applicant’s suitability for a job or promotion as well as announcing job openings. However, we do not think it is reasonable to read the phrase “pertaining to” as broadly as LMERC does. Instead, we find that Paragraph (b)(4)(i) is referring to the unique qualifications of specific individuals, not the type of general information exemplified by a job description.

Second, Paragraph (b)(5) relates to “[r]ecords and files pertaining to wages, salaries and benefits and wage and salary benefit administration.” Although LMERC argues that it uses job descriptions to evaluate salaries and raises, we again believe this is not a reasonable reading and stretches Paragraph (b)(5) beyond

its clear meaning. The paragraph is directed at financial data compiled on the amount of money and other benefits paid to each employee. To accept LMERC's definition would mean that any project an employee worked on could "pertain" to salary if that project led to a raise or demotion. We therefore cannot find that the meaning of "wages, salaries and benefits" encompasses LMERC's job descriptions.

Third, Paragraph (b)(6) covers "[p]rivileged or confidential Contractor financial information and correspondence between the Contractor, its financial institutions or other business segments of Contractor or its parent corporations . . . ." We believe that Paragraph (b)(6) does not apply to a job description. A job description is not related to financial information and correspondence.

Fourth, we acknowledge that LMERC has placed a copy of Dr. Dominguez' job description in the internal complaints, grievance records and employee discipline records mentioned in Paragraphs (b)(4)(ii) and (b)(4)(v) of the contract. However, the job description sought by Dr. Dominguez (and all other LMERC job descriptions) are also kept on file in the Personnel Office of LMERC. This file contains general information about types of jobs, and as discussed above, we find that it is unreasonable to conclude that this job description falls within any of the categories listed in Paragraph H.22(b) as records belonging to the contractor.

Since we conclude that the job description falls within Paragraph H.22(a) as a record that was "acquired or generated by the Contractor in its performance of this contract," we believe that it is the property of the Government.(4) Thus, according to the last part of 10 C.F.R. § 1004.3(e)(1), unless the records are exempt from disclosure under 5 U.S.C. § 552(b), ORO must release the job description. Accordingly, we must remand Case No. VFA-0386 in order that ORO may either release the job description or issue a new determination to Dr. Dominguez explaining which FOIA exemption or exemptions are applicable to the material.

C. The "Group of Peers" Information

Dr. Dominguez requested the following information regarding the "group of peers" which heard testimony concerning his termination from LMERC:

(1) the names of the company and division within the company for each group member as of July 21, 1997;

(2) their full names; (5)

(3) their titles and positions as of July 21, 1997; and

(4) their current titles and positions.

1. The Companies and Divisions of the "Group of Peers"

ORO initially asserted that all of the requested "group of peers" information was withholdable because this material belonged to the contractor under Paragraph (b)(4) of the LMERC contract (which relates to employee concerns records), as well as Paragraph (b)(1) (which covers personnel files maintained on individual employees). Upon our inquiry, however, we learned that Ms. Rothrock was unaware that Dr. Dominguez had supplied with his FOIA request the names of the peers included in the "group of peers." See March 10 and 11, 1998 Records of Telephone Conversations between Amy Rothrock and Dawn L. Goldstein; March 11, 1998 electronic mail message from Amy Rothrock to Dawn L. Goldstein. The company and division of each LMERC employee is listed in the September 1997 phone book containing ORO and LMERC employees, which is located in the ORO reading room. Id.; March 24, 1998 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. Ms. Rothrock explained that since she now knows the peers' names, it is possible to release their companies and divisions. Therefore, she agreed to release copies of the relevant pages of the phone book showing the peers' companies and

divisions. March 11, 1998 electronic mail message from Amy Rothrock to Dawn L. Goldstein.(6)

2. The Titles and Positions of the "Group of Peers"

According to ORO, because the peers' titles and positions are located within their personnel files, this information is not subject to release under DOE regulations. However, this argument fails to take account of the fact that other documents located at LMERC also contain the peers' titles and positions. According to ORO, it is in fact likely that the positions and titles of these five people are located in substantive documents owned by the DOE but possessed by LMERC. ORO also informed us that this information should be readily accessible. See March 17, 1998 Record of Meeting between Amy Rothrock and Dawn L. Goldstein. We must therefore remand this aspect of Case No. VFA-0388 in order that ORO may conduct a search for responsive DOE-owned records that are in the possession of LMERC and therefore subject to 10 C.F.R. § 1004.3(e). Responsive records would contain the current positions and titles and the July 1997 position and titles of the five people Dr. Dominguez named. If ORO locates responsive documents, it should either release them or issue a new determination to Dr. Dominguez explaining which FOIA exemption or exemptions are applicable to the material.

Conclusion

Thus, we are remanding Case No. VFA-0386 in order that ORO may either release Dr. Dominguez' job description or issue a new determination explaining which FOIA exemption or exemptions are applicable to the material. We are also remanding Case No. VFA-0388 in order that it may release the following items or issue a new determination explaining otherwise: the phone book pages containing the peers' companies and divisions; the responsive DOE-owned records possessed by LMERC containing the peers' titles and divisions both currently and as of July 1997; and the responsive agency records containing the full names of the "group of peers."

It Is Therefore Ordered That:

(1) The Appeals filed by Dr. Nicolas Dominguez on March 5, 1998, Case Nos. VFA-0387 and VFA-0389, are hereby denied.

(2) The Appeals filed by Dr. Nicolas Dominguez on March 5, 1998, Case Nos. VFA-0386 and VFA-0388, are hereby granted to the extent set forth in paragraph (3) below and are denied in all other respects.

(3) Case Nos. VFA-0386 and VFA-0388 are hereby remanded to the Oak Ridge Operations Office, which shall promptly issue new determinations in accordance with the guidance set forth in the above Decision.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 2, 1998

(1)1/ The "group of peers" heard testimony from Dr. Dominguez and others regarding his termination from LMERC and the reasons for that termination.

(2)2/ ORO informed us that it possesses documents listing the full names of the "group of peers" in records such as health records and personnel security records. See Record of Telephone Conversation between Amy Rothrock, FOIA Officer, ORO, and Dawn L. Goldstein, Staff Attorney, OHA (March 24, 1998). These records are responsive to Dr. Dominguez' request and therefore we must remand this aspect of Case No. VFA-0388 in order that ORO may either release the responsive records or issue a new determination to Dr. Dominguez explaining which FOIA exemption or exemptions are applicable to the material.

(3)3/ The regulation actually provides that the records must be exempt under 5 U.S.C. 552(b)(2). However, for several reasons, this Office has traditionally considered the restriction to Exemption 2 a typographical error and therefore read the provision as excluding all records covered by the FOIA exemptions. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,234 at 80,895 n. 3 (1997). First, it is our understanding that the DOE meant to exclude from this provision all records that are exempt under the FOIA, not just under Exemption 2. Second, Exemption 2 is little used, as compared with other FOIA exemptions, and it would be nonsensical to include this as the only exemption worth protecting in the DOE contractor records scheme. Last, our conclusion is further bolstered by the fact that 10 C.F.R. § 1004.3(e)(2) refers to 5 U.S.C. 552(b), as we believe Section 1004.3(e)(1) should have done. Accordingly, this Office reads 10 C.F.R. 1004.3(e)(1) as exempting all records covered by 5 U.S.C. 552(b).

(4)4/ Ms. Rothrock of ORO believes that the job description might have originated at Lockheed Martin Corporation's headquarters. See March 10, 1998 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. Even if this document did originate at the parent company of LMERC, Paragraph H.22(a) refers to all records LMERC acquired in its performance of this contract. Clearly, LMERC's use of Dr. Dominguez' job description in the course of its contract with the DOE would fall under H.22(a).

(5)5/ As explained above, because ORO possesses responsive agency records on this topic, we are remanding this aspect of Case No. VFA-0388.

(6)6/ We note that because this phone book is located in the ORO reading room as well as being placed online on the DOE web page, ORO would be entitled to direct Dr. Dominguez to locate this information in either of those places, rather than releasing this information to him in response to his FOIA request. See 5 U.S.C. § 552(a)(2). However, in the interests of being customer-friendly, ORO has chosen to release those pages to him.

Case No. VFA-0390, 27 DOE ¶ 80,124

April 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Hobart T. Bolin, Jr.

Date of Filing: March 9, 1998

Case Number: VFA-0390

Hobart T. Bolin, Jr., files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (the Department) at 10 C.F.R. § 1004. The subject of the Appeal is a determination letter that the Department's Oak Ridge Operations Office (OR) issued in response to Bolin's request for records pursuant to the FOIA. As explained below, we will grant the Appeal and remand this matter to OR to conduct a further search for documents responsive to Bolin's request.

In his FOIA request, dated November 1, 1997, Bolin asked for records regarding an incident that occurred on the Bethel Valley Project in 1995. Bolin specified that his request included, but was not limited to, the initial safety report, the final safety report, all bioassay test results from the time of the accident to the time he left his employment with a contractor of OR, and all investigative documents and results. He stated that the incident occurred in September 1995. OR responded by releasing several documents concerning Bolin's radiation exposure measurements, with a determination letter which noted that these documents constituted OR's final response to Bolin's request. Bolin then filed this Appeal, contending that OR had conducted an inadequate search for documents. As part of our review of Bolin's Appeal, we telephoned him. During the telephone conversation, Bolin acknowledged that the incident occurred in August 1995 rather than September 1995. In addition, he identified specific documents he thought he should have received, and provided the names of several individuals who might know the locations of these documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated often that an FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was, in fact, inadequate. *E.g., National Resources Defense Council*, 26 DOE ¶ 80,229 (1997).

We contacted the staff of the FOI office at OR and discussed Bolin's Appeal with them. Based on Bolin's clarifications and a review of the original search, the staff agreed to conduct a new search for documents. Therefore, we will remand this matter to OR so that it may conduct a further search for responsive documents. OR will release to Bolin any responsive documents that it locates, or will explain the basis for withholding any document or part of a documents it withholds, in a new determination letter, with specific reference to one or more of the exemptions from mandatory disclosure provided in the FOIA.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Hobart T. Bolin, Jr., Case Number VFA-0390, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Department of Energy's Oak Ridge Operations Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 1998

Case No. VFA-0391, 27 DOE ¶ 80,125

April 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William H. Payne

Date of Filing: March 13, 1998

Case Number: VFA-0391

On March 13, 1998, the Office of Hearings and Appeals (OHA) received an Appeal that William H. Payne filed from a determination issued to him by the Director of the Office of Public Affairs at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "the Director"). The Director issued his determination in response to a request for information under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of additional documents to Mr. Payne.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his request, Mr. Payne sought access to all invoices submitted to Sandia National Laboratories (SNL) between August 1, 1995 and August 14, 1997 by (i) law firms defending SNL in legal actions filed by "A. Morales," and (ii) any contractor for work done "involving the name of William H. Payne." In his response to Mr. Payne's request, the Director stated that 11 invoices had been identified as responsive to the request. The Director released the

invoices in redacted form, withholding portions of these documents under Exemptions 4, 5 and 6 of the FOIA, 5 U.S.C. § 552(b)(4), (b)(5) and (b)(6). The Director further stated that subsequent to January 1997, the DOE had not retained any legal invoicesconcerning the Morales law suits. Consequently, any invoices submitted after that date would be in the legal files of SNL, and are therefore not "agency records" that would be subject to release under the FOIA. The Director then said that pursuant to DOE "policy, records in the possession and control of a DOE ... contractor, such as [SNL], will be made available by DOE [under the FOIA] when the contract specifically provides that such records are the property of the government." Determination letter at 1. The Director found that the contract between SNL and the DOE specifically provides that legal records such as those requested by Mr. Payne are the property of SNL, and are therefore not subject to release.

In his appeal, Mr. Payne does not contest the withholding under Exemptions 4, 5 and 6 of portions of the 11 invoices released to him. Instead, he contends that the post-January 1997 invoices are agency records

that are subject to the FOIA. In this regard, he characterizes the DOE contractor records policy as one that "redesignat[es] a class of records from DOE-owned to contractor- owned," thereby shielding those records from the FOIA. Appeal at 2. He further argues that the policy was not adopted in accordance with the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (APA), and has therefore been declared invalid by the federal courts.(1)

II. Analysis

The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in Department of Justice vs. Tax Analysts, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch..., or any independent regulatory agency." 5 U.S.C. § 552(f).

Under these criteria, the post-January 1997 invoices involving the Morales lawsuits clearly are not agency records. They were generated by private law firms defending SNL in the Morales litigation, and not by agencies of the federal government or government-controlled corporations. Moreover, there is no indication in the record that the invoices in question were under DOE control at the time of Mr. Payne's request. The Director correctly concluded that these invoices are not agency records under the FOIA.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). Accordingly, we have examined the contract between SNL and the DOE, and we conclude that under that agreement, SNL's legal files are the property of SNL, and are not subject to release under either the FOIA or the agency records regulation. Accord, William H. Payne, 26 DOE ¶ 80,161 at 80,700 (1997).

Mr. Payne contends, however, that the DOE's contractor records policy narrows information access rights under the FOIA "by redesignating a class of records from DOE-owned to contractor- owned." He also contends that this policy is invalid because it was not adopted in accordance with the notice and comment rulemaking requirements of the APA.

We believe that these arguments reflect a misunderstanding of the effect and origin of 10 C.F.R. § 1004.3(e)(1). Contrary to Mr. Payne's assertions, this regulatory provision expands the scope of documents that are subject to disclosure. Under the Tax Analysts test, "agency records" must (i) have been originated or obtained by an agency, and (ii) be under an agency's control at the time of the FOIA request. However, pursuant to 10 C.F.R. § 1004.3(e)(1), contractor records that do not meet these criteria are still subject to disclosure as long as the contract between the contractor and the DOE provides that the records are government property. Moreover, 10 C.F.R. § 1004.3(e)(1) was adopted in full compliance with the notice and comment requirements of the APA. On October 23, 1991, the DOE published this provision in proposed form. See 56 Fed. Reg. 55036. After receiving and considering 43 comments on the proposed regulation, the DOE adopted 10 C.F.R. § 1004.3(e)(1) in final form. See 59 Fed. Reg. 63882 (December 12, 1994). We therefore reject Mr. Payne's arguments concerning the Director's application of that regulation.

III. Conclusion

The Director correctly determined that the post-1997 Morales invoices are not agency records, and are not subject to disclosure under the FOIA or under 10 C.F.R. § 1004.3(e)(1). We will therefore deny Mr.

Payne's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Payne on March 13, 1998 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 1998

(1)Mr. Payne does not provide a citation for any case in which a federal court has declared the DOE's current contractor records policy to be invalid. However, in Committee to Bridge the Gap v. Department of Energy, Docket No. CV-90-3568-ER (C.D. Cal. October 15, 1991), the court found that the DOE's policy on contractor records constitutes a substantive rule under the APA, and that the DOE's treatment of contractor records should be promulgated through formal notice and comment rulemaking. Subsequent to this ruling, the DOE codified its contractor records policy at 10 C.F.R. § 1004.3(e)(1), a regulatory provision that, as we discuss later, was adopted in accordance with the notice and comment requirements of the APA.

Case No. VFA-0393, 27 DOE ¶ 80,129

April 16, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Moore Brower Hennessy & Freeman, P.C.

Date of Filing: March 18, 1998

Case Number: VFA-0393

On March 18, 1998, Moore Brower Hennessy & Freeman, P.C. (Moore) filed an Appeal from a determination that the Idaho Operations Office (Idaho) of the Department of Energy (DOE) issued to Moore on February 19, 1998. That determination concerned a request for information submitted by Moore pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the DOE would be required to release all responsive documents to Moore.

I. Background

This case presents the issue of whether records generated under a contract between DOE and a management and operating (M&O) contractor are agency records under the FOIA, and if not, whether those records are nonetheless subject to disclosure under DOE's regulation on contractor records, 10 C.F.R. Section 1004.3(e).

In 1993, M-K Ferguson, then M&O contractor (1) of the Idaho National Engineering Laboratory (INEL), awarded a construction contract to Caddell Construction Company, Inc. (Caddell). Caddell then awarded a subcontract to PKM Steel Services, Inc. (PKM). Moore, a law firm representing PKM, made a FOIA request in November 1996 for the disclosure of certain records relating to the construction project. Letter from Moore to FOIA Officer, Idaho (November 29, 1996). Idaho, with the assistance of LMITCO, sent Moore copies of various responsive documents. On August 26, 1997, Moore requested additional records related to the project. In September 1997, Idaho, again assisted by LMITCO, released further responsive material to Moore. However, due to the volume of the records requested, Idaho and Moore agreed to an on-site inspection of the material. In late

January 1998, Idaho and Moore scheduled an on-site inspection of the remaining responsive documents to take place on February 25, 1998 at LMITCO's offices in Idaho.

However, prior to the inspection, LMITCO refused to cooperate with the disclosure of any additional documents. LMITCO informed Idaho that because PKM was in litigation(2) with LMITCO, LMITCO wanted to " shut down the FOIA process and disclose the requested documents under discovery in order to be fair to all the litigants against LMITCO." Letter from FOIA Officer, Idaho, to Valerie Vance Adeyeye, Staff Attorney, Office of Hearings and Appeals (OHA) (March 31, 1998) (Comment Letter). According to the FOIA Officer, LMITCO flatly refused to surrender the requested documents, which were in its physical control, and Idaho was unsuccessful in other attempts to obtain the records. *Id.* LMITCO also

alleged that Moore was using the FOIA to supplement discovery.(3) *Id.*

In its determination letter, Idaho stated that " [because] LMITCO has been brought into the litigation with Caddell and PKM as a third party defendant . . . , and because the documents that have been subject to your FOIA request are in the possession of LMITCO and are not in the possession or under the control of the DOE, DOE is unable to proceed with providing documents . . . pursuant to the FOIA." Letter from FOIA Officer, Idaho, to Moore (February 19, 1998) (Determination Letter). Moore appealed to this Office, arguing that the FOIA Officer submitted no legal foundation for the denial of the request and that, under the contract, the requested records were DOE property. Letter from Moore to Director, Office of Hearings and Appeals (OHA) (March 18, 1998) (Appeal). If granted, this Appeal would require Idaho to release all responsive records to Moore.

II. Analysis

The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in *United States Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). Even if contractor-acquired or contractor-generated records fail to qualify as agency records, they may still be subject to release under DOE regulations which state that:

"When a contract with DOE provides that documents acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government *or the contractor*, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)."

10 C.F.R. § 1004.3(e)(1) (*emphasis added*). *See also Dr. Nicolas Dominguez*, 27 DOE ¶ 80,117 (1998); *STAND of Amarillo, Inc.*, 26 DOE ¶ 80,162 (1997).

Based on the M&O contract between LMITCO and DOE, we find that the records requested are not agency records, but that they are still subject to disclosure under DOE regulations. LMITCO, a privately owned and operated corporation, is clearly not an "agency" as that term is defined in the FOIA. *See William Kuntz III*, 25 DOE ¶ 80,157 (1995) (establishing that LMITCO is not an agency for FOIA purposes). In addition, the records were not under agency control at the time of the FOIA request. Thus the records are not subject to disclosure under the FOIA. Nevertheless, we find that the records are the property of the government and therefore subject to disclosure under DOE regulations unless exempt under the FOIA. The contract between LMITCO and DOE provides, in pertinent part, that:

(a) ... [E]xcept as provided in paragraph (b) of this clause ... , all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government ... as the Contracting Officer may from time to time direct ....

(b) ... The following records ... are considered the property of the Contractor and are not within the scope of paragraph (a) above.

TO BE NEGOTIATED WITH MUTUAL AGREEMENT BETWEEN BOTH PARTIES DURING TRANSITION.

Contract NO. DE-AC07-94ID13223, Modification No. M0004, Section I.105.(4) Contracts between DOE and M&O contractors normally provide a detailed list of those records that are the property of the contractor. *See, e.g., Cincinnati Enquirer*, 26 DOE ¶ 80,205 (1997)*; STAND of Amarillo, Inc.*, 26 DOE ¶

80,162 (1997). The contract clearly states that all records acquired or generated in the performance of the contract are the property of the agency, unless specifically excluded. However, the contract has not identified any category of records as LMITCO property. Therefore, because the records that Moore requested are not identified in the contract as the property of LMITCO, we find that those documents requested are subject to disclosure under DOE regulations unless exempt under the FOIA. Since Idaho has already determined that the documents should be released to Moore, Idaho has no basis to now withhold the documents. As a DOE contractor, LMITCO knows that it is bound to comply with the agency's regulations, including § 1004.3(e), and cannot unilaterally elect to disregard them. *See* Contract No. DE-AC07-94ID13223, Modification No. M071 (August 3, 1994). The possibility that some of the documents may also be released through the discovery process to other parties in the litigation over the construction contract does not justify LMITCO's refusal to continue to make them available to Idaho in response to Moore's FOIA request.

It Is Therefore Ordered That:

(1) The Appeal filed on March 18, 1998, by Moore Brower Hennessy & Freeman, P.C., Case No. VFA-0393, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is remanded to the FOIA Officer of the Idaho Operations Office of the Department of Energy who shall make available all non-exempt portions of the requested material or issue a new determination adequately justifying continued non-disclosure of this information.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 16, 1998

(1)Lockheed Martin Idaho Technologies Company (LMITCO) succeeded M-K Ferguson as M&O contractor in 1994.

(2)In December 1996, PKM sued Caddell for damages arising from the construction contract. In early January 1998, Caddell filed a third-party action against LMITCO in the suit, alleging that M-K Ferguson and LMITCO were liable to Caddell if Caddell was liable to PKM. Appeal at 2.

(3)LMITCO's contention that Moore is using the FOIA to circumvent, displace, or supplement discovery in the litigation over the construction project is irrelevant to the present appeal.

(4)"Transition" refers to the period of the change in M&O contractors in 1994.

Case No. VFA-0394, 27 DOE ¶ 80,132

April 27, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Tamara L. Mix

Date of Filing: March 31, 1998

Case Number: VFA-0394

On March 31, 1998, Tamara L. Mix completed the filing of an Appeal from a final determination issued by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE) on February 18, 1998. (1) In its determination, OR informed Ms. Mix that it could not locate documents that were responsive to a request for information that Ms. Mix filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

BACKGROUND

During a February 1998 visit to the Oak Ridge Reading Room, Ms. Mix obtained a number of documents pertaining to community relations issues (such as land use and city planning) concerning the City of Oak Ridge and the Atomic Energy Commission (AEC) during the late 1940s. In her request for information (sent via electronic mail) dated February 13, 1998 (Request), Ms. Mix requested various additional documents concerning community relations between the AEC and the City of Oak Ridge (Oak Ridge community relations documents). These documents were referenced in the documents she had obtained earlier in the Oak Ridge Reading Room. She also requested Oak Ridge community relations documents concerning the decision on where to locate a particular neighborhood. (2) In a determination letter dated February 18, 1998, OR stated that it had no

responsive documents other than those which were provided to Ms. Mix in her earlier visit to the Oak Ridge Reading Room. In her Appeal, Ms. Mix challenges the adequacy of the search OR conducted for responsive documents.

ANALYSIS

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Dep't of State, 779 F.2d 1378, 1384-85 (8th Cir.

1985).

We contacted the FOIA Officer at OR to inquire as to the nature of OR's search for responsive documents. See Memoranda of telephone conversations between Amy Rothrock, FOIA Officer, OR and Richard Cronin, OHA Staff Attorney (April 16 and 17, 1998). She informed us that earlier in 1998, OR received a FOIA request from a different requester seeking similar documents. In response to that FOIA request, OR conducted a search at the National Archives facility at East Point, Georgia, the only facility known by OR to possess responsive documents. (3)OR copied and placed in its Reading Room all of the Oak Ridge community relations documents located at the National Archives facility. It provided these documents to Ms. Mix during her visit to the OR Reading Room. The FOIA Officer also informed us that to the best of her knowledge no other responsive community relations documents exist at OR or at the National Archives facility. In addition, she informed us that she is not aware of any other facility which might possess additional responsive documents.

Given the facts described above, we believe that OR's search was reasonably calculated to discover responsive documents. Pursuant to a similar prior request, OR searched the only facility it believes possesses responsive documents. OR provided Ms. Mix with all of the Oak Ridge community relations documents it discovered while responding to the similar prior request. Further, OR has no knowledge that responsive documents exist elsewhere. Because we find that OR's search was adequate, Ms. Mix's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tamara L. Mix on March 31, 1998, Case No. VFA-0394, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 27, 1998

(1)Ms. Mix's initial submission did not contain the required copy of the determination letter from which she appealed. See 10 C.F.R. § 1004.8(b). We deemed Ms. Mix's appeal filed upon our receipt of the determination letter on March 31, 1998.

(2)In the Request, Ms. Mix specifically requested the following documents: (1) the minutes from a April 1949 meeting with a Mr. Wadkins, AEC representatives and African-American community members referenced in Document No. ORF 16149; (2) the minutes from a meeting referenced in Document No. ORF 16141; (3) a mimeograph sheet referenced in Document No. ORF 3316; (4) documentation requested in Document No. ORF 33319; (5) a report requested in Document No. ORF 33328; (6) newspaper clippings referred to in Document No. ORF 16131; and (7) records concerning how the decision was made to site Neighborhood 10.

(3)The National Archives facility at East Point, Georgia, is the depository for inactive records created or received by Federal agencies located in several southern states including Tennessee.

Case No. VFA-0395, 27 DOE ¶ 80,128

April 15, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Nuclear Control Institute

Date of Filing:March 18, 1998

Case Number: VFA-0395

On March 18, 1998, The Nuclear Control Institute (the Appellant) filed an Appeal from two determinations issued to it by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge) and Oakland Operations Office (Oakland). These determinations were issued in response to requests for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that the withheld documents be released.

I. Background

This Appeal concerns two separate FOIA requests the Appellant originally filed with Oakland. The first request sought the minutes of three meetings among officials of DOE, Oak Ridge National Laboratories (ORNL) and contractors (the Minutes). Oakland referred this request to Oak Ridge. Oak Ridge issued a determination letter on November 14, 1997, withholding the Minutes in their entirety under the deliberative process privilege of Exemption 5. 5 U.S.C. § 552(b)(5).

The second request was for a document entitled "Plutonium Disposition Study--Implementation of Weapons Grade MOX Fuel in Existing Pressurized Water Reactors" (the Report). This request was filed with Oakland and Oakland issued the January 13, 1998 determination letter withholding the Report in its entirety under the deliberative process privilege.

On March 18, 1998, the present Appeal was submitted claiming that Oakland and Oak Ridge have improperly withheld the documents under the deliberative process privilege.(1) Specifically, the Appeal contends that the withheld documents: (1) are not intra- or inter-agency documents, (2) are not predecisional; (3) are not deliberative; and (4) contain segregable factual information that Oakland and Oak Ridge failed to release.

II. Analysis

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release.

Exemption 5 exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation

with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Among the privileges that fall under this exclusion is the executive or deliberative process privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In the present case, only the "deliberative process privilege" is at issue. The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for the deliberative process to shield a document, it must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

i. Whether the Withheld Materials are Inter- or Intra- Agency Documents

The Appellant claims that since the withheld documents were not created by agency employees, they are not inter- or intra-agency documents. It is well settled, however, that many documents generated outside of agencies are withholdable under the deliberative process privilege. In order to determine whether documents generated outside of agencies are part of the deliberative process, the courts have employed a functional test. Under this functional approach, opinions and recommendations generated by outside consultants are considered part of the deliberative process if they were created pursuant to agency initiative in order to assist the agency in its decision making. *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1123-23 (D.C. Cir. 1989).

The Report is clearly part of DOE's deliberative process. The Report was authored by DOE contractors hired by the agency to make recommendations concerning the agency's future policies on the use of mixed oxide fuels (MOX) in commercial nuclear reactors. Similarly, the Minutes were prepared by a DOE contractor employee in order to memorialize discussions intended to aid the DOE in determining the feasibility of using MOX in commercial nuclear reactors. While recognizing that documents prepared by DOE contractors can qualify for protection under the deliberative process privilege, the Appellant urges that we not extend deliberative process protection when the originator of the information has a direct interest in the outcome of a policy being considered. Appeal at 3. We are not convinced that such a rule is necessary. If we find that release of any information would benefit the public interest we can always release that information under 10 C.F.R. § 1004.1. The public interest is better served if we maintain the flexibility to apply the privilege when necessary. Moreover, the cases cited in the Appeal in support of this contention are inapposite. (2) The cited cases hold that documents submitted by adverse outside parties in the course of settlement negotiations with an agency are not part of the agency's deliberative process. (3) However, those cases are clearly distinguishable from the present case, where the originators of the documents were not adversaries, but were paid by the agency to provide it with advice and consultation, and were therefore participating at its request in the agency's deliberative process. In contrast, parties engaged in settlement negotiations are not participating in the agency's deliberative process. Instead, they are adversaries. Therefore, we reject the Appellant's argument and find that each of the withheld documents are intra-agency documents.

ii. Whether the Withheld Materials are Predecisional

The Appeal next claims that the withheld documents are not predecisional since they were not "created antecedent to a specific agency decision to which [they] relate[]." Appeal at 5. However, it is well settled that the existence of the deliberative process privilege does not turn upon the ability of the agency to identify a specific decision in connection with which a memorandum is prepared. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n. 18 (1975) (*Sears*). "Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions . . . ." *Id.* Since neither the Minutes nor the Report contain final agency decisions and since they are merely recommendations for further consideration, we find that they are properly classified as predecisional in nature.

iii. Whether the Withheld Materials are Deliberative

The Appeal asserts that substantial portions of the Minutes and the Report are not deliberative since they consist of "calculational results and technical conclusions." It is true that purely factual material is often not deliberative. *See, e.g., Formaldehyde Institute v. Department of Health and Human Services,* 889 F.2d 1118 (D.C. Cir. 1989).

However, the Appellant has misinterpreted the description of this material. In many instances, the calculational results and technical conclusions contained in the Minutes and Report are not factual in nature but rather are models and estimates and the opinions of technical experts. Much of the data contained in the Minutes and Report is unproven and unverified and is based upon experimental models, estimates and unproven assumptions. In this case, many of the computational results are far from fixed. Instead, they derive from a complex set of judgments, variables and assumptions. *See Quarles v. Department of the Navy*, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (holding that cost estimates are not factual in nature). These portions of the withheld documents are therefore deliberative in nature.

The preceding analysis indicates that the Report and the Minutes are intra-agency documents that contain predecisional and deliberative material. However, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The segregation and release of non-exempt material is not necessary when it is inextricably intertwined with the exempt material, such that release of the non-exempt material would compromise the confidentiality of the withheld material. *Lead Industries Association v. OSHA*, 610 F.2d 70, 83-86 (2d Cir. 1979). Nor is segregation necessary when the selection of the factual materials itself would reveal the agency's deliberative process if released. *See, e.g. Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774-76 (D.C. Cir. 1988).

Our review of the documents at issue reveals that portions of the documents are purely factual and should have been released. Yet these documents were withheld in their entirety. Consequently, we shall remand this matter to the Operations Offices. On remand, Oakland and Oak Ridge must review the withheld documents and segregate and release all purely factual portions of the documents, or explain why they should be withheld under other applicable privileges or exemptions.

iv. Other Considerations

Even though we have found that portions of the Report and Minutes are eligible for withholding under Exemption 5, our inquiry is not finished. The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. Yet, neither determination letter indicates that the Operation offices considered the public interest in disclosure. On remand, both Oak Ridge and Oakland should review the requested documents in order to determine whether their release would be in the public interest. If any of the requested information is still withheld on remand, new determination letters should explain why its release would not be in the public interest.

Moreover, it is the policy of the DOE with respect to Exemption 5 to withhold only information that, if released, would result in foreseeable harm to the interests that it protects. *See* FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeable harm basic institutional interests that underlie the exemption claimed). Neither determination letter articulates any foreseeable harm to the basic interests that underlie Exemption 5. Accordingly, each office (Oakland and Oak Ridge) must, on remand, consider whether release of any information it intends to withhold would result in foreseeable harm to the interests that are protected by Exemption 5.

III. Conclusion

For the reasons set forth above, we are remanding this matter to Oakland and Oak Ridge. On remand, the Operations Offices should segregate and release all non-deliberative material to the Appellant. Furthermore, Oakland and Oak Ridge should consider whether release of the withheld information would be in the public interest or result in foreseeable harm to interests that are protected by Exemption 5. If it is determined that release of withheld information would be in the public interest or would not result in foreseeable harm to interests protected by Exemption 5, and that the withheld information should not be withheld under a different FOIA exemption, it should then be released to the Appellant. Any information that would not be in the public interest to release or would result in foreseeable harm that is protectable under any FOIA exemption may be withheld. (4)

It Is Therefore Ordered That:

(1) The Appeal filed by The Nuclear Control Institute on March 18, 1998 is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Oakland and Oak Ridge Operations Offices for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 15, 1998

(1)1 The DOE's FOIA regulations require that an administrative appeal be filed within 30 calendar days of receipt of the determination letter. 10 C.F.R. § 1004.8(a). However, the Appellant was granted an extension of time in which to file the present Appeal. December 12, 1997 letter from George B. Breznay, Director, Office of Hearings and Appeals to Paul Leventhal, President, Nuclear Control Institute.

(2)2 *County of Madison v. Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981); *M/A-Com Information Systems, Inc. v. Department of Health and Human Services*, 656 F. Supp. 691, 692 (D.D.C. 1986); *NAACP Legal Defense and Educational Fund v. Department of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985); *Assembly of the State of California v. Department of Commerce*, 797 F. Supp. 1554, 1560 (E.D. Calif. 1992).

(3)3 Moreover, a division of opinion exists among the authorities on this issue. *See, Coastal States Gas Corp. V. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

(4)4 Each Operations Office must take care to segregate and release any non-exempt information. Moreover, if either office intends to continue withholding any information on remand it should be reminded that both the FOIA and the implementing DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). Conclusory and generalized claims explaining the withholding of material are not acceptable.

Case No. VFA-0396, 27 DOE ¶ 80,127

April 15, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.

Date of Filing:March 23, 1998

Case Number: VFA-0396

On March 23, 1998, Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. (Appellant), filed an Appeal from a determination issued to it on February 17, 1998, by the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE). That determination denied a request for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Decision and Order, we will consider whether the DOE must conduct a further search for documents responsive to the Appellant's FOIA request.

I. Background

On December 2, 1997, the Appellant filed a request under the FOIA with DOE's Federal Energy Technology Center (FETC) in which it sought documents related to Request for Proposal (RFP) No. A66343. The request included documents related to the bidding process as well as documents related to the contract that the Appellant presumed was awarded under the RFP. On January 21, 1998, FETC issued a determination to the Appellant. FETC stated that the contract was being issued through RFFO and therefore the request was being forwarded to that office. On February 17, 1998, RFFO issued its determination, stating that it could not locate any responsive documents. On March 23, 1998, the Appellant filed the present Appeal in which it contends that RFFO's search for documents was inadequate and that RFFO should search the records of the Rocky Flats site's management and operating contractor, Kaiser-Hill Company (Kaiser-Hill), and release any responsive documents it locates.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require

absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted RFFO to determine how the search had been conducted. We learned that RFP No. A66343

was originally issued by a contractor, MSE, under the auspices of FETC, in order for MSE to hire a subcontractor to perform installation services at the Rocky Flats site. However, no contract was ever awarded because of internal DOE issues that arose between RFFO and FETC. Therefore, there are no documents concerning any awarded contract for RFP No. A66343. Moreover, RFFO possesses no responsive documents because it never performed oversight functions for the RFP at issue. The DOE entity overseeing this RFP was FETC, not RFFO. See Record of Telephone Conversation between John Drager, Office of Chief Counsel, RFFO, and Dawn L. Goldstein, Staff Attorney, OHA (March 31, 1998).

The Appellant also asserts that Kaiser-Hill possesses responsive documents. We learned that although Kaiser-Hill possessed no responsive documents as of the request date, it came into possession of some responsive documents afterwards. See Record of Telephone Conversation between John Drager and Dawn L. Goldstein (April 1, 1998). Under the FOIA, the search RFFO was required to conduct was only for documents possessed as of the date of the request. See Thomas P. Koenigs, 26 DOE ¶ 80,131 at 80,576-77 (1996). In light of the scope of RFFO's search and its explanation that it did not oversee the RFP at issue, we find that its search was adequate. However, if the Appellant wishes, it may file a new request with RFFO for documents Kaiser-Hill received after the date of the Appellant's request.(1)

It Is Therefore Ordered That:

(1) The Appeal filed by Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. on March 23, 1998, Case Number VFA-0396, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 15, 1998

(1)*/ As the overseeing DOE entity for the RFP at issue, the Federal Energy Technology Center, possesses records which are responsive to the portions of the request concerning the bidding process. See Record of Telephone Conversation between John Drager, Office of Chief Counsel, RFFO, and Dawn L. Goldstein, Staff Attorney, OHA (March 31, 1998); Record of Telephone Conversation between Ann C. Dunlap, FOIA Officer, FETC, and Dawn L. Goldstein (March 24, 1998); Record of Telephone Conversation between Mary Hammack, FOIA Officer, RFFO, and Dawn L. Goldstein (March 23, 1998). FETC has recently issued a second determination to the Appellant regarding only these records, which is not the subject of this Appeal. See Record of Telephone Conversation between Ann Dunlap and Dawn L. Goldstein (April 1, 1998).

Case No. VFA-0397, 27 DOE ¶ 80,134

April 30, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eva Glow Brownlow

Date of Filing: March 23, 1998

Case Number: VFA-0397

On March 23, 1998, Eva Glow Brownlow filed an Appeal from a determination issued to her on March 5, 1998, by the Albuquerque Operations Office (AL) of the Department of Energy. That determination concerned a request for information that Ms. Brownlow submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, AL would be ordered to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 5, 1997, Ms. Brownlow filed a FOIA request seeking copies of several documents related to a Reduction-in-Force (RIF) Exercise that AL conducted in September 1997. Ms. Brownlow specifically requested, *inter alia*, a copy of the RIF notice which would have been mailed to her as part of a RIF exercise and documents regarding her standing on a Retention Register prepared in anticipation of a RIF. See Determination Letter at 1. In its March 5, 1998 determination letter, AL identified one document responsive to Ms. Brownlow's request. (1) AL located a Retention Register that was applicable at the time of the RIF exercise. A Retention Register is a listing based on the records of current employees who are in the same competitive level, i.e. job title, series and grade, and is prepared in anticipation of a RIF. AL withheld this document in its entirety pursuant to Exemption 5 of the FOIA. The Determination Letter further stated that because a RIF

was never ordered by the DOE, the requested information is considered predecisional in nature and protected by Exemption 5. Id. at 1. The Determination Letter also concluded that the release of the document would not be in the public interest.

On March 23, 1998, Ms. Brownlow filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Brownlow asserts that AL has not explained how the release of the Retention Register would harm the government's decision-making processes. Additionally, Ms. Brownlow argues that DOE Headquarters has previously provided selected RIF exercise information to its employees, "some

or all of which was certainly predecisional." See Appeal Letter at 2. Further, Ms. Brownlow asserts that AL has not demonstrated how the requested information would be "detrimental" to the public interest. Id. at 3. For these reasons, Ms. Brownlow requests that the OHA direct AL to release the requested information.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding the RIF exercise information, AL relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The document at issue is a Retention Register for those positions at AL that would possibly have been affected during a RIF exercise in September 1997. According to AL, on August 1, 1997, Deputy Secretary Elizabeth Moler advised all DOE offices "to take actions necessary to prepare for a RIF based on the House of Representatives appropriations mark-up to the DOE budget." Determination Letter at 1. The Office of Human Resources at AL prepared this Retention Register in anticipation of a RIF. See Memorandum of Telephone Conversation between Veronica Monthan, Chief of Employment, AL and Kimberly Jenkins-Chapman, Staff Attorney, OHA (April 9, 1998). However, AL has stated that its Manager requested an extension of the deadline for the issuance of RIF notices in order to "rework" the Retention Register. Memorandum of Telephone Conversation between Veronica Monthan, Chief of Employment, AL and Kimberly Jenkins-Chapman, Staff Attorney, OHA (April 23, 1998). Further, AL has indicated that it was awaiting approval of its extension request when the Deputy Secretary advised it that a RIF would not take place. Id. Thus, AL maintains that the Retention Register was not in its final form, but rather a draft document which was pre-decisional in nature. Id.

Given the facts presented to us, we find that the requested document is a pre-decisional, deliberative intra-agency document. It was created by AL officials in anticipation of a RIF that never occurred, consists of recommendations which reflect the consultative process and never reached its final form. It is well settled that draft documents, by their very nature, are pre-decisional and deliberative. This category of documents

has been afforded Exemption 5 protection because draft documents typically reflect "tentative views which might be altered or rejected upon further deliberation by the authors or by their superiors." Coastal States, 617 F.2d at 866; Committee to Bridge the Gap, 20 DOE ¶ 80,127 (1990). Consequently, we have determined that Exemption 5 was properly applied to the document at issue. However, a very small amount of segregable factual material, consisting of column headings, has been released to Ms. Brownlow.

In addition, Ms. Brownlow has argued that because some offices at DOE Headquarters have provided RIF information to their employees, AL should provide the same type of information to her. We find this argument to be unpersuasive. The fact that a DOE office has exercised its discretion to release similar documents outside of the FOIA process is not determinative of whether a particular document may properly be withheld pursuant to the FOIA and is irrelevant to this Appeal. See Dennis Kirson, 26 DOE ¶ 80,225 (1997).

III. Public Interest Determination

The DOE regulations provide that the DOE shall release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that AL properly applied Exemption 5 to most of the requested information, we must consider whether the public interest nevertheless requires disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

In the present case, the requested RIF exercise information consists of preliminary recommendations by AL Human Resource officials regarding which positions could be eliminated in the eventuality of a RIF. The release of this information would in our opinion have a chilling effect on the willingness of AL officials to make recommendations or voice opinions regarding a very sensitive issue potentially affecting the jobs of DOE employees. Employees and managers would be less likely to communicate their recommendations on this and similar issues if they knew or suspected that an agency would release their opinions to the public. Ms. Brownlow asserts that AL has not addressed how the release of the RIF information would not serve the public interest. However, AL officials have stated that, and we agree, the release of preliminary and therefore possibly inaccurate RIF exercise information could cause unnecessary confusion and distress among employees at AL. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard that the Attorney General articulated and that the release of the material contained in the requested information and protected pursuant to Exemption 5 would not be in the public interest. See Kirson, 26 DOE ¶ 80,225 at 80,869.

It Is Therefore Ordered That:

(1) The Appeal filed by Eva Glow Brownlow on March 23, 1998, Case Number VFA-0397, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 30, 1998

(1)Although Ms. Brownlow requested several documents pertaining to herself, AL has informed us that it has identified only one responsive document, the Retention Register, related to Ms. Brownlow's request. See Record of Telephone Conversation between Veronica Monthan, Chief of Employment, AL and Kimberly Jenkins- Chapman, Staff Attorney, OHA (April 9, 1998).

Case No. VFA-0398, 27 DOE ¶ 80,133

April 28, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: McGraw-Hill Companies

Date of Filing: March 31, 1998

Case Number: VFA-0398

On March 31, 1998, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received an Appeal filed by McGraw-Hill Companies (hereinafter referred to as "McGraw-Hill" or "the appellant") from a determination that the Office of Civilian Radioactive Waste Management (OCRWM) issued to it. The OCRWM issued this determination in response to a request for information that McGraw-Hill submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OCRWM to conduct a further search for responsive materials.

I. Background

In its FOIA request, McGraw-Hill sought access to any "correspondence and records of exchange between the [OCRWM], General Electric Co. and any other utilities or nuclear-related companies ... regarding the possible use of GE's Morris Operations facility ... for the interim storage of commercial utilities' spent fuel." FOIA Request at 1. In a letter to the appellant dated February 27, 1998, the OCRWM stated that it had searched its files and had found no documents responsive to McGraw-Hill's request.

In its appeal, McGraw-Hill claims that OCRWM has failed to conduct an adequate search. The appellant asserts that OCRWM personnel have met "on more than one occasion" with a representative of a waste transport company, and that there should be some record of those meetings. In addition, McGraw-Hill points out that if the DOE has contracted for any work on the subject of waste storage at the Morris facility, the contractor might possess responsive documents.(1)

II. Analysis

The FOIA requires that an agency "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (Truitt). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of files; instead, it requires a search reasonably calculated to uncover sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. The fact that the results of a search may not meet with the requester's expectations does not necessarily mean that the search was inadequate. Robert Hale, 25 DOE ¶ 80,101 at 80,501 (1995). Instead, in evaluating the adequacy of a search, our inquiry generally focuses on the scope of the search that was performed. See, e.g., Richard J. Levernier, 25 DOE ¶ 80,102 (1995).

We contacted OCRWM to ascertain the scope of the search for responsive documents that was performed. We were informed that the search included the Offices of Human Resources and Administration, Program Management and Integration and Waste Acceptance, Storage and Transportation. Furthermore, we were informed that OCRWM also searched for any memoranda or other documents referring to the correspondence and records of exchange requested by the appellant. See memorandums of April 24, 1998 telephone conversations between Robert Palmer, OHA Staff Attorney, and David Zabransky and Susan Showard, OCRWM. Based on the record in this case, we find that OCRWM's search was reasonably calculated to uncover sought materials and was therefore adequate.

We find the appellant's arguments to the contrary to be unpersuasive. As an initial matter, the fact that OCRWM personnel may have met with a representative of a waste transport company does not mean that records of those meetings exist or that any such records would be responsive to McGraw-Hill's request. Furthermore, we have been informed that the DOE has not entered into any contract for the use of the Morris facility for spent fuel storage. Id. Therefore, the record in this matter does not support the appellant's claim that responsive documents might be located in the files of a DOE contractor. For the reasons set forth above, we conclude that OCRWM's search for responsive documents was adequate, and that McGraw-Hill's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the McGraw-Hill Companies on March 31, 1998 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 28, 1998

(1)The appellant also implies that the OCRWM may have intentionally withheld responsive documents, stating that an unnamed representative of a "nuclear-related company" predicted to the appellant that no records would be found. Appeal at 1. In the absence of information concerning the identity of the representative, the circumstances surrounding the statement, and the representative's basis for making the statement, we attribute absolutely no weight to this implication.

Case No. VFA-0400, 27 DOE ¶ 80,131

April 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:FAS Engineering Incorporated

Date of Filings:March 23, 1998

Case Numbers:VFA-0400

VFA-0401

On March 23, 1998, FAS Engineering Incorporated (FAS) filed Appeals from two determinations that the Freedom of Information Act Official of the Idaho Operations Office (FOIA Official) of the Department of Energy (DOE) issued to it on February 12, 1998. In those determinations, the FOIA Official partially granted requests for information that FAS filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which the DOE has implemented in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In its requests for information, FAS sought all information relating to DOE Solicitations DE-PS07-97ID13520 and DE-PS07-95ID13349. In his determinations, the FOIA Official, pursuant to Exemption 5 of the FOIA, withheld in their entirety the “individual detailed application evaluations” for each bid solicitation. The FOIA Official also released seven other documents, but redacted information from six of them pursuant to Exemption 5 of the FOIA. In its Appeal, FAS requests that the DOE release all of the withheld and redacted information on the following grounds:

1. The law mandates prompt release of information normally available through civil discovery or litigation.
2. The DOE should release all of the names, resumes, and affiliations of all evaluators and decision makers.
3. The DOE should provide the complete text of evaluations and decisions.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted).

The courts have identified several privileges that fall under this definition. These privileges include the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The FOIA Official withheld in their entirety the “individual detailed application evaluations” for the two bid solicitations. We reviewed these evaluations and find that they contain some information that is both predecisional and deliberative pursuant to Exemption 5. However, these documents also contain segregable factual information, including “rating guidelines” and headings, that the DOE may not withhold pursuant to Exemption 5. Furthermore, many of the redacted documents also contain additional segregable factual information, such as headings and the names of DOE contractor employees. Unless the names of contractor employees are “inextricably intertwined” with exempt material, the DOE may not withhold these names pursuant to Exemption 5. The DOE has not sufficiently explained how these contractor names meet the requirements of the deliberative process privilege of Exemption 5. Finally, the DOE released portions of FAS’s bid proposals to FAS, but withheld from FAS other companies’ bid proposal information. Exemption 5 does not permit the DOE to withhold the proposal information it received from bidders since the information does not fall into the category of “inter-agency or intra-agency” documents. For these reasons, we will direct the FOIA Official to review all of these documents again and either release factual information, such as “rating guidelines,” headings, names of contractor employees and bid proposal submissions contained in these documents, or provide a detailed explanation for withholding any such information.

It Is Therefore Ordered That:

(1) The Appeals FAS Engineering Incorporated filed on March 23, 1998, Case Nos. VFA-0400 and VFA-0401, are hereby granted as set forth in paragraph (2) below, and are denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Official of the Idaho Operations Office of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 17, 1998

Case No. VFA-0402, 27 DOE ¶ 80,139

May 18, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kramer, Rayson, Leake, Rodgers & Morgan

Date of Filing: April 20, 1998

Case Number: VFA-0402

On April 20, 1998, Kramer, Rayson, Leake, Rodgers & Morgan (Kramer) filed an appeal of a determination that the Department of Energy's (DOE's) Office of Inspector General (OIG) issued to the law firm on November 25, 1997.(1) That determination denied a request for information that Kramer filed on August 22, 1997, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that OIG release responsive documents, if they exist, that were withheld under FOIA Exemption 7(C), 5 U.S.C. § 552 (b)(7)(C).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Kramer, a law firm, represents Lockheed Martin Energy Systems (LMES), the management and operating (M&O) contractor of DOE's Oak Ridge facility. On August 22, 1997, Kramer requested that DOE's Oak Ridge Operations Office release a copy of an investigative file regarding a named individual. Letter from Kramer to Jane Payne, FOIA Officer, OIG (August 22, 1997). The OIG responded that it could neither confirm nor deny the existence of records responsive to Kramer's request, and denied the request under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). Letter from Herbert Richardson, OIG, to Kramer (November 25, 1997). An agency's statement in response to

a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(2)

Kramer subsequently appealed OIG's determination. Letter from Kramer to Director, Office of Hearings and Appeals (April 6, 1998) (Appeal). According to Kramer, the individual, formerly employed by LMES' predecessor Martin Marietta Energy Systems, had charged LMES with malfeasance in the performance of its duties as M&O contractor. Kramer also argued that the individual had waived his privacy rights by litigating the claim. Id. If this Appeal were granted, OIG would be required to release the requested information, if it exists.

II. Analysis

This Decision and Order will focus on the propriety of OIG's determination of a privacy interest and OIG's use of the Glomar response in refusal to confirm or deny the existence of investigatory records concerning a third person. As detailed below, we will uphold both actions.

A. Exemption 7(C)

Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C), allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). Amendments to the FOIA in 1986 extended the protection of Exemption 7 to all records compiled for "law enforcement purposes." See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987).

OIG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that OIG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995).

B. The Balancing Test Under Exemption 7(C)

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980).

1. The privacy interest

An individual who files an official complaint alleging irregularities in DOE's operations has a privacy interest in being protected from possible retaliation. We have previously found that sources mentioned in OIG files have a strong privacy interest in remaining anonymous. See Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); James L. Schwab, 21 DOE ¶ 80,117 (1991). Indeed, the courts have recognized the possibility of harassment or intimidation of these sources, and have consistently found that privacy interests in the identities of individuals providing information to government investigators are greatly amplified. Safecard, 926 F.2d at 1197 (D.C. Cir. 1991), *cited in* Stoel Rives, LLP, 25 DOE ¶ 80,189 at 80,724 (1996). Therefore, unless that person has waived this privacy interest, he is entitled to protection from disclosure of his activities.

We find a cognizable privacy interest at stake in this case. Kramer argues that the named individual has "waived any possible claim of personal privacy" by: (1) offering into evidence in a federal court case a memorandum that accuses LMES of malfeasance in the performance of its functions as M&O contractor at Oak Ridge; and (2) by testifying in a deposition about conversations with representatives of OIG. Appeal at 2. Kramer attached to its Appeal an unsigned document purported to be a copy of the memorandum allegedly offered in evidence in the court case. However, we find that the unsigned document does not provide official confirmation that an OIG enforcement file or proceeding exists. Similarly, we do not

accept as confirmation of an official proceeding Kramer's vague allegations that the named individual testified in a deposition. We have previously stated that we cannot accept unsubstantiated allegations of official confirmation that an enforcement file or proceeding exists. See Keci, 26 DOE at 80,662. Therefore, we find that the individual retains a personal privacy interest in the requested material.

2. The public interest in disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. We have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). The Supreme Court has held that information which does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." Reporters Committee, 489 U.S. at 775.

Kramer claims that "there is an overriding public interest in the disclosure of the requested information." Appeal at 2. However, Kramer has neither explained what that public interest may be, nor provided any proof that the allegations were part of an official proceeding. Courts have held that unsubstantiated allegations of official misconduct do not establish a public interest in disclosure. See McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (allegations that agency is not doing its job do not create a public interest sufficient to override privacy interest protected by Exemption 7(C)); Triestman v. Department of Justice, 878 F. Supp. 667 (S.D.N.Y. 1995) (no substantial public interest in disclosure of information concerning possible investigation of law enforcement agent). Therefore, we find that the public interest in disclosure of unsubstantiated allegations of official misconduct is negligible, and is outweighed by the individual's real and identifiable privacy interest.

C. Disclosure of the Existence of Records Would Reveal Exempt Information

In reviewing this Appeal, we contacted employees of OIG to discuss the Glomar response to Kramer's FOIA request. According to OIG, that office originally believed that Kramer represented the named individual. However, when the OIG discovered that Kramer represented LMES, the OIG then followed its policy of refusing to confirm or deny the existence of records in response to a FOIA request when six factors exist.(3) See Memorandum of Telephone Conversation between Jackie Becker, Attorney, OIG and Valerie Vance Adeyeye, OHA Staff Attorney (April 23, 1998). In this case, OIG determined that the six factors existed and on that basis issued a Glomar response to Kramer's FOIA request. In order to use a Glomar response with Exemption 7, there must be a cognizable privacy interest at stake and insufficient public interest in disclosure to outweigh that privacy interest. See William H. Payne, 26 DOE ¶ 80,144 (1996). A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under Exemption 7(C) of the FOIA, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. FBI, 721 F.2d 615 (7th Cir. 1983); William H. Payne, 26 DOE ¶ 80,144 (1996).

We find that OIG's Glomar response to Kramer was justified. If OIG enforcement records involving the named individual exist, refusal to confirm or deny the existence of these records is proper under Exemption 7(C).(4) A Glomar response to such FOIA requests is necessary to protect the privacy rights of individuals whose identity may be revealed in an OIG investigation. By refusing to confirm or deny the existence of an enforcement file that mentions the named individual, OIG has properly protected that individual's privacy rights. Thus, we find that OIG was justified in providing a Glomar response to this request because the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Kramer, Rayson, Leake, Rodgers & Morgan on April 20, 1998, OHA Case No. VFA-0402, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 18, 1998

(1)Kramer requested that its appeal be accepted notwithstanding the fact that it was submitted outside of the time specified in the regulations for the submission of appeals. In the interest of administrative efficiency, OHA granted the request.

(2)“Glomar” refers to the first instance in which a federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents).

(3)When the following factors exist, OIG will issue a Glomar response: (1) the request is made by a third party; (2) the request is for information about a person identified by name; (3) the requested records, if they exist, would be contained in an enforcement file; (4) the named individual is not deceased; (5) the individual has not given the requester a waiver of his privacy right; and (6) there has been no official confirmation that an enforcement file or proceeding exists. See Keci Corporation, 26 DOE ¶ 80,150 at 80,660 (1996) (Keci) (quoting memorandum from Jackie Becker, OIG, to Linda Lazarus, OHA (November 27, 1996)).

(4)It is important to note that we could reach the same result by relying on those cases that hold that the names of private individuals appearing in an agency’s law enforcement files are “categorically” exempt from disclosure under Exemption 7(C). Safecard, 926 F.2d at 1205- 06.

Case No. VFA-0403, 27 DOE ¶ 80136

May 4, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Air-Con, Inc.

Date of Filing: April 7, 1998

Case Number: VFA-0403

On April 7, 1998, Air-Con, Inc., the Appellant, filed an Appeal from a final determination that the Idaho Operations Office (IO) of the Department of Energy (DOE) issued on March 17, 1998. In its determination, IO informed the Appellant that it could not locate documents responsive to a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

BACKGROUND

Because this Appeal involves a FOIA request for documents regarding a contract dispute between contractors at the Idaho National Engineering and Environmental Laboratory (INEEL), a DOE facility, a brief description of the entities involved in the dispute is given below. DOE contracted with Lockheed Martin Idaho Technologies Companies (LMITCO) to be the management and operations contractor for the INEEL facility. LMITCO subsequently contracted with Lockheed Martin Advanced Environmental Systems (LMAES) to construct remediation facilities and to environmentally remediate the Pit 9 area at INEEL. LMAES subsequently contracted with Kiewit Construction Co. (Kiewit) for construction of remediation facilities for Pit 9. Appellant then became a sub-contractor for Kiewit for the Pit 9 remediation facilities. Subsequently, LMAES terminated the contract with Kiewit for the Pit 9 remediation facilities. Kiewit then terminated its contract with the Appellant. After negotiations, Kiewit entered into a global settlement with LMAES for its claims regarding the termination of the contract as well as the claims of all of Kiewit's subcontractors, including the Appellant.

In a letter dated February 18, 1998 (Request), the Appellant submitted a FOIA Request to IO for all documents containing information regarding the contract termination settlement between LMAES and Kiewit. IO informed the Appellant in its March 17, 1998 determination letter (Determination Letter) that neither it nor LMITCO possessed documents responsive to the Request. Enclosed with the Determination letter was a copy of a letter from LMITCO to LMAES informing LMAES that LMITCO would not attend meetings regarding the termination costs of various LMAES

subcontractors and suppliers. In its Appeal, the Appellant challenges the adequacy of IO's search for responsive documents.

ANALYSIS

The FOIA requires that federal agencies generally release documents to the public upon request. Following

an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. NSA, 610 F.2d 824, 834 (D.C. Cir. 1979).

We contacted the FOIA Officer at IO to inquire as to the nature of its search for responsive documents. See Memorandum of telephone conversation between Carl Robertson, FOIA Officer, IO and Richard Cronin, OHA Staff Attorney (April 13, 1998). He informed us that IO contacted various IO contracting officials and none had any knowledge regarding the existence of responsive documents. He then contacted LMITCO which subsequently conducted a search of its offices. LMITCO informed the FOIA Officer that it had no responsive documents and that LMAES alone conducted the settlement negotiations with Kiewit. While the FOIA Officer believes that LMAES likely possesses responsive documents, he also believes that any documents LMAES possesses are not agency records subject to the FOIA.

In reviewing the adequacy of IO's search, we must now consider whether responsive documents which might be possessed by LMAES are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. (1) In addition, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that any responsive documents that LMAES possesses are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as LMAES, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997) (LASG). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See LASG, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). In making the determination whether an entity is an agency for purposes of the FOIA, the Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 180 & n. 11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, the DOE has no contractual relationship with LMAES. Further, the DOE does not supervise LMAES's day-to-day operations. We therefore conclude that LMAES is not an "agency" subject to the FOIA.

Although LMAES is not an agency for the purposes of the FOIA, its records relevant to the Appellant's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time the Appellant made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989). In this case, none of the potentially responsive documents was in the DOE's control or possession at the time of the Appellant's request. Based on these facts, the documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1). However, in the present case, the DOE does not have a contractual relationship with LMAES. Consequently, this regulatory provision would not apply to any responsive documents LMAES might possess.

Given the facts described above, we believe that IO's search was reasonably calculated to discover responsive documents. IO searched its offices and LMITCO's offices and did not locate responsive documents. While LMAES might possess responsive documents, such documents are not subject to the FOIA or to the DOE policy on contractor records described in 10 C.F.R. § 1004.3(e)(1). Because we find that IO's search was adequate, the Appellant's submission will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Air-Con, Inc. on April 7, 1998, Case No. VFA-0403, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 4, 1998

(1)For the purposes of this analysis, we will assume that LMAES possesses settlement documents responsive to the Appellant's Request.

Case No. VFA-0404, 27 DOE ¶ 80,137

May 8, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant:Francis M. Kovac

Case Number: VFA-0404

Date of Filing: April 9, 1998

On April 9, 1998, Francis Kovac of Oak Ridge, Tennessee, filed an Appeal from a determination issued on March 5, 1998, by the Oak Ridge Operations Office (Oak Ridge Operations) of the Department of Energy (DOE). That determination denied Mr. Kovac's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that agency records held by a covered branch of the federal government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). This Appeal, if granted, would require Oak Ridge Operations to conduct another search of its files for responsive information.

BACKGROUND

Mr. Kovac is a Councilman for the City of Oak Ridge, Tennessee. On February 12, 1998, Councilman Kovac submitted a handwritten note to Oak Ridge Operations requesting “a copy of any data showing the U.S. Department of Energy paid money directly or reimbursed” seven specified individuals. On March 5, 1998, Oak Ridge Operations responded that a search of the files in its control and possession revealed only one responsive document. However, no documents accompanied the determination letter, and in fact that letter set forth the procedures for appealing a determination in which the DOE stated that no responsive documents existed. Oak Ridge Operations claims that the language in the letter was a

mistake. It reaffirmed to both Councilman Kovac and this Office that there were no responsive documents.

Councilman Kovac challenges the adequacy of the Oak Ridge Operations search. In support of his claim that the search was insufficient, Councilman Kovac submitted photocopies of requests for payment or reimbursement that a DOE contractor made to Oak Ridge Operations. Some of the names that Councilman Kovac listed in his present FOIA request appear on those documents either as potential recipients of reimbursements or as signatories of the claim(s) for reimbursement on behalf of the DOE contractor.

ANALYSIS

Under the FOIA, in response to an appropriate request that reasonably describes the information sought and conforms to agency regulations, an agency must search its records and release responsive, unpublished, non-exempt information that it has created or obtained. 5 U.S.C. § 552(a)(3), (b); Department of Justice v. Tax Analysts, 492 U.S. 144-45 (1989); James L. Schwab, 22 DOE ¶ 80,127 at 80,558 (1992). A search that complies with the FOIA need not cover every corner of the agency. Oglesby

v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (and cases cited therein); Citizens' Action Committee of Pike County Citizens, 22 DOE ¶ 80,178 at 80,679 (1993). Rather, an adequate search under the FOIA need only be one reasonably calculated to uncover the documents requested. Kowalczyk v. Department of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996); Thomas Stampahar, 26 DOE ¶ 80,140 at 80,593-94 (1996). "An adequate search, however, must be 'a thorough and conscientious search for responsive documents.'" Energy Research Foundation, 22 DOE ¶ 80,114 at 80,529 (1992) (quoting The Lowry Coalition, 21 DOE ¶ 80,108 at 80,535 (1991)).

We contacted Oak Ridge Operations to determine if it performed a proper search. Oak Ridge Operations informed us that it referred this search to its Finance Division, which is responsible for all disbursements. The Finance Division stated that it searched the Departmental Integrated Accounting System (DIAS) database. Among its functions, DIAS is the combined accounting and record keeping system that Oak Ridge Operations uses to make and track disbursements. A check of the DIAS accounts payable records for the seven names Councilman Kovac listed found no matches. Thus, it appears DOE made no direct payments to the seven persons who were the subject of this request.

Although the DIAS System only shows disbursements made by DOE, at our request, Oak Ridge Operations searched to determine whether there might be records from DOE contractors showing disbursements to its employees, consultants, or subcontractors. Oak Ridge Operations stated that it does have forms from at least some contractors that deal with either requests for reimbursement or financial status, and that these forms may list some names of individuals who were part of the contractor’s claim for reimbursement. These seem to be the forms that Councilman Kovac submitted on appeal but which were not available to Oak Ridge Operations during its original search. Oak Ridge Operations informed us that if Councilman Kovac submits a new FOIA request matching the names of individuals to the DOE contractor(s) he believes may have submitted requests for reimbursement, it will attempt to search its records for any potentially responsive documents.

We believe that given the state of the information before it at the time of its search, Oak Ridge Operations made a satisfactory attempt to satisfy Councilman Kovac’s request. Therefore, we find that the Oak Ridge Operations search was conscientiously performed, was reasonably calculated to reveal the records Councilman Kovac sought, and satisfies the requirements of the FOIA. Cf. Archie M. LeGrand, Jr., 25 DOE ¶ 80,171 at 80,681 (1996). Accordingly, Mr. Kovac's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Francis M. Kovac of Oak Ridge, Tennessee, OHA Case No. VFA-0404, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 8, 1998

Case No. VFA-0405, 27 DOE ¶ 80,135

April 30, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Diane C. Larson

Date of Filing: April 14, 1998

Case Number: VFA-0405

This decision concerns an Appeal filed on April 14, 1998 by Diane C. Larson (Appellant). The Appellant submitted a request for information to the Department of Energy's (DOE) Office of Inspector General (IG) seeking copies of an IG case file (Case File No. I96RS154) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Determination Letter at 1. On March 16, 1998, the IG issued a determination in response to this request, redacting the names of individuals and other identifying information from five of the six documents it provided to the Appellant. On April 14, 1998, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Only Exemptions 6 and 7(C) are at issue in the present case.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding based on either civil and criminal statutes. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is therefore a classic example of an organization with a law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the

record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 109 S. Ct. 1468, 1481 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in Office of Inspector General investigations, which in this case includes reprisal complainants, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 1. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab,* 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990).

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we once again find that the identities of the individuals were properly withheld under Exemptions 6 and 7(C). *See, e.g., Tod Rockefeller*, 26 DOE ¶ 80,238 (1997).

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. By releasing the responsive document with only those redactions necessary to prevent identification of specific individuals, which is what has been done here, the agency can provide as much information as possible while safeguarding individual privacy rights.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Diane C. Larson on April 14, 1998 (Case Number VFA-0405) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the

requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 30, 1998

Case No. VFA-0406, 27 DOE ¶ 80,140

May 18, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant: James E. Minter

Case Number: VFA-0406

Date of Filing: April 17, 1998

On April 17, 1998, James Minter of Knoxville, Tennessee, filed an Appeal from a determination issued on March 12, 1998, by the Albuquerque Operations Office (Albuquerque Operations) of the Department of Energy (DOE). That determination denied Mr. Minter's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.(1)

The FOIA requires that agency records held by a covered branch of the Federal Government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

On December 13, 1997, Mr. Minter filed a FOIA request with Albuquerque Operations, Transportation Safeguard Division. In considering the request, Albuquerque Operations determined that Mr. Minter wanted to know whether the DOE paid a particular DOE employee overtime for physical fitness activity while on specified days of official travel. Physical fitness is apparently a requirement for some DOE jobs. Albuquerque Operations identified two documents as responsive to Mr. Minter's request. One was the employee's time card showing the hours worked for the relevant period. The other was his trip report of activities for the requested time period. On March 12, 1998, Albuquerque Operations issued a determination letter in which it asserted that any responsive documents were shielded in their entirety by Exemption 6 of the FOIA, which protects personal privacy. Mr. Minter appeals this decision claiming that no harm to an important interest will result from disclosure of the requested information, and that the agency failed to segregate and release non-exempt material.

ANALYSIS

Exemption 6 permits an agency to make a discretionary withholding of information that must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §

552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered by Exemption 6, an agency must balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991); Department of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 762 (1989); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991).

First, we find that the documents Albuquerque Operations correctly identified as responsive to this request, trip reports of activities and time cards for hours worked, clearly fall within Exemption 6's threshold requirement that the records be "personnel and medical and similar files." Under the Supreme Court's expansive view of this phrase, Exemption 6 extends to "detailed Government records on an individual which can be identified as applying to that individual." Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (quoting H.R. Rep. No. 89-1497, at 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428). Both the trip reports and the time cards identifiably relate to the particular person on whom Mr. Minter seeks information.

After determining that Exemption 6 applies to this type of information, we advance to the second part of the Exemption 6 test. This second part has three prongs. For each type of information withheld, we must identify the relevant privacy interest for the concerned individual, and the relevant public interest in release, and then balance these two competing interests.

One of the basic principles underlying the FOIA is that, "[t]he public has a significant, enduring interest in remaining informed about actions taken by public officials in the cause of their duties." New England Apple Council v. Donovan, 725 F.2d 139, 144 (1st Cir. 1984). For this reason,

[a]s a general matter, there simply is no privacy interest in material stating or describing a federal employee's official actions or duties ?unless the work somehow reveals something personal or private about the individual . . . or there is some other special circumstance (for example, a reasonable, articulable belief that the person could be subject to harassment. . .).'

Mary Feild Jarvis, 26 DOE ¶ 80,190 at 80,787 (1997) (quoting The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 70,769 (1996) (citations omitted)). See also William H. Payne, 25 DOE ¶ 80,190 at 80,727 (1996). This rule applies to work performed both at and away from the federal employee's regular duty station. Thus, at the least, as long as the activity is part of his or her official functions and is performed while on official duty time, a federal employee cannot claim a zone of privacy even if the activity takes place away from a government site or on "overtime." In this case, the trip report, including the description of overtime work, falls into this general rule.

The same general standard outlined above for official duties of federal employees also applies to the aggregate amount of time spent working as a government employee. We have held that there is no privacy interest in the amount (as opposed to the type) of leave-time federal employees use. Marlene Flor, 26 DOE ¶ 80,104 at 80,511 (1996). See also Dobronski v. Federal Communications Comm'n, 17 F.3d 275, 279 (9th Cir. 1994) (records of dates and times of federal employee sick leave non-exempt because of small privacy interest and large public interest in that case); Jafari v. Department of the Navy, 728 F.2d 247, 249 (4th Cir. 1984) (records of reservist attendance at military duties to employer are unrelated to "official nature of those absences; []or to any reason that may have been assigned to [those absences]," and thus their release is not a clearly unwarranted invasion of personal privacy). If there is no privacy interest in the aggregate amount of leave-time used by federal employees, it follows that there usually is no privacy interest in the aggregate amount of time spent performing official functions. Rather, this is simply another facet of the general rule that federal employees ordinarily lack a privacy interest in their official duties. Thus, when the agency seeks to withhold on privacy grounds the aggregate amount of time spent on official duties by its employees, it can do so only when the release of the material would reveal something personal or private about a person or would implicate other special circumstances. See also Greenpeace U.S.A., Inc. v. Environmental Protection Agency, 735 F. Supp. 13, 14 (D.D.C. 1990) (record showing official attendance of EPA employee at public meeting not withholdable under FOIA Exemption 6);

American Fed'n of Gov't Employees v. National Aeronautics and Space Admin., 482 F. Supp. 281, 282-83 (S.D. Tex. 1980) (daily sign-in sheet is not protected by Privacy Act because it is not "in and of itself, reflective of some quality or characteristic of an individual").

In this case, Albuquerque Operations did not explain the privacy interest it identified and how it fits into the standard articulated above for either of the responsive documents it withheld. Accordingly, we will remand this case to Albuquerque Operations to either release the withheld material or issue a new determination. In the event it continues to withhold the information, Albuquerque Operations must either explain the application of a different exemption or explain the privacy interest in this material as outlined in this Decision. Even if it does find some privacy interest, before it may withhold the information Albuquerque Operations must identify any public interest in release and determine that on balance the privacy interest outweighs the public interest. In addition, if Albuquerque Operations withholds any material, it must segregate and release any non-exempt information.(2)

It Is Therefore Ordered That:

(1) The Appeal filed by James Minter of Knoxville, Tennessee, OHA Case No. VFA-0406, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Albuquerque Operations Office to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the alleged agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 18, 1998

(1)Mr. Minter also cited the Privacy Act as a basis for both his original request for information and for this Appeal. The Privacy Act, insofar as it is relevant to this case, only applies to "access to record[s] or to any information pertaining to [the requester] which is contained in the system [of records]." 5 U.S.C. § 552a(d). In his request, Mr. Minter seeks information about a person other than himself. Consequently, Albuquerque Operations correctly determined that only the FOIA applied to his request.

(2)In this case, it is possible there may be additional responsive documents such as payroll records that show the payment of overtime. If these records exist, Albuquerque Operations should identify and analyze them in the same manner as described for the other identified documents discussed in this decision.

Case No. VFA-0411, 27 DOE ¶ 80,143

June 4, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:David E. Ridenour

Date of Filing: May 6, 1998

Case Number: VFA-0411

On May 6, 1998, David E. Ridenour completed the filing of an Appeal from a final determination that the Office of Inspector General (OIG) of the Department of Energy (DOE) issued on March 31, 1998. (1) In its determination, OIG withheld portions of six documents and did not provide copies of 18 other documents that were responsive to a request for information that Mr. Ridenour filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. BACKGROUND

In a request for information, dated November 28, 1997 (Request), Mr. Ridenour sought documents pertaining to his April 1997 complaint to OIG regarding DOE management misconduct. (2) In a March 31, 1998 determination letter (Determination Letter), OIG provided Mr. Ridenour with a list of 33 documents responsive to his request.(3) The Determination Letter stated that three documents (Document Nos. 4, 5 and 6) originated with other DOE offices and that these offices would provide Mr. Ridenour with a determination regarding those documents. The Determination Letter enclosed copies of six documents (Document Nos. 7, 8, 27, 29, 30 and 31) in their entirety. Redacted copies

of six other documents (Document Nos. 1, 2, 3, 22, 24 and 28) were also provided to Mr. Ridenour. The Determination Letter stated that information in Document Nos. 1, 2, 3, 22 and 24 was being withheld pursuant to Exemptions 6 and 7(C). The information withheld in these documents consisted of names and other information which could disclose the identity of certain individuals. The Determination Letter stated that the individuals mentioned in the documents were entitled to "privacy protections so that they will be free from harassment, intimidation and other personal intrusions" and that it would not be in the public interest to release the withheld material. Determination Letter at 1. Portions of Document No. 28 were withheld pursuant to Exemption 5. The Determination Letter stated Exemption 5's purpose was to protect the deliberative and consultative process of government and that the material withheld in that document consisted of an OIG agent's note containing "predecisional deliberative data which would have been subject to change." Id. With regard to the remaining identified 18 responsive documents, the Determination Letter stated that they would not be provided to Mr. Ridenour since those documents "were either written by you [Mr. Ridenour] or were provided by you and would already be in your possession." Id. at 2.

In his submission, Mr. Ridenour asserts several grounds for his Appeal. First, he claims that he should have been provided a determination regarding the three documents which were referred to other DOE offices. In this regard, Mr. Ridenour states that the time period for OIG's response pursuant to the FOIA

has elapsed. In addition, Mr. Ridenour argues that OIG was inconsistent in its release of material. Specifically, he states that while he was given redacted copies of two responsive documents which he authored in whole or in part (Document Nos. 22 and 24), he was not provided copies of 18 other responsive documents of which he was the author (Document Nos. 9-21, 23, 25, 26, 32 and 33). Mr. Ridenour also argues that other unidentified documents must exist since he was not provided a copy of several reports mentioned in Document No. 28. Mr. Ridenour also challenges the propriety of OIG's withholding of information from Document Nos. 1-3, 22, 24 and 28. Specifically, with regard to Document Nos. 22 and 24, Mr. Ridenour asserts that the withholding was inappropriate since he was the author of Document No. 22 and of an attachment to Document No. 24.

II. ANALYSIS

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

OIG informed us that when it received Mr. Ridenour's Request, it conducted a computer search of its files. Based upon this search, OIG identified two files which were most likely to contain responsive documents. One of the files was the investigation file pertaining to the complaint mentioned in the request. The other file was an investigation file pertaining to another complaint Mr. Ridenour filed later in 1997. OIG identified all responsive documents in each of the files in its Determination Letter. OIG informed us that all documents responsive to Mr. Ridenour's request would be located in these files and that it had no knowledge of any responsive documents that would exist in any other files. See Memorandum of telephone conversation between Pamela Langer, Counsel, OIG, and Richard Cronin, OHA Staff Attorney (May 18, 1998). Given the facts described above, we believe that OIG's search was reasonably calculated to discover responsive documents.

Mr. Ridenour's argument regarding the existence of other documents is unavailing. While Document No. 28 does reference other documents, OIG has informed us that some reports are not customarily retained in a closed investigative file if relevant portions were incorporated in other documents in the file. Consequently, all documents used in an investigation are not necessarily retained in their entirety in an OIG investigative file. See Memorandum from Pamela Langer, Attorney, OIG, to Richard Cronin, OHA Staff Attorney (May 13, 1998). In light of this information, we can not conclude that additional documents exist at OIG by virtue of the fact that they were mentioned in Document No. 28. Consequently, we find OIG's search to be adequate.

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted).

The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, the document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

OIG withheld portions of Document No. 28 pursuant to Exemption 5. The document, entitled "Agent's Notes," contains a list by date of an OIG agent's activities regarding Mr. Ridenour's complaint. The withheld information in the document appears to contain mostly factual, non- deliberative information. Exemption 5 does not protect the type of information withheld in Document No. 28. Consequently, we will remand this matter to OIG so that it may either release the withheld information or issue another determination explaining why the information may be withheld pursuant to the FOIA. (4)

C. Exemptions 6 and 7(C)

In five documents provided to Mr. Ridenour (Document Nos. 1-3, 22 and 24), OIG withheld the names, titles and other identifying information of individuals mentioned in these documents. Each of these documents was contained in the OIG investigatory file regarding Mr. Ridenour's April 1997 complaint.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be

expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3 (Exemption 6); Stone v. FBI, 727 F.Supp 662, 663-64 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (Ortiz) and cases cited therein. In the present case, OIG's actions in investigating Mr. Ridenour's complaint regarding alleged misconduct of a DOE management official were clearly within this statutory mandate and the documents at issue were created for a law enforcement purpose.

(1) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals mentioned in law enforcement files, whether they be suspects, witnesses or investigators. See, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990); Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897, 904 (D.C. Cir 1996) (Computer Professionals). Accordingly, we find that the individuals whose identities were withheld in this case have significant privacy interests in maintaining their confidentiality.

(2) Public Interest in Disclosure

In Reporters Committee, the Supreme Court found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's basic purpose. Reporters Committee, 489 U.S. at 772. The Court identified the basic purpose of the FOIA as "'to open agency action to the light of public scrutiny.'" Id. (quoting Department of Air Force v. Rose, 425 U.S 352, 372 (1976)). Therefore, the Court held that official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. Id. at 773. The Court further found that information about private citizens that is contained in government files but reveals little or nothing about an agency's own conduct does not further the basic purpose of the FOIA. Id. We note that, in Mr. Ridenour's initial request to OIG, he cited a public interest (for the purposes of a request for a waiver of fees) in enabling the public to understand how their government works regarding the oversight of management integrity and ethics. Letter from David E. Ridenour to GayLa Sessoms, Director, FOIA/Privacy Act Division (November 28, 1997). Assuming arguendo that this is the public interest to be served by release of the withheld names, such interest would be insubstantial. Names appearing in law enforcement files are generally not themselves very probative of an agency's behavior or performance. See SafeCard Services v. SEC, 926 F.2d 1197 at 1205 (D.C. Cir 1991). Such information would only serve a significant public interest if there is compelling evidence that an agency is engaged in illegal activity. Id. After examining the documents in

question, it is not apparent that release of the individuals' names and identifying information would contribute to the public's understanding of the DOE's behavior or performance in carrying out its duties. Nor is there compelling evidence before us of illegal activity. Thus, in the present case, we conclude there is little or no public interest in the disclosure of the names and identifying information withheld in the documents at issue in the present case.

(3) The Balancing Test

Because release of the individuals' names or other identifying information could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against little or no public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Consequently, we find that the OIG properly withheld the information redacted in Document Nos. 1-3, 22 and 24 under Exemptions 6 and 7(C).

Our conclusion with regard to Document Nos. 22 and 24 is not changed by virtue of the fact that Mr. Ridenour authored all or part of these documents. In considering this argument in an earlier case, we held that a requester's status as an author of requested documents is irrelevant to our review under the FOIA. W.F. Lawless, 13 DOE ¶ 80,109 at 80,540 (1985). Subsequently, the Supreme Court held that the "identity of the requesting party" has "no bearing on the merits" of a FOIA request with the exception of certain cases involving a claim of privilege. Reporters Committee, 489 U.S. at 771. Consequently, Mr. Ridenour's argument is without merit.

D. Failure of OIG to Issue a Determination Regarding Document Nos. 4, 5 and 6

Mr. Ridenour challenges OIG's failure to issue a determination regarding Document Nos. 4, 5 and 6 within the mandated deadline of 10 days as provided by the FOIA.(5) OIG, in its Determination Letter, stated that it had referred the documents to the DOE offices from which they originated so that those offices could issue Mr. Ridenour a determination.

With regard to Mr. Ridenour's argument, we find that we do not have jurisdiction to decide this issue. OHA jurisdiction in FOIA Appeals extends only to cases where

the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees . . . .

10 C.F.R. § 1004.8(a). As to Document Nos. 4, 5 and 6, no determination has been made by a DOE office. Consequently, until a determination is made regarding those documents, we have no jurisdiction to consider a FOIA Appeal concerning those documents. When Mr. Ridenour receives a determination regarding those documents, he may then submit an Appeal to us. (6)

E. OIG Failure to Provide Copies of Documents Authored by Mr. Ridenour

In his Appeal, Mr. Ridenour asserts that OIG was inconsistent in providing copies of only some of the responsive documents of which he was the author. Specifically, Mr. Ridenour states that he was provided two of the responsive documents (Document Nos. 22 and 24) he authored in whole or in part but was not provided the 18 other responsive documents he authored. With respect to this issue, OIG informs us that it generally does not provide copies of documents authored by a FOIA requester since the requester already has such documents in his or her possession. However, OIG did provide Document Nos. 22 and 24 to Mr. Ridenour because each document contained information not written by Mr. Ridenour. See Memorandum from Pamela Langer, Attorney, OIG, to Richard Cronin, OHA Staff Attorney (May 13, 1998).

We believe that OIG's policy regarding documents originating from a FOIA requester in most instances reflects the wishes of the requester. However, in this case, the requester apparently seeks copies of all responsive documents, even those he authored. We can find no provision of the FOIA that would permit an agency not to make a determination regarding such documents. Consequently, on remand, OIG should issue a determination regarding Document Nos. 9-21, 23, 25, 26, 32 and 33.

It Is Therefore Ordered That:

(1) The Appeal filed by David E. Ridenour on May 6, 1998, Case No. VFA-0411, is hereby granted in part as set forth in Paragraph (2).

(2) This matter is remanded to the Department of Energy's Office of Inspector General for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 4, 1998

Appendix A

Document No. Document

1. Cover of File jacket
2. Basic case information/computer record
3. Hotline Complaint form
4. Memo from Mahaley to Baker (6/6/97)
5. Office of Security Evaluation, Corrective Action Plan
6. Office of Oversite’s [sic] Rocky Flats Report
7. MOI by Berrett (6/11/97)
8. Berrett’s handwritten notes (6/11/97)
9. Copy of Security Officer Vacancy Announcement
10. Memo from Dalton to McCormick/Ridenour (1/13/97)
11. Letter to Dalton from Flats (3/25/97)
12. Memo to Ridenour from Rocky Flats (3/27/97)
13. Letter to Roberson from Ridenour (3/31/97)
14. Copy of position description for GS-15 Security Officer
15. Letter to Ridenour from Roberson (4/11/97)
16. Fax from Ridenour to “Linn Morain” (4/19/97)
17. Letter from Ridenour (unaddressed, undated)
18. Letter from Ridenour to “Lyn Moran” (4/14/97)
19. Same as #13
20. Same as #17
21. Letter from Ridenour (unaddressed, undated)
22. Fax from Ridenour to Pat Pinkey (5/21/97)
23. Letter from Ridenour to Pena (4/16/97)
24. Memo to INV from Layton (5/8/97)

25. Same as #21
26. Letter from Ridenour (unaddressed, undated)
27. Fax from Scherer to Childress
28. Agents Notes
29. Cover of File jacket
30. Basic case information/computer record
31. Hotline Complaint form
32. Ridenour's business card
33. Letter from Ridenour to OSC, OPM, and INV (11/11/97)

(1)Mr. Ridenour's initial submission did not contain the required copy of the determination letter from which he appealed. See 10 C.F.R. § 1004.8(b). We deemed Mr. Ridenour's appeal filed upon our receipt of the determination letter on May 6, 1998.

(2)In the Request, Mr. Ridenour specifically requested the following documents: (1) all unclassified documentation relating to his complaint; (2) a listing of the unclassified titles, dates and the office responsible for generating all classified documents regarding his complaint; (3) all unclassified reports regarding the status or disposition of his complaint; and (4) a listing of unclassified titles and dates for all classified reports concerning the status or disposition of his complaint.

(3)The 33 responsive documents OIG identified are listed in Appendix A.

(4)On remand, OIG may wish to consider if Exemption 6 and 7(C) would be applicable to some of the information originally withheld in Document No. 28.

(5)We note that the 10-day deadline was recently extended to 20 days with the enactment of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat 3048. See 5 U.S.C. § 552(a)(6)(A)(i). Nevertheless, Mr. Ridenour has not received a determination regarding Document Nos. 4, 5 and 6 within the 20 day deadline.

(6)If a requester does not receive a response at the end of the 20-day period, the requester may deem his administrative remedies as exhausted and has a right to a review in a district court of the United States. 5 U.S.C. § 552(a)(4)(B), (6)(A)(i), and (6)(C)(i); cf. Pollack v. Department of Justice, 49 F. 3d 115, 118-19 (4th Cir 1995) cert. denied, 516 U.S. 843 (1995) (case decided under prior 10 day deadline).

Case No. VFA-0412, 27 DOE ¶ 80,141

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

May 26, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Andrew Lee Fuller

Date of Filing: April 27, 1998

Case Number: VFA-0412

On April 27, 1998, Andrew Lee Fuller filed an Appeal from a March 24, 1998 determination of the Privacy Act Officer of the Office of Public Affairs of the Department of Energy's (DOE) Albuquerque Operations Office (Privacy Act Officer). The Privacy Act Officer issued that determination in response to Mr. Fuller's request for information filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The Appeal, if granted, would require the DOE's Albuquerque Operations Office to release the requested information.

Background

Mr. Fuller filed a request under the Privacy Act in which he sought copies of his complete personnel security file XXXXXXXXXXXXXXXXXX. He also requested all "background investigation documents," and all correspondence between DOE headquarters or DOE Albuquerque offices and the DOE Personnel Security Division. On February 11, 1998, the Privacy Act Officer provided 85 responsive documents XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXX Following these recommendations, the Privacy Act Officer requested that Mr. Fuller XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX Mr. Fuller. Since Mr. Fuller did not provide XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX the Privacy Act Officer denied this portion of Mr. Fuller's request. Mr. Fuller contends that the DOE cannot withhold any information it considered in making a determination regarding DOE clearance

issues.

Analysis

The Privacy Act requires, *inter alia*, that each federal agency permit an individual to gain access to information pertaining to him contained in any system of records the agency maintained. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information can be retrieved by using the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). Pursuant to the authority granted in XXXXXXXXXXXXXXXXXXXXX, the DOE regulations state that if a Privacy XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXX the Privacy Act Officer may ask the individual XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX.

Since the personnel security file XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX allows retrieval of information using the name of the individual, we find that it is a system of records pursuant to the Privacy Act. Also, we have confirmed that the appropriate DOE XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. See May 15, 1998 and May 18, 1998 Fax Transmissions from Jim Snyder, Albuquerque Operations Office, to Len Tao, Attorney, Office of Hearings and Appeals. Since Mr. Fuller failed to respond to the Privacy Act Officer's XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX the DOE had sufficient grounds to deny Mr. Fuller's request XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX Accordingly, we must deny Mr. Fuller's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Andrew Lee Fuller on April 27, 1998, Case Number VFA-0412, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1)(B), (g)(5). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 26, 1998

Case No. VFA-0413, 27 DOE ¶ 80,142

June 1, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gary S. Foster

Date of Filings: May 4, 1998

Case Numbers: VFA-0413

VFA-0414

VFA-0415

VFA-0416

VFA-0417

On May 4, 1998, Gary S. Foster (Foster) filed five Appeals with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to five determinations that DOE's Oak Ridge Operations Office (DOE/OR) issued to him on April 6, 1998. Those determinations concerned five requests for information that Foster submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeals were granted, DOE/OR would be required to conduct a further search for responsive material.

I. Background

Foster, according to his Appeals, is an employee at DOE/OR's Y-12 manufacturing facility who suffers from chronic beryllium disease. Foster contends that his disease was caused by exposure to beryllium that was used in Y-12 machining operations in the past. Letters from Foster to Director, OHA (May 4, 1998) (Appeals). On February 7, 1998, Foster submitted six FOIA requests to DOE/OR. In five of these requests, Foster asked for all documents relating to any beryllium transaction between DOE and any of the following five companies: Ceradyne, Cercom Quality Products, Loral American Beryllium (also known as Lockheed Martin Beryllium), General Ceramics (also known as National Beryllium) and Eagle-Picher. Letters from Foster to Amy Rothrock, FOIA Officer, DOE/OR (February 7, 1998). These companies supplied beryllium to DOE/OR for use in machining. In the sixth request, Foster asked for copies of DOE-required reports pertaining to beryllium that were generated by General Ceramics from 1949 through 1998. Id. DOE/OR promptly located material responsive to the sixth request, and forwarded those documents to Foster. However, DOE/OR could not find any responsive documents relating to the first five requests.

Letters from DOE/OR to Foster (April 6, 1998). On May 4, 1998, Foster filed the present Appeals, challenging the adequacy of DOE/OR's search with regards to his first five requests.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Truitt, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Glen Milner, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeals, we contacted DOE/OR to ascertain the scope of the search it performed for the responsive documents. The DOE/OR FOIA Officer informed us that, in response to an April 1997 discovery request stemming from litigation against the agency, all DOE/OR employees had searched for beryllium documents and forwarded all responsive material to the FOIA office. DOE/OR declassified the responsive documents and compiled them into a discovery response, a copy of which was sent to the DOE/OR public reading room. Upon receipt of Foster's request, the FOIA officer reviewed the index of beryllium documents in the reading room and released several documents that were responsive to the sixth request. In addition, the FOIA Officer informed us that she also searched 3 boxes of beryllium information located in her office awaiting indexing and transfer to the reading room.(1) Thus, according to the FOIA Officer, all offices in DOE/OR have disclosed any relevant beryllium documents in their possession. Memorandum of Telephone Conversation between Amy Rothrock, DOE/OR FOIA Officer, and Valerie Vance Adeyeye, OHA Staff Attorney (May 18, 1998).

We find that DOE/OR conducted a search reasonably calculated to uncover all beryllium-related documents in that office. All employees were directed to disclose relevant documents to the FOIA office in 1997, and these documents were sent to the reading room. The FOIA Officer did not request a new search because beryllium operations were discontinued at DOE/OR prior to 1997 and there have been no new beryllium-related transactions (and thus no new documents created) between DOE and the named companies since then. The FOIA Officer stated that she located the responsive material related to General Ceramics/National Beryllium in the reading room. Thus, it was reasonable for the FOIA Officer to search the public reading room for documents responsive to Foster's request. As stated above, the FOIA does not require an exhaustive search, only a reasonable one. On the basis of the facts provided above, we find that DOE/OR conducted a search reasonably calculated to uncover responsive documents. Accordingly, we must deny Foster's Appeals.

It Is Therefore Ordered That:

(1) The Appeals filed on May 8, 1998 by Gary S. Foster, OHA Case Nos. VFA-0413, VFA-0414, VFA-0415, VFA-0416, and VFA-0417, are hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 1, 1998

(1)These documents required more complex processing than the other beryllium-related material, and thus were still being processed at the time of Foster's request.

Case No. VFA-041927 DOE ¶ 80,144

June 8, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Applicant: Jones, Walker Waechter, Poitevent Carrère & Denègre, L.L.P.

Case Number: VFA-0419

Date of Filing: May 6, 1998

On May 6, 1998, Jones, Walker Waechter, Poitevent Carrère & Denègre, L.L.P., filed an Appeal from a determination issued by the Federal Energy Technology Center (FETC) of the Department of Energy under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. The firm sought from FETC, the original supervising entity, documents on the Mound Site Plume Treatment System contract at the Rocky Flats Environmental Technology Site. Before issuing the contract, FETC gave contract authority to the Rocky Flats Field Office (RFFO). FETC later transferred the firm's FOIA request to RFFO. During the appeal of RFFO's determination, FETC found responsive documents submitted before transfer of its authority. Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P., 27 DOE ¶ 80,127 at 80,564, n.* (1998).

In its March 31, 1998 determination letter, FETC withheld all documents under Exemption 4, which permits withholding of "trade secrets and confidential or financial information." 5 U.S.C. § 552(b)(4). FETC found that because RFFO had not let the new contract, release of the information could cause harm "to any future competition for the work." FETC informs us that RFFO recently awarded the contract. Because the factual predicate for the FETC determination no longer applies, we will remand this matter to FETC for a new determination. See STAND of Amarillo, Inc., 26 DOE ¶ 80,105 at 80,513 (1996).

It Is Therefore Ordered That:

(1) The Appeal filed by Jones, Walker Waechter, Poitevent Carrère & Denègre, L.L.P., is hereby granted, remanded to the Federal Energy Technology Center for a new determination, and denied in all other respects.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 8, 1998

Case No. VFA-0420, 27 DOE ¶80,146

June 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Goodell, Stratton, Edmonds & Palmer, L.L.P.

Date of Filing: May 22, 1998

Case Number: VFA-0420

On May 22, 1998, Goodell, Stratton, Edwards & Palmer, L.L.P., filed an Appeal from a determination issued on April 21, 1998, by the Department of Energy's Southwestern Power Administration (SWPA). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Appellant challenges the adequacy of SWPA's search for documents responsive to its request.

I. Background

On March 26, 1998, the Appellant requested from SWPA "any and all documents which reference anticipated frequency or time of use for all easements above Pensacola Dam along the Neosho/Grand River up to the Kansas line between elevation 750 and 760 ngvd [National Geodetic Vertical Datum, a standard used in the measurement of elevation from sea level]." Letter from N. Larry Bork, Goodell, Stratton, Edmonds & Palmer, L.L.P., to Marti Ayers, FOIA Officer, SPA (March 26, 1998). SWPA issued a determination on April 21, 1998, in which it stated that it had searched its records and located no documents responsive to the Appellant's request. Letter from Michael A. Deihl, Administrator, SWPA, to N. Larry Bork (April 21, 1998).

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

According to the Appellant, the federal government, through various agencies, operated the Pensacola Dam between November 1941 and September 1946, after which control was returned to an Oklahoma state agency. Letter from N. Larry Bork to Fred Romanski, National Archives (April 30, 1998). The

Appellant further asserts that, during the period of federal control, SWPA was responsible for the acquisition of flowage easements in connection with the operation of the dam.(1)

In responding to the Appellant's request, the SWPA FOIA Officer contacted the Realty Officer within SWPA's Division of Acquisition and Property, which was unable to locate any responsive documents. The Realty Officer subsequently informed the FOIA Officer that, "[s]ince disposition of land ownership records is based on disposition of the land, most likely the records related to those acquisitions were disposed of several years ago." Electronic mail from Linda Saults, Realty Officer, Division of Acquisition and Property, SWPA, to Marti Ayers, FOIA Officer, SWPA (May 11, 1998). Subsequent to the filing of the present Appeal, the SWPA FOIA Officer received responses from SWPA's Division of Engineering and Planning and Division of Scheduling and Operations indicating that neither division possessed documents responsive to the Appellant's request. Electronic mail from Ken Legg, Director, Division of Engineering and Planning, SWPA, to Marti Ayers (May 11, 1998); Electronic mail from Jerry Johnson, Director, Division of Scheduling and Operations, SWPA, to Marti Ayers (May 11, 1998). If responsive documents are still in the possession of SWPA, the divisions which the FOIA Officer consulted appear to us to be those within SWPA where such documents would likely be located.

SWPA also gave the Appellant access to the Federal Records Center in Fort Worth, Texas, authorizing the Appellant "to personally inspect and copy [SWPA] records pertaining to Grand Lake/Neosho River/Pensacola Dam, except documents and files, if any, identified as privileged attorney client communications." Letter from Laurence Yadon, Chief Counsel, SWPA, to Pete Scholls, Federal Records Center (March 31, 1998). The Appellant informed SWPA that his inspection revealed no documents responsive to his request.

We find that the search for responsive documents coordinated by the SWPA FOIA Officer extended to the Divisions within SWPA where she reasonably believed those documents would be located if those documents still exist and were in the possession of SWPA. We therefore conclude that SWPA's search was reasonably calculated to uncover the documents the Appellant sought. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Goodell, Stratton, Edwards & Palmer, L.L.P., Case Number VFA-0420, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 17, 1998

(1) Id. The functions of the SWPA were transferred from the Department of the Interior to the DOE upon the establishment of the DOE by the Congress in 1977. 42 U.S.C. § 7152(a)(1)(B).

Case No. VFA-0421, 27 DOE ¶ 80,152

August 11, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:International Brotherhood of Electrical Workers

Date of Filing:June 8, 1998

Case Number: VFA-0421

On June 8, 1998, the International Brotherhood of Electrical Workers (Appellant) filed an Appeal from a determination issued to it on March 26, 1998, by the Savannah River Operations Office (SR) of the Department of Energy (DOE).(1) In that determination, SR released various relevant records and withheld other information identified as responsive to the Appellant's July 30, 1997 Request under the Freedom of Information Act (FOIA). SR charged $226.90 for search and review. In an earlier determination, SR denied the Appellant's request for a fee waiver. This Appeal, if granted, would require the DOE to release the withheld information, conduct a further search, and order SR to either grant the Appellant a fee waiver or reduce the amount the Appellant has been ordered to pay for search and review costs.

The FOIA requires that agency records held by a covered branch of the federal government generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1. In addition, the FOIA and DOE regulations promulgated thereunder establish procedures for performing searches for, and waiving applicable fees for, information responsive to a request. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. § 1004.9.

I. Background

On July 30, 1997, the Appellant submitted a FOIA request to SR seeking the following nine items:

(1) a copy of any and all correspondence, memos, directives, electronic mail, etc., concerning the IBEW and [its] organizing activity generated by Wackenhut Services, Inc. (WSI) and/or the DOE Savannah River site since October 1996;

(2) a copy of any and all flyers, letters, brochures, buttons, training plans, videos and other data or material used by WSI to counter our efforts and the cost to produce or procure each item;

(3) a copy of the list of anti-Union consultants provided to WSI management by the DOE;

(4) a copy of the contract between WSI and the anti-Union consultants they retained including their names and addresses;

(5) a copy of the contract between WSI and the law firm retained to represent them during the organizing, election and post-election period;

(6) a copy of any and all documents showing each expense charged by the consultants and attorneys including salary, fees, per diem, travel, lodging, expenses, materials, etc.;

(7) a copy of any and all documents such as financial records, requests for expenditures, vouchers, payroll records, timecards, travel expenses, receipts, etc. for moneys spent for all supervisor training, [and] time spent on the clock by the "Vote No" Committee while influencing their co-workers and the employees during their "captive audience" anti-Union informational meetings with the supervisors;

(8) a copy of the request from WSI to DOE for employees' salary increases and /or bonuses for the current year and DOE's response granting same;

(9) a copy of any and all documents showing how all of the above costs were passed on to the DOE.

Letter from Appellant to Pauline Conner, Freedom of Information Act Officer, SR (July 30, 1997) (Request Letter).

In its Request Letter, the Appellant also requested a fee waiver. On August 4, 1997, SR determined that the Appellant was ineligible for a fee waiver. Letter from Pauline Conner to Appellant (August 4, 1997) (Fee Waiver Determination Letter). In a September 11, 1997 letter, SR estimated the cost of the search to be performed at $1,330.52. SR explained that it had, discretionarily, agreed to absorb 50 hours of search cost for Request Item 1, but added that the Appellant would still be required to assure SR that it would pay the total remaining estimated cost of $290.00. The Appellant responded in an October 6, 1997 letter that it would make that assurance, with the proviso that it expected the charges to be much less than estimated and that they expected a large volume of information to be released.

In its March 26, 1998 Determination Letter, SR released approximately 78 documents (362 pages) to the Appellant, and withheld or redacted approximately 35 documents, citing FOIA Exemptions 4, 5 and 6. The majority of the withheld documents at issue consist of legal billing records and expense reports. All of the withheld and released documents were listed in an attached document (list of Response Documents). SR further determined that some requested documents were not agency records. It also withheld some responsive videos but failed to state a reason for this withholding. SR charged the Appellant $226.90 for fees, including search and review costs. Letter from Greg Rudy, Authorizing Official, SR, to Appellant (March 26, 1998) (Determination Letter). On June 8, 1998, the Appellant filed the present Appeal in which it contends that SR's refusal to release withheld information was improper, SR's search was inadequate, and that SR should have granted the Appellant a fee waiver or alternatively reduced its fees. The Appellant is also appealing an earlier August 29, 1997 FOIA determination by SR of a different request.(2) Appeal Letter from Appellant to Director, Office of Hearings and Appeals (June 2, 1998) (Appeal Letter).

II. Analysis

A. Earlier Request

The Appellant failed to appeal the earlier August 29, 1997 determination within the thirty day regulatory deadline. See 10 C.F.R. § 1004.8(a). Normally, this Office would request that the Appellant submit a new request for that information and receive another determination. The Appellant could then appeal that determination in a timely manner. But since SR has agreed that no administrative or other interests will be harmed by allowing the Appellant to appeal the August 29, 1997 determination at this point, and we are obligated to issue a decision in any event on the appeal of the March 26, 1998 determination, we will consider the appeal of the earlier action as a matter of our discretion.

The August 29, 1997 determination was issued in response to a July 23, 1997 request for information. That request was for “a copy of the exact salary (not range) paid to each non-exempt employee by name and classification of those listed on the Excelsior list [enclosed] provided to the Union by WSI in February of this year.” SR responded that it was releasing one document but it possessed no other responsive documents. It stated that WSI, a DOE contractor, possessed responsive documents. SR found that these documents are neither agency records nor subject to release. SR determined that pursuant to its contract with WSI, WSI owns this information and it is therefore not subject to release under the contractor records regulation, 10 C.F.R. § 1004.3(e).

The Appellant asserted in its Appeal that all taxpayer-funded records are subject to release under the FOIA. This assertion is incorrect. Our threshold inquiry in FOIA matters is whether any of the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term “agency” under the FOIA). Records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that no responsive “agency records” exist at SR and that none of the records is subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as WSI, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595- 96.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. The Supreme Court ruled that for FOIA purposes, an organization will be considered a federal agency if its day-to-day operations are supervised by the federal government. Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Pursuant to its contract with the DOE, WSI is responsible for providing security at the Savannah River Site. While the DOE obtained WSI’s services and exercises general control over the contract work, it does not supervise WSI’s day-to-day operations. See Printout of Electronic Mail Message from Pauline Conner to Dawn Goldstein (June 15, 1998). We therefore conclude that WSI is not an "agency" subject to the FOIA.

Although WSI is not an “agency” for the purposes of the FOIA, its records could be considered "agency records" if the DOE obtained them and they were within the DOE's control at the time the Appellant made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). In its Appeal, the Appellant argues that Response Document 66, a letter from SR to WSI asking for responsive records, demonstrates that the DOE has or had possession of additional responsive records, thereby making them “agency records.” SR has informed us that contrary to the Appellant’s contention, WSI never turned over to the agency the records requested by SR in Response Document 66. See Record of Telephone Conversation between Pauline Conner and Dawn Goldstein (June 11, 1998). It therefore does not appear that DOE obtained or controlled the WSI records at issue. Consequently, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1) (DOE contractor records regulation). We therefore next look to the contract between the DOE and WSI to determine the status of the requested records. The relevant contract provision states “All personnel records relating to Contractor’s employees, including salary records, references, training records, performance or promotability appraisals, disciplinary actions, medical records, Employee Assistance Program records, or any other personnel related records, . . . generated or retained in the course of performance of this contract shall be the property of the Contractor. . . [emphasis in original].” Contract No. DE-AC09-93SR18292, Modification No. A011, Clause H.16. Since the Appellant requested salary records, SR’s August 29, 1997 determination that these records are owned by WSI and therefore not subject to the DOE contractor records regulation was correct.

B. Fee Waiver

Regarding the Appellant’s instant request for fee waiver, we note that this request is very similar to another fee waiver request it filed. See I.B.E.W., 26 DOE ¶ 80,153 (1997). In that case, we held that because the Appellant has a commercial interest in the requested material and the Appellant’s primary interest in the information is for the benefit of its membership, it is not entitled to a fee waiver. That earlier request for documents seeks material similar to that requested currently. Moreover, the Appellant has made the same arguments in favor of the fee waiver that we responded to in the earlier case. We see no reason to depart from our analysis set forth in that decision. Accordingly, we find that the Appellant is not entitled to a fee waiver.(3)

In its request and its Appeal, the Appellant requests that the agency calculate the difference between savings DOE could gain from stopping alleged fraud and the amount that the Appellant could hope to gain from exposing the alleged fraud, in order to justify its position that its interest is not primarily commercial. We note that the FOIA does not require this type of quantitative analysis. However, the FOIA does require an analysis similar to the one we performed in the earlier I.B.E.W. decision when we balanced the Appellant’s commercial interest against the identified public interest. See I.B.E.W., 26 DOE at 80,672. In that balancing, this Office found that disclosure of the requested information is primarily in the commercial interest of the requester. See 5 U.S.C. § 552(a)(4)(A)(iii). SR has made the same finding regarding the current request. See Letter from Pauline Conner to Appellant (August 4, 1997). Therefore, we find that SR correctly evaluated the public and commercial interests at stake, and this argument is not grounds for reversal.

C. Reasonableness of Fees

The DOE regulations provide for fees to be assessed to cover the “full allowable direct costs incurred” of responding to requests for information. 10 C.F.R. § 1004.9. Pursuant to the FOIA, the DOE has issued regulations "specifying the schedule of fees applicable to the processing of requests . . . ." 5 U.S.C. § 552(a)(4)(A)(i). Under this fee schedule, the DOE charges for manual searches at the salary rate(s) (i.e. basic pay plus 16 percent) of the employees making the search. 10 C.F.R. § 1004.9(a)(1). In addition, "[t]he DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure." 10 C.F.R. § 1004.9(a)(3).

The Appellant makes several arguments that the fees assessed in this case should be reduced. We reject each of these arguments. First, the Appellant argues that it should not be charged as a commercial use requester. The Appellant is incorrect. As we found in the earlier I.B.E.W. decision, the Appellant has a strong commercial interest in requesting this information. Therefore, it was properly classified as a

commercial requester.

Second, the Appellant argues that the amount of documents generated does not appear substantial enough to justify the $226.90 fee charged. The Appellant's complaint regarding the number of responsive documents received is not relevant to whether appropriate fees were charged. There can never be any assurance that a FOIA request will yield any releasable documents or that the requester will find the documents released to be useful. Fees are not charged because the requester may derive a benefit from the documents, but because the government expends money to process the request. See Association of Public Agency Customers, 25 DOE ¶ 80,200 at 80,749 (1996) (sixteen pages

released and $1,145.63 in fees found to be properly assessed); ITech, Inc., 25 DOE ¶ 80,169 at 80,678 (1996). In fact, DOE regulations specifically provide that fees will be assessed even if no responsive documents are located. 10 C.F.R. § 1004.9(b)(6). Here, the Appellant in fact received 362 pages. Moreover, SR discretionarily chose not to charge for the first 50 hours of search time for Request Item 1. Its charges were actually considerably less than SR estimated.

We contacted SR to determine how it calculated the fees charged to the Appellant. In this case, SR charged $167.04 for search time, based on 10 hours of search time by both clerical and non-clerical employees (for the remaining eight request items), $41.76 for two hours of review time, and $18.10 for photocopying charges. Given the size of the Appellant's request, the amount of search and review time was reasonable.(4)

Third, the Appellant asserts that it should not be charged for duplicates, heavily redacted pages (which the Appellant called "blank pages"), or non-responsive information such as Appellant- generated material. Regarding the Appellant's complaints regarding the duplicate pages, SR informed us that it photocopied all enclosures to responsive documents in an effort to be complete and to demonstrate that it was not hiding any responsive documents. See Record of Telephone Conversation between Pauline Conner and Dawn Goldstein (June 10, 1998). In addition, we note that it would have increased the review time spent, and thus the Appellant's fees, if SR had taken the time to search for duplicates. SR also heavily redacted some of the pages. By releasing the redacted version, we find that SR correctly showed to the Appellant the precise amount of redacted material, as is required under the Electronic Freedom of Information Act Amendments of 1996. 5 U.S.C. § 552(b). Therefore, the portion of the fees due to duplicate and redacted pages was reasonable.

With regard to the Appellant-generated material, we note that Item 1 of the Appellant's request asked for "any and all correspondence . . . concerning the International Brotherhood of Electrical Workers (I.B.E.W.) and [its] organizing activity generated by Wackenhut Services, Inc. (WSI) and/or the DOE Savannah River site since October 1996 [emphasis added]." SR explained to us that the Appellant-generated material was part of their correspondence files and therefore SR included the 80 to 90 pages of this material in its response. See Record of Telephone Conversation between Dawn Goldstein, Pauline Conner and Timothy Fischer, Office of Chief Counsel, SR (July 22, 1998). We find SR's inclusion of this material to be unreasonable because the Appellant's request specifically excluded this material. Further, it should have been fairly simple to remove these pages. Therefore, we are remanding this portion of the Appeal so that SR can reduce the amount it charged the Appellant for photocopying pages generated by neither SR nor WSI. The remainder of the fees that SR imposed in this case were proper.

D. Withholding of Videos

In its determination, SR withheld several videos responsive to Request Item 2 and informed the Appellant of the private entity from whom it could purchase copies. However, SR did not provide

in that determination its reason for withholding these videos. Both the FOIA and the DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents. See, e.g., Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Digital City

Communications, Inc., 26 DOE ¶ 80,149 at 80,657 (1997); 10 C.F.R. § 1004.7(b)(1). Those DOE regulations provide that a denial of records will contain the following: "A statement of reason for the denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement why a discretionary release is not appropriate." We are therefore remanding this portion of the Appeal for a further determination on this issue. (5)

E. Adequacy of the Search

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted SR to determine how it conducted the search for each item of the request. See Record of Telephone Conversation between Timothy Fischer and Dawn Goldstein (June 22, 1998). SR conducted a search of its own Office of Chief Counsel, Chief Financial Office (consisting of the Finance Division, Financial Evaluation Division and the Planning and Budget Division), the Contracts Management Division and the Office of Safeguards and Security (the program office having oversight responsibility for WSI). See Memorandum from Timothy Fischer to Dawn Goldstein (June 12, 1998); Record of Telephone Conversation between Donna Brown, Paralegal, Office of Chief Counsel, SR, and Dawn Goldstein (June 29, 1998). In addition, SR supervised a search of the following WSI offices: Environmental Protection Department, Accounting, Site Security Support Department, Zone Operations Training Department, Zone Operations, Office of Deputy Assistant General Manager for Administration, Dispute Resolution and Compliance, Security Programs and Projects Department, Training Department and Labor Relations. See Printout of Electronic Mail Message from Pauline Conner to Dawn Goldstein (June 12, 1998).

SR later informed us that it had mistakenly failed to search a file held by SR's Office of Chief Counsel which appears to be responsive to the July 30, 1997 request. The file consists, inter alia, of additional attorney invoices, invoices by the labor consultant, SR/WSI correspondence, National Labor Relations Board documents, settlement-related documents and a letter referred to in Response Document 6 from WSI's outside counsel, Mr. Savitz, to Ms. Lucy Knowles, attorney at SR's Office of Chief Counsel. SR is reviewing the contents of this file and plans to issue a determination regarding that file after this Decision is issued.(6) See Record of Telephone Conversation between Donna Brown and Dawn Goldstein (July 1, 1998). In addition, in its Appeal, the Appellant noted that an SR litigation manual was referred to Response Document 103 and asked that SR release the manual to it. Since the filing of this Appeal, SR has released the litigation manual to the Appellant.

Next, we will examine each of the request items for which the Appellant has made a specific argument regarding the adequacy of SR's and WSI's search.

1. Request Item 1

SR's search for Request Item 1, concerning correspondence and other documents pertaining to the union, generally appears to have been adequate. However, regarding WSI's search, the contractor has stated that it did not turn over documents responsive to Request Item 1 if it had already released these documents to the Appellant during the union drive. See Memorandum from B. Weber, Labor Relations, WSI, to Timothy Fischer (November 4, 1997) (WSI Response). This limitation was inappropriate. WSI is obligated to release responsive, DOE-owned, non-exempt documents that have been requested under the FOIA.

Therefore, we must remand this issue to SR so that WSI can conduct a complete search. SR must then determine whether, under the applicable ownership of records provision, DOE owns these documents.(7) If DOE owns these documents, SR must then determine whether these documents are exempt under 5 U.S.C. § 552(b), see 10 C.F.R. § 1004.3(e)(1), and whether WSI claims a privilege recognized under federal or state law and that there is a reasonable basis for that privilege claim. See 10 C.F.R. § 1004.3 (e)(2); Sangre de Cristo Animal Protection, Inc., 25 DOE ¶ 80,121 at 80,552 (1995). On remand, SR shall make a determination on these issues.

Also regarding Request Item 1, the Appellant stated that it had not received deposition transcripts referred to in some of the released records such as Response Documents 73 and 103. SR informed us, after a thorough search of the logical places for such transcripts, it does not possess them. Nor does WSI possess these transcripts. Instead, these documents are solely in the possession of WSI's outside counsel. See Record of Telephone Conversation between Timothy Fischer, Pauline Conner and Dawn Goldstein (June 29, 1998). Since the terms of the contractor records regulation do not include the records of a subcontractor, we find that the FOIA and 10 C.F.R. § 1004.3 do not apply to these records. Apart from the issues discussed above, WSI's search for Request Item 1 was adequate.

2. Request Item 3

It appears that the offices of SR that would logically possess the list of labor consultants were adequately searched. However, WSI's response to this item of the request was that it had no " ?anti- Union consultant' nor was any such list provided us by DOE." See WSI Response. WSI appears to object to the Appellant's description of the labor consultant ultimately hired by WSI, Mr. Sommerville, as an "anti-Union" consultant, and therefore WSI did not search for any documents relating to his hiring. We believe that SR should have consulted with the Appellant to ascertain whether the Appellant was indeed referring to a list containing Mr. Sommerville's name, or any other list containing names of labor consultants, and then notified WSI of this clarification. Cf. 10 C.F.R. §1004.4(c)(2). We shall therefore remand this portion of the Appeal for a further search by WSI.

3. Request Items 4 and 5

It does not appear that SR ever possessed a copy of either the WSI contract with the labor consultant, or the contract between WSI and the law firm it retained. It does appear that these records exist and are in the possession of WSI, notwithstanding WSI's response that it possesses no contracts with any "anti-union consultants." SR has also never determined whether either contract is subject to release under the DOE contractor records regulation, 10 C.F.R. § 1004.3. See Record of Telephone Conversation between Timothy Fischer and Dawn Goldstein (June 22, 1998). From our reading of the applicable ownership of records provision, WSI does not own these contracts. On remand, SR shall make a determination whether these contracts are subject to release under the DOE contractor records regulation.

4. Request Item 7

SR released no documents responsive to Request Item 7 pertaining to WSI expenditures on behalf of what the Appellant called the "Vote No" committee. WSI stated that it uses "no separate coding" to mark the time cards of employees who attended the training sessions referred to in the request. WSI also stated, "The Company did not knowingly pay for time spent by the voluntary committee referred to by the IBEW as the ?Vote No' committee and, as such, we have none of the documentation requested." See WSI Response.

Based on our review and in view of the way the Appellant formulated its request, we believe that DOE and WSI performed an adequate search for this item of the request. However, we suggest that the Appellant, with the aid of SR, formulate a new request that could be the basis for a further search. For instance, if the Appellant makes a new request for records pertaining to a specific period of time or

specific meetings prior to the union election, WSI may be able to find responsive records.(8)

5. Request Item 8

This item concerned WSI's request to SR for salary increases for WSI employees, and SR's response to this request. In its determination, SR explained that it released a responsive document to the Appellant on August 29, 1997 as a result of a previous FOIA request.(9) This document contains various tables and is entitled, "WSI-SRS 1997 Salary Increase Fund." In addition, SR explained that other responsive documents that WSI owned and possessed are not subject to release under DOE's contractor records regulation. Finally, in response to the instant FOIA request, SR released Response Document 32, "Calendar Year 1997 Salary Increase Chronology," of which a small portion was redacted, as discussed below.

The Appellant notes that several other salary-related documents are referred to in this chronology, none of which was released or listed in the Response Documents list. These documents include a November 25, 1996 proposal by WSI, another document submitted by WSI on December 18, 1996, a January 22, 1997 approval letter from DOE, proposed matrix guidelines submitted by WSI on February 19, 1997 and SR's approval of the matrices on February 20, 1997. It is unclear whether any of these documents are responsive to the Appellant's request. We suggest that the Appellant make a new request for each of these items. We nevertheless find that WSI's and SR's search was adequate for this item.

6. Request Item 9

This Office consulted with the Appellant in order to clarify what was meant by Request Item 9, which pertains to documents related to reimbursements by DOE to WSI for costs pertaining to the union election. The Appellant specified that this item was meant to include documents showing reimbursements by DOE to WSI for the following expenditures: labor consultant bills; law firm bills; the "Vote No" Committee (Request Item 7); and any other WSI expenditures on behalf of fighting the union organizing campaign later reimbursed by DOE. See Record of Telephone Conversation between Appellant and Dawn Goldstein (July 6, 1998). While DOE has released redacted versions of the law firm bills, it has not yet done so for the labor consultant's bills. As explained earlier, SR is currently making a determination regarding the releasibility of these bills. In addition, we have upheld the adequacy of WSI's and SR's search regarding Item 7. We are therefore remanding this portion of the Appeal in order that SR may issue its determination regarding the labor consultant's bills.

F. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). Exemption 5 is generally recognized as encompassing certain distinct privileges, including the attorney-client privilege, the attorney work- product privilege, and the governmental deliberative process privilege. Coastal States Gas Corp. v. DOE, 617 F.2d 854, 862 (D.C. Cir. 1980). In the present case, SR relied on the work-product privilege of Exemption 5 to withhold Response Document 56.

However, this document does not meet the threshold test of Exemption 5, that the document be inter-agency or intra-agency. This document was prepared by a Mr. Brian Weber, a labor relations employee (but not an attorney) for WSI. Mr. Weber prepared this document at the request of Mr. Savitz, WSI's outside counsel, so that Mr. Savitz could learn the facts regarding several issues in litigation before the National Labor Relations Board. We note that in William H. Payne, 26 DOE ¶ 80,161 at 80,698 (1997), this Office said that Exemption 5 could protect billing records generated by outside counsel and sent to a DOE contractor. However, in that case, we noted that the billing records at issue there were used by DOE

to monitor the litigation as part of its decision-making process and to determine whether it might be necessary to impose additional controls. Id. That is not the case here, since the DOE never obtained the document at issue. Thus, because DOE was not involved in preparing this document in any way, and it is not an inter-agency or intra-agency document, Exemption 5 does not apply and cannot be used to withhold it. We will therefore remand this issue so that SR may either release the document or determine that another exemption such as Exemption 4 justifies its withholding.(10)

G. Exemption 4

SR withheld several documents under Exemption 4, including the labor consultant's normal billing rates, a portion of Response Document 32 and portions of attorney invoices. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks). Clearly, a request for payment for services rendered, a labor consultant's normal rates and a document concerning salary increases are "commercial" within the meaning of Exemption 4. In addition, the information submitted by WSI was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of that Exemption. See Ronson Management Corp., 19 DOE ¶ 80,117 (1989). Moreover, we also consider the information submitted by the Savitz law firm to be obtained from a "person." See Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (term "person" includes partnerships (relying upon definition found in Administrative Procedure Act, 5 U.S.C. § 551(2))).

1. "Confidential" documents

In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; see also Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. Because the information at issue in this case was submitted as part of a contract between the DOE and WSI, this information is not considered to have been submitted voluntarily and is therefore considered "confidential" if it meets the test set out in National Parks. Cf. Nayar & Company, P.C., 23 DOE ¶ 80,185 at 80,710 (1994) (information submitted in response to request for proposal).(11)

a. The labor consultant's normal rates

SR explained that it withheld the labor consultant's rates as confidential business information pursuant to Exemption 4, not under the attorney-client privilege as the Appellant appears to believe. WSI's only statement regarding this issue was that the rates should be withheld as "proprietary information" under Exemption 4. See WSI Response. Both the FOIA and the DOE regulations require reasonably specific justifications for the withholding of documents or portions of documents, as discussed above. Thus, a FOIA determination that material should be withheld pursuant to Exemption 4 because its disclosure is likely to cause substantial harm must include the reasons for believing such harm will result to the competitive position of the person from whom the information is obtained. Larson Associated, Inc., 25 DOE ¶ 80,204 (1996); Milton L. Loeb, 23 DOE ¶ 80,124 (1993).

In this case, WSI could, but did not, provide any explanation as to why release of the rates would likely cause substantial harm to the competitive position of either it or the labor consultant. Alternately, SR could

provide an explanation why the release of specific information within the proposal would impair the government's ability to obtain necessary information in the future. See Critical Mass, 975 F.2d at 879. In making the latter determination, SR should keep in mind that conclusory allegations of harm do not suffice to protect information from disclosure under Exemption 4. Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (Westlaw, DCT database) (submitters are "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict"). Since neither SR nor WSI provided a reasonably specific justification, we are remanding this aspect of the Appeal so that SR may determine if adequate justification exists. In addition, if SR finds that it believes that this material should be released, it should consult with Mr. Sommerville and WSI on their views regarding this matter. See 10 C.F.R. § 1004.11(f). SR should then either release the withheld material or issue a new determination setting forth a specific explanation as to why Exemption 4 applies to the labor consultant's normal rates.

b. Response Document 32

SR released Response Document 32, the "Calendar Year 1997 Salary Increase Chronology," in response to Request Item 8. SR redacted a portion of the document pursuant to Exemption 4. As with the labor consultant's rates, SR failed to provide any explanation as to why this portion is exempt. We therefore shall remand this aspect of the Appeal so that SR can perform the type of analysis described in the proceeding section.

2. "Privileged" documents

Several of the withheld documents are invoices for legal fees incurred by WSI's attorneys. WSI forwarded the invoices to the DOE for payment in accordance with the provisions of the DOE's contract with WSI. SR withheld portions of these documents under the attorney-client privilege and the attorney work-product privilege. The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc. v. Department of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).(12)

SR released the rates billed for each item of service, the dollar figure shown for the total services rendered in the billing period, and the expenses charged on the bills prepared by the firm. SR also released in Response Documents 73 and 103 the identities of the partner, Mr. Savitz, who worked on this case, his rates for counseling and litigation, and the identity of the associate, Mr. Timothy O'Rourke, who worked on this matter. SR also released in Response Document 95 the fact that a paralegal would be working on this case and that person's rate. The withheld portions of the documents consist of the total amount of time spent by the firm on the case, the dates services were rendered, a description of the services rendered, the attorney who worked on the case, the amount of hours billed for each service, and the cost for each service. SR also withheld several invoices for travel expenses incurred by the attorneys.

Some withheld portions of the documents consist of information protected by the attorney work- product privilege or the attorney-client privilege. Specifically, those portions include descriptions of the legal services provided, the cost of each service and the amount of time spent by the attorneys in performing each service. The descriptions of the services provided reflect the legal theories and strategies of the attorneys. The time and cost figures reveal the relative importance attached to each task by the attorneys. For these reasons, we have previously determined that this type of information is subject to the attorney work-product privilege. C.D. Varnadore & Betty Freels, 24 DOE ¶ 80,123 at 80-557. We also note some of the Westlaw and Federal Express invoices were redacted to protect the attorney-client privilege of non-WSI clients of the law firms. We note that release of this information, since it is privileged attorney-client communication, would impair the ability of the government to obtain necessary information in the future. We also find that in applying each of the first four criteria listed in 10 C.F.R. § 1004.11(f) to the facts of this case, this information should remain withheld. We therefore reject the Appellant's contention that SR improperly withheld those portions of the invoices pursuant to Exemption 4.

However, we find that SR cannot properly withhold some of the information contained in the attorney billing invoices using either the attorney-client privilege or the attorney work-product privilege. In addition to the information already disclosed, that information includes the total time on the matter spent by the firm within the given billing period, and amounts of expenses such as travel and telephone bills, withheld in Response Document 96.(13) Given the facts of this case, disclosure of this information would not reveal WSI's motive for seeking representation, litigation strategy, the specific nature of the services rendered by the attorneys or any privileged communications.

Moreover, we note that SR already released the identities of the attorneys working on this case, and their rates, most of which are different. Because SR also released the rate per service on the attorney invoices, SR has effectively released the identities of those attorneys whose rates are different. Therefore, it is required to release most of the initials shown in the "attorney or staff" column.(14) Releasing the initials of the paralegal who worked on this case would also reveal nothing that would harm the attorney-client or work-product privilege. Accordingly, we find that SR cannot withhold such information using the attorney-client privilege. Nor would release of this information reveal mental impressions, litigation strategy, conclusions or legal theories of the attorneys. Therefore, this information is not withholdable under the attorney work-product privilege. See C.D. Varnadore & Betty Freels, 24 DOE ¶ 80,123 at 80,556-57 (1994). We are therefore remanding this issue so that SR may either release the withheld material or find that another exemption applies.

3. Public Interest Analysis

The DOE regulations provide that material exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public if the DOE determines that disclosure is permitted by federal law and is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that can be withheld pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.(15)

III. Conclusion

We therefore uphold SR's earlier determination and its current determination regarding the Appellant's request for a fee waiver. We also find most of the fees SR charged to be reasonable. However, we find that we must remand certain aspects of this case so that SR can reduce the fees which it charged for photocopying and so that it can make a proper determination regarding the requested videos. In addition, SR has agreed to make a determination regarding a responsive file found in its Office of Chief Counsel. It and WSI must also conduct a further search for some of the items requested and SR must either release the Weber memorandum previously withheld under Exemption 5 or issue a determination stating another justification for withholding it. Finally, some portions of the attorney billing records, the labor consultant's normal rates, and the redacted portion of Response Document 32, withheld under Exemption 4, must either be released or a new determination must be issued stating that another exemption properly applies.

It Is Therefore Ordered That:

(1) The Appeal filed by the International Brotherhood of Electrical Workers on June 8, 1998, Case Number VFA-0421, is granted to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) This case is hereby remanded to the Savannah River Operations Office, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 11, 1998

(1) 1/ On May 8, 1998, this Office granted the Appellant an extension of time to submit this Appeal beyond the regulatory deadline of thirty calendar days after receipt of the determination letter. See Letter from Director, Office of Hearings and Appeals (OHA) to Appellant; 10 C.F.R. § 1004.8(a). In addition, due to the complexity and number of matters discussed herein, this Office sought an extension of time to issue this Decision beyond the regulatory deadline of twenty working days after receipt of the Appeal. See 10 C.F.R. § 1004.8(d). The Appellant had no objections. See Record of Telephone Conversation between Appellant and Dawn Goldstein, Staff Attorney, OHA (June 29, 1998).

(2) 2/ The Appellant is not appealing SR's March 26, 1998 determination with respect to its application of Exemption 6. See Record of Telephone Conversation between Appellant and Dawn Goldstein (June 16, 1998); Appeal Letter. Therefore, that issue will not be discussed in this Decision.

(3) 3/ In its Appeal, the Appellant argues that one of the cases SR relied upon in denying the fee waiver is inapposite. That case is American Airlines, Inc. v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978). We find that SR correctly applied the principles of that case to the issue at hand in the instant case. It is true, as the Appellant points out, that the basic issue in the earlier case concerned whether the number of authorization cards submitted by a union constituted "commercial information." Id. at 870. However, in order to reach that decision, the Second Circuit necessarily had to decide whether unions engage in commercial activity, precisely the issue at stake in the instant case.

(4) 4/ We note that the Appellant originally requested that a breakdown of the fees be sent to it with its final bill. Since this was not done with the determination, this Office requested that SR send this breakdown to the Appellant and it has done so.

(5) 5/ In this regard, SR should consider whether the agency exercises the requisite amount of legal control over the copyrighted videos sufficient to render them agency records. See, e.g., Tax Analysts, 492 U.S. at 144-46.

(6) 6/ In its Appeal, the Appellant made an argument regarding the applicability of the attorney- client privilege to these documents. Since SR has not yet made a determination regarding these documents' releasability, the Appellant's argument is premature and we will not consider it at this time.

(7) 7/ SR has informed us that on May 18, 1998, a new ownership of records clause went into effect between WSI and DOE, known as Modification No. 35. See Record of Telephone Conversation between Timothy Fischer, Pauline Conner and Dawn Goldstein (June 28, 1998). It is our initial view that the ownership of records clause in effect at the time of the request at issue, Modification No. 11, should govern this Appeal, as well as SR's determination on remand.

(8)We note that any records indicating WSI's reimbursement of individual employees should be considered personnel records that WSI owns under its contract with the agency. These records include payroll records, time cards, and potentially vouchers, travel expenses and receipts. Such records are not

subject to mandatory release. However, other types of responsive records might not be WSI-owned. These other types of records might include financial records showing outlays by WSI not related to specific personnel. Such records are owned by DOE and therefore subject to release under the contractor records regulation.

(9)With regard to these documents, SR correctly informed the Appellant of these documents' existence and that they had already been released to the Appellant. However, we note that SR is still obligated to provide another copy of these documents to the Appellant, if it so requests.

(10) 10/ We further note that this document does not appear to qualify as attorney work-product. It was not prepared by an attorney, nor was Mr. Weber acting as an agent for an attorney.

(11) 11/ DOE regulations set forth four additional criteria to be considered in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4: (i) whether the information has been held in confidence by the person to whom it pertains; (ii) whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor; (iii) whether the information was transmitted to and received by the DOE in confidence; and (iv) whether the information is available in public sources. 10 C.F.R. § 1004.11(f).

(12) 12/ We note that because SR is relying on the government impairment prong of Critical Mass, it was not required to obtain the submitter's views as to the application of Exemption 4 to the invoices.

(13) 13/ SR argued that the dates of these travel bills may reveal something about WSI's litigation strategy. See Record of Telephone Conversation between Timothy Fischer and Dawn Goldstein (June 22, 1998). While that is a sufficient justification for withholding the dates shown on the hotel bill and the travel expense form, it does not justify withholding these two documents in their entirety, as SR did in this case. SR also mentioned that it withheld the name of the hotel listed on the bill in the interest of privacy. Id. However, this justification was not mentioned in its determination letter. Nor does that reason provide a justification for withholding the entire bill. Thus, nothing on the travel bills and expense forms, with the possible exception of the date and the identity of the person traveling, appears to be properly withholdable.

(14) 14/ Two of the partners who worked on this case charged the same rate for litigation. Response Document 95. Therefore, to protect the identities of these two partners, their initials, for the items noting litigation charges, must continue to be withheld.

(15) 15/ We note that in contrast to Exemption 4, this public interest analysis does apply to documents withheld under Exemption 5. However, because we have not upheld SR's sole Exemption 5 determination, a public interest analysis is not required with respect to that document.

Case No. VFA-0422, 27 DOE ¶ 80,149

July 6, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Karen Coleman Wiltshire

Date of Filing: June 5, 1998

Case Number: VFA-0422

On June 5, 1998, the Office of Hearings and Appeals (OHA) received a submission from Karen Coleman Wiltshire which completes the filing of her Freedom of Information Act (FOIA) Appeal. Ms. Wiltshire appeals from a determination that the Acting Director of the Department of Energy's FOIA/Privacy Act Division issued to her on April 11, 1998. The Acting Director issued this determination in response to a request for information that Ms. Wiltshire submitted in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Acting Director to conduct a further search for responsive materials.

I. Background

In her request, Ms. Wiltshire sought access to information concerning (i) J.R. Brady, Deputy Director of Neuropsychiatry of the Walter Reed Army Institute of Research, (2) James Brennan, Armed Forces Radiobiology Research Institute, and (3) a specified study concerning thyroidal radioactive uptake evaluated by Bio- Science Labs of California. The Acting Director forwarded the request to the Office of Records, Research, Data and Access (ORRDA) of the Office of Environment, Safety and Health, which searched its files for responsive documents. The Acting Director informed Ms. Wiltshire that no such documents were located, and suggested that Ms. Wiltshire contact the Department of Defense (DOD) for assistance with her request.

In her Appeal, Ms. Wiltshire contests the adequacy of the search for responsive documents. Specifically, she states that she obtained her references to Messrs. Brady and Brennan and to radioiodine uptake studies through the Human Radiation Experiments Information Management System (HREX), an Internet-accessible database containing documents pertaining to experimental human

radiation exposure. (1) She claims that HREX is a DOE database, and that therefore the DOE should be in possession of documents that are responsive to her request.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In order to evaluate the adequacy of the search, we contacted ORRDA. This Office maintains the records of the DOE's Office of Human Radiation Experiments (OHRE). We were informed that all OHRE documents are available to the public through HREX, which was searched for documents responsive to Ms. Wiltshire's request. See memorandum of June 19, 1998 telephone conversation between Robert Palmer, OHA Staff Attorney, and Cindy Shinbledecker, ORRDA. Some of the documents found contain references to Messrs. Brady and Brennan and to thyroidal radioiodine uptake research.

This does not, however, necessarily imply the existence of further records of this type in the DOE's possession. The HREX database, which was designed and is maintained by Argonne National Laboratories, a DOE contractor, consists of documents that were obtained from the DOE, the DOD and various other federal agencies. The documents containing the references noted in Ms. Wiltshire's request are DOD records, not DOE records, and they are not in the DOE's custody. Id.; see also April 8, 1998 memorandum from Paul J. Seligman, Deputy Assistant Secretary for Health Studies, to the Acting Director. There is no evidence that DOE documents that are responsive to Ms. Wiltshire's request exist, or that there are other such records from other agencies that are in the DOE's possession. On the basis of the information before us, we conclude that the ORRDA's search for responsive documents was reasonably calculated to uncover responsive documents, and was therefore adequate. Accordingly, we will deny Ms. Wiltshire's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Karen Coleman Wiltshire on June 5, 1998 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:July 6, 1998

(1)The Internet address is http://hrex.dis.anl.gov

Case No. VFA-0423, 27 DOE ¶ 80,150

July 28, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Edwin S. Rothschild

Date of Filing: July 1, 1998

Case Number: VFA-0423

Edwin S. Rothschild files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (the Department) at 10 C.F.R. § 1004. The subject of the Appeal is a determination letter that the Department's Deputy Assistant Secretary for Strategic Petroleum Reserves (the Denying Official) issued in response to Rothschild's request for records pursuant to the FOIA. As explained below, we will deny the Appeal.

The origin of this Appeal lies in a request that Rothschild filed on July 7, 1997. In the request, Rothschild sought:

all records --draft reports, memoranda, analysis, meeting minutes, briefing documents, e-mail messages, etc. pertaining to a report to Congress on the costs and benefits of a regional petroleum product reserve, as well as all records pertaining to consideration of a regional petroleum product reserve with regard to the Department of Energy's Policy Statement of the Strategic Petroleum Reserve.

The Department released various documents, and withheld a number on the ground that they were "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency," provided in the FOIA at 5 U.S.C. § 552(b)(5), 10 C.F.R. § 1004.10(b)(5) (Exemption 5). The Denying Official stated that the requested documents came within two categories of material protected from disclosure by Exemption 5: documents produced during a "deliberative process," and documents protected by the attorney-client privilege.(1)

Rothschild appealed the determination to the U.S. District Court for the District of Columbia. In his appeal to the court, Rothschild conceded that the responsive documents were predecisional and deliberative. He argued, however, that the Department's search for responsive documents was inadequate, and that the Department waived the deliberative process privilege by authorizing a meeting between a Departmental subcontractor who was preparing the report and a representative of the petroleum industry. The court granted summary judgment to the Department, upholding the Department's decision to withhold the documents. *Rothschild v. Department of Energy*, Civil Action No. 97-1825 (May 1, 1998).

The Department issued a report to Congress regarding the proposed regional petroleum product reserve on May 13, 1998.(2) Rothschild then filed a second FOIA request for the the same documents. The request was denied in a determination letter dated June 29, 1998. In response to this determination letter, Rothschild filed the present appeal, arguing that the publication of the report "mandates the release of the responsive requested documents." Appeal at 2.

The FOIA generally requires that documents held by the federal government be released to the public upon request. There are, however, nine exemptions to the FOIA that set forth the types of information agencies are not required to release.

Exemption 5, which is at issue in this appeal, exempts a broad range of material, encompassing both statutory privileges and privileges recognized by case law. *United States v. Weber Aircraft Corp.*, 443 U.S. 340, 354 (1979). Among the privileges that fall under this exclusion is the "executive" or "deliberative process" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States)*. The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 at 150 (1975) (*Sears*).

The purpose of Exemption 5 is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*). To qualify for protection under the deliberative process privilege of Exemption 5, a document must be both predecisional (*i.e.* generated before the adoption of agency policy), and deliberative (*i.e.* reflecting the give-and-take of the consultative process). *Coastal States* at 866.

In his effort to overcome Exemption 5 protection for the documents he seeks, Rothschild raises two arguments on appeal. In the first argument, Rothschild claims that "the information I requested was denied based on its ?predecisional character.' However, in May of this year the Department of Energy issued the ?United States Statement of Policy on the Strategic Petroleum Reserve," ... This determination constitutes an official agency position, which in turn mandates the release of the responsive requested documents." Appeal at 2.

Rothschild's claim is based on a misunderstanding of the law. The predecisional nature of documents is not changed by the fact that the agency has subsequently made a final decision. *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979) (*Merrill)*; *May v. Department of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 357 (3rd Cir. 1985). As the Court explained in *Merrill*:

the purpose of the privilege for predecisional deliberations is to insure that a decision maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency.

Merrill, 443 U.S. 359-60.

Rothschild's second argument is essentially a policy argument. He contends that the responsive documents:

which form the basis for the Department's ... final policy directive submitted to Congress, constitute the ? working law' of the agency and should be held outside the protection of Exemption 5. Agencies cannot use the deliberative privilege to create a body of secret law by which they justify their decisions and actions.

Appeal at 2, citing *Coastal States*, 617 F.2d at 868.

Rothschild is correct in asserting that Exemption 5 cannot be used to shield documents that comprise the "secret law" of an agency. This argument, however, is inapplicable to the documents at issue in this case. Courts have defined "secret law" as "orders and interpretations which [the agency] actually applies to

cases before it." *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971). Consequently, such documents are not truly predecisional, but "discuss *established* policies and decision." *Coastal States*, 617 F.2d at 868 (emphasis in the original).

We examined the documents withheld by the Department in this case. They consist of drafts of the final report, and memoranda and e- mail messages suggesting alternative ways of analyzing the data. There is no indication that these documents were applied to deciding cases, or to any use other than the preparation of the final report. On the contrary, we believe that providing protection for these documents is squarely in accord with the policy goals of Exemption 5: (1) to encourage frank, open, discussions on matters of policy between subordinates and superiors; and (2) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-3.

As a final consideration, the Department's regulations provide that it shall release material to the public if it is determined that federal law permits disclosure and it is in the public interest to do so, even if the material is exempt from release under the FOIA. 10 C.F.R. § 1004.1. Notwithstanding our finding that the Denying Official properly applied Exemption 5 to most of the requested documents, we must consider whether the public interest nevertheless requires disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. *See* Memorandum from the Attorney General to Heads of Departments and Agencies (October 4, 1993), stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption.

In the present case, the Denying Official stated that:

Discretionary release of these documents is not in the public interest. The quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public... Furthermore, the documents do not reflect the final agency view on the subjects they discuss and it would therefore mislead the public if the documents were to be released."

After reviewing the documents, we agree with the analysis of the Denying Official. We find instead the documents to consist of "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated," which Exemption 5 was designed to protect. *Sears*, 421 U.S. at 150. *See Eva Glow Brownlow*, 27 DOE ¶ 80,134 (1998).

For the reasons set forth above, we find that the Denying Official correctly determined that the responsive documents are exempt from mandatory disclosure pursuant to Exemption 5, and that release of the documents would not be in the public interest. We will therefore deny the appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Edwin S. Rothschild, Case Number VFA-0423, is hereby denied.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 28, 1998

(1) Rothschild did not question the withholding of documents under the attorney-client privilege. We will therefore not discuss the withholding of these documents in the present appeal.

(2) The Office of the Deputy Assistant Secretary for Strategic Petroleum Reserves sent a copy of the report to Rothschild.

Case No. VFA-0424, 27 DOE ¶ 80,151

July 31, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Charles W. Hemingway

Date of Filing:July 2, 1998

Case Number: VFA-0424

On July 2, 1998, Charles W. Hemingway appealed a determination that the Office of the General Counsel (OGC) of the Department of Energy (DOE) issued on June 30, 1998, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Appeal, Mr. Hemingway requests that the Office of Hearings and Appeals (OHA) order OGC to release information withheld pursuant to Exemption 6 of the FOIA. For the reasons detailed below, we will deny this Appeal.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. §1004.10(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

BACKGROUND

This Appeal arises from Mr. Hemingway’s request for copies of the financial disclosure reports (Forms SF 278), including attachments, filed by Corlis M. Moody, a DOE official. In addition to Ms. Moody’s Forms SF 278, Mr. Hemingway requested copies of documents, including opinions or statements rendered by agency ethics counsel, as well as correspondence between agency personnel and Ms. Moody, concerning the financial disclosure reports.

On June 30, 1998, Ralph Goldenberg, the Assistant General Counsel for General Law, responded to Mr. Hemingway's request for documents by issuing a determination under the FOIA. The requested documents were attached to the determination. Mr. Goldenberg also indicated that, pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), Ms. Moody's home address, personal brokerage account number, and social security number had been redacted from one of the documents. Mr. Goldenberg indicated that this information had been withheld because:

[d]isclosure of the withheld information would constitute an invasion of the personal privacy of the individual because it could lead to unwanted communications and attention that would be intrusions into her personal life. Moreover, disclosure of this information will not reveal any aspect about the operations or activities of the Government.

On July 2, 1998, Mr. Hemingway filed this Appeal.

ANALYSIS

In his Appeal, Mr. Hemingway contends that the redacted information was wrongfully withheld under Exemption 6 of the FOIA because he made his request for disclosure under the Ethics in Government Act (EGA), 5 U.S.C. App. 4 §§ 101 et seq., and the FOIA exemptions are inapplicable to disclosures required by the EGA.(1) Mr. Hemingway also claims that DOE waived the right to withhold Ms. Moody's social security number under Exemption 6 because DOE had previously released this information in response to an appeal before the Merit Systems Protection Board (MSPB).(2) For the reasons detailed below, we find that Mr. Hemingway's arguments are unpersuasive.

THE SCOPE OF OHA'S JURISDICTION

OHA lacks jurisdiction to determine issues that arise under the EGA. OHA has held that jurisdictional regulations must be explicit and narrowly construed. See Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988) (dismissing FOIA appeal because OHA lacks jurisdiction of matters not explicitly set forth in jurisdictional regulation); John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing FOIA appeal based on narrow construction of jurisdictional regulation); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (without explicit statutory or regulatory provision, no administrative remedy for agency's non-compliance with a timeliness requirement).

Neither Congress nor any administrative agency has empowered OHA to adjudicate matters arising under the EGA. Thus, in the absence of an explicit grant of authority, OHA lacks jurisdiction to adjudicate such disputes. Accordingly, we dismiss that portion of Mr. Hemingway's appeal that is based on DOE's failure to release information under the EGA.

EXEMPTION 6 OF THE FOIA

We also find that the Ms. Moody's social security number, personal brokerage account number, and home address were properly redacted under Exemption 6 of the FOIA. Exemption 6 permits an agency to make a discretionary withholding of information that must otherwise be released in response to a FOIA request if the materials are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). After ensuring that the documents meet the threshold test for types of material covered by Exemption 6, an agency must balance the public interest in disclosure with the privacy interest involved. Department of State v. Ray, 502 U.S. 164, 175 (1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (Rose); Harold H. Johnson, 21 DOE ¶ 80,148 at 80,640 (1991).

First, we believe that the document containing the redacted information meets the Exemption 6 threshold test as of being within the category of "personnel and medical files and similar files." The Supreme Court has taken an expansive view of what falls within this phrase. The Court has made clear that Exemption 6 extends to "detailed Government records on an individual that can be identified as applying to that individual." Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (quoting H.R. Rep. No. 89-1497, at 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428). Here, the document at issue is a detailed government record that can be identified as applying to a named DOE official. This easily falls within the Supreme Court's Exemption 6 threshold definition. See Rose, 425 U.S. at 376-80.

In applying the balancing portion of the Exemption 6 test, we must examine the types of information redacted, identify any privacy interest involved, and weigh that against any public interest in the material as defined by the Supreme Court. We first find that Ms. Moody has a privacy interest in her social security number, personal brokerage account number, and home address. See Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 497-501 (1994) (home addresses); Barvick v. Cisneros, 941 F. Supp. 1015 (D. Kan. 1996) (home addresses and telephone numbers, dates of birth, maiden names, life insurance

and annuity information); Oliva v. HUD, 756 F. Supp. 105 (E.D.N.Y. 1991) (social security numbers).

As noted above, once we identify a privacy interest, we must then determine whether there is a FOIA-defined public interest in release of the withheld material. In Reporters Committee, the Court took an exceptionally narrow view of what is in the public interest for the purposes of the FOIA. The only relevant public interest, in the Court's view, is the extent to which release of information would contribute "'significantly to public understanding of the operations or activities of the government.'" Reporters Committee, 489 U.S. at 775 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Here, release of the redacted information would not in any way "shed light on the conduct of any Government agency or official," Reporters Committee, 489 U.S. at 773, or the public's understanding of what the government has done and is doing. Ms. Moody's social security number, personal account number, and home address do not provide any information that may be used to determine the propriety of her official conduct. Because OGC released the entire substance of the requested documents, we find that no further benefit would accrue to the public interest, under the Supreme Court's definition, by release of the redacted information. Reporters Committee, 489 U.S. at 766 n.18.

The Exemption 6 balancing test presupposes that there is some public interest to balance. Thus, where there is no public interest to balance, as here, the privacy interest in non-disclosure, however small, must prevail. Maynard v. Central Intelligence Agency, 986 F.2d 547, 566 n.21 (1st Cir. 1993); Federal Labor Relations Auth. v. Department of Defense, 984 F.2d 370, 374 (10th Cir. 1993). Accordingly, we find that Ms. Moody's privacy interest in the redacted information outweighs the lack of a FOIA-defined public interest, and that this information was properly withheld from disclosure.

The Appellant contends that DOE waived its right to claim that Ms. Moody's social security number may be withheld from disclosure under Exemption 6 because it released this information in response to an appeal filed with the MSPB. The Supreme Court rejected a similar argument in Reporters Committee, when it held that individuals have a privacy interest in the non-disclosure of their arrest and conviction records ("rap-sheets"), although most of the rap-sheet information is a matter of public record. The Court based this conclusion on the "practical obscurity" of the arrest and conviction information that is available to the public. 489 U.S. at 762, 764, 780. Similarly, because of the "practical obscurity" of the information contained in the MSPB files no waiver of privacy interest occurred, and Ms. Moody continues to have a privacy interest in the non-disclosure of her social security number. See also Federal Labor Relations Auth., 510 U.S. at 500 (privacy interest in non- release of information does not dissolve because the information may be available in another form to the public); L & C Marine Transp. Ltd. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) (privacy interest not lost because information may be discovered through other means); Tenaska Washington Partners II, L.P., 25 DOE ¶ 80,212 (1996) (inadvertent release of personal information by federal agency does not destroy privacy rights).

It Is Therefore Ordered That:

(1) The portion of the Appeal filed by Charles W. Hemingway on July 2, 1998, that is based on DOE's failure to release information under the Ethics in Government Act is hereby dismissed, and the remainder of the Appeal is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 31, 1998

(1)The EGA requires that financial disclosure reports (Forms SF 278) submitted by certain high- level government officials be released to the public. 5 U.S.C. App. 4 § 105. See also 5 C.F.R. § 2634.603. Gregg Burgess, an OGC staff attorney, told us that the redacted document was not part of a SF 278, but was submitted by Ms. Moody as proof that she had sold certain stock. He stated that this document was released under the FOIA because OGC concluded that this document did not have to be disclosed under the EGA.

(2)Additionally, Mr. Hemingway alleges that DOE improperly redacted information from Ms. Moody's 1997 Form SF 278 without explanation. See Mead Data Central v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (FOIA requires the agency to provide a reasonably specific justification for withholding documents or portions of documents). However, after investigation, we find that OGC did not improperly redact information from this document. Gregg Burgess, the OGC staff attorney, informed us that he redacted the information at issue on July 23, 1997, when he was conducting a substantive review of Ms. Moody's Form SF 278 to determine compliance with the EGA. In accordance with the general practice at OGC, the information was redacted because Ms. Moody was not required to report it on the Form SF 278. Accordingly, we conclude that OGC redacted this information in the ordinary course of business, and that OGC did not have an unredacted copy of this document when it received Mr. Hemingway's request for documents.

Case No. VFA-0426, 27 DOE ¶ 80,153

August 11, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Arnold Kramish

Date of Filing: July 17, 1998

Case Number: VFA-0426

On July 17, 1998, Arnold Kramish filed an appeal from a June 24, 1998 determination by the Acting Director of the FOIA/Privacy Act Division of the Office of the Executive Secretariat of the Department of Energy (DOE). In that determination, the Acting Director partially granted a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented in 10 C.F.R. Part 1004. In his appeal, Mr. Kramish asks that we order a search for additional responsive documents.

I. Background

In his request for information, Mr. Kramish sought copies of all personnel records the DOE possesses concerning Robert and Charlotte Serber. In a June 24, 1998 letter, the Acting Director enclosed responsive information concerning Robert Serber. However, the Acting Director informed Mr. Kramish that he did not find any responsive information on Charlotte Serber.

In his appeal, Mr. Kramish states that several published books refer to the “Serber security records” from the August 5, 1948 Atomic Energy Commission (AEC) Personnel Security Board hearing in San Francisco involving Robert Serber. In addition, Mr. Kramish asserts that a July 12, 1948 Federal Bureau of Investigation (FBI) memorandum (a copy of which he enclosed in his appeal) confirms that the AEC possessed substantial security-related materials concerning Robert and Charlotte Serber. Mr. Kramish argues that it is improbable that security records and transcripts for this important case no longer exist. In his appeal, Mr. Kramish also requests a copy of the AEC information referenced in the July 12, 1948 FBI memorandum.

II. Analysis

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further documents might

conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the appeal, we contacted a representative of the Acting Director to ascertain the validity of Mr. Kramish's contention that there must exist additional responsive information. We supplied the Acting Director with the additional background information regarding the Serbers that Mr. Kramish provided in his appeal. The Acting Director used this material to conduct another search for responsive information in the Office of Nonproliferation and National Security and in the Office of the Executive Secretariat. The Acting Director confirmed that neither of these offices possess additional responsive information or a copy of the AEC information referenced in the July 12, 1948 FBI memorandum. We find that the Acting Director correctly searched all of the DOE offices that would likely have responsive information. Since neither of these two offices possess additional responsive information and we have no reason to believe that other DOE offices possess additional responsive information, we must deny Mr. Kramish's appeal.

During our investigation of this appeal, we discovered the possibility that responsive records may exist at the National Archives and Records Administration (NARA). Specifically, the representative of the Acting Director informed us that responsive information may exist in "Box SI-4-1, Investigation of Clearance, Vol. 2, dated December 16, 1954" at NARA. Since this box appears to be in the possession of NARA and was not in the control of the DOE at the time of Mr. Kramish's request, it is not a DOE record subject to a FOIA request at the DOE. See Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). However, Mr. Kramish is free to contact NARA directly to request copies of this information.

It Is Therefore Ordered That:

(1) The appeal filed by Arnold Kramish on July 17, 1998 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 11, 1998

Case No. VFA-0427, 27 DOE ¶ 80,156

August 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Bernice McCulloh

Date of Filings: July 13, 1998

Case Numbers: VFA-0427

On July 13, 1998, Bernice McCulloh (McCulloh) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Oak Ridge Operations Office (DOE/OR) issued to her on June 23, 1998. The determination concerned a request for information that McCulloh submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE/OR would be required to conduct a further search for responsive material.

I. Background

According to McCulloh, in 1960 her mother was treated with radiation therapy(1) at Baptist Hospital in Winston Salem, North Carolina for cancer of the cervix. *See* Letter from McCulloh to Amy Rothrock, FOIA Officer, DOE/OR (June 10, 1998) (Request Letter); Clinical Summary, North Carolina Baptist Hospital (August 15, 1960). The treatment involved Cobalt-60 implants(2) allegedly prepared at DOE/OR for experimental purposes. McCulloh contends that her mother, Flossie Hilton (Hilton), was an unknowing participant in one such experiment, and was subjected to a very large dose of radiation that ultimately resulted in her death. *See* Request Letter. In 1994, McCulloh

contacted the DOE's Office of Human Radiation Experimentation (OHRE)(3) and was assigned a case worker. Letter from McCulloh to DOE, EH Hotline (February 1, 1994). DOE found that Hilton was not a participant in an experiment, but rather, her therapy represented "conventional medical treatment . . . for that time." Letter from Tara O'Toole, Assistant Secretary, EH to McCulloh (September 8, 1995). *See also* Letter from Peter Brush, Principal Deputy Assistant Secretary, EH to McCulloh (November 22, 1995). In addition, DOE stated that neither DOE nor its predecessor agencies were associated with the type of experimentation that McCulloh described at Baptist Hospital. *Id*. A review of DOE records revealed that human radiation experiments involving other isotopes were conducted at Baptist Hospital, but none involved Cobalt-60. Letter from Director, OHRE, to McCulloh (September 27, 1995). McCulloh continued to correspond with OHRE and EH through 1997, and the agency maintained that her mother was not the subject of any DOE-conducted experiment. *See* Letter from Peter Brush, EH to McCulloh (November 7, 1997) (stating that exposure to ionizing radiation is not defined as an experiment).

Not satisfied with the responses from OHRE and EH, McCulloh submitted a FOIA request to DOE/OR for information about the Cobalt-60 treatment and her mother's experience. See Request Letter. On June 23, 1998, DOE/OR sent McCulloh copies of "the only two studies performed at Oak Ridge pertaining to Cobalt 60." Letter from Amy Rothrock, Authorizing Official, to McCulloh (June 23, 1998) (Determination

Letter). Neither study involved treatment for cancer of the cervix. On July 13, 1998, McCulloh filed the present Appeal, challenging the adequacy of DOE/OR's search.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted DOE/OR to ascertain the scope of the search it performed for the responsive documents. According to the FOIA Officer, DOE/OR only retains information about patients who were treated at the now-defunct Oak Ridge Institute for Nuclear Studies (ORINS) Hospital in Oak Ridge. Because Hilton was treated at Baptist Hospital, the FOIA Officer stated that Baptist Hospital would be the most likely repository of information about where the isotope was purchased and the exact dosage used. Nonetheless, the FOIA Officer informed us that she and her staff searched at DOE/OR for documents containing any of the following subjects: (1) Hilton's name, (2) experiments with Cobalt-60, (3) the name of the doctor who allegedly prepared the isotope used in the treatment, and (4) Baptist Hospital in Winston Salem, North Carolina. The search produced two documents containing information about two Cobalt-60 experiments, both involving leukemia patients.

However, the DOE/OR FOIA Officer also noted that there may be statistical identifiers attached to the records of the two DOE Cobalt-60 experiments and, if Hilton was a subject, this information could confirm her participation. After discussing the Appeal with this office, the DOE/OR FOIA Officer offered to research the sponsoring office of the experiment for additional information on where the isotope was prepared and where the experiments took place. *See* Memorandum of Telephone Conversation between Amy Rothrock, Authorizing Official, DOE/OR and Valerie Vance Adeyeye, OHA Staff Attorney (July 30, 1998).

We find that DOE/OR conducted a search reasonably calculated to uncover all documents related to Hilton's Cobalt-60 treatment at Baptist Hospital in 1960. After determining that McCulloh had corresponded with OHRE and received some responsive material from that office, DOE/OR then searched for and found additional responsive documents. Even though the experiments in the documents did not seem, on their face, related to Hilton's treatment, DOE/OR nonetheless has agreed to research the experiments further to ascertain any reference to Hilton. A new response is forthcoming. As stated above, the FOIA does not require an exhaustive search, only a reasonable one. On the basis of the facts provided above, we find that DOE/OR conducted a search reasonably calculated to uncover responsive documents. Accordingly, we must deny McCulloh's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on July 13, 1998 by Bernice McCulloh, OHA Case No. VFA-0427, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 17, 1998

(1)Radiation therapy is the treatment of cancer and other diseases with ionizing radiation. Ionizing radiation deposits energy that injures or destroys cells in the area being treated and makes it impossible for these cells to continue to grow. It is often used to treat localized solid tumors, such as cancer of the skin, breast, or cervix. National Cancer Institute Website.

(2)Cobalt-60 is a radioisotope (an atom with nuclei that are seeking a more stable nuclear configuration by emitting radiation). Radioisotopes can be manipulated to perform different tasks, and are widely used in medicine and in many industrial processes. Nuclear Regulatory Commission Website, “The Regulation and Use of Radioisotopes in Today’s World.”

(3)OHRE was established in March 1994 to document DOE’s Cold War radiation research on human subjects. OHRE has a web site located at http://www.ohre.doe.gov that provides Internet access to DOE’s 3.2 million cubic feet of records related to human radiation experiments. The documents concern experiments conducted at government and non- government facilities. The Office of Environment, Safety and Health (EH) now fields inquiries about human radiation experimentation.

Case No. VFA-0429, 27 DOE ¶ 80,154

August 14, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Gary A. Davis

Date of Filing: July 21, 1998

Case Number: VFA-0429

On July 21, 1998, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by Gary A. Davis. Davis is appealing a determination by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). Oak Ridge issued a determination on June 25, 1998, in response to a request for information submitted in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Oak Ridge to conduct a further search for responsive materials.

I. Background

The request sought access to documents containing information about the following four items:

(1) The Anderson County [Tennessee] Landfill . . . and any of its operations;

(2) Any waste materials disposed of by DOE, its predecessors and its contractors in the Anderson County Landfill;

(3) Any waste materials transferred off the Oak Ridge Reservation by local or regional waste management companies or contractors, which may have been disposed of in the Anderson County Landfill; and

(4) The disposal of waste materials by American Nuclear Corporation in Anderson County, Tennessee.

On June 25, 1998, Oak Ridge issued a determination letter in which it claimed that it was unable to locate any documents responsive to the first item of Davis' request. As for the other three requested items, Oak Ridge distinguished between hazardous and sanitary wastes. Oak Ridge alleged that since it has no way of determining which landfill its sanitary waste disposal contractors use, it could not locate any responsive documents involving sanitary wastes. Oak Ridge further claims that hundreds of thousands of hazardous waste manifests would have to be searched individually in order to determine whether hazardous wastes from Oak Ridge would have been disposed of in the Anderson County Landfill. (1) The determination letter further informed Davis that he could call or write Oak Ridge to clarify or narrow the scope of the search for hazardous waste manifests.

In his Appeal, Davis does not contest Oak Ridge's determination that it could not locate any documents responsive to Item 1 of his request. However, Davis contests the adequacy of the search for documents which are responsive to the remaining three items. Specifically, he contends that:

1) Oak Ridge should have searched the procurement files for Oak Ridge's waste contractors during the relevant time period, since it is not uncommon for contracts with disposal contractors to specify a disposal site;

2) It is unnecessary to search every hazardous waste manifest. Since there were state requirements that required preapproval before certain hazardous wastes, those records could be searched instead; and

3) Oak Ridge did not indicate the results of its search for documents responsive to Item 4.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

We find that Oak Ridge's response to Items 2 and 3 was inadequate. Oak Ridge claims that the search for responsive documents would involve hundreds of thousands of hazardous waste manifests, and would not likely result identifying responsive documents because most of DOE's hazardous wastes were shipped out of state. Oak Ridge's determination letter then suggests that Davis could contact Oak Ridge in order to narrow the scope of its request.

The DOE's FOIA regulations state that "a request must enable the DOE to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations." 10 C.F.R. § 1004.4(c)(1). However, the search for responsive documents would not necessarily include the search of hundreds of thousands of documents as Oak Ridge asserts. Instead, we agree with Davis that Oak Ridge could have searched the contracts of all of its hazardous waste contractors during the period set forth in the request (1971 through 1982). Such a search would have satisfied DOE's obligations under the FOIA without placing an undue burden upon Oak Ridge's operations. Accordingly, we are remanding this portion of the Appeal to Oak Ridge. On remand, Oak Ridge should search the contracts of each hazardous waste contractor for the years 1971 through 1982 for the identity of specified and/or preapproved disposal sites.

B. Adequacy of the Determination

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

After reviewing the record, we find that the determination letter that Oak Ridge issued to Davis fails to respond to Item 4 of the request. Accordingly, Item 4 is to be remanded to Oak Ridge. On remand, Oak Ridge must conduct a thorough search for responsive documents and issue a new determination letter. The

new determination letter should contain a thorough description of the scope of the search conducted in response to this item of the request.

It Is Therefore Ordered That:

(1) The Appeal filed by Gary A. Davis on July 21, 1998, case number VFA-0429, is hereby granted and remanded to the Oak Ridge Operations Office which shall promptly implement the instructions set forth above.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 14, 1998

(1) Oak Ridge also implies that it is unlikely that hazardous waste from Oak Ridge would end up in a local disposal site.

Case No. VFA-0430, 27 DOE ¶ 80,157

August 20, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Baker, Donelson, Bearman & Caldwell

Date of Filing:July 23, 1998

Case Number: VFA-0430

On July 23, 1998, the Washington, D.C., law firm of Baker, Donelson, Bearman & Caldwell (Baker, Donelson) filed an Appeal from a determination issued on June 29, 1998, by the Golden Field Office of the Department of Energy (DOE). That determination denied in part the law firm's request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would require the DOE to release the withheld information.

The FOIA requires that agency records held by a covered branch of the Federal Government, and which have not been made public in an authorized manner, generally be released to the public upon request. 5 U.S.C. § 552(a)(3). In addition to this requirement, the FOIA lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The DOE regulations further provide that documents exempt from mandatory disclosure will nonetheless be released to the public if the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1. See also Dykema Gossett, PLLC, 26 DOE ¶ 80,237 at 80,904-05 (1997) (no public interest analysis required in Exemption 4 cases because release of exempt material would violate the Trade Secrets Act, 18 U.S.C. § 1905).

BACKGROUND

On June 9, 1998, Baker, Donelson filed a FOIA request with the Freedom of Information Officer at DOE Headquarters in Washington, D.C. The request sought any document provided to the DOE by the National Renewable Energy Laboratory (NREL), or any contractor, concerning the DOE "Building America" program. The June 9 request also referenced a previous April 28, 1998 FOIA request to DOE Headquarters looking for other documents related to the "Building America" program and contracts issued pursuant to Request for Proposal RAR-4-14061. DOE Headquarters referred the request to the Golden Field Office, the portion of the Department that was determined to have responsive documents. In its June 29, 1998 determination, the Golden Field Office released all responsive information in its files except records concerning a contract between NREL and Steven Winter Associates, Inc. This material was withheld pursuant to Exemption 4, which permits withholding of confidential business and trade secret information. Baker, Donelson appeals this withholding.

ANALYSIS

Exemption 4 permits an agency to withhold from release to a FOIA requester "trade secrets and

commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Thus, to qualify for this exemption, withheld material must either be (A) information that constitutes a trade secret or (B) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged" or "confidential." In applying Exemption 4, the withholding office must first determine whether the information either is a trade secret or is commercial or financial information. If the agency determines the material is trade secret information for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). However, if the agency determines the material is commercial or financial information, there is another threshold determination the agency must make: whether the information was involuntarily or voluntarily submitted. If it was involuntarily submitted, the information may be withheld under Exemption 4 if disclosure is likely either to (A) impair the government's ability to obtain necessary information in the future or (B) cause substantial harm to the competitive position of the person from whom the government obtained the information. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Conversely, if the information is voluntarily submitted, it may be withheld under Exemption 4 if it is of a kind that the submitter would not customarily make available to the public. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992). As the descriptions indicate, these three tests are mutually exclusive; for Exemption 4 purposes information is either voluntarily or involuntarily submitted commercial or financial information or it is a trade secret.

In its determination letter, the Golden Field Office offered three justifications for invoking Exemption 4. First, it stated that, "[a]ccording to the submitter, such information would not customarily be disclosed to the public." Thus, the Determination Letter implied that the relevant information was commercial or financial material that was voluntarily submitted, and that it was withheld on that basis under the Critical Mass standard. However, the Determination Letter then stated that the withheld information "could cause substantial harm to their [the submitter's] competitive position, in that it could allow competing institutions to determine their trade secrets." This indicates that the material was trade secret information. Finally, the Determination Letter added that "[d]isclosure could also have a chilling effect on the government's ability to work with similar institutions in the future." With this statement, the Determination Letter reverted to a finding that the material was commercial or financial information. However, under this formulation, the Determination Letter applied the National Parks test for involuntarily submitted information as opposed to the Critical Mass standard for voluntarily submitted information that it previously employed.

When the Determination Letter melded together the three, analytically distinct, Exemption 4 tests, it became unclear which test applied, or whether discrete portions of the information individually qualified for the different tests. As a result, the Determination Letter does not satisfy either the FOIA or the DOE regulations implementing the FOIA. Both require a reasonably specific justification for withholding a document. See 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); Digital City Communications, Inc., 26 DOE ¶ 80,149 at 80,657 (1997). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. Tri-State Drilling, Inc., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992). The Determination Letter does not conform to these principles because it fails to precisely state or explain the application of Exemption 4. As such, it does not permit either a meaningful appeal or review.

Under these circumstances, the proper course is to remand this matter to the Golden Field Office to issue a new determination. That determination shall either release the withheld information or provide a new justification for withholding. If the Golden Field Office chooses the latter course, it must explain which Exemption 4 test it is applying to the material it withholds, and it must provide more than the simple restatement of the applicable Exemption 4 test. William H. Payne, 26 DOE ¶ 80,221 at 80,861 (1997); Davis Wright & Jones, 19 DOE ¶ 80,104 at 80,510 (1989). Finally, if the Golden Field Office withholds any information, it should segregate and release any non-exempt material. 5 U.S.C. § 552(c); 10 C.F.R. § 1004.10(b); Glen M. Jameson, 26 DOE ¶ 80,236 at 80,902 (1997)

It Is Therefore Ordered That:

(1) The Appeal filed by Baker, Donelson, Bearman & Caldwell of Washington, D.C. on July 23, 1998, OHA Case No. VFA-0430, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Golden Field Office to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 20, 1998

Case No. VFA-0431, 27 DOE ¶ 80,155

August 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Hanford Education Action League

Date of Filing: July 24, 1998

Case Number: VFA-0431

On July 24, 1998, the Hanford Education Action League (HEAL) filed an Appeal from a determination issued on June 22, 1998, by the Department of Energy's Richland Operations Office (DOE/RL). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Appellant challenges the adequacy of DOE/RL's search for documents responsive to its request.

I. Background

On June 23, 1992, the Appellant requested from the DOE a number of specific documents "relating to the operations of the Department of Energy's Hanford facility near Richland, Washington." In Item 2 of the request, HEAL sought copies of "[a]ll volumes of the ?Manager's Data Book,' 1944-1954." Letter from James P. Thomas, Research Director, HEAL to Yvonne Sherman, FOI Officer, DOE/RL (June 23, 1992). DOE/RL issued a determination on June 22, 1998, by which it released documents responsive to Item 2 of HEAL's request. Letter from Karen K. Randolph, Director, Office of External Affairs, DOE/RL, to James P. Thomas (June 22, 1998). On July 24, 1998, HEAL filed the present appeal stating that the DOE "did not provide all responsive records. . . . The Department should conduct a more extensive search for responsive records. . . . [T]he Department should also provide a listing of all document repositories searched as well as documentation for any records that have been destroyed." Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

Accordingly, after receiving HEAL's Appeal, we contacted DOE/RL to find out about the search it

conducted in response to HEAL's request. DOE/RL informed us that it was able to locate documents responsive to Item 2 of HEAL's request (for Manager's Data Books, 1944-1954) through two sources. The first source is a Records Inventory and Disposition Schedule (RIDS). By consulting RIDS, DOE/RL can determine whether documents have been disposed of, and if not, where the documents would be located. In this instance, the RIDS schedule identified, by document number, specific records that were responsive to Item 2 of HEAL's request. The schedule indicated that the documents had not been destroyed and would be located in boxes numbered 1063 and 1064 in DOE/RL's records holding area. The second source of information on the location of responsive documents was a database called DDTS (Declassified Document Tracking System), which tracks Richland's classified and previously classified documents. Queries of this database can be done by document number, title, authors' last name, and certain keywords. Personnel in the records holding area performed a query of the database, the results of which referred to the same specific documents listed on the RIDS schedule, and indicated that they would be located in the same boxes numbered 1063 and 1064. DOE/RL found the documents that the RIDS schedule and DDTS query results identified, Manager's Data Books dated from 1949 forward, in these boxes. With the exception of two documents discussed below, DOE/RL eventually released these documents to the Appellant. Memorandum of telephone conversation between Dorothy Riehle, Office of External Affairs, DOE/RL, and Steve Goering, Office of Hearings and Appeals (OHA) (August 3, 1998).

In its Appeal, HEAL stated that DOE "did not provide at least two responsive documents: (1) HAN-25408 ½ (volumes 1, 2, and 3) and (2) the Manager's Data Book for 1950." DOE/RL has informed us that these two documents were among those specifically identified as responsive in its search described above, which was conducted shortly after HEAL's request was received in 1992, and that shortly thereafter these documents were sent to a DOE/RL classification officer for review. However, these two documents did not make their way through the lengthy process of review for classified information, and therefore were not among those that DOE/RL released in its June 22, 1998 determination. DOE/RL states, and we have no reason to doubt, that it believed at the time that it was releasing all identified responsive documents in its determination. After we received the present Appeal, with its reference to these two documents, and forwarded a copy of the Appeal to DOE/RL, records holding personnel at DOE/RL located the two documents in the same boxes where they had originally been found. These documents are now being reviewed and will be released to the Appellant with, if necessary, exempt information withheld.

HEAL also contends in its Appeal that, although the documents Richland released generally include one book for each year of the relevant period, "there may have been two data books per year. Among the documents received thus far, there are two versions of the 1951 Construction Data Book (June and November) as well as two data books for 1952 (June and December)." Appeal at 1. The Appellant states that,

[a]fter more detailed analysis of the publicly available data books, I am beginning to understand why there were likely two data books for each year. I think that the Manager's Data Books were Richland's official submittal to headquarters for the purpose of headquarters compiling the mandated AEC semi-annual reports to Congress.

Therefore, it is reasonable to conclude that there would be additional copies of Hanford's data books at headquarters.

Electronic mail from Jim Thomas, HEAL, to Steven Goering, OHA (August 4, 1998).

First, regarding the two responsive documents that DOE/RL did not provide to the appellant, we do not find that the apparently inadvertent failure of DOE/RL to release these two documents reflects negatively on DOE/RL's search. The two documents were, in fact, specifically identified as responsive in that search, but for reasons unrelated to the search were not released to HEAL on June 22, 1998. Second, while the Appellant may be correct that there were Manager's Data Books created that were not among those located in the search at DOE/RL, this possibility alone does not undermine the adequacy of DOE/RL's search. As we stated above, "[t]he issue is not whether any further documents might conceivably exist but

rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982). The point the Appellant raises does, however, suggest that there may be additional responsive documents at DOE Headquarters. We will therefore remand this matter to the Freedom of Information and Privacy Group at DOE Headquarters (FOI and Privacy Group) for a search for responsive documents in headquarters offices.

Based on our review of the particulars of DOE/RL's search as set forth above, we find that DOE/RL took steps reasonably calculated to uncover the documents sought by the Appellant. DOE/RL personnel consulted presumably reliable sources to determine where responsive documents would be, and these sources led DOE/RL to a location where it found those documents. There is no information of which we are aware that would point to other locations at DOE/RL where additional responsive documents might exist,(1) and the FOIA clearly does not require DOE/RL to conduct an exhaustive search through all of its document holdings to make certain that it has no other documents responsive to the Appellant's request. We therefore find that DOE/RL's search was adequate to meet the requirements of the FOIA. In this respect, the present Appeal will be denied, but we will grant the Appeal to the extent that we are remanding the matters to the FOI and Privacy Group for a search of DOE Headquarters offices.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Hanford Education Action League, Case Number VFA-0431, is hereby granted as set forth in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the DOE's FOI and Privacy Group, which shall conduct a search of DOE Headquarters offices for documents responsive to Item 2 of the Appellant's June 23, 1992 request, and release to the Appellant any responsive documents, or explain in detail its reasons for withholding responsive documents with reference to one or more FOIA exemptions.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 17, 1998

(1) In considering the present Appeal, we discussed with the Appellant the possibility that DOE/RL's search should have included a specific search of the Counsel's Office at DOE/RL, because the documents at issue relate to matters currently in litigation. We have discussed this with DOE/RL, and we are convinced that a specific search of the DOE/RL's Counsel's Office is not required before we can deem the search adequate under the FOIA. First, DOE/RL pointed out to us that HEAL's 1992 request, and the search that was conducted shortly thereafter, predates the litigation in question. Further, even if the Counsel's Office had responsive documents in its possession at that time, those documents would have been identified by DOE/RL's reference to the RIDS schedule and the DDTS database, both of which are comprehensive enough to encompass any documents that would be responsive to HEAL's request.

Case No. VFA-0432, 27 DOE ¶ 80,158

August 27, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Neutron Technology Corporation

Date of Filing: July 28, 1998

Case Number: VFA-0432

Neutron Technology Corporation (NTC) files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. § 1004. As explained below, we will deny the Appeal.

NTC requested, pursuant to the FOIA, materials concerning the trial treatment of brain cancer patients using Boron Neutron Capture Therapy (BNCT).(1) The trials were conducted by Associated Universities, Incorporated (AUI) at DOE's Brookhaven National Laboratory (Brookhaven). The specific materials sought by NTC were the following.

1. Patient charts generated during the period September 14, 1994 to April 20, 1998.
2. Records showing the reactor power during patient treatment, the duration of neutron irradiation, and the protocol associated with each patient treated.
3. Documentation of post-irradiation calculations for each patient treated identifying actual treatment parameters for specified dose-delivery mechanisms.
4. Records showing dates of tumor diagnosis, treatment, recurrence, and patient death.
5. Documentation regarding the production, sale, and use of BPA-fructose during the clinical trials.(2)

Brookhaven responded to NTC's request for records by stating that the requested information was contained in clinical research center records that belonged to AUI, and was thus not government property. Brookhaven's response included part of a contract for the clinical trials. Brookhaven concluded that the requested records were not subject to release under the FOIA.

In its Appeal, NTC raises three issues: (a) that there were two contracts for clinical trials, but the response letter cited only one contract; (b) the information requested by NTC cannot be construed as patient records; and (c) public policy favors disclosure of the requested documents.

Before considering the issues raised by NTC, we will examine a question not explicit in the Appeal -- whether the material is subject to the FOIA in the first place. Brookhaven stated in its letter to NTC that, according to the terms of the contract, the requested material is "considered the property of the contractor. Thus, the information is not government property and not subject to the FOIA."

The FOIA generally provides that any person has a right of access to federal agency records, except to the extent that such records, or portions thereof, are protected from disclosure by one of the specified exemptions or exclusions. The term "agency records," however, is not defined in the FOIA. In interpreting this term, we apply a two-step analysis developed by the courts for determining whether documents

created by non-federal organizations, such as AUI, are subject to the FOIA. *See, e.g., BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). The analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA; and, if not, (ii) whether the requested material is nonetheless an "agency record." *Gibbs*, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch ... or any independent regulatory agency." 5 U.S.C. § 552(f). In addition, the courts have identified certain factors to consider in determining whether we should regard a private entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976) (*Orleans*), a case that did not involve the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "The question here is not whether the ... agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Orleans* at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision- making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Although DOE contracted for AUI's services and exercised general control over the contract work, it did not supervise AUI's day-to-day operations. *See* Contract No. DE-AC02- 76CH00016. We therefore conclude that AUI is not an "agency" subject to the FOIA.

Although AUI is not an agency for the purposes of the FOIA, its records could become "agency records" if DOE obtained them and they were within DOE's control at the time of NTC's FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, Brookhaven personnel informed us that the materials requested by NTC were not in DOE's control at the time of the request. Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *Tax Analysts*, 492 U.S. at 145-46; *Forsham*, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and the contractor provides that the document in question is the property of the agency. DOE's regulations state that "when a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1).

Article 94 of the contract between DOE and AUI that concerns the materials requested by NTC states that:

(b) The following records are considered the property of the Contractor and are not within the scope of paragraph (a) [defining the government's records] above....

(2) .... Clinical Research Patient Records.

Modification No. M327 Supplemental Agreement to Contract No. DE-AC02-76CH00016.

Since the materials requested by NTC are Contractor records, we find that they are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations.

The number of contracts in question

NTC states in its Appeal that:

there were two government contractors during the period in question, but only one contractual provision was provided as the basis of denial. Did the other contract contain the same provision?

According to Brookhaven, NTC is correct in stating that two contracts have been awarded for BNCT research. Brookhaven personnel added, however, that work has not started on the second contract. All records that would be responsive to NTC's request, therefore, would have been generated under the contract referenced in Brookhaven's response.

The status of the requested material as "patient records"

NTC's next argument claims that:

the denial was a blanket denial for all the requests even though most of the other information requested would not fall under any reasonable definition of "patient records."

When we contacted Brookhaven about the claim that certain of the requested documents might not fall under the contract provision regarding patient records, personnel there assured us that all the materials requested by NTC fall under the category of "clinical research center patient records." Moreover, since the descriptions of the documents requested by NTC all plausibly refer to records generated in clinical treatment of patients, we see no reason to doubt Brookhaven’s characterization of the material.

Public policy as a basis for the release of the requested material

NTC's last claim is that:

there should be an overriding public policy to disclose this information to the general public because terminally diagnosed brain cancer patients and their doctors cannot assess all the treatment options without access to this information. There is no other source, public or private. Patient confidentiality can be protected... It just doesn't seem right to me that a government funded researcher should be able to sequester clinical research results for almost two years to the detriment of cancer patients and their doctors.

As discussed above, the material requested by NTC is neither the property of the government nor subject to release under the FOIA. Thus, the issue of whether Brookhaven should release it on public policy grounds is moot.

In summary, we find no basis in NTC’s Appeal to remand this matter to Brookhaven or to order the release of the requested material. Accordingly, we will deny NTC’s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Neutron Technology Corporation, Case No. VFA-0432, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 27, 1998

(1)Boron Neutron Capture Therapy is an experimental procedure for treating cancer of the brain. For further information on Boron Neutron Capture Therapy, see "A Prescription for Hope" in the *Berkeley Lab Research Review*, Fall 1997.

(2)FOI Requests from Ron J. Twilegar of NTC dated April 20, 1998 and April 23, 1998. The two request letters have been consolidated for the purpose of this Decision and Order.

Case No. VFA-0434, 27 DOE ¶ 80,160

September 2, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Scripps Institute of Oceanography

Date of Filing: July 31, 1998

Case Number: VFA-0434

On July 31, 1998, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received an Appeal filed by the Scripps Institute of Oceanography (Scripps) from a determination issued to it by the Director of the DOE's Federal Energy Technology Center (hereinafter referred to as "the Director"). The Director issued this determination in response to a request for information that Scripps submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that the Director release certain documents to Scripps.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, Scripps sought access to all correspondence between Biopraxis Inc., a DOE contractor, and the DOE pertaining to (1) the costs incurred by Scripps in performing subcontracts 96-001 and 96-003, (2) payments made by Biopraxis to Scripps relating to these contracts, (3) the reimbursement of Biopraxis by the DOE for payments made to Scripps, and (4) the termination of subcontracts 96-001 and 96-003 and settlement proposals relating to those terminations.

In her determination, the Director identified as responsive to Scripps' request all documents contained in the file entitled "General Correspondence - Biopraxis/Scripps Audit Issues." These documents consist of correspondence between Biopraxis and the DOE

concerning alleged irregularities in Scripps' billing practices relating to subcontracts 96-001 and 96-003. Upon examination of the documents, the Director found that they are exempt in their entirety from mandatory release pursuant to Exemptions 4 and 7(A) of the FOIA. 5 U.S.C. § 552(b)(4) and (b)(7)(A).

Exemption 4 pertains to trade secrets and privileged or confidential commercial or financial information. With regard to this Exemption, the Director found that the responsive documents were voluntarily submitted by Biopraxis to the DOE, and consisted of commercial or financial information that Biopraxis would not ordinarily make available to the public. Therefore, pursuant to the holding of the D.C. Circuit

Court of Appeals in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (Critical Mass), the Director withheld these documents.

Exemption 7(A) protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that release of the records could reasonably be expected to interfere with law enforcement proceedings. In her determination, the Director concluded that because these documents concern matters that are the subject of pending audits by the Defense Contract Audit Agency and the Department of Health and Human Services, and that release of the information could adversely affect these audits, the documents are protected from mandatory disclosure by Exemption 7(A).

In its appeal, Scripps contests the Director's application of these Exemptions. With regard to Exemption 4, Scripps argues that as a federal contractor, Biopraxis was required to report any allegedly improper billing by a subcontractor to the DOE. Therefore, Scripps claims, Biopraxis did not submit the responsive documents on a voluntary basis. Moreover, Scripps contends that the documents do not contain commercial or financial information within the meaning of Exemption 4.

Scripps further claims that Exemption 7(A) is inapplicable because the audits are not law enforcement proceedings. Moreover, even if the audits could be characterized as law enforcement proceedings, Scripps states that they have terminated, thereby making it unlikely that release of the documents would interfere in the audit process. Scripps therefore requests that we release the documents in their entirety.

II. Analysis

A. Exemption 4

Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In interpreting this Exemption, the federal courts have distinguished between documents that are voluntarily submitted to the government, and documents that are provided on a non-voluntary basis. In order to be exempt from mandatory disclosure under Exemption 4, documents containing privileged or confidential commercial or financial information that are supplied to the DOE on a voluntary basis need only be of a type that the submitter would not customarily release to the public. Critical Mass. Documents submitted on a non-voluntary basis, however, must meet a stricter standard of confidentiality in order to be exempt from mandatory disclosure. Such documents are confidential for purposes of Exemption 4 if disclosure of the information is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Association v. Morton, 498 F 2d. 765, 770 (D.C. Cir. 1974) (National Parks).

Scripps' initial contention is that the withheld material does not meet the threshold requirement for protection under Exemption 4, i.e., that the documents do not contain commercial or financial information. Scripps argues that because it is a nonprofit organization, information concerning its performance under the subcontracts is not "commercial or financial" within the meaning of Exemption 4. We do not agree. The federal courts have repeatedly stated that the business dealings of nonprofit organizations may be considered "commercial" for Exemption 4 purposes. See, e.g., Critical Mass, 975 F.2d at 880 (reports submitted by nonprofit consortium of nuclear power plants deemed "commercial in nature"); Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir. 1985) (reports submitted by nonprofit water supply company deemed "clearly commercial"); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (employee "authorization cards" submitted by nonprofit union deemed "commercial"). The documents at issue here are correspondence between the DOE and Biopraxis concerning Scripps' performance under its subcontracts. They pertain to issues regarding commerce between Scripps and Biopraxis, and are thus clearly "commercial," as that term is used in Exemption 4.

Scripps' next contention is that the responsive documents were submitted on a non-voluntary basis, and that the National Parks criteria should therefore apply. Scripps does not, however, specify the regulatory or contractual provision under which Biopraxis was required to submit the documents in question, and we find no such requirement in the Biopraxis contract or in the DOE regulations. 10 C.F.R. Part 200 et seq. We therefore conclude that the documents were submitted on a voluntary basis. Furthermore, we find that Biopraxis does not customarily disclose commercial and financial information of the type contained in these documents to the public. In this regard, we note that most of the documents are captioned "Biopraxis Business Confidential And Proprietary." Others contain commercially sensitive data concerning Bipraxis' business dealings with the DOE and with Scripps, or information that could possibly be used against Biopraxis in any legal action filed by Scripps concerning the termination of the subcontracts, or concerning the substance of the communications between Biopraxis and the DOE. We therefore conclude that the Director properly applied Critical Mass in withholding the responsive documents.

However, even if we were to conclude that the documents were submitted on a non-voluntary basis, and that the National Parks criteria were therefore applicable, we would still find that those documents were properly withheld. As we stated previously, such documents are confidential for purposes of Exemption 4 if disclosure of the information is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770. We believe that release of this type of information would make it more difficult for the government to obtain information from contractors regarding alleged inappropriate behavior on the part of their subcontractors. A contractor would have a significant incentive to be less forthcoming to the DOE about its subcontractor concerns if it believed that such information could later be used in a legal action against it by the subcontractor. For these reasons, we find that the Director properly applied Exemption 4 in withholding the responsive documents.

B. Exemption 7(A)

The Director also cited Exemption 7(A) in withholding the responsive documents. This exemption allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(i). We find this Exemption to be inapplicable in this case.

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. See F.B.I. v. Abramson, 456 U.S. 615, 622 (1982); William Payne, 26 DOE ¶ 80,144 (1996) (Payne). An organization withholding material under Exemption 7 must have statutory authority to enforce a violation of a law or regulation within its authority. Church of Scientology v. Department of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). For example, we have consistently found that the DOE's Office of the Inspector General (IG) compiles reports for law enforcement purposes within the meaning of Exemption 7. See Richard Levernier, 26 DOE ¶ 80,182 (1997) ("The IG is a classic example of an organization with a clear law enforcement mandate."); Keci Corporation, 26 DOE ¶ 80,149 (1997); Payne; McKinney. Applying these principles to the matter at hand, we find no indication in the record that the Federal Energy Technology Center has the "requisite law enforcement mandate" to invoke the protection of Exemption 7. See, e.g., Church of Scientology International v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) (law enforcement mandate provided by enforcement provisions of federal tax code). Moreover, even if we were to assume that the Director could invoke Exemption 7(A) on behalf of the Defense Contract Audit Agency and the Department of Health and Human Services auditors, the record is devoid of any indication that these auditors possess any law enforcement mandate or authority. See generally 32 C.F.R. Part 387 and 45 C.F.R. Part 74 (Defense Contract Audit Agency and HHS auditors, respectively, authorized to perform accounting services regarding agency contracts and subcontracts). Without evidence of such a mandate, we cannot conclude that the withheld documents were compiled for law enforcement purposes within the meaning of Exemption 7.

Although we have found this exemption to be inapplicable, the Director properly withheld the responsive documents pursuant to Exemption 4. We will therefore deny Scripps' appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Scripps Oceanographic Institute on July 31, 1998 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

DATE: September 2, 1998

Case No. VFA-0435, 27 DOE ¶ 80,159

September 2, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Heart of America Northwest

Date of Filing:August 5, 1998

Case Number:VFA-0435

On August 5, 1998, Heart of America Northwest (HOAN) filed an Appeal from determinations the Director of the Office of External Affairs (Director) of the Richland Operations Office of the Department of Energy (DOE) issued to it on July 1, 1998 and July 7, 1998. In those determinations, the Director partially granted a request for information that HOAN filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In its request for information, HOAN sought information regarding various types of waste at the Hanford Site. In her July 1, 1998 determination, the Director released a copy of a document from Corpex Technologies, but she deleted information that identified a Corpex Technologies chemical product and its chemical composition pursuant to Exemption 4 of the FOIA. See 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In her July 7, 1998 determination, the Director released a copy of an estimated cost proposal Fluor Daniel Northwest, Inc. submitted to the DOE, but deleted specific types of cost information pursuant to Exemption 4 of the FOIA. The types of cost information the Director deleted included general and administrative percentages, profits, and overhead rates.

Regarding the Corpex Technologies information, HOAN contends that the DOE should disclose the name and chemical composition of the Corpex Technologies chemical product and the “owners, generators or transporters” of this material. HOAN argues that the DOE cannot use Exemption 4 to withhold the name and chemical composition of the Corpex Technologies product because the release of this information is in the public interest. HOAN also states that the chemical composition of the Corpex Technologies chemical product is not a trade secret or commercial or financial information and is neither confidential nor privileged. Specifically, HOAN states that the Corpex Technologies chemical product is not a trade secret because it is a waste product created without any innovation or effort.

Furthermore, HOAN contends that the DOE should not have withheld Fluor Daniels Hanford’s overhead costs because other numbers in the released document allow one to calculate the deleted information. HOAN also contends that the DOE should have revealed the reasons why it did not designate hazardous materials as “dangerous materials” pursuant to the laws in the State of Washington. HOAN also states that the DOE’s Richland Office of External Affairs improperly delegated to other DOE regional offices the responsibility for responding to its FOIA request. Finally, HOAN argues that the DOE should not have disseminated responsive information to it in a “piecemeal” fashion without an index.

Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (Critical Mass). By contrast, information a submitter provided to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. In choosing between these two tests, we have consistently held that a submitter involuntarily submits information in response to a request for proposal. Thus, the information is "confidential" if it meets the test set out in National Parks. See Glen M. Jameson, 25 DOE ¶ 80,191 (1996) (Jameson); Hanford Education Action League, 23 DOE ¶ 80,143 (1993).

As an initial matter, we note that HOAN is correct when it argues that Exemption 4 does not protect the name of the Corpex Technologies chemical product. A representative of the Director informed us that it should have released this information. See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. We agree. The name of the chemical product available for public sale, “Corpex 918," is not withholdable pursuant to the FOIA under these circumstances.

We do not agree with HOAN that Corpex 918 is itself a waste product and Corpex Technologies did not create it using any innovation or effort and thus the DOE should have released the chemical composition of Corpex 918. In Public Citizen Health Research Group v. FDA, the U.S. Court of Appeals for the D.C. Circuit defined a trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” 704 F.2d 1280, 1288 (D.C. Cir. 1983). The Director’s representative informed us that Corpex 918's formula is a unique commercial product for sale to the public for chemical decontamination and recycling of radiologically contaminated metals. See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. Since Corpex 918 is a unique product created to safely neutralize dangerous chemicals and to recycle radiologically contaminated metals, we do not agree with HOAN that Corpex 918 is a waste product created without any innovation or substantial effort. Rather, we find that it is an innovative product whose formula falls within the definition of a trade secret. Accordingly, we find that the chemical formula of Corpex 918 is a trade secret withholdable pursuant to Exemption 4.

HOAN also is incorrect when it argues that Exemption 4 does not protect the release of Fluor Daniels Hanford’s overhead costs because other numbers in the released document allow one to calculate the deleted information. The Director’s representative informed us that the DOE mistakenly released figures that might assist HOAN in calculating Fluor Daniels Hanford’s overhead costs for its estimated cost proposal concerning the “Navy RC Landhaul Road Improvements.” See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. Simply because the DOE mistakenly released information it meant to withhold is not a proper justification for releasing additional information. We find that an agency’s ability to withhold information pursuant to Exemption 4 does not evaporate simply because an agency inadvertently released some information it intended to withhold.

In appropriate cases, Exemption 4 protects the release of the type of information the requester seeks. We

find that the overhead costs are confidential commercial information within the meaning of Exemption 4. The DOE obtained this material from a "person" as Exemption 4 requires, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). As stated above, we have consistently held that a submitter involuntarily submits information in response to a request for proposals. Thus, the information is "confidential" if it meets the test set out in National Parks. We conclude that the overhead costs are confidential because their release would substantially harm the submitter's competitive position. We have stated in the past that a competitor could use the release of cost information to undercut another firm's bids and thus effectively eliminate the disclosing firm from competition. See International Technology Corporation, 22 DOE ¶ 80,107 (1992); U.S. Rentals, 21 DOE ¶ 80,118 (1991). In this case, for example, any competitor could use overhead costs to easily determine how to adjust its proposal to offer more favorable terms than the submitter in a future bid process.

We have reviewed HOAN's FOIA request and have confirmed that HOAN did not specifically request the names of the "owners, generators, or transporters" of Corpex 918 in its original FOIA request. We have generally held that an appellant may not expand the scope of a request on appeal by requesting new information. F.A.C.T.S., 26 DOE ¶ 80,132 at 80,578 (1996); Energy Research Found., 22 DOE ¶ 80,114 at 80,529-30 (1992). Because this additional request clearly represents an expansion of the scope of HOAN's request, we must deny this portion of HOAN's appeal. Furthermore, the Director's representative confirmed that the DOE searched and did not find any information detailing the reasons why it did not designate hazardous materials as "dangerous materials" pursuant to the laws in the State of Washington. See August 31, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. Accordingly, we must deny this portion of HOAN's appeal.

We do not find any merit to HOAN's other arguments. First, HOAN argues that the DOE's Richland Office of External Affairs improperly delegated to other DOE regional offices the responsibility of responding to its FOIA request. In addition to searching at the DOE Richland Operations Office, the DOE Richland Office of External Affairs forwarded copies of HOAN's request to other DOE field offices based on its belief that other DOE field offices were also likely to possess responsive information. See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. The Director forwarded HOAN's request in an effort to help HOAN rather than require HOAN to make separate requests to the individual DOE field offices. We find nothing improper with the DOE Richland Office of External Affairs' customer-friendly forwarding of HOAN's request to facilitate the search process.

Finally, HOAN argues that the DOE should not have disseminated responsive information to it in a "piecemeal" fashion without an index. The Director's representative stated that if HOAN had requested that the DOE not release the documents to it in a "piecemeal" fashion, that the DOE would have complied with HOAN's request. The Director's representative informed us that the DOE sent HOAN copies of documents in a "piecemeal" fashion to expedite the response rather than delay the release until the DOE had culled together all of the 12,000 pages HOAN eventually received. See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. Finally, the Director's representative informed us that it sent to HOAN a copy of a document called the "matrix," which is the only extant DOE document similar to an index of responsive information. See August 28, 1998 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Yvonne Sherman, Richland Operations Office. However, since the FOIA does not require the DOE to create an index of documents the DOE provided in response to a FOIA request, we find no merit to HOAN's contention that the DOE should have released a nonexistent index.

The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public

interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by FOIA Group, Inc. on January 20, 1998, Case No. VFA-0369, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Director of the Office of External Affairs of the Richland Operations Office of the Department of Energy, who will release a new copy of the document containing the name of the Corpex Technologies chemical product.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 2, 1998

Case No. VFA-0436, 27 DOE ¶ 80,161

September 3, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William Payne

Date of Filings: August 6, 1998

Case Numbers: VFA-0436

On August 6, 1998, William Payne (Payne) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Albuquerque Operations Office (DOE/AL) issued to him on March 30, 1998. The determination concerned a request for information that Payne submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to Payne.

I. Background

On February 17, 1998, Payne filed a FOIA request with DOE/AL requesting access to:

1. All purchase requisitions, including any attached statement of work, issued by Sandia National Laboratories, Los Alamos National Laboratories, or DOE/AL between January 1, 1991 and February 17, 1998 to RSA Inc.
2. Copies of all invoices from RSA Inc. received by Sandia National Laboratories, Los Alamos National Laboratories, or DOE/AL between January 1, 1991 and February 17, 1998.

Letter from Payne to Elva Barfield, DOE/AL (February 17, 1998). DOE/AL, the Kirtland Area Office (oversight for Sandia National Laboratories (SNL)), and the Los Alamos Area Office (oversight for Los Alamos National Laboratories (LANL)) each conducted a search, but found no DOE records that were responsive to Payne's request. DOE/AL then supplied Payne with the names and addresses of individuals at SNL and LANL to contact regarding the existence of information responsive to his request. Letter from Elva Barfield, DOE/AL to Payne (March 30, 1998). On May

15, 1998, Payne sent an electronic mail message to the Secretary of Energy appealing AL's determination. Payne filed the present Appeal with OHA on August 6, 1998. In this Appeal, Payne asserts that the requested information should be considered agency records if DOE is properly managing its contractor relationships.

II. Analysis

Our threshold inquiry in this case is whether the material requested can be considered "agency records" and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf*. 5 U.S.C. § 552(f)

(describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as SNL and LANL, are subject to the FOIA. *See, e.g., BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

A. SNL and LANL Are Not Agencies Under the FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552 (f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. V. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Lockheed Martin Corporation, through its wholly- owned subsidiary the Sandia Corporation, is the contractor responsible for maintaining and operating SNL. *See Hellen Ruth Sutton-Pank*, 25 DOE ¶ 80,178 (1996) (*Sutton-Pank*); *William Kuntz, III*, 25 DOE ¶ 80,157 (1995). Under a similar contractual relationship with the DOE, the University of California (UC) is the contractor responsible for maintaining and operating LANL. *See Los Alamos Study Group*, 26 DOE ¶ 80,212 (1997) (*LASG*). While the DOE obtained both organizations' services and exercises general control over the contract work, it does not supervise the day-to-day operations of either UC or Lockheed Martin Corporation. We therefore conclude that neither SNL or LANL can be considered an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control At The Time Of Request

Although SNL and LANL are not agencies for the purposes of the FOIA, their records relevant to Payne's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time Payne made his FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, DOE/AL has informed us that the information that Payne seeks was not in the agency's control at the time of the appellant's request. *See* Electronic Mail Message from E. Barfield, DOE/AL to W. Schwartz, OHA (August 12, 1998). Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

C. The Contracts Provide That Procurement Records Are Contractor Property

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that they are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We next look to the contracts between DOE and the two laboratories to determine the status of the requested records. Both contracts provide that all records "acquired or generated" by the contractor in its performance of the contract shall be the property of DOE except "records related to any procurement action by the [contractor]." Contract DE-AC04-94AL85000, Modification No. M009, Clause 10(a) (SNL); Contract No. W-7405-ENG-36, Paragraph b(8) (LANL). *See also LASG*, 26 DOE at 80,842; *Sutton-Pank*, 25 DOE at 80,694. Because the documents at issue are related to procurement actions of SNL and LANL, we find that the requested records are not agency records and thus not subject to release under DOE regulations.

It Is Therefore Ordered That:

(1) The Appeal filed on August 6, 1998 by William Payne, OHA Case No. VFA-0436, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 3, 1998

Case No. VFA-0438, 27 DOE ¶ 80,162

September 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William Payne

Date of Filing: August 13, 1998

Case Number: VFA-0438

This decision concerns an Appeal filed on August 13, 1998 by William Payne (Appellant). The Appellant submitted a request for information to the Department of Energy's (DOE) Office of Inspector General (IG) seeking copies of "all investigative reports authored at DOE in response to [the Appellant's] allegation that NSA willfully and knowingly attempted to sabotage DOE/Sandia cryptographic projects." This request was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Determination Letter at 1. On July 6, 1998, the IG issued a determination in response to that request, redacting the names of individuals and other identifying information from two of the five documents it provided to the Appellant. * On August 13, 1998, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA, which set forth the types of information agencies are not required to release. Only Exemptions 6 and 7(C) are at issue in the present case.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement

proceeding based on either civil or criminal statutes. FBI v. Abramson, 456 U.S. 615, 622 (1982); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied sub nom. Donolon v. IRS, 414 U.S. 1024 (1973). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 769, 773 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in an Office of Inspector General investigation, which in this case includes sources of information, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 1. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. James L. Schwab, 21 DOE 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE 80,129 (1990). Therefore, we find that release of the individuals' identities would result in significant invasions of privacy.

In Reporters Committee, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals's identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that the identities of the individuals were properly withheld under Exemptions 6 and 7(C). See, e.g., Tod Rockefeller, 26 DOE 80,238 (1997).

The Appellant also requests that he be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation of why that exemption is applicable. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1980). On previous occasions, we have stated that, although such an index may be required of the agency when it is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE 80,145 at 80,627 (1990). At the administrative level, determinations need only include a general description of the withheld material and a statement of the reason for the withholding. Therefore, we reject

the Appellant's request for a Vaughn index.

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. By releasing the responsive document with only those redactions necessary to prevent identification of specific individuals, which is what has been done here, the agency can provide as much information as possible while safeguarding individual privacy rights.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by William Payne on August 13, 1998, Case Number VFA-0438, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 19, 1998

Case NO. VFA-0443, 27 DOE ¶ 80,164

October 9, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Baker, Donelson, Bearman & Caldwell

Date of Filing: September 8, 1998

Case Number: VFA-0443

The law firm of Baker, Donelson, Bearman & Caldwell (Baker) files this Appeal under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. § 1004. As explained below, the Office of Hearings and Appeals (OHA) will grant the Appeal.

Baker filed a request for documents with the Department's Golden Field Office (Golden) on April 28, 1998. In the request, Baker sought "all contracts entered into pursuant to Request for Proposal No. RAR-4-14061, ?Systems Engineering Approaches to Development of Advanced Residential Buildings.'"

This case represents the second time that Baker's request for these documents has been before the OHA. On the first occasion, Baker appealed Golden's initial response to its request. In its response, Golden released all the responsive documents it located in its files except one set of records. The records withheld by Golden concerned a contract between the National Renewable Energy Laboratory and Steven Winter Associates (Winter). Golden withheld the Winter documents under Exemption 4 of the Freedom of Information Act (FOIA), discussed below, and Baker appealed. We found that Golden's determination did not provide a reasonably specific justification for its assertion of Exemption 4. We therefore remanded the matter to Golden for a new determination. *Baker, Donelson, Bearman & Caldwell*, Case No. VFA-0430 (August 20, 1998).

In its second determination letter to Baker, Golden again withheld the Winter documents under Exemption 4, but provided a new justification. Baker then filed the present appeal.

The FOIA generally requires that agency records be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA provides nine exemptions for specific types of information that the agency may withhold at its discretion. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The exemption asserted in the present case, Exemption 4, permits an agency to withhold from release "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4).

In its second determination letter, Golden claims that the withheld documents consist of "privileged or confidential commercial or financial information." Based on this assertion, Golden withheld the Winter documents in their entirety. However, even when the requested material contains matter that may be withheld, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

Exemption 4 rarely permits the withholding of documents in their entirety. *Tri-State Drilling*, 26 DOE ¶ 80,202 (1997). For example, the mere fact that the contents of a document may be useful to competitors in future bids is not sufficient ground to withhold the material unless the material is unique. *Morgan, Lewis & Bockius*, 20 DOE ¶ 80,165 (1990). A finding that material is "unique" under FOIA standards has generally been limited to cases where the material consists of specific technical processes that are the property of, or have been developed by, the submitter. *Government Sales Consultants*, 13 DOE ¶ 80,115 (1985).

On the other hand, information such as the total price of a contract, after the contract has been awarded, does not reveal the submitter's bidding strategy; thus, it cannot normally be withheld under Exemption 4. *Covington & Burling*, 20 DOE ¶ 80,124 (1990). In addition, we have found that contractual items such as rental car charges, airfares, and postage are not "unique methods and procedures," and cannot generally be withheld under Exemption 4. *Greenpeace USA*, 26 DOE ¶ 80,219 (1997).

We have reviewed a sample of the Winter documents. We cannot find that all of the information contained in the documents, on its face, meets the requirements for withholding under Exemption 4. Furthermore, Golden has provided no reasons in its determination letter that would establish that all the material can be withheld under Exemption 4.

Consequently, on remand, Golden must conduct an additional review of any information in the Winter documents that it seeks to withhold from Baker, so that it can determine whether the documents contain information that can be segregated and released to the public. The Authorizing Official must review each category of material withheld and determine whether its release could cause the submitter substantial competitive harm or impair the government's ability to obtain similar information in the future. *International- Hough Division/Dresser*, 12 DOE ¶ 80,140 (1985). Any determination that Winter would suffer substantial competitive harm, or that the government's ability to obtain would be impaired, must be supported by well-founded reasons presented in a new determination letter to Baker. *See W.N. Gates Co*., 10 DOE ¶ 80,111 (1982).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Baker, Donelson, Bearman & Caldwell, Case Number VFA-0443, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to Golden Field Office, which shall promptly issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:October 9, 1998

Case No. VFA-0444, 27 DOE ¶ 80,165

October 9, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Missouri River Energy Services

Date of Filing: September 9, 1998

Case Number: VFA-0444

On September 9, 1998, Missouri River Energy Services (Missouri) filed an Appeal from a determination issued to it on August 10, 1998, by the Department of Energy's Western Area Power Administration (WAPA). That determination concerned a request for information that Missouri submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, WAPA would be ordered to release the requested information or issue a new determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 28, 1997, Missouri filed an extensive FOIA request seeking copies of several documents relating to transmission rate analyses conducted by WAPA's Upper Great Plains Regional Office. In its August 10, 1998 determination letter, WAPA identified a number of documents responsive to Missouri's request. Specifically, WAPA identified one box of responsive documents and 20 computer disks. However, WAPA withheld 56 documents in their entirety pursuant to FOIA Exemptions 4 and 5. See Determination Letter at 1.

On September 9, 1998, Missouri filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Missouri challenges WAPA's determination and asserts that WAPA failed to: (1) produce an index of the documents it provided and indicate whether it segregated non-exempt material from those documents; (2) specifically identify the exemption applicable to each withheld document stated in the determination; (3) provide an adequate justification for applying Exemptions 4 and 5 to each of the withheld documents; and (4) provide sufficient information in its determination to permit Missouri to make a meaningful appeal. See Appeal Letter at 1 and 2.

II. Analysis

In its Appeal, Missouri contends, *inter alia*, that WAPA has failed to identify the specific exemption applicable to each withheld document identified in the Response and failed to provide an adequate justification for applying Exemptions 4 and 5 to the withheld documents. It is well established that a FOIA determination must have reasonably specific justifications for withholding all or parts of documents responsive to a FOIA request. See, e.g., Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992); Davis Wright & Jones, 19 DOE ¶ 80,104 at 80,509 (1989) (and cases cited therein). Conclusory and generalized claims by agency officials that material is exempt from disclosure are not acceptable. We strongly adhere to this position so that the requesting party may prepare an adequate appeal, and so that this Office may make an effective review of the initial agency determination. Thus, "when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Arnold & Porter, 12 DOE ¶ 80,108 at 80,528 (1984). A sufficiently detailed explanation should indicate the issues addressed in a document and the functions of the document which render it exempt from mandatory disclosure. Coastal States Gas Corp. v. DOE, 617 F.2d 854, 861 (D.C. Cir. 1980); Vaughn v. Rosen, 523 F.2d 1136, 1145 (D.C. Cir. 1975); Arnold & Porter, 12 DOE at 80,528. These requirements are reflected in the DOE regulations, which require that a response to a properly submitted FOIA request include:

a statement of the reason for the denial, containing as applicable . . . (i) [a] reference to the specific exemption authorizing the withholding of the record, and to the extent consistent with the purposes of the exemption, a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

10 C.F.R. § 1004.7(b)(1)(i).

In past cases, we have held that a general discussion of the policies underlying the various exemptions that fails to explain why the specific documents withheld fall within the claimed exemption is inadequate. Arnold & Porter, 12 DOE at 80,528 (and cases cited therein). Instead, we have required the agency to support its application of an exemption providing the type of justification required by Arnold & Porter. In this case we find that WAPA's Determination Letter does not permit either an adequate appeal or an effective review of its basis for withholding documents.

A. Adequacy of the Exemption 4 Justification

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either: (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks).

In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government *involuntarily* is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). By contrast, information a submitter provides to an agency *voluntarily* is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. While it appears in WAPA's Determination Letter that it applied the National Parks test, it is still unclear whether the withheld documents were in fact involuntarily submitted.

Therefore, WAPA's Determination Letter does not meet the threshold tests of Exemption 4. Moreover, the Determination Letter does not specifically indicate which particular documents are withheld under

Exemption 4. In addition, even if WAPA was correct in applying the National Parks test, it did not provide a sufficient explanation of why release of the information it withheld would cause competitive harm to the submitters. Rather, the letter merely contains a general statement that competitive harm would occur. Consequently, we hold that WAPA's blanket justification in this case is too general to support the invocation of Exemption 4.

B. Adequacy of Exemption 5 Justification

WAPA, in its Determination Letter, also seeks to invoke Exemption 5 to justify withholding a number of documents. Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, the Determination Letter fails to disclose which documents are specifically withheld under Exemption 5 and how the applicable privilege specifically applies to the withheld documents. Consequently, WAPA's blanket justification is also too general to support the invocation of Exemption 5.

III. Conclusion

As discussed above, we have concluded that WAPA has failed to specifically identify the exemption applicable to each withheld document stated in its Determination Letter and has failed to provide an adequate justification for withholding documents under FOIA Exemptions 4 and 5. Accordingly, we will remand this Appeal to WAPA to issue another, more detailed Determination Letter that is consistent with the standards we have outlined above. (1) Specifically, for each document withheld in full or in part, WAPA should include a statement of the reason for denial, a brief explanation of how the exemption applies to the record withheld, and a statement of why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). WAPA should further review each document for the possible segregation and release of non-exempt material. In making its determination, WAPA may group similar documents together and provide one justification for each group of documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Missouri River Energy Services on September 9, 1998, Case Number VFA- 0444, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Western Area Power Administration for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 9, 1998

(1)As noted earlier, Missouri contends that it should be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation why that exemption is applicable, or in the alternative a similar document describing each withholding. See Appeal Letter at 3. On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991). At the administrative levels, determinations need only include a general description of the withheld material, and a statement of the reason for withholding each document. Therefore, we reject Missouri's request for a Vaughn index. However, as stated above, in its new determination WAPA should provide Missouri with a general description of all withheld information, identify the exemption applicable to each withheld document (or group) and the reasons for any withholdings.

Case No. VFA-0447, 27 DOE ¶ 80,167

October 28, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tod N. Rockefeller

Date of Filings: September 29, 1998

Case Numbers: VFA-0447

On September 29, 1998, Edward Slavin, Jr., Esq. (Slavin), filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on behalf of his client Tod N. Rockefeller (Rockefeller) in response to a determination that DOE's Albuquerque Operations Office (AL) issued to Rockefeller on September 24, 1998. The determination concerned a request for information that Rockefeller submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in AL releasing any existing responsive material to Rockefeller free of charge.

I. Background

On August 4, 1998, Slavin, on behalf of Rockefeller, filed a FOIA request with AL requesting copies of: (1) the telephone records of several AL employees, (2) any DOE legal bills for whistleblower issues, (3) legal audits of AL and DOE's Carlsbad Area Office (CAO), (4) a government ethics file for a former CAO manager, (5) and any and all documents regarding Tod Rockefeller that exist in AL, CAO, OHA, DOE Headquarters, or Westinghouse, contractor for CAO. Letter from Slavin to Tyler Przybylek, Chief Counsel, AL (August 4, 1998) (Request Letter). Slavin stated that "a full fee waiver is requested in the public interest in preventing, detecting and exposing government fraud. . . . " Request Letter at 8. According to Slavin, "DOE site workers and managers have a right to know the truth of all of the matters covered by this request." *Id.*

AL denied Rockefeller's request for a fee waiver. Letter from Elva Barfield, AL, to Slavin (September 24, 1998). According to AL, both the Merit Systems Protection Board and the Office of Special Counsel of the Department of Labor had found Rockefeller's whistleblower allegations to be without merit. Thus, AL concluded that Rockefeller's current action was "personal in nature" and that Slavin, as Rockefeller's attorney, made the FOIA request for Slavin's own commercial interest. AL went on to state that it determined that Rockefeller's request was not likely to contribute

significantly to public understanding of the operation and activities of the government. *Id.* Thus, AL denied Rockefeller's request for a fee waiver. Slavin then filed this Appeal, asserting that AL failed to properly weigh the fee waiver criteria and the public interest. Letter from Slavin to OHA Director (September 29, 1998) (Appeal).

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the Act provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii) (1988 ed.).

Statutory Standard For Fee Waiver

The burden of satisfying the two-prong test for a fee waiver is on the requester. *See International Brotherhood of Electrical Workers*, 26 DOE ¶ 80,153 (1997) (*IBEW*); *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (*per curiam*). The DOE has implemented the statutory standard for fee waiver in its FOIA regulations. *See* 10 C.F. R. § 1004.9(a)(8). Those regulations set forth the following four factors which must be considered by the agency in order to determine whether the first statutory fee waiver condition has been met, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;" (Factor A)

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (Factor B)

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; (Factor C) and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i). If the DOE finds that a request satisfies these four factors, it must also consider the following two factors in order to determine whether disclosure of the information is primarily in the commercial interest of the requester:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

10 C.F.R. § 1004.9(a)(8)(ii). We have performed a *de novo* review of the merits of Rockefeller's request for a fee waiver and find that Rockefeller should not be granted a fee waiver for the reasons described below.

Disclosure Would Not Be In The Public Interest

Factor A asks us to determine whether the subject of the requested documents concerns the operations or activities of the government. A fee waiver is appropriate only where the subject matter of the requested material concerns government operations or activities. *See IBEW*, 26 DOE at 80,671. We have previously found that standard telephone billing records, without any evidence linking them to identified government

operations, have no informative value in relation to government operations or activities. *See William H. Payne*, 24 DOE ¶ 80,134 at 80,857 (1994). Thus, we find that disclosure of this part of Rockefeller's request is not in the public interest. However, the remaining items requested by Rockefeller (DOE legal bills related to whistleblower issues, legal audits of AL and CAO, a government ethics file for a former CAO manager, and all documents regarding Rockefeller) are likely to contain information that specifically concerns government operations or activities. *See William H. Payne*, 25 DOE ¶ 80,184 (1996) (stating that subject matter of law firm invoices discloses how the government spends taxpayer money). Therefore, we conclude that the subject of most of the requested material meets the requirement of Factor A.

Factor B requires a consideration of whether the disclosure of information is "likely to contribute" to the public's understanding of government operations and activities. *See Seehuus Associates*, 23 DOE ¶ 80,180 (1994) (*Seehuus*). If the information is publicly available or common knowledge among the general population, release to the requester would not contribute to the public understanding. *Seehuus*, 23 DOE at 80,694. The material at issue here is not in the public domain, and could contribute to the public's understanding of how the government deals with whistleblower issues. Thus, the requested information meets this requirement.

Factor C asks us to determine whether the requested material would contribute to the general public's understanding of the subject. To meet this test, the requester must have the ability and intention to disseminate this information to the public. *See IBEW*, 26 DOE at 80,671; *James L. Schwab*, 22 DOE ¶ 80,133 (1992). *See also Judicial Watch, Inc. v. Department of Justice*, No. 97-

2089, slip op. at 13 (D.D.C. Jul. 14, 1998) (finding failure to establish intent and ability to convey information fatal to request for fee waiver); *Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (stating that relevant inquiry is whether requester will disseminate the disclosed records to a reasonably broad pool of interested persons). We find that Slavin's statement that "Rockefeller merely seeks to share information about . . . his case with the public" is insufficient and does not demonstrate either Slavin or Rockefeller's intent or ability to meaningfully disseminate the information to the public. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (*McClellan*) (conclusory statements will not support a fee waiver request). Therefore, we conclude that release of the requested material would not contribute to the general public's understanding of the subject, and thus does not meet the requirement of Factor C.

Factor D requires us to consider the significance of the contribution made under Factor C. Because we have previously determined that the release of the material would not contribute to public understanding under Factor C, we find that there is no significance to the contribution. Therefore, we conclude that the requested information does not meet the requirement of Factor D.

III. Conclusion

Because the requester has not met his burden of satisfying all four factors of the fee waiver regulation, we need not consider whether disclosure of the information is primarily in the commercial interest of the requester.(1) Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 29, 1998 by Tod Rockefeller, OHA Case No. VFA-0447, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 28, 1998

(1)We note, however, that we do not agree with AL's conclusion that Slavin should be designated a commercial requester because his client did not prevail in previous whistleblower actions. We have no evidence that Rockefeller's current action is "personal in nature" as AL contends, or that Rockefeller is not pursuing a new action seeking compensation or retribution for wrongs he allegedly suffered. Courts have held that where a requester seeks information to assist in a suit seeking "compensation or retribution," such a suit is not a "commercial interest" within the meaning of the FOIA. *See McClellan*, 835 F.2d at 1285 (finding no commercial interest in records sought in furtherance of requesters' tort claim). *See also Government Accountability Project*, 25 DOE ¶ 80,203 (1996) (granting fee waiver to public interest law firm); *Government Accountability Project*, 23 DOE ¶ 80,169 at 80,668 (1993); *Muffoletto v. Sessions*, 760 F.Supp. 268, 277-78 (E.D.N.Y. 1991) (finding no commercial use when records were sought to defend against state court action to recover debts).

Case No. VFA-0448, 27 DOE ¶ 80,168

October 30, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Hans M. Kristensen

Date of Filing:October 1, 1998

Case Number: VFA-0448

On October 1, 1998, Hans M. Kristensen (Kristensen) filed an Appeal from a determination issued on September 10, 1998, by the Department of Energy's (DOE) FOIA and Privacy Act Division (FPAD). In that determination, FPAD responded to a request for information filed by Kristensen on August 1, 1998, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

The FOIA generally requires that federal agencies release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE release to the public a document exempt from mandatory disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest and not contrary to other laws. 10 C.F.R. § 1004.1.

I. BACKGROUND

In its request, Kristensen sought, among other information, the most recently updated Stockpile Stewardship and Management Plan (the Green Book). On September 10, 1998, FPAD issued a determination releasing a copy of the Unclassified Second Annual Update of the Green Book to Kristensen. This document was a redacted version of the classified Green Book meant for widespread dissemination to the public. FPAD apparently assumed that by releasing the public version of the Green Book, it had fully responded to this portion of Kristensen's request, since the determination letter did not indicate that portions of the Green Book were being withheld and did not advise Kristensen of his appeal rights.

On October 1, 1998, Kristensen filed the present Appeal contending that by releasing the unclassified version of the Green Book to him, FPAD was in effect withholding those portions of the Green Book that appear only in the original classified version of the Green Book.

II. ANALYSIS

We agree with Kristensen. By releasing only the public version of the Green Book FPAD withheld those portions of the document that were redacted from the original Green Book. The FOIA requires that the agency provide the requester with a written determination notifying the requester of the agency's

intentions to withhold responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). Such a determination allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters clearly indicate which information was withheld, and specify the exemption(s) under which information was withheld. *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. *Id.* Since the determination letter should have indicated that it was withholding portions of the Green Book and should have specifically indicated the exemptions under which that information is being withheld, we find that it is inadequate.

Accordingly, we shall remand this matter to the FPAD with instructions to issue a new determination letter. The new determination letter should specifically identify any information it is withholding from the requested document and indicate the exemption(s) under which that information is being withheld. The new determination letter should also explain why any withholdings under the exemption(s) are appropriate.

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to the FOIA and Privacy Acts Division with instructions promptly to issue a new determination letter that complies with the requirements discussed above.

It Is Therefore Ordered That:

(1) The Appeal filed by Hans M. Kristensen on October 1, 1998, Case Number VFA-0448, is hereby granted and remanded to the FOIA and Privacy Acts Division for further processing in accordance with the instructions set forth above.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 30,1998

Case No. VFA-0449, 27 DOE ¶ 80,170

November 12, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tammi D. Mourfield Selvidge, et al.

Date of Filing: October 13, 1998

Case Number: VFA-0449

On October 13, 1998, Tammi D. Mourfield Selvidge, Charles Selvidge and Sam Selvidge filed an appeal from a determination that the Department of Energy's Oak Ridge Operations Office (ORO) issued on September 1, 1998. The determination responded to a request for information the Selvidges filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The appellants challenge the adequacy of ORO's search, ORO's delay in responding to their request, ORO's failure to declassify documents, and a number of procedural matters.

I. Background

On September 22, 1997, the appellants requested from the DOE all documents concerning five categories of information, and requested that the responsive documents be declassified, if necessary, before their release. Those five categories are:

1. DOE's failure ... to decontaminate, decommission or deactivate the Molten Salt Reactor (MSRE) at Oak Ridge National Laboratory ... including documentation on all explosions, nuclear criticalities, radiation and chemical leaks [and] safety deficiencies ... at the facility, as well as all contractual documents and DOE orders or other instructions relating to the contractor's duties with respect to the [MSRE].
2. The entire history of the [MSRE] Building complex and environs, including toxic and hazardous substances used prior to the [MSRE] ...
3. Medical records of all DOE, contractor and subcontractor employees who ever worked in the [MSRE] Building ...
4. The identity and effects of the nearly 100 "classified" substances at Oak Ridge.
5. The entire contents of the Records Holding Task Group in Oak Ridge, Tennessee.

ORO issued a partial response to this request on October 21, 1997. In that response ORO informed the Selvidges that it was providing some documents responsive to Items 1 and 2 of their request, but that it was continuing to search for additional responsive documents. With respect to Item 3, ORO notified the requesters that it was still identifying the workers at the MSRE facility, and after they were all identified a search for their medical records would begin. ORO stated that it found no documents responsive to Item 4 of the request. Finally, it explained that the nature and scope of the request's Item 5 were so broad that it could not respond without additional assistance from the requesters, estimating that it would take 80 person-years to declassify all the information that responded to the request as submitted. Instead, it proposed to provide the requesters with a list of the contents of the responsive database as a finding aid,

from which the requesters could then select documents that they would like to view.

On September 1, 1998, ORO again responded to the requesters, providing a copy of the list of the contents of the database that it found to be responsive to Item 5 of the request. The listing, entitled "1998-RHA-241 RHTG System Master Report," itemizes the records held by the Records Holding Task Group at Oak Ridge. Certain information was deleted from the copy of the listing that ORO provided to the requesters. However, an index accompanied the listing, in which ORO detailed the reasons for withholding the information from the requesters. The reasons fell into two categories: either the information was deleted pursuant to Exemptions 1 and 3 of the FOIA, or an entire page was withheld because the releasability of information contained on that page was "being coordinated with external agencies and other Department of Energy offices. As soon as those coordinated reviews are completed, a final version of the Report will be issued and you will be provided updates." September 1, 1998 ORO Response.

On October 13, 1998, the Selvidges filed their appeal to the September 1 determination. In their appeal they challenge ORO's failure to conduct an adequate search within reasonable time limits, the length of time it has taken ORO to respond to their initial request for information, ORO's failure to declassify and release documents responsive to their request, and the quality of the "Vaughn" index that ORO provided in its response. (1) Each of these bases for appeal will be addressed below.

II. Analysis

A. Delay

The Selvidges argue, inter alia, that ORO has failed to respond fully to their request despite the passage of more than one year. This Office has no jurisdiction to hear such an allegation. Our jurisdiction, which arises from the DOE regulations at 10 C.F.R. § 1004.8, requires the issuance of a determination letter by a DOE official, in which the DOE has taken some action adverse to the requester. Although ORO has provided some documents responsive to the first and second categories of this request, it has consistently stated that those responses are partial responses, and that it intends to provide further response to those portions of the request, as well as an initial response to the third category of the request. Consequently, ORO has not completed its determination with respect to the first, second, and third categories of the request. This Office cannot review ORO's partial responses because they do not constitute complete determinations. Nevertheless, the Selvidges are correct in that ORO has failed to complete its determination within the time limits set by statute and regulation. Under those circumstances, the FOIA explicitly provides that requesters may seek relief in the federal district courts. 5 U.S.C. § 552(a)(6)(C). We note, however, that the federal courts have recognized that federal agencies frequently are unable to meet the statutory processing deadlines due to large backlogs of pending cases and inadequate resources. See, e.g., Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

By contrast, ORO informed the requesters in its October 21, 1997 letter that it had no documents responsive to the fourth category of information sought in their request. That determination is ripe for review and will be addressed below. With respect to the fifth category of the request, ORO's determination to withhold information from a document is subject to review by this Office and is addressed below. However, its failure to produce additional documents responsive to the fifth category is not now subject to our review. Because ORO has indicated its willingness to continue its search with the cooperation of the requesters, we conclude that it has not issued a complete determination concerning this portion of the request. Only that portion of its partial response to the fifth category of the request in which ORO withheld information constitutes a determination that we can review.

B. "No Documents" Response

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search

conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

After receiving this appeal, we contacted ORO to find out about the search it conducted in response to the Selvidges' request for "[t]he identity and effects of the nearly 100 ?classified' substances at Oak Ridge." Amy Rothrock, the FOIA Officer for ORO, explained the background for this fourth category of the request and the manner in which she searched for responsive documents. According to the FOIA Officer, the topic arose in a public meeting at which a Tennessee state employee informed the audience that the state had investigated the presence of some 100 substances at Oak Ridge, of which 20 were classified. She then determined that two offices at Oak Ridge might possibly have a list of the 100 substances, and contacted each one. At the Office of the Assistant Manager for Environment, Safety and Quality, she spoke with the project coordinator of the State of Tennessee Health Studies for Dose Reconstruction. She also questioned the Oak Ridge Office of Declassification, to learn whether it had any record of a document that contain a list of the 20 allegedly classified substances. Neither office informed the FOIA Officer that it possessed any responsive documents.

Based on our review of the details of ORO's search as set forth above, particularly in light of the fact that the source of the underlying statement was not associated with the DOE, we find that ORO took steps reasonably calculated to uncover the documents the Selvidges sought. ORO personnel consulted presumably reliable sources in ORO offices that would likely possess the information sought, were any to exist. There is no information of which we are aware that would point to other locations at ORO where additional responsive documents might exist, and the FOIA clearly does not require ORO to conduct an exhaustive search through all of its document holdings to make certain that it has no other documents responsive to the Selvidges' request. We therefore find that ORO's search concerning the fourth category of the request was adequate to meet the requirements of the FOIA. In this respect, the present Appeal will be denied.

C. Partial Response Concerning the RHTG Records

In its October 21, 1997 determination, ORO responded to the fifth category of the Selvidges' request for documents by stating that the scope of the request was so broad that it would require a declassification review that would take an estimated 80 person-years to complete. Instead it proposed to provide the requesters with printout of the contents of the Records Holding Task Group (RHTG) database. When review of that printout was complete, the requesters would be provided with a copy, from which they could select individual documents to be declassified and released, if possible. On September 1, 1998, ORO provided a copy of that printout, from which subject-identifying information had been deleted from some records listed. ORO informed the requesters that the information was withheld pursuant to Exemptions 1 and 3 of the FOIA and provided an explanation of each withholding in the form of an index, which ORO identified as a "Vaughn" index.

We have reviewed the manner in which ORO processed the fifth category of this request and find that it was appropriate. After performing a preliminary search, ORO determined that retrieving and reviewing all responsive documents would be an immense task. To provide better service and to avoid unnecessary delay and expense, it released a document that identified the universe of responsive documents and described them. ORO did not consider this a full response to the request. Rather, it identified the listing as a "finding aid," and instructed the requesters to select documents from that list that they wished to obtain. To the extent that ORO has not fully responded to this portion of the request, it has failed to respond within the statutory time limits, and the requesters' recourse is in the federal courts, as discussed above.

The listing ORO provided, however, was in a redacted form. Information contained in that document was withheld under Exemptions 1 and 3 of the FOIA. Despite the contentions raised in the appeal, ORO followed the appropriate procedures for handling a responsive document that had been identified as containing classified information. It referred the document to the Office of Declassification (OD) for a classification review, to determine whether the information claimed as classified could be declassified under current classification guidance. OD performed the required review and determined that those portions of the document continued to be considered classified. On that basis, those portions were withheld from the requesters under Exemptions 1 and 3, and the DOE official responsible for those withholdings was named in ORO's determination letter. See 10 C.F.R. § 1004.6. That determination is ripe for review, and pursuant to the regulations governing appeals of denials of requests for classified information, we have referred this portion of the appeal to the Director of Security Affairs for appellate review. (2) See 10 C.F.R. § 1004.8(f). When that office completes its review, we will issue a final agency determination on the withholdings under these Exemptions.

Finally, the Selvidges assert that ORO provided a Vaughn index that is "facially inadequate, uninformative and misleading." A Vaughn index is recognized in the context of FOIA as an index identifying each responsive document, the exemption under which it is being withheld and an explanation why that exemption is applicable, or in the alternative a similar document describing each withholding. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Missouri River Energy Services, 27 DOE ¶ 80,___, Case No. VFA-0444 (October 9, 1998); Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991). At the administrative levels, agency determinations to deny release of documents need only provide a general description of the withheld material, and a statement of the reason for withholding each document. ORO's index, which explains the basis for each withholding from the database printout, clearly meets this standard. The index permits the appellants to formulate the basis for their appeal, and permits the appellate authority to understand the DOE's assertion of exemption. Therefore, we reject the Selvidges' request for a more complete Vaughn index. (3)

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Tammi D. Mourfield Selvidge, et al., Case Number VFA-0449, is hereby denied as set forth in paragraphs (2) and (3) below, and dismissed in all other respects.

(2) The portion of the appeal described in paragraph (1) above that concerns the adequacy of the search conducted by the DOE's Oak Ridge Operations Office for documents that reveal the identity and effects of the nearly 100 ?classified' substances at Oak Ridge is hereby denied.

(3) The portion of the appeal described in paragraph (1) above that concerns the adequacy of the index describing the withheld portions of the finding aid provided in partial response to

the request for the contents of the Records Holding Task Group at Oak Ridge is hereby denied.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 12,1998

(1) In addition, they assert that a conflict of interest exists that has tainted the ability of the ORO FOIA Officer to perform her function diligently, and request that this Office have no ex parte communications with ORO personnel during our handling of this appeal. Although this Office has no authority to consider claims of conflict of interest, we have considered whether the ORO FOIA Officer's determinations to date are in compliance with the FOIA, and have determined that they are, as set forth in this Decision. With respect to ex parte communications, there are no statutory or regulatory provisions governing this proceeding that prohibit such communications. Moreover, such a prohibition has no bearing in an administrative review process, such as this one, that is not of a quasi-judicial nature. Compare 10 C.F.R. §§ 708.9(c), 710.26(a) (prohibiting ex parte discussions in whistleblower and personnel security proceedings, respectively).

(2) Appellate review of the withholding of information from the RHTG database printout under Exemptions 1 and 3 has been assigned Case Number VFA-0451.

(3) We note that the index also indicates that certain pages of the printout will be provided after ORO receives advice it has sought from other agencies or other DOE offices. No information has yet been withheld under these conditions. The appellants may await further communication from ORO and appeal any information that might be withheld upon notice of such withholding, or may seek recourse at the present time in the Federal courts.

Case No. VFA-0450, 27 DOE ¶ 80,169

November 10, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Frank E. Isbill

Date of Filing: October 14, 1998

Case Number: VFA-0450

On October 14, 1998, Frank E. Isbill, the Appellant, filed an Appeal from a final determination that the Oak Ridge Operations Office (OR) of the Department of Energy (DOE) issued on September 11, 1998. In its determination, OR granted in part a request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

BACKGROUND

In a letter dated June 9, 1998 (Request), the Appellant submitted a FOIA Request to DOE Headquarters (DOE/HQ) in Washington, D.C., for the following five categories of documents:

1. Records pertaining to the Appellant's complaint to the DOE's Office of Inspector General (OIG) about fraud and mismanagement at the DOE's Office of Scientific and Technical Information (OSTI) at Oak Ridge, Tennessee, including all information located at Oak Ridge and Washington, D.C. Also requested was information located at the DOE's Office of Employee Concerns at both locations and documents in the files of NCI Information Systems (NCI) at its Oak Ridge and Washington, DC, offices. The Appellant specifically named eight DOE employees and two NCI employees as individuals who might possess responsive documents.
2. Records pertaining to the handling of complaints of fraud, mismanagement and reprisals at OSTI from the Office of the Director of OSTI and the Office of the Secretary of Energy.
3. Copies of memoranda, directives, electronic messages (e-mail) and all other records with regard to the Appellant's performance, veteran status, promotions or salary from the files of DOE, NCI or Labat Incorporated (Labat).(1)
4. Copies of memoranda, directives, electronic messages (e-mail) and all other records from the files of OSTI or the Office of Personnel at OR with regard to the Appellant's application for employment by the DOE.
5. Copies of memoranda, directives, electronic messages (e-mail) and all other records from the files of OSTI or the Office of Personnel at OR with regard to any applications for employment by Labat or NCI personnel for employment by the DOE.

DOE/HQ forwarded the Appellant's request to OR for a determination regarding documents held at OR. (2) OR, in a September 11, 1998 determination letter, released a number of documents to the Appellant. (3)

In his Appeal, the Appellant challenges the extent of the search which was conducted for responsive

documents. Specifically, the Appellant claims that, based upon the documents provided to him, OR failed to search records at OSTI and that OR did not provide any documents responsive to categories 1 and 2 of his Request.

ANALYSIS

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. NSA, 610 F.2d 824, 834 (D.C. Cir. 1979). In the present case, to evaluate the adequacy of OR's search, we must review two issues: the reasonableness of OR's search and the correctness of OR's determination that responsive records, if any, possessed by Labat and NCI are not agency records.

We contacted the officials at OR and OSTI to inquire as to the nature of their search for responsive documents at OR and at OSTI. See Memorandum of telephone conversation between Linda Chapman, OR and Richard Cronin, OHA Staff Attorney (October 21, 1998); Memorandum of telephone conversation between Lowell Langford, OSTI, and Richard Cronin, OHA Staff Attorney (October 21, 1998). The OR official informed us that OR searched in the offices most likely to contain responsive documents, specifically OR's personnel office, Personnel Clearance and Assurance Branch offices, the Office of Diversity Programs and Employee Concerns and the office of OR's Evaluation and Control Division. All responsive documents that were located were provided to the Appellant.

OSTI conducted a search of the files at its Resource Management Office, which is the personnel office at OSTI. Additionally, a search was made for responsive documents by searching for documents in the Office of the Director of OSTI, Walter Warnick, as well as in the offices of Chuck Morgan, Ken Williams and Brian Hitson, all of whom were named in the Appellant's Request. Mr. Hitson then inquired of the remaining DOE employees named in the Appellant's Request to determine if they were in possession of responsive documents. All responsive documents that were located were then provided to the Appellant.

From the above facts, it appears that OR conducted a search reasonably calculated to find responsive documents in its possession. All the OR and OSTI offices that were thought to possess responsive documents were searched and officials at OR and OSTI made inquires to each of the DOE personnel named in the Appellant's Request.

To complete our review of the adequacy of the search made for responsive documents, we must now consider whether responsive documents that might be possessed by NCI or Labat are "agency records" under the criteria set out by the federal courts and whether records that do not meet these criteria are nonetheless subject to release under the DOE regulations. (4)10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that any responsive documents that NCI and Labat possess are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as NCI or Labat, are subject to

the FOIA. See, e.g., Air-Con, Inc., 27 DOE ¶ 80,136 (1998) (Air-Con). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Air-Con, 27 DOE at 80,582.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 180 & n. 11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, DOE did not supervise Labat's day-to-day operations during its contractual relationship with Labat. We therefore conclude that Labat is not an "agency" subject to the FOIA. With regard to NCI, DOE does not supervise NCI's day-to-day operations. Consequently, we find that NCI is not an "agency" subject to the FOIA.

Although neither NCI or Labat is an agency for the purposes of the FOIA, their records relevant to the Appellant's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time the Appellant made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989). In this case, none of the potentially responsive documents was in the DOE's control or possession at the time of the Appellant's request. Based on these facts, any responsive documents possessed by NCI or Labat clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1). There was no DOE records ownership provision in the DOE-Labat contract. However, the DOE-NCI contract contains the following provisions regarding record ownership:

H 19. Ownership of Records

(a) Government Records. Except as provided in (b) below, all records generated under this contract shall be the property of the Government . . .

(b) Contractor's Records. The following records are the property of the Contractor and not within the scope of Paragraph (a) above:

(1) Personnel records and files maintained on individual employees and applicants;

. . . .

(4) Employee relations records and files such as records and files pertaining to:

(i) Qualifications or suitability for employment of any employee, applicant or former employee;

(ii) Allegations, investigation, and resolution of employee misconduct;

(iii) Employee discipline;

(iv) Employee charges of discrimination;

. . . .

(5) Records and files pertaining to wages, salaries, and benefits and wage, salary, and benefit

administration. . . .

Section H 19, DOE Contract No. DE-AC05-95MA40110. The types of records requested by the Appellant in his Request are defined by Section H 19 of the DOE-NCI contract as belonging to NCI. Consequently, the DOE policy on contractor records described by 10 C.F.R. § 1004.3(e)(1) does not mandate release of such documents to the public.

To summarize, we believe that OR's search was reasonably calculated to discover responsive documents. OSTI and OR searched the offices that were believed most likely to possess responsive documents. Additionally, each of the DOE employees named in the Request were contacted to discover if they had responsive documents. All discovered responsive documents were disclosed to the Appellant. While NCI or Labat (or the two named NCI employees) might possess responsive documents, such documents are not subject to the FOIA or to the DOE policy on contractor records described in 10 C.F.R. § 1004.3(e)(1). Because we find that OR's search was adequate, the Appellant's submission will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Frank E. Isbill on October 14, 1998, Case No. VFA-0450, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 10, 1998

(1)NCI is the contractor which provides support services for OSTI. Labat was the predecessor contractor to NCI. The Appellant was employed by both firms at OSTI.

(2)We have been informed that DOE/HQ and OIG will issue a separate determinations regarding whether they possess any responsive documents, including any documents discovered in OIG offices at Oak Ridge. See Memorandum of telephone conversation between Tanya Woods, HQ, and Richard Cronin, OHA Staff Attorney (October 26, 1998).

(3)Portions of some documents were withheld pursuant to Exemption 6 of the FOIA. Exemption 6 protects contents of personnel, medical and similar files. See 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The Appellant does not challenge OR's determination regarding the material withheld pursuant to Exemption 6.

(4)For the purposes of this analysis, we will assume that NCI and Labat possess documents responsive to the Appellant's Request.

Case No. VFA-0451, 27 DOE ¶ 80,262

March 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners:Tammi D. Mourfield Selvidge, et al.

Date of Filing: October 16, 1998

Case Number: VFA-0451

Tammi D. Mourfield Selvidge, Charles Selvidge and Sam Selvidge (appellants) filed an Appeal from a determination that the Department of Energy's Oak Ridge Operations Office (ORO) issued on September 1, 1998. The determination responded to a request for information that the appellants filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The appellants challenge ORO's failure to declassify documents. This Appeal, if granted, would require the DOE to release the information that it withheld as classified in its September 1, 1998 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On September 22, 1997, the appellants requested from the DOE all documents concerning five specified categories of information and requested that the responsive documents be declassified, if necessary, before their release. The requested information concerned Oak Ridge National Laboratory's Molten Salt Reactor, the identity of "classified" substances, and the Records Holding Task Group (RHTG). This Appeal only deals with the review of the withholding under FOIA Exemptions 1 and 3 of information from the RHTG database printout. Tammi D. Mourfield Selvidge, 27 DOE ¶ 80,170, at 80,675 n.2 (1998). ORO had determined some of the redacted information was required to be withheld from disclosure as classified pursuant to the Atomic Energy Act of 1954, and therefore exempt from

mandatory disclosure under Exemption 3 of the FOIA. It also determined that some of the withheld information was classified, the release of which could cause damage to the national security, and therefore should be withheld under Exemption 1.

The present Appeal seeks the disclosure of the withheld portions of the requested documents. In their Appeal, the appellants contend that the withheld information should be released because there is a medical reason to know the information and it is in the public interest to release it.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Tammi D. Mourfield Selvidge, 26 DOE ¶ 80,118 (1996); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). Among the types of information of which dissemination is prohibited under the Atomic Energy Act are Restricted Data and Unclassified Controlled Nuclear Information (UCNI). 42 U.S.C. §§ 2162, 2168.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed again the RHTG database based upon current classification guidance. This review identified Restricted Data and UCNI that must remain protected. The Director has affirmed that all of the information being withheld as Restricted Data is related to special nuclear material production and nuclear weapons design. The Unclassified Controlled Nuclear Information being withheld from the documents concerns sensitive facilities at Oak Ridge used for the production of Special Nuclear Material. The Director also found that none of the information that continues to be properly withheld is subject to Exemption 1 of the FOIA, and determined that some information previously withheld may now be released.

Based on the review performed by the Director of SA, we have determined that the Atomic Energy Act requires the continued withholding of much of those portions of the document that the DOE previously identified as containing classified information. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Director of SA has now determined to be properly classified must be withheld from disclosure. However, because some previously deleted information may now be released as a result of the Director of SA's review, a newly redacted version of the requested document will be provided to the appellants under separate cover. Accordingly, the appellants' Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the Tammi D. Mourfield Selvidge, Charles Selvidge, and Sam Selvidge, on October 16, 1998, Case No. VFA-0451, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the Records Holding Task Group database, in which additional information is released, will be provided to Tammi D. Mourfield Selvidge, Charles Selvidge, and Sam Selvidge.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 3, 2000

Case No. VFA-0452, 27 DOE ¶ 80,171

November 13, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ashok Kaushal

Date of Filing: October 19, 1998

Case Number: VFA-0452

On October 19, 1998, Ashok Kaushal filed an Appeal from a determination issued on October 6, 1998, by the Department of Energy's Albuquerque Operations Office (DOE/AL). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the Department of Energy (DOE) in 10 C.F.R. Parts 1004 and 1008.

I. Background

On April 28, 1997, Mr. Kaushal requested, under the FOIA and Privacy Act, information related to a whistleblower complaint he filed against Sandia National Laboratories (SNL). Specifically, Mr. Kaushal sought

(a) a copy of the investigation report and all documents, memoranda, letters, data, [that] has been collected by DOE/ [Office of Contractor Employee Protection] office regarding this matter; (b) a copy of response filed by Sandia National Labs; (c) a copy of the audit report prepared by Martin Marietta Corporation auditors; (d) a copy of the documents indicating [Sandia] Auditing Department costs in compiling this information; (e) a copy of the documents identifying legal costs incurred by [Sandia] including costs paid to Bob Bosser, Martin Marietta auditors; (f) a copy of documents identifying legal costs incurred by [Sandia] Legal Department and outside legal staff; (g) a copy of documents identifying other legal costs incurred pertaining to my [whistleblower complaint] and . . . my complaint filed with the Equal Employment Opportunity Commission.

Letter from Ashok Kaushal to GayLa Sessoms, DOE (April 23, 1997). In addition, Mr. Kaushal asked the DOE to "identify the Privacy Act system of records that contain this information." Id. Mr. Kaushal's request, which was sent to the Freedom of Information and Privacy Act Office at DOE Headquarters, was referred to the DOE's Office of Inspector General and DOE/AL. Memorandum of telephone conversation between Carolyn Becknell, DOE/AL, and Steve Goering, OHA (October

23, 1998).

DOE/AL issued a determination on October 6, 1998, in which it released 26 records in their entirety in response to item (a) of the Mr. Kaushal's request, released two records with information deleted that DOE/AL found was exempt from release under the FOIA in response to items (b) and (c) of the request, and stated "in reference to portions (d) through (g) of your request, no records exist because the costs are

not tracked separately because these legal costs are included in the cost of doing business. Therefore, there are no responsive records to these portions of your request." Letter from David L. Geary, DOE/AL, to Ashok Kaushal (October 6, 1998). Finally, DOE/AL informed Mr. Kaushal that in "reference to identifying the Privacy Act System of Records (SOR) that contain this information, none of the responsive records are indexed by a SOR." Id. (1)

On October 19, 1998, Mr. Kaushal filed the present appeal, stating, "This is to respond to a letter of October 6, 1998. I file an appeal and seek the information, which you have denied me." Appeal at 1. Mr. Kaushal then listed in his Appeal the information he is seeking by essentially restating items (a), (e), and (f) from his April 23, 1997 request. Id. Because the appellant specifically stated which items of his request are the subject of his appeal, this decision will only address DOE/AL's response to items (a), (e), and (f) of Mr. Kaushal's request.

II. Analysis

A. Item (a) of the Appellant's Request

As noted above, DOE/AL released to Mr. Kaushal 26 records in their entirety responsive to his request for "a copy of the investigation report and all documents, memoranda, letters, data, [that] has been collected by DOE/ [Office of Contractor Employee Protection] office regarding this matter." In addition, DOE/AL stated in its determination,

In reference to the portion of (a) referencing the investigation report, [DOE/AL's Management Review Division, the DOE's Kirtland Area Office], and the Sandia National Laboratories (SNL) do not have in their possession a copy of the requested investigation report prepared by the DOE Office of Contractor Employee Protection. Therefore, no responsive record is provided. This portion will be responded to by the [Office of Inspector General (OIG) at DOE Headquarters] in Washington, D.C. [DOE/AL] has discussed this portion with the OIG and they will correspond directly with you.

Though the appellant does not state specifically in his appeal what information responsive to Item (a) of his request he is being denied by DOE/AL, the only responsive document identified by DOE/AL that was not provided to Mr. Kaushal is the investigation report prepared by the Office of Contractor Employee Protection (OCEP). However, DOE/AL has informed Mr. Kaushal that he will be receiving a response to his request for the investigation report from the OIG.

Section 1004.8(a) of the DOE Regulations states that the OHA has jurisdiction to consider Freedom of Information Act Appeals "[w]hen the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees." 10 C.F.R. § 1004.8(a). Because the OIG is responsible for issuing a determination in response to the appellant's request for the investigation report, and because the OIG has not yet issued its determination, the DOE has not denied the Appellant's request for the investigation report. After the OIG has responded to Mr. Kaushal's request, he will have the right to file an appeal of the withholding of any records responsive to item (a) of his request. In addition, after receiving the OIG's determination, Mr. Kaushal can appeal the adequacy of the DOE's (both DOE/AL's and the OIG's) search for responsive documents. At this point, however, the DOE's response to item (a) of the Appellant's request is beyond the scope of our jurisdiction and the present Appeal.

B. Items (e) and (f) of the Appellant's Request

In items (e) and (f) of his request, the appellant sought "a copy of the documents identifying legal costs incurred by [Sandia] including costs paid to Bob Bosser, Martin Marietta auditors" and "a copy of documents identifying legal costs incurred by [Sandia] Legal Department and outside legal staff." Letter from Ashok Kaushal to GayLa Sessoms, DOE (April 23, 1997). The costs to which the Appellant's letter

refers are those incurred in responding to the whistleblower and EEO complaints he filed against SNL. DOE/AL responded that “no records exist because the costs are not tracked separately because these legal costs are included in the cost of doing business. Therefore, there are no responsive records to these portions of your request.”

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

After receiving Mr. Kaushal’s Appeal, we contacted DOE/AL to obtain additional information regarding its search for documents responsive to items (e) and (f) of the appellant’s request. DOE/AL informed us that it consulted SNL and learned that SNL had reached a settlement agreement regarding Mr. Kaushal’s complaints, and that the entire matter was handled by in-house counsel for SNL. Memorandum of telephone conversation between Carolyn Becknell, DOE/AL, and Steven Goering, OHA (October 22, 1998). As such, SNL states that it maintained no separate accounting of its costs related to this case. Id. We find that DOE/AL took steps reasonably calculated to uncover the documents sought by the appellant. Beyond contacting the appropriate personnel at SNL and finding out why no documents such as those sought by Mr. Kaushal would have been created by SNL, we cannot imagine what other reasonable steps DOE/AL could have taken in response to the appellant’s request. We therefore will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Ashok Kaushal on October 19, 1998, Case Number VFA-0452, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 13, 1998

(1) As implied by the issues raised in Mr. Blanco’s Appeal, the Privacy Act also imposes certain requirements on government agencies in their use of personal information, including limitations on disclosure to third parties. However, the appeal authority of the OHA under the DOE Privacy Act regulations extends only to the review of determinations issued in response to requests by individuals for access to records or amendment of records. 10 C.F.R. § 1008.11(a). Moreover, in Mr. Blanco’s original request to BPA, he did not seek to amend records, but rather requested only access to records under the Privacy Act. Thus, only the first issue raised by Mr. Blanco, relating to his right to access particular records, is within the scope of the present Appeal.

(2) As implied by the issues raised in Mr. Blanco's Appeal, the Privacy Act also imposes certain requirements on government agencies in their use of personal information, including limitations on disclosure to third parties. However, the appeal authority of the OHA under the DOE Privacy Act regulations extends only to the review of determinations issued in response to requests by individuals for access to records or amendment of records. 10 C.F.R. § 1008.11(a). Moreover, in Mr. Blanco's original request to BPA, he did not seek to amend records, but rather requested only access to records under the Privacy Act. Thus, only the first issue raised by Mr. Blanco, relating to his right to access particular records, is within the scope of the present Appeal.

Case No. VFA-0453, 27 DOE ¶ 80,173

November 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Ruth Towle Murphy

Date of Filing: October 19, 1998

Case Numbers: VFA-0453

Ruth Towle Murphy files this Appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. § 1004.

Murphy filed a FOIA request with the Department's Office of Scientific and Technical Information (OSTI) in Oak Ridge, Tennessee.(1) In her request, Murphy sought material dealing with health and safety issues at OSTI. In addition, she asked for a waiver of fees for finding and duplicating the requested materials.

Lowell Langford, the Freedom of Information Officer at OSTI, initially responded to Murphy in a letter dated September 18, 1998. Langford stated that her request "does not meet the necessary criteria" for a fee waiver set out at 10 C.F.R. § 1004.9(a)(8), but gave her until October 9 to provide more information. On October 9, Langford sent Murphy his final response, informing her that "our decision to … deny a fee waiver for providing the information requested stands." Murphy now appeals the denial of her request for a fee waiver. Because we find that Murphy failed to show her eligibility for a fee waiver, we will deny the Appeal.

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in considering whether to waive the fees. The two prongs can be summarized as the "public interest" prong and the "commercial interest" prong. The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government. The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

The burden of satisfying the two-prong test for a fee waiver is on the requester. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988);*International Brotherhood of Electrical Workers*, 26 DOE ¶ 80,153 (1997) (*IBEW*).

In order to determine whether the requester meets the first prong - that is, whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities - the Department considers the four factors listed below.

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government.

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities.

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure.

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest.

Although OSTI did not explain why it denied Murphy's request for a fee waiver, we find Factor C - whether the disclosure contributes to the understanding of the general public - to be determinative in this case. In considering whether the requester satisfies this factor, the relevant inquiry is whether he or she will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (*Carney)*. To meet this test, the requester must have the intention and ability to disseminate this information to the public. *IBEW*, 26 DOE at 80,671; *James L. Schwab*, 22 DOE ¶ 80,133 (1992). The inability to disseminate information, by itself, is sufficient basis for denying a fee waiver request. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

Murphy stated in her appeal that she is a doctoral student at the University of Tennessee. She said that the information she is requesting is for research on her dissertation, and "will be offered to the general public at no cost." She provides no explanation, however, of how her dissertation will be disseminated to a reasonably broad academic audience, as required in *Carney*.

The courts have looked closely at a requester's ability to broadly disseminate the requested information. For example, a researcher sought a fee waiver based on his statement that "I am an instructor and researcher employed by Middle Tennessee State University, and intend to use the information I am requesting as the basis for a planned book." *Burriss v. CIA*, 524 F. Supp. 448, 449 (M.D. Tenn. 1981). The court upheld the agency's denial of a fee waiver request based on its finding that the requester's statements had not demonstrated his ability to effectively disseminate the information to the public. Similarly, a requester's intention to merely place the requested information in a library is insufficient, in itself, to establish public dissemination for the purpose of obtaining a fee waiver. *Klamath Water Users Protective Ass'n v. Department of the Interior*, No. 96-3077, slip op. at 47 (D. Or. June 19, 1997) (magistrate's recommendation), *adopted* (D. Or. Oct. 16, 1997) (appeal pending).

Although the requester must disseminate the disclosed information to the public to obtain a fee waiver, the information need not reach a broad cross-section of the public. As the court explained in *Carney*:

The [agency] suggests that, because [the requester's] dissertation and proposed articles and book ... are scholarly in nature, they will not reach a general audience and hence will not benefit the public at large. Such work by its nature usually will not reach a general audience, but, by enlightening interested scholars, it often is of great benefit to the public at large.... The relevant inquiry, as we see it, is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.

From the information he submitted to the [agency], we are satisfied that [the requester] will disseminate the disclosed records to a sufficiently broad audience of students and academics interested in his work.... While it is true that [the requester's] book is only tentative, the fact that he is working on a related dissertation is sufficient evidence, for purposes of the public interest fee waiver, to conclude that his book will be completed.

Carney 19 F.3d at 815.

While it is clear that the dissemination requirement may be met by disclosing the information to a community of scholars, we do not find that Murphy has met this standard. Murphy has provided us with no evidence of her ability to disseminate the information to a sufficiently broad audience, and she has thus failed to meet the requirements for a fee waiver for this request. We will therefore deny this Appeal. (2)

It Is Therefore Ordered That:

(1) The Appeal filed by Ruth Towle Murphy, Case No. VFA-0453, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 17, 1998

(1) 1/ Murphy filed nine separate FOIA requests between August 31 and September 15, 1998, all dealing with health and safety at OSTI. The FOIA office at OSTI aggregated the nine requests into one.

(2) 2/ Because Murphy has not met the burden of satisfying the public interest prong, we need not consider the second prong of the test - whether disclosure of the information is primarily in the commercial interest of the requester.

Case No. VFA-0454, 27 DOE ¶ 80,172

November 17, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alan Henney

Date of Filing: October 20, 1998

Case Number: VFA-0454

On October 20, 1998, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received a request from the Department of Commerce asking DOE to provide a direct response to part of an Appeal filed by Alan Henney under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. As detailed below, we will dismiss this Appeal because OHA lacks jurisdiction to adjudicate this matter under the DOE FOIA regulations, 10 C.F.R. Part 1004. We will also ask the FOIA/Privacy Act Division of the Office of the Executive Secretariat (DOE FOIA Office) to treat Mr. Henney's Appeal as if it were a new request for documents under the FOIA.

BACKGROUND

This Appeal involves information concerning 3,273 radio frequency authorizations assigned to DOE by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.

On February 26, 1995, Mr. Henney submitted a FOIA request to the Department of Commerce seeking a list of all unclassified NTIA radio frequency authorizations, and accompanying information fields, for each agency in the Federal government. On February 6, 1996, the Chief Counsel of the NTIA issued a determination denying Mr. Henney's request pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), because the information sought was classified as "confidential," and met the criteria established by Executive Order 12356.

On February 20, 1996, Mr. Henney appealed this determination to the Assistant General Counsel for Administration of the Department of Commerce. On September 14, 1998, in response to this Appeal, the

Assistant General Counsel issued a decision that provided some records to Mr. Henney, and explained that other records had been withheld because:

[t]he remaining records . . . consist of frequency assignments that the agencies to which they are assigned have asked us not to disclose, based on one or more FOIA exemptions. Thus, we are referring your appeal to these agencies (a total of thirty-two), each of which should respond directly to you.

The Assistant General Counsel stated that, under the FOIA, 5 U.S.C. § 552(a)(4)(B), Mr. Henney had the right to seek judicial review of the partial denial of records contained in this decision, but she recommended that Mr. Henney deal separately with an agency that was withholding its frequency authorizations.

A chart was appended to the decision that showed the total number of unclassified NTIA radio frequency authorizations assigned to each federal agency, and the number of FOIA exemptions claimed by each agency. The chart showed that DOE had a total of 9,592 unclassified NTIA radio frequency assignments, and had claimed that information concerning 3,273 unclassified NTIA radio frequency assignments was exempt from disclosure under the FOIA. The Assistant General Counsel did not cite any specific exemption that provided the basis for withholding information concerning each of the 3,273 radio frequency authorizations assigned to DOE. Additionally, the Assistant General Counsel did not indicate whether she had considered and rejected a discretionary release of this information, or whether there was any segregable, nonexempt information in the withheld records that she could have disclosed. Finally, the Assistant General Counsel never identified the DOE official who had requested that the documents be withheld under an exemption to the FOIA.

ANALYSIS

Under 10 C.F.R. § 1004.8(a) of the DOE regulations, OHA does not have jurisdiction to adjudicate this matter because there is no evidence that the decision to withhold documents in response to Mr. Henney's FOIA request was made by a DOE officer who has custody or responsibility for these records under the FOIA. Moreover, under 10 C.F.R. § 1004.7(b), a legally sufficient denial of records under the FOIA has not been issued.

OHA's appellate jurisdiction under the FOIA is based on DOE regulations. 10 C.F.R. Part 1004. Section 1004.8(a) of the DOE regulations gives OHA jurisdiction over matters arising under the FOIA only in the following circumstances:

When the Authorizing Officer (1) has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees.

OHA has consistently held that Section 1004.8(a) must be strictly construed, and does not confer jurisdiction upon OHA when the requester has not received an initial denial or a statement that there are no documents responsive to the request from an Authorizing Official. See John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); see also Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988) (dismissing appeal because OHA lacks jurisdiction over matters not explicitly set forth in jurisdictional regulation); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (without explicit statutory or regulatory provision, no administrative remedy exists for agency's noncompliance with a timeliness requirement). However, this Section does confer appellate jurisdiction upon OHA whenever a DOE Authorizing Official has denied records. Thus, OHA will have jurisdiction to hear an appeal based on a denial issued by another agency when the determination names a DOE Authorizing Official as the individual responsible for a denial of records. Cf. 10 C.F.R. § 1004.4(f)(2) (regulation involves denial of FOIA request by DOE at the behest of another agency, and requires that the other agency's denying official be identified).

OHA cannot review the denial of records by the Assistant General Counsel for Administration of the Department of Commerce because there is no evidence, aside from a very general statement in the February 20, 1996 letter quoted earlier, that a DOE Authorizing Officer determined that these records should be withheld. The Assistant General Counsel's generalized assumption that the Department of Commerce was withholding the information Mr. Henney seeks from DOE because DOE claimed that the withheld records are exempt from disclosure under the FOIA is not sufficient to consider this appeal. To confer jurisdiction upon OHA, the Assistant General Counsel should have identified the DOE official who made the determination to withhold these documents.

Moreover, the decision issued by the Assistant General Counsel is not a legally sufficient denial of documents under the DOE regulations because it does not contain other information required by 10 C.F.R. § 1004.7. Section 1004.7 requires, in relevant part, that each denial under the FOIA contain:

(1) A specific statement of the reason for the denial. The determination must refer to the FOIA exemption that justifies the non- disclosure of the information, provide an explanation of the reason that the exemption applies to the record withheld, and explain the reason that a discretionary release is not appropriate.

(2) A statement that identifies each DOE official who is responsible for the determination.

(3) A statement addressing the issue of segregable nonexempt material in the documents that have been denied.

(4) A statement that the determination may be appealed within thirty calendar days to the Office of Hearings and Appeals.

The information required by Section 1004.7 enables a requester to decide whether the agency's response to its FOIA request was adequate and proper, and also provides OHA with a record upon which to base its consideration of an administrative appeal. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. Burlin McKinney, 25 DOE ¶ 80,205 at 80,767 (1996).

The decision issued by the Assistant General Counsel is inadequate under the DOE regulations. First, as previously set forth, it failed to identify the DOE Official who determined that information relating to certain radio frequency authorizations assigned to DOE was exempt from disclosure. Moreover, it failed to specify the FOIA exemption that was applicable to each withheld record, to indicate whether segregable, nonexempt material in the withheld records had been released, or to inform Mr. Henney of his right to appeal to OHA. Usually, OHA will remand an insufficient determination to the Authorizing Official who issued it to correct the inadequacy. Here, however, the insufficiency of the determination rises to the level of a jurisdictional defect because an Authorizing Official is not identified, and the decision contains very little of the information required by Section 1004.7.

Neither Congress nor any administrative agency has empowered OHA to adjudicate an issue under the FOIA unless a DOE Authorizing Official has first denied the release of the requested documents. Because no DOE Authorizing Official is responsible for the denial of information, the Department of Commerce's response to Mr. Henney's FOIA Appeal does not contain a denial that OHA may review. Accordingly, OHA lacks jurisdiction to decide whether the information concerning the 3,273 radio frequency authorizations assigned to DOE was properly withheld by the Department of Commerce under an exemption to the FOIA. Accordingly, we must dismiss this Appeal.

We will forward Mr. Henney's submission to the DOE FOIA Office with a request that it treat Mr. Henney's Appeal as if it were a new request under the FOIA. A DOE Authorizing Official will then determine whether these documents should be provided to Mr. Henney. If the DOE Authorizing Official determines that any of these records are exempt from disclosure under the FOIA, the denial should refer to the FOIA exemption that justifies each non- disclosure of the information, provide an explanation of the reason that the exemption applies to the record withheld, and explain the reason that a discretionary release is not appropriate. Moreover, the DOE Authorizing Official should release to Mr. Henney all segregable nonexempt information contained in the records. Based on this information, Mr. Henney will be able to decide whether DOE's response to his FOIA request is adequate, and OHA will have a full explanation of the agency's action, should Mr. Henney chose to appeal the determination.

It Is Therefore Ordered That:

(1) The Appeal of Alan Henney received by the Office of Hearings and Appeals on October 20, 1998, is hereby dismissed.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial

review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 17, 1998

(1)The DOE regulations define the term "Authorizing or Denying Official" to mean a DOE officer who has custody of or responsibility for records under the FOIA. 10 C.F.R. § 1004.2(b).

Case No. VFA-0455, 27 DOE ¶ 80,174

December 3, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Douglas Farver

Date of Filing: October 20, 1998

Case Number: VFA-0455

This Decision and Order concerns an Appeal that was filed by Douglas Farver from a determination issued to him by the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In this determination, Oak Ridge granted in part a request for information that Mr. Farver filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. However, Oak Ridge declined to process a portion of the request, finding that it did not "reasonably describe" the records sought, as is required under 10 C.F.R. § 1004.4(c)(1). In his appeal, Mr. Farver contests this finding, and asks that we order the production of any additional responsive documents.

I. Background

In his FOIA request, Mr. Farver sought access to nine specified categories of documents pertaining to the procurement, use and disposal of acetonitrile (also known as methyl cyanide) at the Y-12 plant and the East Tennessee Technology Park (ETTP). In response to this request, Oak Ridge issued a partial determination on February 2, 1998 and a final determination on September 14, 1998. In these determinations, Oak Ridge provided a number of documents responsive to items 1, 4, 5, 6 and 8 of the request, and stated that no documents responsive to item 9 (documents describing accident scenarios involving acetonitrile at the Y-12 plant) could be located. With regard to items 7(a) through 7(g), Oak Ridge stated that processing this portion of the request would require in excess of

several hundred hours of effort....Furthermore, the agency would not normally undertake this magnitude of

effort in the normal course of day to day operations at the Y-12 Plant. Therefore, because of the extraordinary amount of time, funds, and personnel involvement in such an undertaking, we consider the scope of your item 7 as currently written too broad and cumbersome to process under the FOIA at this time.

September 14, 1998 determination letter at 1.(1) Oak Ridge did not respond to items 2 and 3 of Mr. Farver's request in either determination. In his appeal, Mr. Farver contends that Oak Ridge has not adequately justified its refusal to process item 7 of the request.(2)

II. Analysis

We have carefully reviewed the record in this matter, including all of the arguments raised in Mr. Farver's

appeal, and Oak Ridge's responses to those arguments. For the reasons set forth below, we conclude that Oak Ridge has not adequately justified its finding that item 7 does not "reasonably describe" the records sought, and that the determination issued to Mr. Farver was inadequate. We will therefore remand this matter to Oak Ridge for the issuance of a new determination letter.

A. Adequacy of the Request

The FOIA requires that federal agencies generally release documents to the public upon request. Under the FOIA, such a request must "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). This requirement is met if the request enables the DOE "to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations." 10 C.F.R. § 1004.4(c)(1). The DOE may take into consideration problems of search which are associated with the files of a particular facility and determine that a request is not one for reasonably described documents as it pertains to that facility. Id. If the request does not "reasonably describe" the records sought, the agency response must specify the reasons for this finding and invite the requester to confer with knowledgeable personnel "in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records." 10 C.F.R. § 1004.4(c)(2). (3)

As previously stated, Oak Ridge determined that item 7 did not "reasonably describe" the records sought. In that item, Mr. Farver sought copies of all documents pertaining to the quantities and dates of use of acetonitrile in facilities associated with the Y-12 plant (7(a) through 7(g)) and facilities associated with the ETTP (7(h) through 7(l)). While Oak Ridge provided some justification for its finding that items 7(a) through 7(g) do not "reasonably describe" the records sought, it has provided no explanation for the determination letter's apparent finding that items 7(h) through 7(l) are impermissibly broad. Indeed, there is nothing in the record to indicate that processing this portion of the request would be unduly burdensome, or would disrupt the normal operation of the ETTP or any other Oak Ridge operation in any meaningful way. Therefore, on remand, Oak Ridge should either explain why items 7(h) through 7(l) do not "reasonably describe" the requested material, or process these requests by conducting a new search and informing Mr. Farver of the results of that search in a new determination letter. In addition, Oak Ridge should also provide further information as to the extent of the burden that processing items 7(a) through 7(g) would produce. This information should include as accurate an estimate as possible of the amount of material that would have to be searched for responsive documents, and the number of employees who would be available to undertake such a task.

B. Adequacy of the Determination

After conducting a search for responsive documents under the FOIA, an agency must provide a written determination notifying the requester of the results of that search, and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). This allows the requester to decide whether the agency's response to its request was adequate and provides this Office with a record upon which to base its consideration of an administrative appeal.

As previously stated, Oak Ridge did not respond to items 2 and 3 of Mr. Farver's request. In item 2, Mr. Farver requests copies of all documents detailing the use of acetonitrile at the Y-12 plant. In item 3, he seeks copies of all such documents concerning the ETTP. Without responses to these items, it is not possible for Mr. Farver to effectively challenge Oak Ridge's handling of this portion of his request, nor does it provide us with a complete record upon which to consider his appeal. Therefore, Oak Ridge's new determination letter should specifically address items 2 and 3 of Mr. Farver's request. In this letter, Oak Ridge should describe the scope of the search for documents responsive to these items, and provide the results of that search.

C. Summary

For the reasons set forth above, we will remand this matter to Oak Ridge. On remand, Oak Ridge shall perform a new search for documents responsive to items 2, 3, and 7(h) through 7(l) of Mr. Farver's request and shall issue a new determination letter informing him of the results of that search, unless it determines that these items do not "reasonably describe" the requested documents. In that case, the determination letter should fully set forth its reasons for that finding. Oak Ridge should also provide additional support for its finding that items 7(a) through 7(g) of Mr. Farver's request are impermissibly broad.

It Is Therefore Ordered That:

(1) The Appeal filed by Douglas Farver is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Freedom of Information Officer of the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 3, 1998

(1)The letter went on to state that unless Mr. Farver narrowed the scope of item 7, or gave a written statement indicating his willingness to pay expected search and copying costs, Oak Ridge could not process that portion of his request. In his appeal, Mr. Farver interprets this statement as a rejection of his request for a fee waiver, and argues that the rejection was improper. However, the volume of documents provided to Mr. Farver did not exceed the 100 page threshold for the assessment of fees, 10 C.F.R. § 1004.9(a)(6), and Oak Ridge has stated that it did not process item 7 of the request because it considered that item to be too broad and cumbersome. September 14 determination letter. Therefore, no fee waiver determination was necessary and none was in fact made. See memorandum of November 25, 1998 telephone conversation between Robert Palmer, OHA Staff Attorney, and Amy Rothrock, Oak Ridge FOIA Officer.

(2)In addition, Mr. Farver argues that Oak Ridge has not conducted an adequate search for responsive documents. However, because we are remanding this matter to Oak Ridge and additional documents may therefore be provided to Mr. Farver, we will not address this arguments at this time.

(3)Oak Ridge has informed us that it did in fact confer with Mr. Farver in an attempt to narrow the scope of his request. These efforts were unsuccessful. Oak Ridge Response to Farver appeal at 5.

Case No. VFA-0456, 27 DOE ¶ 80,175

December 8, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Louella Benson

Date of Filings: November 6, 1998

Case Numbers: VFA-0456

On November 6, 1998, Louella Benson (Benson) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE Headquarters FOIA/Privacy Act Division (DOE/HQ) issued to her on October 16, 1998. The determination concerned a request for information that Benson submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE/HQ would be required to conduct a further search for responsive material.

I. Background

In a letter to the Secretary of Energy, Benson requested information regarding any DOE funds disbursed to (1) Lloyd Energy of Baton Rouge, Louisiana, or (2) Compass Bank, of Houston, Texas and/or any of their agents or associates, for any reasons, including but not limited to research and development, energy, dual-use, geophysical, environmental, or genetic operations. Letter from Benson to the Secretary of Energy (August 27, 1998). She also asked for information regarding any DOE funding for research and development projects at her properties in Virginia and Louisiana. *Id.* The Office of the Secretary forwarded the letter to DOE/HQ on September 14, 1998. DOE/HQ assigned the request to the Office of Energy Research (ER) and the Office of the Chief Financial Officer (CR) to conduct a search of their files. Letter from DOE/HQ to Benson (September 23, 1998). On October 2, 1998, CR sent Benson a list of DOE funds disbursed to Lloyd Energy, Compass Bank, and a school located in the same Louisiana parish as Benson's property. Letter from CR to Benson (October 2, 1998). That letter also indicated that the responsive documents included only data residing at DOE Headquarters. *Id.* Shortly thereafter, DOE/HQ issued a determination to Benson, stating that ER found no responsive material in its search. Letter from DOE/HQ to Benson (October 16, 1998) (Determination Letter). On November 6, 1998, Benson filed this Appeal, arguing that the responsive information that she received was not complete because it did not contain an explanation of the payments. She also questioned whether other offices may possess responsive material.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably

calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

In reviewing the present Appeal, we contacted CR and ER to ascertain the scope of both searches. DOE/HQ determined that ER would be a likely location for responsive documents, since ER is responsible for much of DOE's research. DOE/HQ also sent the request to CR, the DOE office responsible for the disbursement of funds.

Two ER offices, the Office of Resource Management (ORM) and the Office of Health and Environmental Research (OHER), had conducted searches in response to Benson's request. ORM informed us that the Grants and Contracts Division searched the Integrated Procurement System, a database of all grants and awards. No responsive material was found. OHER searched its database on city and state, and institution name. That search did not uncover any responsive material. *See* Memorandum of Telephone Conversation between Bonnie Lasky, ER, and Valerie Vance Adeyeye, OHA (December 1, 1998).

Capital Accounting is one of three DOE payment offices, and is the CR office responsible for headquarters payments and disbursements. Capital Accounting had searched its records in response to Benson's request and found responsive material from fiscal year 1990 through fiscal year 1998. CR promptly sent this material to Benson, along with the name of a CR employee to call with any questions about the disclosure.(1) Thus, CR fulfilled its obligation under the FOIA to provide responsive, non-exempt material to a requester. Nonetheless, after discussing the Appeal with this office, and being advised of the requester's apparent lack of understanding of the material produced, CR offered to research the payments listed in the responsive material in order to provide Benson with any non-exempt background information. *See* Memorandum of Telephone Conversation between Bill Robinson, CR and Valerie Vance Adeyeye, OHA Staff Attorney (November 30, 1998). We also contacted CR's Office of Departmental Accounting to determine if additional responsive material existed in local offices. That group agreed to ask the two remaining DOE payment offices (Albuquerque and Oak Ridge) to search for any further responsive documents. *See* Memorandum of Telephone Conversation between Woodie Fisher, CR, and Valerie Vance Adeyeye, OHA (December 3, 1998). A new response is forthcoming.

We find that ER and CR conducted a search reasonably calculated to uncover all documents related to DOE disbursements to Lloyd Energy, Compass Bank, and research projects that may exist at the requester's properties. As stated above, the FOIA does not require an exhaustive search, only a reasonable one. On the basis of the facts provided above, we conclude that ER and CR conducted a search reasonably calculated to uncover responsive documents. Accordingly, we must deny Benson's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on November 6, 1998 by Louella Benson, OHA Case No. VFA-0456, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 8, 1998

(1)According to Benson, she made repeated unsuccessful attempts to contact this individual.

Case No. VFA-0457, 27 DOE ¶ 80,182

January 19, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Hans M. Kristensen

Date of Filing:November 10, 1998

Case Number: VFA-0457

Hans M. Kristensen filed an Appeal from a determination issued to him on October 30, 1998, by the Deputy Director of the Office of Communications and Information of the Department of the Air Force (Deputy Director). In that determination, the Deputy Director denied in part a request for information that Mr. Kristensen filed with the Air Force on December 1, 1995, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Some of the information deleted from two documents the Air Force released to Mr. Kristensen in that determination was withheld pursuant to a review of the documents by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to instruct the Deputy Director that the DOE no longer requires the classification and withholding of the information that the Air Force withheld on the DOE's behalf.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 1, 1995, Mr. Kristensen submitted a request under the FOIA to the Department of the Air Force for a number of documents, including two entitled "History of Strategic Air Command, Volume I, 1 July 1954-30 June 1956" and "History of Strategic Air Command, Volume I, 1 July 1956-31 December 1956." On May 28, 1996, the Air Force sent the documents to the DOE for classification review. In response to that request, the DOE advised the Air Force on June 17, 1998, that the documents contained classified information that it considered exempt from mandatory disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). On October 30, 1998, the Air Force released to Mr.

Kristensen excerpts of the two documents described above, from which it withheld the information that the DOE claimed was exempt from disclosure under the FOIA as well as other information that the Air Force claimed was exempt from disclosure.

In his Appeal to the DOE, Mr. Kristensen seeks the disclosure of those portions of the excerpts that the Air Force withheld at the request of the DOE. Mr. Kristensen contends that the information the DOE has identified as classified should be declassified and released, because "the records are nearly 50 years old"

and because the public would benefit significantly from their disclosure.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The portions that the DOE deleted under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons storage that was classified as Formerly Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

Upon referral of the Appeal from the Office of Hearings and Appeals, the Office of Declassification again reviewed those portions of the excerpts for which the DOE had claimed exemptions from mandatory disclosure under the FOIA. That Office has now concluded that the document no longer contains any information that needs to remain classified by the DOE. The information, though no longer classified by the DOE, may still be classified by the Air Force. The DOE has advised the Air Force of its determination and the Air Force will now inform Mr. Kristensen of its own determination concerning that information. Accordingly, Mr. Kristensen's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by Hans M. Kristensen on November 10, 1998, Case No. VFA-0457, is hereby granted.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 19, 1999

Case No. VFA-0459, 27 DOE ¶ 80,181

January 19, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Matthew Cherney, M.D.

Date of Filing: December 9, 1998

Case Number: VFA-0459

On December 9, 1998, Matthew Cherney, M.D., filed an Appeal from determinations issued on July 24, 1998, and September 18, 1998, by the Office of Utility Technologies, Energy Efficiency and Renewable Energy (DOE/EE). The determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

Dr. Cherney requested from the DOE all documents related to an unsolicited proposal he had submitted to the DOE. The proposal concerned a system for collecting solar energy invented by Dr. Cherney. Dr. Cherney's request specified the following categories of documents relating to the proposal:

(1) All documents received by DOE and given consideration;

(2) All written comments from all evaluators (and any calculations): Dr. Allan Hoffman, Dr. Joseph Galdo, Jeff Muhs, Slo Rajic, Marc Simpson, and Anthony Schaffhauser;

(3) All comments from any other evaluators;

(4) Transcripts of any oral comments made by any evaluator;

(5) Any other documents in the file; and

(6) Any electronic communications or telephone recordings.

On July 24, 1998, DOE/EE issued a partial response to the Appellant's request in which it released copies of 26 responsive documents. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of

Utility Technologies, Energy Efficiency and Renewable Energy, to Dr. Matthew Cherney, Sunbear Systems (July 24, 1998). DOE/EE issued another partial response on September 18, 1998. In that determination, DOE/EE released an additional 35 documents in their entirety, released 4 other documents with information redacted from them, and identified 31 documents that it was withholding in their entirety. DOE/EE stated that the information it was withholding was exempt from disclosure under Exemption 5 of the FOIA. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (September 18, 1998).(1) In the latter determination, DOE/EE stated that it would issue a final response to Dr. Cherney's request after it completes its review of 35 remaining responsive documents. Id. To date, DOE/EE has not issued a final response to the request.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are “inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts “those documents, and only those documents, normally privileged in the civil discovery context.” NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work product privilege, and the “deliberative process” privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, DOE/EE relied upon the deliberative process privilege of Exemption 5.

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

DOE/EE explained in its determination that the documents withheld were

created during agency consideration of your proposal and were prepared in order to assist the agency decisionmaker in arriving at his or her decision on your proposal. They reflect the analysis, advisory opinions, deliberations and recommendations of subordinates that are part of the deliberative process leading to a final decision and comprise part of the process by which government decisions were considered. Thus these documents are prior to the adoption of a final decision and are part of a deliberative process in that they make recommendations or express opinions to decision makers. These documents are subject to further review and analysis, they discuss possible courses of action, and several versions could be used in the decision making process. They do not represent the final agency decision.

Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (September 18, 1998) at 2.

In his Appeal, Dr. Cherney asks that we order DOE/EE to release to him all responsive documents. Letter from Matthew Cherney, M.D., Sunbear Systems, to Director, Office of Hearings and Appeals (OHA) (November 17, 1998) (Appeal Letter 1). First, the Appellant contends that the 35 documents currently being reviewed by DOE/EE “fit no conceivable exemption” and should be released. Id. at 1. Regarding the documents that DOE/EE has withheld under FOIA Exemption 5, Dr. Cherney argues that material withheld under this exemption should be released because it “is, by definition, available in a lawsuit anyway.” Id. The appellant also questions when an “actual decision” was made on his proposal. Id. at 2. He notes that information he has indicates that a decision was made “circa January 9" of 1998, and that

therefore any documents created after that date are not "predecisional." Id.

In addition, Dr. Cherney states in some detail why he is seeking the documents in question. Appeal Letter 1; Letter from Matthew Cherney, M.D., Sunbear Systems, to Steven J. Goering, OHA (November 30, 1998) (Appeal Letter 2). Not surprisingly, the Appellant would like to have a complete understanding of why the DOE did not accept his proposal. Thus, he wants to know why those who reviewed his proposal arrived at their conclusions and what standards were used in the review, so that he and his company can "respond intelligently." Appeal Letter 2 at 1-2; Appeal Letter 1 at 1. He also wants to find out whether the DOE's decision was based on scientific criteria or "legal/political" reasons. Appeal Letter 2 at 5; Addendum to Appeal Letter 1 at 2. Finally, the Appellant contends that the documents being withheld will show that his company proceeded in "maximal good faith." Addendum to Appeal Letter 1 at 2.

II. Analysis

A. Documents Currently Being Reviewed by DOE/EE

As noted above, DOE/EE is currently reviewing 35 remaining documents responsive to Dr. Cherney's request, and thus has not yet issued a final determination in response to the request. Section 1004.8(a) of the DOE Regulations states that the OHA has jurisdiction to consider Freedom of Information Act Appeals "[w]hen the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees." 10 C.F.R. § 1004.8(a). Because DOE/EE has not yet issued a determination with respect to the remaining responsive documents, the DOE has not denied the Appellant's request as to these documents. Thus, there is no determination with respect to the remaining documents that can appealed to this office. After DOE/EE has issued a determination regarding those documents, Dr. Cherney will have the right to file an appeal of any withholding. In addition, after receiving the DOE/EE's final determination in response to his request, Dr. Cherney can appeal the adequacy of the DOE/EE's search for responsive documents.

The Appellant has asked whether we nonetheless could at this point consider the lack of a final determination from DOE/EE a constructive denial of his request that could be appealed to the OHA. Memorandum of telephone conversation between Matthew Cherney, M.D., and Steven Goering, OHA (December 22, 1998). We have previously considered an argument that a request to which there has been no response constitutes a constructive denial appealable to the OHA. We held there, as we do here, that we have "no jurisdiction to consider an Appeal until a determination is issued by a DOE office." U.S. Solar Roof, 26 DOE ¶ 80,102 at 80,505 (1996). The Appellant, however, does have the right to file a complaint, based on the DOE's failure to issue a final response to his request within the prescribed time period, with the appropriate federal district court. See 5 U.S.C. § 552(a)(4)(B), 6(C).

B. Documents Withheld by DOE/EE Under FOIA Exemption 5

Before we address specifically the documents withheld by DOE/EE, we will consider generally three points raised by Dr. Cherney in his Appeal. First, we note above that the Appellant has provided a number of reasons why he seeks the documents he has requested. However, a requester need not justify or explain why he needs documents in order to obtain them under the FOIA. Regardless of the identity or particular needs of a requester, the FOIA presumptively mandates that documents requested be released. 5 U.S.C. § 552(a)(6)(A). Only if information is specifically exempt from disclosure may an agency withhold documents in response to a FOIA request. 5 U.S.C. § 552(a)(6)(B). In addition, as we discuss below, the DOE will discretionarily release information exempt from the FOIA if disclosure is not contrary to federal law and is in the public interest. However, the particular interest of a requester in the information he seeks has no bearing on our determination as to whether information should be released under the FOIA or DOE regulations.

Second, Dr. Cherney contends that even if the information withheld is protected by Exemption 5, it should be released because it "is, by definition, available in a lawsuit anyway." Appeal Letter 1 at 1. This contention is not correct. To the contrary, FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5) (emphasis added).

Third, the Appellant argues that, although he received a letter from DOE dated March 23, 1998, stating that the DOE would not fund his proposal, there is information indicating that the actual decision on his proposal was made prior to that date. The date of the agency decision is significant in that it can help determine whether materials were prepared prior to a final action, policy, or interpretation, and therefore are predecisional. We have reviewed the documents withheld from the appellant and the letters sent to him on March 23, 1998, and we conclude that none of these documents evidences an agency decision on Dr. Cherney's proposal prior to March 23, 1998. Though the materials indicate that certain technical evaluations of the proposal were completed prior to this date, it is clear that the only DOE official empowered to decide whether the agency would fund the proposal was the Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy. As late as March 23, 1998, the date of this DOE official's letter to Dr. Cherney, technical evaluations, comments, and recommendations regarding the proposal were provided to the official by and on behalf of his subordinates, and these recommendations are cited by the DOE official in his letter to the Appellant. Thus, we conclude that materials prepared on or prior to March 23, 1998, are predecisional.

1. Documents Responsive to Item 1 of the Appellant's Request

In its September 18, 1998 determination, DOE/EE withheld three documents in part under FOIA Exemption 5 in response to the Appellant's request for "all documents received by DOE and given consideration" with regard to his proposal. The documents from which information was withheld were submitted to the DOE by the Appellant's company as part of its proposal. Withheld from the document are handwritten notes of DOE personnel who were evaluating the proposal. We find that these notations clearly reflect the mental processes of the evaluators prior to the agency's decision on the Appellant's proposal, and thus are precisely the kind of information intended to be shielded by Exemption 5. See Montrose Chem. Corp. v. Train, 491 F.2d 63, 70 (D.C. Cir. 1974) ("[T]he purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny.").

2. Documents Responsive to Item 2 of the Appellant's Request

In response to Dr. Cherney's request for "[a]ll written comments from all evaluators (and any calculations)," DOE/EE withheld one document in part and 13 other documents in their entirety under Exemption 5. Each of these documents contains the analysis of the agency personnel who evaluated the Appellant's proposal. This analysis was obviously done as part of the agency's deliberative process by which it ultimately decided whether to fund the proposal. Thus, DOE/EE properly withheld material contained in these documents.

However, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate, Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979). We therefore must determine whether DOE/EE should segregate and release any of the material it withheld from the Appellant.

We have reviewed the documents in question and find that non-exempt material in certain of the documents can be released to Dr. Cherney without compromising the material withheld or imposing an inordinate burden on DOE/EE. First, in the one-page memorandum from A.C. Schaffhauser withheld in its entirety and labeled "#7," the sentences that are deliberative in nature can easily be redacted from the document. Similar redactions can be made in the one-page memorandum addressed to T. Schaffhauser labeled "#8." The remaining portions of these documents may not be withheld from the Appellant under FOIA Exemption 5. With respect to the other documents withheld in response to this item of Dr. Cherney's request, we find that any non-exempt information in the documents is so inextricably intertwined with the exempt material that release of the non-exempt material would necessarily compromise the withheld material.

3. Documents Responsive to Item 5 of the Appellant's Request

DOE/EE withheld one document in its entirety in response to the Dr. Cherney's request for "[a]ny other documents in the file." This document is a memorandum of a telephone conversation authored by a DOE employee. We find nothing in this memorandum that discusses the substance or merits of the Appellant's proposal and therefore do not agree with DOE/EE that it reflects the agency's deliberative process by which the decision with regard to the proposal was made. Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (withheld material must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters"). Accordingly, this document may not be withheld from the Appellant under Exemption 5.

4. Documents Responsive to Item 6 of the Appellant's Request

We reach a similar opinion regarding the 17 documents withheld in their entirety from the Appellant in response to his request for "[a]ny electronic communications or telephone recordings." While small portions of some of these electronic mail messages reflect the opinions of DOE personnel on the merits of Dr. Cherney's proposal, these memoranda by and large discuss the status of DOE's process of reviewing the proposal. There are cases where revealing the status of the agency's decision-making process has been found to necessarily reveal intra-agency or inter-agency pre-decisional opinions on a particular matter. For example, in Wolfe v. HHS, 839 F.2d 768 (D.C. Cir. 1988) (en banc), the requester sought agency logs that revealed "dates on which regulatory proposals, identified by subject matter title, were transmitted from one agency to another." Id. at 771. The court found that material sought was protected by Exemption 5, reasoning that,

The fact of forwarding is, in each instance, the functional equivalent of an intra-agency or inter-agency memorandum that states, "We recommend that a regulation on this [named] subject matter be promulgated." The fact of a failure to forward from the FDA to HHS, or from HHS to OMB is the equivalent of a memorandum from HHS to FDA that states, "We disapprove of your recommendation that a particular regulation on this [named] subject matter be promulgated."

Id. at 774-75.

In the present case, however, no such opinions on the matter being decided, i.e. whether to fund Dr. Cherney's proposal, are revealed by disclosing when or if recommendations on the proposal were forwarded from one office of the DOE to another. Thus, with the minor exception of the small amount of information in some of these memoranda that reveals the opinions of agency personnel on the merits of the Appellant's proposal, these documents are not protected by FOIA Exemption 5.

5. The Public Interest in Disclosure of Material Subject to Exemption 5

As explained earlier, under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest.

Regarding information withheld under the deliberative process privilege, we find that the public interest is served by the frank and open expression of views by agency employees. The release of this deliberative material could have a chilling effect upon this expression. The ability and willingness of personnel to make honest and open recommendations concerning similar matters in the future could well be compromised. If personnel were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. Fulbright & Jaworski, 15 DOE ¶ 80,122 at 80,560 (1987). Consequently, we conclude that release of the withheld material protected under Exemption 5 would result in foreseeable harm to the interests that are protected by the deliberative process privilege. FAS Engineering, Inc., 27 DOE ¶ 80,126 at 80,562 (1998); see Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

The appellant put forth two arguments that cite public interests in the disclosure of the information he seeks. First, he points to the public interest in the benefits that would result from deployment of his invention in the form of inexpensive, environmentally safe energy. See, e.g., Memorandum of telephone conversation between Matthew Cherney, M.D., and Steven Goering, OHA (January 4, 1999). Second, he contends that the withheld materials are evidence of criminal fraud, conspiracy to commit fraud, and other illegal behavior on the part of government officials. Id. We agree with the appellant that there is a public interest both in the development of cheap and safe energy supplies and the exposure of illegal conduct by government officials. However, having reviewed the documents in question, we cannot conclude that either interest would be furthered by release of the material we have found to be properly withheld under Exemption 5.

First, there is clearly a dispute as to the feasibility of the appellant's proposal, and this office is far from qualified to resolve that dispute within the scope of the present proceeding, in which we consider only Dr. Cherney's FOIA Appeal. Even if we were to assume that Dr. Cherney's proposal represents a quantum leap forward in energy production technology, we find the connection between the release of the documents in question and the proliferation of this technology to be indirect and tangential at best. Second, while exposure of unlawful conduct on the part of government officials would clearly further the public interest, the information we have found was properly withheld evidences, on its face, no illegal activity of any kind. Therefore, the public interest does not mandate release of the material withheld by DOE/EE under Exemption 5.

III. Conclusion

For the reasons stated above, we find that DOE/EE properly withheld some material from the Appellant under FOIA Exemption 5. However, we find that other information contained in the relevant documents, as specified above, may not be withheld from Dr. Cherney under Exemption 5. We will therefore remand this matter to DOE/EE so that it may either release the withheld information or issue another determination explaining why the information may be withheld pursuant to another FOIA exemption.(2)

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew Cherney, M.D., Case No. VFA-0459, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place

of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 19, 1999

(1) DOE/EE did not identify any documents responsive to items 3 and 4 of the Appellant's request in either of its determinations.

(2) Certain portions of the material withheld from these documents may be exempt under FOIA Exemption 6. However, since this was not one of the stated bases for DOE/EE's withholding, we make no finding here on the application of that exemption. If DOE/EE ultimately determines to withhold information under any other FOIA exemption, Dr. Cherney will have the opportunity to appeal that determination to this office.

Case No. VFA-0461, 27 DOE ¶ 80,178

January 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David G. Swanson

Date of Filing: November 30, 1998

Case Number: VFA-0461

On November 30, 1998, David G. Swanson filed an Appeal from a determination issued to him on November 13, 1998, by the Office of Inspector General (IG) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Mr. Swanson challenges the adequacy of IG's search for documents responsive to his request.

I. Background

On September 17, 1998, Mr. Swanson filed a request for information in which he sought "a copy of all information available on the investigation of PDI Technology, Inc. of Chino, CA by your [IG's] office, including any final report." On November 13, 1998, IG issued a determination which stated that it was releasing 14 documents in response to Mr. Swanson's request. See Determination Letter at 1. However, IG indicated that portions of 13 documents were withheld pursuant to Exemption 6 and 7(C) of the FOIA.

On November 30, 1998, Mr. Swanson filed the present Appeal with the Office of Hearings and Appeals. In his Appeal, Mr. Swanson challenges the adequacy of the search conducted by IG. Specifically, Mr. Swanson contends that the information provided failed to include an interview of him conducted at the "Livermore Inspector General's Office." Mr. Swanson asserts that this interview is related to the investigation of PDI Technology and should have been included in the responsive documents released to him. See Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca

Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at IG to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Swanson's request might exist. Upon receiving Mr. Swanson's request for information, IG instituted a search of its files. Specifically, IG searched its Management Information System, an automated tool used for recording and tracking information relevant to IG investigative work, by providing it with all of the relevant terms associated with Mr. Swanson's request. Based on this search, IG produced 14 relevant records that were responsive to Mr. Swanson's request. These records were provided to Mr. Swanson with redactions. IG has informed us that this search did not produce an interview of Mr. Swanson as described in his Appeal and that this interview would not have been found in a search related to the PDI investigation, but possibly in a search concerning Mr. Swanson. See December 22, 1998 Record of Telephone Conversation between Pam Langer, IG and Kimberly Jenkins- Chapman, OHA.(1) Given the facts presented to us, we find that IG conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Swanson's request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by David G. Swanson, OHA Case No. VFA-0461, on November 30, 1998, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 6, 1999

(1)Even though IG's search did not locate the transcript of the interview described in Mr. Swanson's Appeal, Mr. Swanson may file a new request with IG if he wants this information.

Case No. VFA-0462, 27 DOE ¶ 80,211

June 14, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing:December 7, 1998

Case Number: VFA-0462

The National Security Archive (Appellant) filed an Appeal from a determination that the Department of Energy's Albuquerque Operations Office (Albuquerque) issued to it on October 28, 1998. In that determination, Albuquerque denied in part a request for information that the Appellant filed on July 6, 1995, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the document released to the Appellant in that determination was withheld after a review of the document had been performed by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require Albuquerque to release the information that it withheld in its October 28, 1998 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 6, 1995, the Appellant submitted a request under the FOIA to the DOE's Nevada Operations Office for a copy of a report by Hans Bethe, entitled "Analysis of Joe-4," T-527, dated September 11, 1953. "Joe-4" was the name given to the fourth nuclear test conducted by the Soviet Union. After determining that Albuquerque had custody of the requested document, the Nevada Operations Office forwarded the request to Albuquerque. Albuquerque then reviewed the document, determined that it contained information marked as classified, and forwarded it to the DOE's Office of Declassification for review. On October 28, 1998, after the Office of Declassification completed its review, Albuquerque released to the Appellant a copy of the requested document from which it

withheld information it claimed to be classified as Restricted Data pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the requested document. In its Appeal, the National Security Archive contends that additional portions of the report, specifically, the estimated yield of the test and the role of "AFOAT-1" in collecting data on this test, may be released without jeopardizing the national security. AFOAT was the Air Force Office--Atomic Testing.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 26 DOE ¶ 80,203 (1997); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to the Office of Declassification, the portions that the DOE deleted from the requested document under Exemption 3 were withheld on the grounds that they contain information about nuclear weapons design that has been classified as Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

In performing his review the Director of SA considered the concerns the Appellant specifically raised in his appeal, and performed as well a general review of the material under the current classification guidance. In his re-evaluation of the report, the Director of SA determined that some of the information that was initially withheld from the Appellant may now be released. The information now being released includes material related to the topics the Appellant addressed in its appeal as well as information contained in the summary of the report and some of its conclusions.

Based on the review performed by the Director of SA under current classification guidance and his conclusions, however, we have determined that the Atomic Energy Act requires the continued withholding of most of those portions of the report that were previously identified as classified information. These portions relate primarily to the design and functioning of United States weapons and the similarity between our weapons and those of Soviet design. This classified information is inextricably intertwined with some unclassified information, which requires the withholding of entire pages of the document, in some instances.

Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the report that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. A newly redacted version of the report, containing the additional material that may now be released, will be provided to the Appellant under separate cover. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on December 7, 1998, Case No. VFA-0462, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the report by Hans Bethe entitled "Analysis of Joe-4," T-527, dated September 11, 1953, in which additional information is released, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the

requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 14, 1999

Case No. VFA-0463, 27 DOE ¶ 80,177

January 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Los Alamos Study Group

Date of Filing: December 7, 1998

Case Number: VFA-0463

On December 7, 1998, the Los Alamos Study Group (the Study Group) filed an Appeal of a determination issued on October 29, 1998, by the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) in response to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, the Study Group contends that Albuquerque improperly withheld a document under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), based on the deliberative process privilege. In the alternative, the Study Group contends that Albuquerque improperly failed to segregate and release factual information contained in this document. For the reasons detailed below, we will remand this matter to Albuquerque and direct it to issue a new determination that either releases this document or provides a detailed reason for withholding information.

BACKGROUND

This Appeal involves the "Site-wide Environmental Impact Statement" (SWEIS) that is currently being prepared for the Los Alamos National Laboratory (LANL).(1) On July 7, 1997,

the Study Group submitted a FOIA request seeking a copy of a document entitled the "TA-55 SWEIS Key Parameter Data Report"(Data Report).(2)

In response to this FOIA request, on October 29, 1998, the Director of the Office of Public Affairs (Public Affairs Director) issued a determination letter indicating that although a "draft of the specified report" had been located, this document would not be released because it contains predecisional information that may be withheld under Exemption 5 of the FOIA. The Public Affairs Director also indicated that the Data Report was a draft that had never been completed because "the process of developing the information contained in the document was transferred to development of the LANL Sitewide Environmental Impact Statement (SWEIS)," and that the information contained in the Data Report might be inaccurate.

The Public Affairs Director also stated that the Data Report, including the factual information contained in the document, could not be released without harming the process of agency deliberations. In support of this conclusion, he stated that:

[t]he draft document contains much factual information, from which was chosen pertinent information to be included in the SWEIS. . . . 'Selective' facts are entitled to the same protection as that afforded to purely deliberative materials, as their release would 'permit indirect inquiry into the mental process,' and so

'expose' predecisional agency deliberations. . . . In addition, to segregate and release the 'factual portion' of this draft document would reveal the exercise of judgment by agency personnel. Also, release of the draft document and any information contained therein would likely inhibit creative thoughts and candid expression of ideas within the organizations involved and in future such projects; thereby undermining the organizations's ability to perform its functions. (Citations omitted.)

On December 7, 1998, the Study Group appealed this determination to the Office of Hearings and Appeals (OHA). In its Appeal, the Study Group contends that the Data Report is not predecisional and, as a "final" document, is not encompassed by the deliberative process privilege. In support of its position, the Study Group attached a bibliography of the LANL Stockpile Stewardship & Management Master Plan (LANL Master Plan) which lists the Data Report as a source, but does not show that the Data Report is a draft. In the alternative, the Study Group contends that, even if the Data Report is a draft, Albuquerque should have segregated and released the factual portions of the document.

ANALYSIS

For the reasons detailed below, we will remand this matter to Albuquerque and direct it to issue a new determination that either releases this document or provides a detailed reason for withholding information.

EXEMPTION 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have held that Exemption 5 encompasses the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States).

The deliberative process privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (Mink) (citing Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id.

Although the deliberative process privilege is generally inapplicable to purely factual matters, there are exceptions to this general rule. The first exception is for those circumstances where factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. See Montrose v. Train, 491 F.2d 63 (D.C. Cir. 1974); Dudman Communications v. Department of Air Force, 815 F.2d 1564 (D.C. Cir. 1987) (draft manuscript that contributed to public document exempt from disclosure under the FOIA because release of draft would reveal deliberative process if compared to the public document); but see Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993) (agency required to release chronology prepared by staff because it was a "comprehensive collection of essential facts," reflected no point of view, and relationship between release of chronology and exposure of deliberative process was too attenuated). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. Wolfe v. HHS, 839

F.2d 769, 774-76 (D.C. Cir. 1988).

THE DATA REPORT

To determine whether the Data Report was properly withheld under the deliberative process privilege, we asked counsel for the DOE Los Alamos Area Office (LAAO) for information concerning its purpose and use, and we also conducted an independent examination of the document. Counsel informed us that this document is a preliminary draft that was prepared by a government contractor for use by DOE in the preparation of the LANL SWEIS on matters relating to the TA-55 facility. Counsel characterized the Data Report as a large collection of facts that had been used by the drafters of the SWEIS as a body of information from which they selected pertinent information for inclusion in the SWEIS.(3) Counsel indicated that the Data Report has never been reviewed for accuracy.

Counsel also stated that, if Albuquerque released the Data Report, a reader could gain insight into the deliberative process that resulted in the SWEIS by comparing the facts set forth in the Data Report with the facts selected for inclusion in the SWEIS. Thus, a reader who compared these documents could obtain information concerning the exercise of judgment by agency personnel. See Memoranda from Lisa Cummings, Area Counsel for the DOE Los Alamos Area Office, to Linda Lazarus, Staff Attorney, OHA (December 17 and 23, 1998).

Counsel further indicated that the release of documents such as the Data Report would have a chilling effect on government decision-makers because:

[i]f draft documents such as these must be released to the public, an agency may be loath in the future to amass large amounts of information and expose itself to public scrutiny of it[s] decisonmaking process regarding what facts it believes are pertinent to be included in the final document. If unable to freely collect all pertinent facts for such a process, the quality of documents will suffer.

See Memorandum from Lisa Cummings to Linda Lazarus (December 23, 1998).

Based on our independent review of the Data Report, we learned that it is a fifty-seven-page document, consisting of a three-page Table of Contents, twenty-five pages of text, and twenty-nine pages of figures and tables. The document has the appearance of a draft. Each page has the word "DRAFT" at the top, there is no cover page, and some of the tables appear to be incomplete. Additionally, certain common words are abbreviated. The text of the Data Report is divided by the use of headings and sub-headings. The Table of Contents lists each heading and sub-heading, and indicates the page number of the Data Report on which the heading or sub-heading can be found. The following are some of the headings that appear in the Data Report: 1) Objective; 2) Introduction; and 3) Summary. The Data Report states that it provides a "technical aid and data source for those preparing the Los Alamos Site- Wide Environmental Impact Statement." A substantial amount of the information contained in the Data Report seems to be factual in nature.

BASIS FOR REMAND

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Based on the information outlined above, we cannot conclude that the Data Report was properly withheld in its entirety because we are not persuaded that the deliberative process would be exposed in the event that segregable portions of this document were released.(4)

Counsel's argument that the release of the Data Report would expose the deliberative process because it could be compared to the SWEIS to ascertain which facts were excluded from the SWEIS does not justify the withholding of all the material in the Data Report. This argument justifies only the non-release of the part of the Data Report that consists of a body of facts from which facts were selected for the SWEIS.

However, as detailed above, there are other types of material contained in the Data Report. For example, the document contains headings, such as "Objective," "Introduction," and "Summary," that do not contain such factual information. Moreover, the statement in the Data Report that it provides a "technical aid and data source for those preparing the Los Alamos Site-Wide Environmental Impact Statement" is also not part of a body of facts that was used as the source of the factual information in the SWEIS.(5) Albuquerque has not explained the reason that such material was not segregated and released.(6)

Accordingly, because we are unable to determine whether Albuquerque correctly withheld the Data Report under the deliberative process privilege, we will remand this matter to Albuquerque to determine if this document, or any information contained in this document, may be released without exposing the deliberative process. Albuquerque must then issue a new determination letter in which it releases this information, withholds it under other applicable FOIA exemptions, or provides a detailed explanation of the reason that release of the withheld information would expose the deliberative process.

Moreover, on remand, Albuquerque must comply with the DOE regulations implementing the FOIA that provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1. On remand, Albuquerque should review the Data Report in order to determine whether its release would be in the public interest. If any of the requested information is still withheld on remand, the new determination letter should set forth reasons why release of this information would not be in the public interest.

Furthermore, it is the policy of the DOE with respect to Exemption 5 to withhold only information that, if released, would result in foreseeable harm to the interests that it protects. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie the exemption claimed). Accordingly, on remand, Albuquerque must consider whether release of any information it intends to withhold would result in foreseeably harm to the interests that are protected by Exemption 5.

It Is Therefore Ordered That:

(1) The Appeal filed by the Los Alamos Study Group on December 7, 1998, is hereby granted as set forth in Paragraph (2) below, and is in all other respects denied.

(2) This matter is remanded to Albuquerque to review the "TA-55 SWEIS Key Parameter Data Report" to determine if the release of this document, in whole or in part, would expose the deliberative process. Albuquerque must then issue a new determination letter in which it releases this information, withholds it under other applicable FOIA exemptions, or provides a detailed explanation of the reason that release of the withheld information would expose the deliberative process. Furthermore, on remand, Albuquerque should consider whether release of the withheld information would be in the public interest or result in foreseeable harm to interests that are protected by Exemption 5.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of busi ness, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 6, 1999

(1)A SWEIS provides DOE and the public with an analysis of the environmental impacts of past, present and reasonably foreseeable activities at a site, and compares these activities with reasonable alternatives to permit DOE to make more informed decisions regarding its activities, operations and resources. A SWEIS was last prepared for LANL in 1979. See "Notice of Intent to Prepare the SWEIS for the Los Alamos National Laboratory," 60 Fed. Reg. 25697 (May 12, 1995).

(2)LANL's proposed SWEIS specifically describes fifteen facilities, including TA-55. See Memorandum from Lisa Cummings to Linda Lazarus (December 17, 1998).

(3)Counsel also indicated that the Data Report was used as a "springboard" to develop the concepts expressed in the SWEIS.

(4)We do, however, find that this document is predecisional in nature. It is clear that the Data Report is, in fact, a draft. The non-final nature of this document is reflected in the fact that the word "DRAFT" appears at the top of each page, there is no cover page, several of the tables seem to be incomplete, and words are sometimes abbreviated. Moreover, counsel for LAAO has stated that the document was a preliminary draft used to prepare the SWEIS. Although the Data Report was listed, without reference to its draft status, in a bibliography of the LANL Master Plan, this does not affect our conclusion that the Data Report is a draft. Both drafts and non- drafts are listed in the LANL Master Plan bibliography, and the fact that the Data Report was not designated as a draft in the bibliography could have resulted from an oversight.

(5)Albuquerque also alleged that it should not be required to release the factual material in the Data Report because the factual material may be inaccurate. We find this argument unpersuasive. An agency cannot shield factual information from disclosure under the deliberative process privilege on the grounds that such information may be inaccurate. To hold otherwise could result in the expansion of the deliberative process privilege to include virtually all factual materials because nearly all factual information may arguably be inaccurate.

(6)It is not clear whether Albuquerque is claiming that there is non-factual deliberative material in the Data Report. On remand, in the event that Albuquerque continues to withhold any part of the Data Report under the deliberative process privilege, the new determination must specify whether the information withheld is factual or deliberative.

Case No. VFA-0464, 27 DOE ¶ 80,227

September 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing:December 9, 1998

Case Number: VFA-0464

The National Security Archive filed an Appeal from a determination issued to it on October 13, 1998, by the Manpower, Personnel and Administration Directorate, United States European Command, of the Department of Defense (USEUCOM). In that determination, USEUCOM denied in part a request for information that the National Security Archive filed on August 19, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from one of the documents USEUCOM released in that determination was withheld pursuant to a review of the documents by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to instruct USEUCOM that the DOE no longer requires the classification and withholding of the information that USEUCOM withheld on the DOE's behalf.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 19, 1994, the National Security Archive submitted a request under the FOIA to USEUCOM for histories relating to "NATO nuclear forces, deployments of [intermediate range ballistic missiles], command and control over nuclear forces, and nuclear weapon safety" in the years 1957 through 1962. On August 16, 1996, USEUCOM sent excerpts of the 1961 and 1962 histories to the DOE for classification review. In response to that request, the DOE advised USEUCOM on June 17, 1998, that the 1961 history contained classified information that it considered exempt from mandatory disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). The DOE reported that the 1962 history, however, contained no DOE classified information. On October 13, 1998, USEUCOM released to the National Security Archive a copy of the 1962 history in its entirety and

a copy of the 1961 history from which it withheld information that the DOE claimed was exempt from disclosure under the FOIA.

In its Appeal to the DOE, the National Security Archive seeks the disclosure of those portions of the 1961 history that USEUCOM withheld at the request of the DOE. The Appellant contends that the information

the DOE has identified as classified should be declassified and released, because the report was prepared 35 years ago, the United States withdrew almost all of its nuclear weapons from Europe nearly ten years ago, and the DOE released data on the United States nuclear stockpile through 1961 several years ago.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Hans M. Kristensen, 27 DOE ¶ 80,182 (1999); Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The information that the DOE deleted under Exemption 3 concerns Fiscal Year (FY) 1964 Atomic Weapon Planning for United States Europe warhead requirements and a FY 1962 plan for the dispersal of nuclear weapons, which the DOE classified as Formerly Restricted Data under the Atomic Energy Act.

Upon referral of the Appeal from the Office of Hearings and Appeals, the Office of Security Affairs again reviewed the withheld portions of the 1961 history for which the DOE had claimed exemption from mandatory disclosure under the FOIA. It has informed us that current classification guidance indicates that the classification of planning information for nuclear weapons that are based outside the United Stated and its territories is to be determined by the parties concerned. Based on that guidance, it has now concluded that the document no longer contains any information that needs to remain classified by the DOE. Because the 1961 history is not a DOE document, that Office will return the document to USEUCOM for its consideration for release in light of the DOE's new stance on this matter. USEUCOM will then inform the National Security Archive directly of its own determination concerning the release of that information. Accordingly, the National Security Archive's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by The National Security Archive on December 9, 1998, Case No. VFA-0464, is hereby granted.

(2) The Department of Energy's (DOE) Office of Declassification shall inform the Department of Defense, United States European Command (USEUCOM), that the 1961 USEUCOM History contains no DOE classified information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 1, 1999

Case No. VFA-0465, 27 DOE ¶ 80,180

January 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:McKenna & Cuneo, L.L.P.

Date of Filing:December 10, 1998

Case Number: VFA-0465

On December 10, 1998, McKenna & Cuneo, L.L.P. (McKenna) filed an Appeal from a determination the Acting Manager of the Chicago Operations Office (Acting Manager) of the Department of Energy (DOE) issued to the firm on November 12, 1998. In that determination, the Acting Manager partially granted a June 15, 1998 request for information that McKenna filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In McKenna's request for information, the firm sought copies of documents related to a DOE contract solicitation. In his determination, the Acting Manager released several responsive documents, but redacted labor rates, profit amounts, and indirect expense rates in accordance with 5 U.S.C. § 552(b)(4). The Acting Manager also withheld from release three pages of documents containing communications between the DOE Counsel and the Acquisition and Assistance Group pursuant to 5 U.S.C. § 552(b)(5). McKenna contends that the Acting Manager did not properly identify all of the documents he redacted and withheld. The firm states that several of the documents released to it indicate that other responsive pages or complete responsive documents exist. Without additional information to identify the pages or documents the Acting Manager redacted or withheld, McKenna argues that it is impossible to determine whether the Acting Manager properly withheld information pursuant to the FOIA.

Analysis

So that we may determine whether the Acting Manager properly identified all of the information responsive to McKenna's request, we must first verify whether the Acting Manager conducted a thorough search for all responsive information. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the

files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

We have also consistently held that the FOIA requires the authorizing official give reasonably informative descriptions of the documents or portions of documents being withheld that are sufficient to allow the requester to understand the determination and if appropriate to formulate a meaningful appeal. See, e.g., Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984); Exxon Co., USA, 5 DOE ¶ 80,178 at 80,813 (1980); Cities Service Co., 5 DOE ¶ 80,101 at 80,502 (1980). Descriptions are generally adequate if each document is identified by a brief description of the subject matter it discusses and "if available, the date each document was produced [and] its authors and recipients. . . ." Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); Petroleum Delivery Service, 5 DOE ¶ 80,152 (1980). We have indicated that the "brief description" requirement is generally satisfied if sufficiently informative titles of the withheld documents are provided and that the descriptions need not contain factual information that would compromise the privileged nature of the documents. Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); P.A. Barnes, 5 DOE ¶ 80,112 at 80,538 (1980); Akin Gump, Hauer & Feld, 3 DOE ¶ 80,155 at 90,765 (1979).

McKenna states that documents the firm received from the Acting Manager indicate the possible existence of other responsive information. McKenna cites 11 examples where the firm believes that other responsive documents or portions of documents exist. In none of these 11 examples did the Acting Manager identify responsive information being withheld. These potentially responsive documents include specifically named documents, attachments referred to in letters or facsimile cover sheets, and missing numbered pages. McKenna also believes that circumstances dictate the existence of other responsive documents.

In reviewing the appeal, we contacted a representative of the Acting Manager to ascertain the validity of McKenna's contention that there must exist additional responsive information. We supplied the Acting Manager's representative with the additional information McKenna provided in its appeal. The Acting Manager's representative confirmed that at least one of these 11 examples of potentially responsive documents McKenna cites does exist and was not properly identified in the Acting Manager's response. See Record of January 8, 1999 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Kim Donham, Chicago Operations Office. The Acting Manager's representative is continuing to search for additional responsive information. Since the Acting Manager's initial search was incomplete and since the Acting Manager's determination did not include enough information to allow McKenna to reasonably understand the determination and formulate a meaningful appeal, we must remand this determination to the Acting Manager for a new search and a more informative description of any withheld information.

It Is Therefore Ordered That:

(1) The Appeal McKenna & Cuneo, L.L.P. filed on December 10, 1998, Case No. VFA-0465, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Acting Manager of the Chicago Operations Office of the Department of Energy for a new search pursuant to McKenna & Cuneo, L.L.P.'s June 15, 1998 request for information and a reasonably informative description of the documents or portions of documents being withheld from this request for information that is sufficient to allow McKenna & Cuneo, L.L.P. to understand the Acting Manager's determination.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 12, 199

Case No. VFA-0466, 27 DOE ¶ 80,179

January 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jennifer Kuehnle

Date of Filings: December 14, 1998

Case Numbers: VFA-0466

On December 14, 1998, Jennifer Kuehnle (Kuehnle) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE Oakland Operations Office (Oakland) issued to her on November 20, 1998. The determination concerned a request for information that Kuehnle submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Oakland would be required to conduct a further search for responsive material.

I. Background

In a letter to Oakland, Kuehnle requested three documents: (1) the draft version of "Production and Use of Beryllia Ceramics at Coors Ceramics Company," dated March 5, 1990; (2) the final version of the above document; and (3) pages 179-192 and 199-202 of "Final Operation Report of the Manufacture of Beryllia-Urania Fuel Elements for the Tory II-C Reactor," dated May 31, 1963. Letter from Kuehnle to Oakland (October 19, 1998). Oakland forwarded the request to the Lawrence Livermore National Laboratory (Livermore). The staff of the laboratory archives conducted an unsuccessful search of all classified and unclassified data bases in the archives. Letter from Livermore to Oakland (November 12, 1998). Livermore further stated that the documents did not carry any report numbers that would identify them as having been created in their organization, and that the 1990 document title referred to a project that was terminated at Livermore in the 1960s. *Id.* Consequently, Oakland sent Kuehnle a determination letter informing her that no responsive documents were found. Letter from Oakland FOIA Authorizing Official to Kuehnle (November 20, 1998). However, according to Kuehnle, the previous summer Oakland had released copies of portions of the requested documents to her in response to an earlier FOIA request. Letter from Kuehnle to Oakland (December 14, 1998) (Appeal). In fact, Kuehnle attached copies of portions of the two documents to this Appeal, challenging the adequacy of Oakland's search. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that

the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Oakland to ascertain the scope of the most recent search, particularly in light of Kuehnle's contention that Oakland had released some responsive material to her the previous year. Oakland confirmed the allegation, but could not explain Livermore's inability to find any responsive material for this request. Memorandum of Telephone Conversation between Rose Ann Pelzner Goodwin, Oakland FOIA Officer, and Valerie Vance Adeyeye, OHA Staff Attorney (January 7, 1999). Nonetheless, Oakland agreed to ask the Livermore staff members who provided the partial documents in the past to now provide Kuehnle with complete documents. *Id.(1)*

In addition, Oakland informed us that upon receiving the Appeal, they reviewed the search conducted in response to the October 19, 1998 request. In the course of that review, the FOIA Officer was informed that the labs at Livermore and Berkeley were once a single entity and that Berkeley archives might contain some responsive information. Memorandum of Telephone Conversation between Rose Ann Pelzner Goodwin, Oakland FOIA Officer, and Valerie Vance Adeyeye, OHA Staff Attorney (December 31, 1998). As a result, the Oakland FOIA Officer requested that the librarian search the archives for Berkeley information, and that search was initiated after the labs reopened for the new year. Memorandum of Telephone Conversation between Rose Ann Pelzner Goodwin, Oakland FOIA Officer, and Valerie Vance Adeyeye, OHA Staff Attorney (January 7, 1999).

In summary, Oakland has agreed to conduct a further search at Livermore for complete documents, and to search the Berkeley archives for any responsive information. Accordingly, we shall remand this matter to Oakland for the release of any additional non-exempt responsive material.

It Is Therefore Ordered That:

(1) The Appeal filed on December 14, 1998 by Jennifer Kuehnle, OHA Case No. VFA-0466, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Oakland Freedom of Information Act Officer who will promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3 This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 12, 1999

(1)If, as Livermore suggested in its response, the documents were created by another organization, Oakland should provide Kuehnle with the name of the organization or any other useful information that could help Kuehnle in her research.

Case No. VFA-0467, 27 DOE ¶ 80,183

January 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The Oregonian

Date of Filing:December 21, 1998

Case Number: VFA-0467

On December 21, 1998, The Oregonian, a newspaper located in Portland, Oregon, filed an Appeal from a determination issued to it by the Department of Energy's Bonneville Power Administration (BPA). The BPA issued this determination in response to a previous Decision and Order that this office issued on February 3, 1998 (*The Oregonian I*). The Appeal, if granted, would require that documents that the BPA withheld be released in whole or in part.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA requests, The Oregonian had sought access to all expense records and related correspondence pertaining to the defense of lawsuits filed by Chase Manhattan Bank and Tenaska Washington Partners II against the BPA. In response to the requests, the BPA released a wealth of material -- mainly copies of contracts by which it has procured legal advice, analysis and assistance in contesting the lawsuits. The BPA withheld a number of documents, including travel vouchers, estimates of future litigation expenses, and invoices for shipping, travel, courier and legal expenses pursuant to the attorney-client and attorney work product privileges. Finding that the information it was withholding was encompassed by Exemption 5 of the FOIA, BPA stated that release of these documents "might prejudice BPA in the current litigation with Tenaska by revealing BPA's litigation strategies." BPA's Original Determination at 2.

The Oregonian appealed, claiming that BPA applied Exemption 5 too broadly in withholding the expense-related documents in their entirety. The newspaper contended that BPA improperly withheld documents "which cannot possibly reveal attorney thought processes or truly confidential attorney- client communications." The Oregonian's Original Appeal at 3.

On February 3, 1998, OHA issued a decision and order in which we found:

[S]ome of the material withheld by BPA is not subject to the attorney-client or attorney work product privileges. This non-exempt material includes information pertaining to travel, copying, communications,

shipping and courier service expenses, as well as the attorneys' identities. Based on the record before us, we cannot conclude that release of this information would reveal BPA's litigation strategy or the mental impressions, conclusions, or legal theories of their attorneys.

The Oregonian I, 27 DOE ¶ 80,108 at 80,516 (1998) (*The Oregonian I*). However, we also found

the expense statements at issue also contained information which could reflect BPA's litigation strategy or the thoughts and conclusions of BPA's outside counsel. Accordingly, we concluded:

This information consists of the descriptions of the specific services performed by the attorneys, the dates on which those services were performed, the hours billed by each attorney, and the amounts charged for each attorney's services. Disclosure of this information would provide opposing counsel with insights into BPA's litigation strategy and would reveal the timing and intensity of the legal services provided. Release of the number of hours billed by the attorneys, as well as the dollar amounts charged, would indicate the manner in which the outside counsel's legal services were being allocated and could therefore reveal an important component of BPA's legal strategy. This information was therefore properly withheld under Exemption 5.

Id. Therefore, we remanded the appeal to BPA. On remand, BPA was instructed to review the withheld material in accordance with the guidelines set forth above, and to make every reasonable attempt to segregate and release non-exempt material.

In response to our remand, BPA issued another determination letter on November 12, 1998 (the November 12th Determination Letter). The November 12th Determination Letter released copies of the requested billing records from which it redacted information that it continues to find exempt. Specifically, BPA continues to categorically withhold those portions of the billing statements which describe (1) the services performed by attorneys, consultants and witnesses, (2) the dates on which those services were performed (3) the hours billed by each attorney, witness or consultant and (4) the amounts charged for the services of each attorney, witness or consultant. BPA justified its withholdings under Exemption 5 by stating, in pertinent part:

[T]he release of this exempt material would not be in the public interest and would harm the interest[s] protected by the attorney-client and attorney work product privileges by revealing BPA's litigation strategy and the thought processes of outside counsel. Release of this information, even after litigation is concluded, could discourage BPA's outside counsel from providing similarly detailed information in future billings, thus impeding BPA's ability in any future litigation, to effectively monitor and control legal costs. BPA continues to believe that the release of the withheld information would result in foreseeable harm to the BPA institutional interests that are protected by Exemption 5.

November 12th Determination Letter. On December 21, 1998, The Oregonian filed the present Appeal.

II. Analysis

A. Adequacy of the Determination

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

The written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and

provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

As an initial matter, we note that the November 12th Determination Letter claims the attorney-client privilege, but fails to explain to which withheld information it is applying this privilege. Moreover, the November 12th Determination Letter fails to provide any justification of its withholdings under the attorney-client privilege. We have reviewed a representative sample of the withheld documents and it is not clear to us that the withheld information is protectable under the attorney-client privilege.

Our review also indicates that the November 12th Determination Letter is flawed in two important ways. First, The Oregonian contends that BPA's determination letter:

[D]id not include any supporting documentation provided to BPA by [its outside counsel] as part of its routine billings. BPA, by its own actions, had earlier identified these supporting records as subject to the FOIA request. Yet when BPA offered its FOIA response, the records were not only missing, but the agency also failed to explain it was withholding these records.

December 21, 1998 Appeal at 5. Our review of a representative sample of the billing information BPA received from its outside counsel supports this contention. The billing information that BPA received from its outside counsel was accompanied by supporting documentation including telephone bills and hotel invoices. This supporting documentation was responsive to The Oregonian's requests and therefore BPA should have identified it as responsive to the requests and either released this information or justified its withholding.

In addition, as discussed in the next section, the November 12th Determination Letter inappropriately justifies its categorical withholdings under Exemption 5's attorney work product and attorney-client privileges by referring to an analysis appropriate only under Exemption 4.

We are therefore remanding this matter to BPA. On remand, BPA should issue a new determination letter in which it identifies each document responsive to The Oregonian's requests, indicates whether any responsive document (or portion thereof) has been withheld, and justifies any withholdings. The new determination letter must also specifically indicate which exemptions or privileges are being applied to each withholding.

B. Applicability of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). The attorney-client and attorney work product privileges are among the privileges incorporated by the courts under Exemption 5. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*).

The attorney-client and the attorney work product privileges are frequently confused with each other. The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Proceedings 88-9 (MIA)*,

899 F.2d 1039 (11th Cir. 1990); *In Re Grand Jury Subpoena of Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); 8 J. Wigmore, *Evidence*, § 2291, p. 590 (McNaughton Rev. Ed. 1961); McCormack, *Law of Evidence*, Sec. 87, p.175 (2d ed. E. Cleary 1972). Not all communications between attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992) (*Clark*). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976) (*Fisher*). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). This privilege is also limited. It does not extend to every written document generated by an attorney. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. *See*, *e.g.*, *Coastal States*, 617 F.2d at 865.

The billing statements involved in this case set forth, on a daily basis, the date of the services provided, the name of the attorney providing the services, a brief description of the nature of the services provided, the daily number of hours billed by each attorney and the hourly cost of those services. The billing statements also state the amounts charged for various administrative services such as court reporting and photocopying.

It is well settled that attorney fee information is normally not privileged. *See*, *e.g.*, *Clark*, 974 F.2d at 129; *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States v. Sims*, 845 F.2d 1564, 1568 (11th Cir. 1988); *In Re Slaughter*, 694 F.2d 1259, 1260 (11th Cir. 1982); *In Re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 671 (5th Cir. 1975); *Indian Law Resource Center*, 477 F. Supp. 144, 147 (D.D.C. 1979) (*Indian Law*). For example, the courts have repeatedly found that the specific amount of fees paid to attorneys is not privileged. *See*, *e.g.*, *In Re Grand Jury Witness (Salas, Waxman)*, 695 F.2d 359 (9th Cir. 1982) (*Salas*). Nor is the general purpose for which the legal work was performed usually privileged. *Clark*, 974 F.2d at 129. However, in those cases where a party has been able to show that the attorney billing statements or time records at issue reveal the motive of the client in seeking representation, litigation strategy, privileged communications or the *specific* nature of the services provided by attorneys, such as research into particular areas of the law, courts have found them to be privileged. *Id.*; *Salas*, 695 F.2d at 362 (emphasis supplied).

Accordingly, we have held that information in expense records pertaining to the total amount charged by a law firm for a litigation, the attorneys' identities, their hourly rates, and the costs of travel, reporting services and document reproduction are generally not exempt from disclosure pursuant to the attorney-client or attorney work product privileges. *See*, *e.g.*, *William H. Payne*, 26 DOE ¶ 80,161 (1997); *C.D. Varnadore and Betty Freels*, 24 DOE ¶ 80,123 (1994). Information that could reveal the litigation strategy, thoughts or impressions of the attorneys, however, is protected from mandatory disclosure under these privileges. *Id.*

Turning to the present case, it is important to note that the litigation between BPA and the Tenaska Washington Partnership II has recently been settled. The significance of this settlement is that some of the information which was originally properly withheld under the attorney work product privilege may no longer be properly withheld under that privilege.

Prior to October 4, 1993, an agency could withhold information under any of the privileges encompassed by Exemption 5 as long as there was "a substantial legal basis" for doing so. However, on that date, Attorney General Janet Reno issued a *Memorandum for Heads of Departments and Agencies*, which requires that FOIA exemptions be applied only in those circumstances where release can reasonably be expected to harm a protectable interest. *See FOIA Update, U.S. Department of Justice, Office of Information and Privacy* (Spring 1994); *Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies* (October 4, 1993) (*the Reno Memorandum*). As a result of the policies adopted

in the Reno Memorandum, BPA must now show that release of information could reasonably be expected to harm an interest protectable under Exemption 5 in order to withhold it under Exemption 5. *The Reno Memorandum* ("it shall be the policy of the U.S. Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption").

Prior to the termination of litigation to which the agency is a party, the release of any information, generated in expectation or preparation for that litigation that might reveal the mental impressions, conclusions, opinions or legal theories of the agency's attorneys or representatives could reasonably be expected to interfere with the agency's litigation efforts. Such information may therefore be categorically withheld under Exemption 5. However, once that litigation is resolved, the release of that information cannot harm the agency's interests in the resolved litigation. However, it is foreseeable that the release of some of that information which could be protected from mandatory disclosure under the attorney work product privilege prior to the termination of the litigation might continue to harm the agency's other litigation interests even after the original litigation has concluded. For example, information that could reasonably be expected to reveal the agency's settlement threshold or that could reasonably be expected to reveal litigation strategies that might be used in other cases could properly be withheld. In such circumstances, it would be entirely appropriate to continue withholding such information under Exemption 5's attorney work product privilege.

However, the interest cited by BPA in justifying its decision to withhold the information was not among those interests protected by the attorney work product privilege. BPA's determination letter contends:

Release of this information, even after litigation is concluded, could discourage BPA's outside counsel from providing similarly detailed information in future billings, thus impeding BPA's ability in any future litigation to effectively monitor and control legal costs.

November 12, 1998 Determination Letter. This justification is not appropriate under Exemption 5's attorney work product privilege. The purpose of the attorney work product privilege is to protect the adversarial trial process by insulating attorneys' preparations from scrutiny by opposing parties. *See Jordan v. U.S. Dept. of Justice*, 591 F.2d 755 (D.C. Cir. 1978) (*en banc*). The attorney work product privilege was clearly not created with the intention to protect the rights of clients to receive accurate and reliable billing statements. (1)

Applying these principles to the present case, we find that BPA has not properly applied Exemption 5 to the attorney billing information. Specifically, we find that BPA has categorically withheld all portions of the attorney billing statements that describe (1) the services performed by attorneys, consultants and witnesses, (2) the dates on which those services were performed, (3) the hours billed by each attorney, witness or consultant, and (4) the amounts charged for the services of each attorney, witness or consultant without segregating and releasing that information which could not reasonably be expected to harm interests protected under Exemption 5's attorney work product privilege now that the subject litigation has ended. In addition, BPA applied a justification available only under Exemption 4 to some of its withholdings under Exemption 5.

Accordingly, we are remanding this matter to BPA. On remand, BPA must conduct a line-by-line review of any information responsive to the requests at issue in the present case which it has withheld under the attorney work product privilege. This information should then be released, withheld under another appropriately applied and justified FOIA exemption or privilege, or withheld under Exemption 5, but with an adequate explanation showing how its release could reasonably be expected to harm interests protectable under Exemption 5.

III. Conclusion

For the reasons set forth above, we are remanding this matter to BPA for further processing in accordance

with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by The Oregonian on December 21, 1998 is hereby granted as set forth in paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 21, 1999

(1)In some circumstances however, release of information which the government has obtained from outside sources might reasonably be expected to impair the agency's ability to obtain similar information in the future. In those circumstances, such information may be withheld under FOIA Exemption 4. Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be exempt from mandatory disclosure under Exemption 4, a record must consist of either (A) "trade secrets" or (B) information that is: (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the D.C. Circuit established the broadly employed "*National Parks*" test for defining "confidential" information. Under this test, commercial or financial information is "confidential" for purposes of Exemption 4 if its disclosure is likely to either *impair the government's ability to obtain necessary information in the future* or cause substantial harm to the competitive position of the person from whom the information was obtained. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*Critical Mass*) (emphasis supplied); *National Parks*, 498 F.2d at 770. In most circumstances, it is unlikely that disclosure of information subject to a filing requirement would impair the government's ability to obtain similar information in the future. Accordingly, the courts have presumed that the Government's interest in receiving similar information in the future is not threatened by disclosure of information that is required to be submitted. *Critical Mass*, 975 F.2d at 878; *National Parks*, 498 F.2d at 770. This presumption is clearly rebuttable. *SeeCritical Mass*, 975 F.2d at 878; *Washington Post v. Department of Health & Human Services*, 690 F.2d 252, 268-69 (D.C. Cir. 1982). However, it can only be rebutted by a preponderance of evidence showing that disclosure would likely impair the government's future ability to obtain similar information.

Case No. VFA-0468, 27 DOE ¶ 80,184

January 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tod N. Rockefeller

Date of Filing: December 22, 1998

Case Number: VFA-0468

On December 22, 1998, Tod N. Rockefeller (Appellant) filed an Appeal from a determination issued to him on December 15, 1998, by the Freedom of Information Officer at the Department of Energy's Albuquerque Operations Office (DOE/AL). That determination followed a Decision and Order of this Office in which the Appellant appealed a previous determination by the DOE/AL. See Tod N. Rockefeller, 27 DOE ¶ 80,167 (1998) (Rockefeller). DOE/AL's first determination denied the Appellant's request for a fee waiver with regard to a request for information submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. In Rockefeller, we affirmed DOE/AL's denial of a fee waiver. DOE/AL then requested that the Appellant provide adequate assurances that he would pay the fees associated with processing his FOIA request. The Appellant failed to provide what DOE/AL considered adequate assurances and that office notified him that it was administratively closing his case. If the present Appeal were granted, the DOE would be ordered to continue processing the Appellant's case and conduct his initially requested search under a full fee waiver.

I. Background

In an August 4, 1998 FOIA request, the Appellant sought information connected with his dismissal from his job and a waiver of fees for processing that request. In a September 24, 1998 determination, DOE/AL denied the Appellant's request for a fee waiver.

The Appellant appealed, and in Rockefeller, we found that a fee waiver should not be granted to the Appellant. Rockefeller, 27 DOE at 80,667. DOE/AL then requested that the Appellant provide adequate assurances that he would pay the fees that would be incurred in processing the Appellant's August 4, 1998 request. The Appellant responded in the following manner: "while Mr. Rockefeller is willing to pay fees if a fee waiver were denied, he is unemployed. He is unwilling to pay improper fees, excessive fees, exorbitant fees, confiscatory fees, or retaliatory fees." Letter from Appellant's Counsel to Elva Ann Barfield, Freedom of Information Officer, DOE/AL (December 5, 1998). DOE/AL responded that since it did not consider this response to convey the Appellant's willingness to pay fees as requested, it was closing the Appellant's request file. Letter from Elva Ann Barfield

to Appellant's Counsel (December 15, 1998). The Appellant subsequently filed the present Appeal in which he contends that he had adequately conveyed the willingness to pay "reasonable" fees and challenges our original Rockefeller determination. Letter from Appellant's Counsel to Director, OHA (December 22, 1998) (Appeal Letter).

II. Analysis

In the Appeal Letter, the Appellant made a number of different arguments. First, he argued that his December 5, 1998 letter adequately conveyed his willingness to pay "reasonable" fees. Second, he argued that we should overturn our Rockefeller determination because he now meets all of the requirements for granting a fee waiver and because this Office failed to consider an important document in reaching our fee waiver determination. Third, he noted that he has made two additional FOIA requests that he does not believe that DOE/AL is processing.

We have examined each of the Appellant's arguments carefully and make the following determinations. First, we note that the question of whether the Appellant has adequately conveyed his willingness to pay fees would not normally appear to be a question subject to this Office's jurisdiction as laid out in 10 C.F.R. § 1004.8(a).(1) However, because this issue is related to the Appellant's fee waiver denial (an issue squarely within our jurisdiction) and because we are mindful that the DOE intends to provide customer-friendly service whenever possible, we will resolve the issue the Appellant has raised.

We find that the Appellant's offer to pay only legal, non-excessive and reasonable fees is not adequate. Requesters may state their willingness to pay only fees provided for by either the DOE regulations or the FOIA statute. They may also place certain limitations on their assurance to pay fees such as the amount of costs they are willing to authorize the agency to incur. However, the Appellant's limitation appears to leave the discretion as to the definition of "excessive" and "reasonable" to the Appellant. This puts the shoe on the wrong foot. DOE/AL is the deciding authority in the first instance. The subjective limitation which the Appellant seeks cannot be considered a satisfactory assurance of full payment. For this reason, it was not improper for DOE/AL to administratively close the Appellant's August 4, 1998 request.(2)

Next, we do not agree with the Appellant that he now meets all of the requirements for granting a fee waiver. In our Rockefeller decision, we found that the Appellant failed to meet the requirements of Factor C and Factor D of the fee waiver test. Factor C is the amount of "the contribution to an understanding by the general public of the subject likely to result from disclosure." 10 C.F.R. § 1004.9(a)(8)(i)(C). To meet this test, the requester must have the ability and intention to disseminate this information to the public. International Brotherhood of Electrical Workers, 26 DOE ¶ 80,153 at 80,671 (1997). The only additional information on this topic the Appellant has provided is that he is obtaining statements "from New Mexico citizens concerned about environmental issues and expect[s] to file them soon." See Appeal Letter at 2. This information is irrelevant because it conveys nothing about the Appellant's ability to spread the information obtained to the general public at large. Therefore, we find that the Appellant has again failed to meet Factor C of this test. Cf. Glen Milner, 26 DOE ¶ 80,147 at 80,649 (1996) (Factor C met where requester had had articles published in major newspapers and a New York Times reporter stated that the requested documents were newsworthy).(3) Because the meeting of Factor C is a pre-requisite for addressing Factor D (the significance of the contribution made to public understanding), Factor D need not be considered. Therefore, we find no reason to grant a fee waiver and overturn our earlier Rockefeller decision

With regard to the Appellant's final argument, the Appellant asserts that he made two additional information requests to DOE/AL in his December 5, 1998 letter to that office and that DOE/AL has failed to respond to these requests. We note that this Office does not have jurisdiction in cases where no appealable determination has been issued, as is the case here, and therefore we will not consider these issues. Where the department has failed to respond to requests in a timely manner, however, the Appellant does have the right to file a complaint with the appropriate federal district court. See 5 U.S.C. § 552(a)(4)(B), (6)(C). We have nevertheless discussed these two requests with DOE/AL and can give the Appellant some guidance.

In the first request, the Appellant stated that if his request for a fee waiver in connection with his August 4, 1998 request was denied again, he then wished to re-request all items mentioned in that previous request, in order to avail himself of another opportunity to show that he meets Factors C and D of the fee

waiver test. As discussed above, the Appellant does not meet these factors and has had an adequate opportunity to show that he does meet them. His sole remaining remedy on the fee waiver issue is to proceed to federal court. We view the Appellant's December 5, 1998 request for all documents he previously requested in his August 4, 1998 request as purely a means for continuing to challenge the DOE's fee waiver determination and not in fact a new request for information. Thus, we believe that DOE/AL correctly refused to process that December 5, 1998 request.

In his other December 5, 1998 request, the Appellant sought all documents relating to his FOIA requests. DOE/AL has informed us that it will begin processing this request. See Record of Telephone Conversation between Dawn L. Goldstein and Terry Apodaca (December 29, 1998).

In conclusion, we find that it was not erroneous for DOE/AL to administratively close the Appellant's August 4, 1998 FOIA request. We also find no reason to overturn our earlier Rockefeller decision. Further, we believe that DOE/AL correctly refused to begin processing the Appellant's new request for all documents he previously requested on August 4, 1998. Finally, DOE/AL has informed us that it will begin processing the Appellant's new FOIA request for documents relating to his FOIA requests. However, because OHA has no jurisdiction over those latter two issues, we will dismiss that portion of the Appeal. Consequently, the Appellant's appeal is being dismissed in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Tod N. Rockefeller on December 22, 1998, Case Number VFA-0468, is hereby dismissed to the extent set forth in paragraph (2) below and is denied in all other respects.

(2) The portions of the Appeal filed in Case No. VFA-0468 concerning the Albuquerque Operations Office's failure to begin processing the two December 5, 1998 requests are hereby dismissed.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 21, 1999

(1) 1/ This regulation provides the following: "[w]hen the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with Section 1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals."

(2)We further note that DOE/AL had requested from the Appellant a partial advance payment of $1,500 in order to process the request. The payment was never made. See Record of Telephone Conversation between Dawn L. Goldstein, OHA Staff Attorney and Terry Apodaca, DOE/AL (December 30, 1998). This is a separate, equally valid reason for DOE/AL to administratively close the Appellant's August 4, 1998 request. Moreover, if the Appellant wishes to have the request reopened, DOE/AL would be entitled to obtain "an advance payment of an amount up to the full estimated charges" because the estimated fees in this case were greater than $250 and the Appellant apparently has no history of payment with the DOE. 10 C.F.R. § 1004.9(b)(8)(i).

(3) 3/ The Appellant also complained that DOE/AL failed to consider a Department of Labor whistleblower complaint that he had filed and considers relevant to his fee waiver request. We have examined this complaint and find that it contains no information relevant to the Appellant's ability to meet Factor C.

Case No. VFA-0469, 27 DOE ¶ 80,185

January 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: William E. Logan, Jr. & Associates

Date of Filing: January 4, 1999

Case Number: VFA-0469

William E. Logan, Jr., of the law firm William E. Logan, Jr., & Associates (Logan), files this Appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (the Department) at 10 C.F.R. Part 1004.

Logan sent a FOIA request to the Department's Strategic Petroleum Reserve Project Management Office (SPR) in New Orleans. In its request, Logan sought material dealing with lease and purchase agreements between Shell Pipeline Corporation and the Department. The agreements concerned the Bayou Choctaw crude oil pipeline and the St. James Terminal.

SPR released redacted copies of the agreements. In its determination letter accompanying the released documents, SPR informed Logan that it had withheld formula rates. With regard to the Bayou Choctaw and St. James Terminal lease agreements, SPR explained that:

The formula rates have been withheld because [they are] exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(4). Exemption 4 provides that an agency can withhold such data if it believes release would cause substantial harm to the competitive position of the person from whom the information was obtained or impair the Government's ability to obtain such information in the future.

Similarly, with regard to the purchase agreement concerning Bayou Choctaw, SPR released a redacted copy, stating that "portions of [the purchase agreement] contain formulas that are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)." SPR did not provide any further explanation of its decision to redact the documents. Logan then filed this Appeal, contending that "the formula rates which have been deleted are not exempt from disclosure under the Freedom of Information Act."

The FOIA generally requires that agency records held by a covered branch of the Federal Government, and which have not been made public in an authorized manner, be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9).

The exemption asserted in this case by SPR is found at 5 U.S.C. § 552(b)(4) (Exemption 4). Exemption 4 permits an agency to withhold from release "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus, in applying Exemption 4, the withholding office must first determine whether the information either is a trade secret or is commercial or financial information.

If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983).

However, if the agency determines the material is commercial or financial information, obtained from a person, and privileged or confidential, there is additional analysis the agency must undertake. First, the agency must decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992). If it was involuntarily submitted, the information may be withheld under Exemption 4 if disclosure meets either prong of a two-pronged test. Under the first prong, the information may be withheld if disclosure is likely to impair the government's ability to obtain necessary information in the future. Under the second prong, the information may be withheld if disclosure is likely to cause substantial harm to the competitive position of the person from whom the government obtained the information. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

As the descriptions indicate, these three standards are mutually exclusive. For purposes of Exemption 4, either information is voluntarily or involuntarily submitted commercial or financial information, or it is a trade secret.

In addition, once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C.Cir. 1983); *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

The determination letter issued by SPR does not satisfy either the FOIA or the Department's regulations. As an initial matter, it does not explicitly state which of the three standards under Exemption 4 SPR applied in its decision to withhold the formula rates. Because the determination letter mentions the substantial competitive harm and impaired ability standards, it appears that SPR categorized the formula rates as involuntarily submitted commercial or financial information. However, SPR did not provide any explanation of how it arrived at this categorization. As a result, we cannot evaluate whether SPR applied the proper standard in withholding the formula rates. Furthermore, the determination letter provides no basis for the assertion that releasing the information would meet either prong of the test for involuntarily submitted commercial or financial information. Consequently, the determination letter does not permit either a meaningful appeal or an appropriate review.

We will therefore remand this matter to SPR to issue a new determination. That determination shall either release the formula rates or provide a new justification for withholding.(1) If SPR continues to withhold the formula rates under Exemption 4, it must explain which Exemption 4 test it is applying. In doing so, it

must provide more than a simple restatement of the applicable test. Instead, it should include a statement of the reason for any withholding, and a brief explanation of how the exemption applies to the matter withheld. 10 C.F.R. § 1004.7(b)(1); *William H. Payne*, 26 DOE ¶ 80,221 at 80,861 (1997); *Davis Wright & Jones*, 19 DOE ¶ 80,104 at 80,510 (1989). In making its determination, SPR may group similar documents together and provide one justification for each group of documents.

It Is Therefore Ordered That:

(1) The Appeal filed by William E. Logan, Jr. & Associates, OHA Case No. VFA-0469, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office, to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 21, 1999

(1)*/ In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (1982); *Mead Data Central, Inc. v. Air Force*, 556 F.2d 242, 259-62 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 927 (1978*); EPA v. Mink*, 410 U.S. 73, 89, 91 (1973); *Casson, Calligaro & Mutryn*, 10 DOE ¶ 80,137 at 80,615 (1983). However, segregation and release of non-exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 83-86 (2d Cir. 1979).

Case No. VFA-0470, 27 DOE ¶ 80,189

February 26, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ashok K. Kaushal

Date of Filing: January 22, 1999

Case Number: VFA-0470

On January 22, 1999, Ashok K. Kaushal filed an Appeal from a determination issued to him on December 16, 1998, by the Office of Inspector General (IG) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004 and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Mr. Kaushal challenges the adequacy of IG's search for documents responsive to his request.

I. Background

On April 29, 1997, Mr. Kaushal filed a request for information in which he sought documents created in response to a complaint he filed against Sandia National Laboratory. On December 16, 1998, IG issued a determination which stated that it located a number of documents responsive to Mr. Kaushal's request. See Determination Letter at 1. IG released certain documents to Mr. Kaushal. However, it withheld other documents and portions thereof pursuant to Exemptions 5, 6 and 7(C) of the FOIA.

On January 22, 1999, Mr. Kaushal filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Kaushal does not challenge the documents that were withheld pursuant to Exemptions 5, 6 and 7(C), but rather challenges the adequacy of the search that IG conducted. Specifically, Mr. Kaushal contends that IG failed to locate and provide a copy of the investigative report related to Mr. Kaushal's complaint. Mr. Kaushal asks that the OHA direct IG to conduct a new search for this investigative report. See Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand

a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C.

Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at IG to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Kaushal's request might exist. Upon receiving Mr. Kaushal's request for information, IG instituted a search of its files. Specifically, IG searched its Allegation-Based Inspections Files. Based on this search, IG located a number of documents that were responsive to Mr. Kaushal's request. Some of these documents were provided to Mr. Kaushal in their entirety and others were provided with material withheld pursuant to Exemptions 5, 6 and 7(C). IG has informed us that this search did not produce the investigative report referred to in Mr. Kaushal's Appeal because Mr. Kaushal's complaint was settled before a report could be issued. See Record of Telephone Conversation Between Geoffrey Gray, IG, and Kimberly Jenkins-Chapman, OHA (February 9, 1999). According to IG, it is their policy to destroy any drafts of their investigative reports. However, upon a further search during the course of this Appeal, IG has located a number of additional documents that were used in drafting an investigative report.

Given the facts presented to us, we find that IG conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Kaushal's request. However, in light of the fact that IG has located additional documents that might be responsive to Mr. Kaushal's request, we shall remand this matter to IG to either release these documents to Mr. Kaushal or issue a new determination adequately supporting the withholding of the documents.

It Is Therefore Ordered That:

(1) The Appeal filed by Ashok K. Kaushal, OHA Case No. VFA-0470, on January 22, 1999, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Office of Inspector General of the Department of Energy, which shall either release additional responsive documents or issue a new determination adequately supporting the withholding of the documents.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 29, 1999

Case No. VFA-0471, 27 DOE ¶ 80,186

February 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Beech Grove Technology, Inc.

Date of Filing: January 11, 1999

Case Number: VFA-0471

This Decision and Order concerns an Appeal that Beech Grove Technology, Inc. (BGTI) filed from a determination issued to it by the Department of Energy's (DOE) Golden Field Office. In this determination, the Golden Office granted in part a request for information that BGTI filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the Golden Office to conduct a further search for responsive materials.

In its request, BGTI sought access to all negative evaluations of its application under the DOE's Inventions and Innovations Program (Solicitation No. DE-PS36-98GO10293). In response to this request, the Golden Office provided BGTI with three "I&I Technical Review" worksheets. These worksheets consist of the comments of three evaluators concerning BGTI's application. In its Appeal, BGTI contests the adequacy of the search for responsive documents. (1)

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he

standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to evaluate the adequacy of the search, we contacted the Golden Office. We were informed that three evaluations of BGTI's application were performed, and that all three were provided to BGTI. See memorandum of February 2, 1999 telephone conversation between Robert Palmer, OHA staff attorney, and Christopher Powers, Golden Field Office. We have examined these documents, and they appear to be complete. Moreover, BGTI has offered no additional information or evidence which would lead us to believe that other relevant documents exist. We therefore find that the search for responsive documents conducted by the Golden Office was adequate, and that BGTI's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Beech Grove Technology, Inc. on January 11, 1999 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 8, 1999

(1)In its Appeal, BGTI also responds to the negative evaluations of its application, and requests that this response be placed in the company's file in the Golden Office. We have forwarded BGTI's Appeal to the Golden Office, which has informed us that it will grant this request.

Case No. VFA-0472, 27 DOE ¶ 80,191

March 10, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:City of Federal Way

Date of Filing:February 9, 1999

Case Number: VFA-0472

On February 9, 1999, the City of Federal Way, Washington, completed the filing of an Appeal from a determination issued to it in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Manager of Real Property Services and the Freedom of Information Act Officer (Authorizing Officials) of the Bonneville Power Administration (BPA) issued the determination on November 9, 1998. This Appeal, if granted, would require that the Authorizing Officials release responsive information that was withheld under FOIA Exemptions 4 and 5, 5 U.S.C. §§ 552(b)(4) and (b)(5).

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 12, 1998, the City of Federal Way filed a request with the Bonneville Power Administration for copies of any and all leases, licenses or agreements, or any proposed leases, licenses or agreements between Western Wireless and the BPA within the State of Washington and between any telecommunication provider and the BPA within the State of Washington. The Manager of BPA's Real Property Services responded to this FOIA request in a July 29, 1998 letter and released some portions of documents, but withheld information pursuant to Exemption 4 of the FOIA. On September 14, 1998, the City of Federal Way filed an appeal with the Office of Hearings and Appeals of the DOE (OHA). Following an inquiry by the OHA, the BPA requested that the OHA allow it to withdraw its determination so that it could issue a new determination concerning the City of Federal Way's FOIA request. On October 19, 1998, the OHA granted the BPA's request and allowed the BPA to issue a new determination within 20 working days. Finally, on November 9, 1998, the BPA issued a new determination withholding information pursuant to Exemptions 4 and 5 of the FOIA.

II. Analysis

In its Appeal, the City of Federal Way claims that the BPA incorrectly applied Exemptions 4 and 5 to responsive information. The City of Federal Way maintains that the Authorizing Officials did not identify

the proposed lease documents the BPA withheld pursuant to Exemption 5, or explain how the exemption applies to the particular records and why discretionary release is not appropriate. The City of Federal Way also contends that improper ex parte communications between the OHA and the BPA staff, and the illegal withdrawal and reissuance of the BPA's determination, have "invalidated" the BPA's entire decision process. For these reasons, the City of Federal Way argues that the OHA must reverse the BPA's determination and disclose the withheld information.

Allegations of Improper Procedure

As an initial matter, we note that the OHA addressed the City of Federal Way's allegations regarding improper ex parte communications between the OHA and the BPA staff, and alleged illegal withdrawal and reissuance of the BPA's determination, in a November 4, 1998 letter from Thomas O. Mann, OHA Deputy Director, to Bob Sterbank, Deputy City Attorney for the City of Federal Way. In this letter, the OHA Deputy Director stated that the OHA's role in FOIA proceedings is not that of an appellate court reviewing the holding of a lower court, but is instead more informal. The OHA's responsibility in these cases is to ensure that FOIA determinations are properly done and are issued fully in accordance with both the letter and the spirit of the FOIA and the applicable DOE regulations. In fulfilling this responsibility, the OHA often performs a non-judicial function such as investigating the adequacy of a DOE Office's search for responsive documents and facilitating communications between a requester and the DOE Office that processed the request.

The City of Federal Way had claimed that the BPA is limited to "one bite at the apple" through the doctrine of "res judicata" and that this doctrine is made applicable to administrative agencies by Drummond v. Commissioner of Social Security, 126 F.3d 837, 840-41 (6th Cir. 1997) (Drummond) and similar cases. The City of Federal Way exaggerates the limitations imposed upon agencies by the doctrine of "res judicata." Agencies are always able and encouraged to correct mistakes. The OHA Deputy Director informed the City of Federal Way that, contrary to its argument, nothing in 10 C.F.R. § 1004.8 of the DOE FOIA regulations prohibits the OHA from allowing the BPA to withdraw its determination and issue a new one. Specifically, the OHA Deputy Director stated that Drummond is inapposite because that case involved a quasi-judicial, trial type administrative hearing, which is not the case here. The City of Federal Way's argument, if carried to its logical conclusion, would prevent an issuing Office from amending or replacing a defective determination letter, even if that letter was so vague as to make it impossible to identify the exemptions or the reasons for the actions taken. Nothing in the FOIA or the DOE regulations requires such a result. Furthermore, the OHA Deputy Director informed the City of Federal Way that the BPA has not waived its ability to rely in the future on any exemptions that it did not cite in the original determination. The federal courts have held that an agency's failure to raise a FOIA exemption at any level of the administrative process does not constitute a waiver of that defense. See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992); Frito-Lay v. EEOC, 964 F.Supp. 236, 239 (W.D. Ky. 1997). Thus, nothing in the DOE regulations or in the applicable case law precludes the withdrawal of a determination letter and the issuance of a new one.

Finally, unlike other areas of OHA jurisdiction (e.g. personnel security and "whistleblower" proceedings, which are quasi-judicial in nature) there are no provisions in the DOE's FOIA regulations prohibiting ex parte contacts. Moreover, our experience confirms that communication with the DOE office issuing the determination often proves critical to our ability to investigate the process underlying that determination and to reach the correct result following an appeal. Accordingly, for all of the reasons stated above, we again find no merit in the City of Federal Way's contention that improper procedures require the OHA to reverse the BPA's determination.

The Documents Withheld Pursuant to Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or

(2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (Critical Mass). By contrast, information a submitter provided to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879.

In appropriate cases, Exemption 4 protects the release of the type of information the requester seeks. We have reviewed the redacted information and find that it contains rates and charges negotiated for lease agreements between the BPA and Western Wireless. These negotiated rates and charges are confidential commercial information within the meaning of Exemption 4. The DOE obtained this material from a "person" as Exemption 4 requires, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). In this case, once the BPA began negotiations with Western Wireless, the firm involuntarily submitted information to the BPA since a requirement of completing the lease agreement was Western Wireless's submission of rates and charges it was willing to pay. See March 2, 1999 Record of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Sonya Baskerville, BPA Attorney. Thus, the information Western Wireless submitted is "confidential" if it meets the test set out in National Parks. We conclude that the charges and rates are confidential because their release would substantially harm the submitter's competitive position. A competitor could use the release of these lease terms to easily determine how to adjust its proposed payments to offer more favorable terms than the submitter in an attempt to obtain another lease agreement with the federal government. Moreover, release of these lease terms would provide a competitor with detailed information revealing the submitter's financial position in its negotiations with the federal government.

The Documents Withheld Pursuant to Exemption 5

As stated above, the City of Federal Way maintains that the Authorizing Officials did not identify the proposed lease documents the BPA withheld pursuant to Exemption 5, or explain how the exemption applies to the particular records and why discretionary release is not appropriate. We have consistently held that the FOIA requires the authorizing official give reasonably informative descriptions of the documents or portions of documents being withheld that are sufficient to allow the requester to understand the determination and if appropriate to formulate a meaningful appeal. See, e.g., Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984); Exxon Co., USA, 5 DOE ¶ 80,178 at 80,813 (1980); Cities Service Co., 5 DOE ¶ 80,101 at 80,502 (1980). Descriptions are generally adequate if each document is identified by a brief description of the subject matter it discusses and "if available, the date each document was produced [and] its authors and recipients. . . ." Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); Petroleum Delivery Service, 5 DOE ¶ 80,152 (1980). We have indicated that the "brief description" requirement is generally satisfied if sufficiently informative titles of the withheld documents are provided and that the descriptions need not contain factual information that would compromise the privileged nature of the documents. Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); P.A. Barnes, 5 DOE ¶ 80,112 at 80,538 (1980); Akin Gump, Hauer & Feld, 3 DOE ¶ 80,155 at 90,765 (1979).

In the determination letter, the Authorizing Officials cited Exemption 5 as the basis for withholding "'any and all' proposed licenses that BPA is planning to execute in the future with 'any telecommunication provider'. . . ." The BPA did not elaborate any further than this statement regarding its application of Exemption 5 to specific documents. We find that applying Exemption 5 to "proposed licenses that BPA is planning to execute" does not provide an adequate description of the documents or portions of documents being withheld sufficient to allow the requester to understand the determination and if appropriate to

formulate a meaningful appeal. Accordingly, we must remand this determination to the Authorizing Officials for a more informative description of each proposed license the BPA withheld pursuant to Exemption 5. The BPA must specifically identify each proposed license it withheld in November of 1998 with an informative title.

III. The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. We have determined that Exemption 4 requires the continued withholding of negotiated rates and charges between the BPA and Western Wireless. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. Furthermore, since it is not possible for us to determine at this time which documents the BPA withheld pursuant to Exemption 5, we are not currently able to make a public interest determination concerning those documents.

It Is Therefore Ordered That:

(1) The Appeal the City of Federal Way filed on February 9, 1999, Case No. VFA-0472, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Officer of the Bonneville Power Administration of the Department of Energy for a reasonably informative description of the documents being withheld pursuant to Exemption 5 sufficient to allow the City of Federal Way to understand the BPA's November 9, 1998 determination.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 1999

Case No. VFA-0473, 27 DOE ¶ 80,187

February 17, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Matthew Cherney, M.D.

Date of Filing:January 28, 1999

Case Number: VFA-0473

On January 28, 1999, Matthew Cherney, M.D., filed a Motion for Reconsideration of a Decision and Order that the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) issued on January 19, 1999. The January 19 Decision and Order considered Dr. Cherney's Appeal of determinations issued on July 24, 1998, and September 18, 1998, by the Office of Utility Technologies, Energy Efficiency and Renewable Energy (DOE/EE). The determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. For the reasons detailed below, we will deny Dr. Cherney's motion.

I. Background

Dr. Cherney requested from the DOE all documents related to an unsolicited proposal he had submitted to the DOE. The proposal concerned a system for collecting solar energy that Dr. Cherney invented. Dr. Cherney's FOIA request specified the following categories of documents relating to the proposal:

(1) All documents received by DOE and given consideration;

(2) All written comments from evaluators (and any calculations): Hoffman, Galdo, Muhs, Rajic, Simpson, Schaffhauser;

(3) All comments from any other evaluators;

(4) Transcripts of any oral comments made by any evaluator;

(5) Any other documents in the file; and

(6) Any electronic communications or telephone recordings.

On July 24, 1998, DOE/EE issued a partial response to the Dr. Cherney's request in which it released copies of 26 responsive documents. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Dr. Matthew Cherney, Sunbear

Systems (July 24, 1998). DOE/EE issued another partial response on September 18, 1998. In that determination, DOE/EE released additional documents in their entirety, released four other documents with

information redacted from them, and identified 31 documents that it was withholding in their entirety. DOE/EE stated that the information it was withholding was exempt from disclosure under Exemption 5 of the FOIA. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (September 18, 1998).

In considering Dr. Cherney's Appeal, we reviewed the 35 documents that DOE/EE withheld from him, either in part or in their entirety, in its September 18, 1998 determination. These documents were specifically identified in an “Index of Released Documents” and an “Index of Documents Not Released” DOE/EE provided to Dr. Cherney with the September 18, 1998 determination letter. A copy of these indices can be found in the Appendix to this Decision and Order. We reviewed all of the 31 documents listed in the “Index of Documents Not Released.” We also reviewed four documents listed in the “Index of Released Documents” that were withheld from Dr. Cherney in part.

In our January 19, 1999 Decision and Order, we found that DOE/EE properly withheld in part the four documents listed in the “Index of Released Documents.” Of the 31 documents listed in the “Index of Documents Not Released” we found as follows. DOE/EE properly withheld information in the 13 documents responsive to Dr. Cherney's request for “All written comments from evaluators (and any calculations): Hoffman, Galdo, Muhs, Rajic, Simpson, Schaffhauser.” However, we found that a portion of the material in two of these 13 documents (nos. 7 and 8) “can be released to Dr. Cherney without compromising the material withheld or imposing an inordinate burden on DOE/EE.” January 19, 1999 Decision and Order at 5. With respect to the 18 documents withheld in their entirety in response to Dr. Cherney's request for “Any other documents in the file” and “Any electronic communications or telephone recordings,” we found that DOE/EE may not withhold these documents in their entirety under FOIA Exemption 5. Id. at 6.

II. Analysis

Dr. Cherney's first argument in his Motion for Reconsideration concerns the documents that we found in our January 19, 1999 Decision and Order were properly withheld by DOE/EE under FOIA Exemption 5. Dr. Cherney contends that he was “told in writing” that these documents “did not even exist, . . .” Motion for Reconsideration at 1. In a letter submitted after he filed his Motion for Reconsideration, Dr. Cherney posits that the documents “never existed” or “do not exist at all and were 'invented'” by our office. Letter from Matthew Cherney, M.D., to George Breznay, Director, Office of Hearings and Appeals (January 26, 1999). Dr. Cherney asserts in the alternative that the documents provided to our office in the course of reviewing his Appeal “amount[] to back-dated fraudulent material.” Motion for Reconsideration at 1.

We find these contentions puzzling, because on December 9, 1998, Dr. Cherney provided us with the September 18, 1998 determination letter he received from DOE/EE, along with the two indices of documents we refer to above. These indices quite explicitly informed Dr. Cherney what documents *did* exist, and as we stated above, *each document we found in our Decision and Order to be exempt from withholding under Exemption 5 was specifically identified in these indices*. Thus, Dr. Cherney's contentions that he was not made aware of the existence of the documents we reviewed, or that they were “invented” after he filed his Appeal, have no factual basis. Moreover, in reviewing these documents, we found no evidence of alteration, nor is there any other extrinsic or intrinsic evidence to support his claim. Without even a shred of evidence to support Dr. Cherney's assertion that the documents were “back-dated” or “fraudulent,” we cannot blithely accept it as fact.

Second, Dr. Cherney takes issue with the statement in our Decision and Order that “while exposure of unlawful conduct on the part of government officials would clearly further the public interest, the information we have found was properly withheld evidences, *on its face*, no illegal activity of any kind.” Id. (emphasis added). Dr. Cherney contends that because we see no evidence of illegal activity, we are “intimating that the material . . . was in fact *exculpatory*.” Motion for Reconsideration at 1. Regardless of

any inferences Dr. Cherney may choose to draw from the text of our Decision and Order, we merely stated in that Decision, as we do now, that we could find no evidence of fraud or illegal activity of any kind in the documents we reviewed. Dr. Cherney offers us nothing in his Motion for Reconsideration that would alter that fact. Accordingly, the present Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Matthew Cherney, M.D., on January 28, 1999, Case Number VFA-0473, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 17, 1999

Case No. VFA-0474, 27 DOE ¶ 80,190

March 3, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Louthian & Louthian

Date of Filings: February 2, 1999

Case Numbers: VFA-0474

On February 2, 1999, the law firm of Louthian & Louthian (Louthian) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Savannah River Operations Office (SR) issued to Louthian on January 25, 1999. The determination concerned a request for information that Louthian submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to Louthian.

I. Background

On November 19, 1998, Louthian filed a FOIA request with DOE/SR, seeking: (1) copies of the computer-generated list of salaried professional employees used by management at SR prior to a 1997 layoff, (2) a list of employees being considered by management for the 1997 layoff in 1996, and (3) the list of employees being considered for layoff on January 10, 1997, and January 15-17, 1997. In a determination letter, SR responded that DOE did not possess or own responsive documents. Letter from SR to Louthian (January 25, 1999). Rather, the records requested were "employment- related records" of Westinghouse Savannah River Company (WSRC), the management and operating contractor of SR. *Id.* Louthian appealed this determination, asserting that the requested records should be considered agency records because the information is readily available to DOE from WSRC. Letter from Louthian to OHA (February 2, 1999) (Appeal).

II. Analysis

Our threshold inquiry in this case is whether the material requested can be considered "agency records" and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf*. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as WSRC, are subject to the

FOIA. *See, e.g., International Brotherhood of Electrical* Workers, 27 DOE ¶ 80,152 (1998); BMF *Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

A. WSRC Is Not An Agency Under the FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552 (f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. V. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with DOE, WSRC is the contractor responsible for maintaining and operating SR. See Memorandum from Jim Durkis, SR, to Valerie Vance Adeyeye (February 2, 1999). While DOE obtained WSRC's services and exercises general control over the contract work, it does not supervise the day-to-day operations of WSRC. Electronic Mail Message from Pauline Conner, SR, to Valerie Vance Adeyeye, Staff Attorney, OHA (February 11, 1999). We therefore conclude that WSRC cannot be considered an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control At The Time Of Request

Although WSRC is not an agency for the purpose of the FOIA, its records relevant to Louthian's request could become "agency records" if DOE obtained them and they were within DOE's control at the time Louthian made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, SR has informed us that the information that Louthian seeks was not in the agency's control at the time of the appellant's request. *See* Electronic Mail Message from Pauline Conner, SR to Valerie Vance Adeyeye, OHA (February 11, 1999). Based on these facts, the responsive documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

C. The Contract Provides That Employment-Related Records Are Contractor Property

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and the contractor provides that they are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We next look to the contract between DOE and WSRC to determine the status of the requested records. The contract provides that all records “acquired or generated” by the contractor in its performance of the contract shall be the property of DOE "[e]xcept as provided in paragraph b . . . . " Contract DE-AC09-96SR18500 (October 1, 1996), Section H.27, Paragraph (a). *See also International Brotherhood of Electrical Workers*, 27 DOE ¶ 80,152 (1998). Paragraph (b) of the DOE-SR contract states that employment-related records are considered the property of the Contractor, including personnel records and similar files. Because the documents at issue are related to employment issues at WSRC, we find that the requested records are not agency records and thus not subject to release under DOE regulations.

It Is Therefore Ordered That:

(1) The Appeal filed on February 2, 1999 by Louthian & Louthian, OHA Case No. VFA-0474, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 3, 1999

Case No. VFA-0475, 27 DOE ¶ 80,200

April 16, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael J. Ravnitzky

Date of Filing: February 5, 1999

Case Number: VFA-0475

Michael J. Ravnitzky filed an Appeal from a determination that the Department of Energy's FOIA/Privacy Act Division (FOI/PA) issued to him on January 19, 1999. In that determination, FOI/PA denied in part a request for information that Mr. Ravnitzky filed with the Federal Bureau of Investigation on April 20, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This Appeal, if granted, would require the Department of Energy (DOE) to release the information that was withheld in the January 19 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his request, Mr. Ravnitzky sought FBI records concerning Bob Considine, a syndicated reporter whose work appeared in the Philadelphia Inquirer, among other newspapers. The FBI identified, among the documents responsive to this request, two letters that originated at the Atomic Energy Commission, a predecessor agency to the DOE. Because these letters were marked as containing classified information, the FBI referred them to the DOE for review, in July 1998. The DOE's Office of Declassification (OD) determined that one of the two letters was unclassified and could be released. OD determined, however, that the other letter, dated April 11, 1962, contained some classified information, which was identified and redacted from the copy released to Mr. Ravnitzky on January 19, 1999, together with a full copy of the first letter. FOI/PA

stated in its January 19 letter that the deleted information was withheld under Exemption 1 of the FOIA, because it concerned military plans, weapons systems, or operations that are classified as National Security Information under Section 1.5(a) of Executive Order 12958.

In his Appeal, Mr. Ravnitzky contends that the withheld information is not properly classified, that some portions of the withheld information may be segregated from any properly classified portion and released, and that this information is more than 35 years old.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. See National Security Archive, 26 DOE ¶ 80,118 (1996); Keith E. Loomis, 25 DOE ¶ 80,183 (1996); A. Victorian, 25 DOE ¶ 80,166 (1996).

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this Appeal from the Office of Hearings and Appeals, the Director of SA reviewed all materials for which the DOE had claimed an exemption from mandatory disclosure under the FOIA. The Director of SA has now concluded that the document no longer contains any information that needs to remain classified by the DOE. Accordingly, Mr. Ravnitzky's Appeal will be granted and the withheld information will be provided to the appellant under separate cover.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael J. Ravnitzky on February 5, 1999, Case No. VFA-0475, is hereby granted.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 16, 1999

Case No. VFA-0476, 27 DOE ¶ 80,192

March 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:John L. Gretencord

Date of Filing: February 16, 1999

Case Number: VFA-0476

On February 16, 1999, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by John L. Gretencord. Gretencord is appealing a determination by the Department of Energy's (DOE) Ohio Field Office (Ohio). Ohio issued a determination on December 15, 1998, in response to a request for information submitted in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require DOE to conduct a further search for responsive materials and to release additional information to Gretencord.

I. Background

The present appeal appears before this office under somewhat unusual circumstances. The Appellant, Mr. Gretencord, is a former employee of a DOE contractor, West Valley Nuclear Services, Inc. (WVN). While he was employed by WVN at a DOE site, Gretencord apparently contacted DOE officials on several occasions to report his safety concerns. Gretencord's safety concerns were investigated by Ohio, which supervises the operations conducted on the DOE's behalf by WVN. Gretencord's employment was subsequently terminated by WVN. Gretencord, contending that his termination resulted from reporting his safety concerns to DOE, filed a whistleblower complaint with the DOE under 10 C.F.R. Part 708. Gretencord's whistleblower allegations were investigated by DOE's Office of Inspector General (the IG).

Gretencord also wrote his local member of Congress requesting intervention on his behalf "regarding the safety concerns investigation over the DOE-WVDP nuclear facility." Specifically, Gretencord sought to "review the investigation documentation and evidence." A member of the Congressman's staff referred Gretencord's request to the IG. The IG then referred the request to Ohio, requesting that it be processed under the FOIA. On December 15, 1998, Ohio issued a determination letter in which it released the contents of its file on the investigation of Gretencord's safety concerns to him. However, Ohio withheld portions of one document contained in the investigation file under the deliberative process privilege of Exemption 5. In addition, Ohio withheld the identities of several individuals under Exemption 6.

In his Appeal, Gretencord does not contest Ohio's withholdings under Exemption 6. However, he contests the adequacy of the search for documents responsive to his request and Ohio's withholdings under Exemption 5.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

Gretencord contends that the DOE should have searched the IG's files as well as Ohio's files. We agree. Initially, we note that the scope of Gretencord's request is somewhat ambiguous. On one hand, he refers to "[t]he safety concerns investigation over the [WVN] facility," while on the other hand he discusses his attempts to contact the IG and his whistleblower claims. Under circumstances where a request is ambiguous in nature, the DOE's FOIA regulations require the DOE to "invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request." 10 C.F.R. 1004.4(c)(2). Therefore, the IG should have contacted Gretencord to clarify the scope of his request instead of assuming that Gretencord sought only information concerning the investigation of his safety concerns. On appeal, Gretencord indicates that he intended to obtain information concerning the whistleblower investigation as well the safety investigation. Had the IG consulted with Gretencord, we believe he would have been able to clarify that he was also interested in the files of the whistleblower investigation. Accordingly, we are remanding this portion of the present appeal to the IG. On remand, the IG should conduct a new search of its files for all information generated as a result of its investigation into his whistleblower allegations. Upon completion of this search, the IG should issue a determination to Gretencord explaining its results.

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those “privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context.” *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Among the privileges that fall under this exclusion is the executive or deliberative process privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for the deliberative process to shield a document, it must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give- and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

After reviewing the information that Ohio withheld under Exemption 5, we find that it was properly withheld under Exemption 5's deliberative process privilege. The withheld information consists of portions of a report entitled "QA Paradigm Team Draft Findings." This document is a draft of a self-improvement team's tentative conclusions concerning WVN's Quality Assurance program. Because it is clearly a draft and is obviously recommendatory in nature, it is predecisional. Moreover, since it consists purely of opinion, it is clearly deliberative.

Release of this information could reasonably be expected to chill the agency's deliberative process. It is doubtful that the report's authors and sources would have provided the frank opinions contained in the report if they thought their opinions would be subjected to public release. The candid and frank exchange of ideas is critically important to the proper functioning of the agency. Because the public release of such candid and frank opinions could reasonably be expected to cause agency employees to become less frank and candid in the future, we find that releasing the withheld information would be contrary to the public interest. Accordingly, we find that Ohio's withholdings under Exemption 5 were proper.

III. Conclusion

For the reasons set forth above, we find that the IG should conduct an additional search for responsive documents. In addition, we find that Ohio's withholdings under Exemption 5's deliberative process privilege were proper.

It Is Therefore Ordered That:

(1) The Appeal filed by John L. Gretencord on February 16, 1999, Case Number VFA-0476, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The portion of the Appeal concerning the search for responsive documents is hereby remanded to the Office of Inspector General with instructions to conduct a further search for documents responsive to the Appellant's request in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 12, 1999

Case No. VFA-0477, 27 DOE ¶ 80,193

March 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Puget Sound Energy, Inc.

Date of Filing: February 12, 1999

Case Number: VFA-0477

On February 12, 1999, Puget Sound Energy, Inc. (PSE) filed an Appeal from a final determination that the Bonneville Power Administration (BPA) issued on January 28, 1999.(1)In its determination, BPA released a number of documents in their entirety but withheld portions of four documents and withheld in their entirety 17 other documents that were responsive to a request for information that PSE filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. BACKGROUND

In a request for information dated December 11, 1998 (Request), PSE sought:

(1) Documents pertaining to changes to electric transmission facilities relating to ARCO (a private firm), Whatcom County Public Utility District #1 (Whatcom County PUD), or any other entity in Whatcom County. (2)

(2) Agreements (or drafts) between the PUD and BPA relating to transmission and sale of electric power, including Agreement Number 97TX30078.

(3) A copy of the Whatcom County New Load Addition Preliminary System Impact Study (or similar documents) and all drafts of these documents.

(4) Any agreements (or drafts) concerning transmission capacity between BPA and Intalco (a private firm).

(5) Documents relating to a specified BPA memorandum outlining a new BPA transmission project to by-pass PSE's transmission system in Whatcom County for the benefit of ARCO.

In a January 28, 1999 determination letter (Determination Letter), BPA released a number of documents in their entirety and provided PSE with a list of 21 documents that it was withholding in part or in whole. The Determination Letter provided redacted copies of four documents (Documents Nos. 4, 9, 10, and 19). The remaining 17 documents were withheld in their entirety. Information in Documents Nos. 8, 9 and 10 was withheld pursuant to Exemption 4 of the FOIA. Specifically, BPA asserted that the withheld information consisted of confidential commercial information whose release would cause competitive harm to Whatcom County PUD. Documents Nos. 1-4, 6-7, 11-21 contained information that was withheld pursuant to Exemption 5. BPA asserted that the material withheld from these documents consisted of

predecisional analyses by BPA staff members that are protected from mandatory disclosure by the deliberative process privilege. All of Document No. 5 and portions of Document No. 6 were also withheld under Exemption 5's attorney-client privilege. BPA stated that the material withheld in these documents consisted of confidential legal opinions. The Determination Letter also stated that portions of Document No. 7 contained information prepared in anticipation of an administrative rate hearing and thus, was protected by Exception 5's attorney work product privilege.

In its submission, PSE asserts numerous specific grounds for its Appeal. In general, PSE challenges the extent of the search that BPA conducted for responsive documents. Additionally, PSE challenges BPA's application of Exemptions 4 and 5 to the documents listed in the Determination Letter. (3)

II. ANALYSIS

As described below, after examining the documents in question, we believe that much of the withheld material was properly withheld pursuant to Exemptions 4 and 5. However, we also find that some of the withheld material was improperly withheld, under the rationale stated in BPA's Determination Letter. Additionally, BPA failed to segregate exempt material from the documents. Consequently, for the reasons stated below we will remand this matter to BPA. On remand, BPA shall either release the material described below or issue another determination detailing under what FOIA exemption it seeks to withhold the material.

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

BPA informed us that upon receipt of PSE's FOIA request, the account executive of the BPA team working on the proposed new electricity transmission project was asked to conduct a search for responsive documents. This official searched his office and then asked each of the members of his team to search for responsive documents. All documents related to that inquiry were forwarded or identified to PSE. The official was also aware of an 1996 inquiry regarding a similar project. The account executive then asked BPA employees involved with that inquiry about the existence of responsive documents. All responsive documents were either forwarded or identified to PSE. BPA officials were not aware of any other location at BPA that would contain responsive records. See Memorandum of telephone conversation between Susan Millar, Esq., and Carol Jacobson, Office of Chief Counsel, BPA, and Richard Cronin, OHA Staff Attorney (February 25, 1999).

PSE argues that BPA's search was inadequate. Specifically, PSE asserts that given the "size, cost and unusual nature of the proposed new transmission project," BPA should have discovered many more documents. See February 12, 1999 Appeal Letter from William R. Mauer, Perkins Coie, LLP, at 3 n.1. PSE also argues that it was not provided any documents regarding the sale of electric power. In response, BPA asserts that it does not have a policy that requires the retention of meeting notes or notes from telephone conversations. In this connection, BPA also maintains that many of the meetings regarding the proposed project were held "face to face" and thus no documents were generated. BPA notes that the

proposed project is still in the preliminary stage and that no construction agreement has been reached with Whatcom County PUD. With regard to "sale of power" documents, BPA states that it has recently responded to PSE's request for such documents through a February 24, 1999 response to a subsequent PSE FOIA Request.

As to documents pertaining to the new transmission project, we believe BPA conducted an adequate search. BPA contacted the official whose team was responsible for the proposed project and that official had a search conducted in the offices of each of the individuals working on that project. Aside from the offices of the team's personnel, BPA was not aware of any location where responsive documents would exist. Further, given BPA's explanation as to how it conducted business regarding the proposed new project and the status of the proposed project, we cannot say that the number of documents discovered tends to show that BPA did not conduct an adequate search. Consequently, we believe that BPA conducted an adequate search for responsive documents regarding the proposed new transmission project. With regard to the search for "sale of power" documents, PSE may file an appeal regarding the adequacy of the search for these documents upon receipt of BPA's determination regarding the other PSE FOIA Request.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." (4) National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is "confidential" if it is of a kind that the provider would not customarily make available to the public. Critical Mass, 975 F.2d at 879. BPA withheld portions of Documents Nos. 9 and 10 and Document No. 8 in its entirety pursuant to Exemption 4.

Even if portions of the documents at issue in this Appeal meet the criteria cited above for applying Exemption 4 or any other Exemption, that does not mean that they may be withheld in their entirety. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." See 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10; Boulder Scientific Co., 19 DOE ¶ 80,126 at 80,577 (1989). In the context of Exemption 4, this means that the non-confidential information in documents should be released to the requester. The only exceptions to the requirement of segregation are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, Lead Industries Ass'n v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979), or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. Id. at 86; Neufeld v. IRS, 646 F.2d 661, 666 (D.C. Cir. 1981).

Document No. 8 is a letter from the Whatcom County PUD soliciting a study by BPA regarding needed electric transmission options for potential new customers of Whatcom County PUD. The letter contains information about these potential new customers and Whatcom County PUD's preliminary ideas of how best to service these customers. Document No. 8 thus contains commercial information obtained from a person. The commercial information in Document No. 8 was submitted voluntarily to BPA. Consequently, this information can only be considered confidential if it is not information Whatcom County PUD would customarily make available to the public. We note that, in the letter, Whatcom County PUD itself requested confidential treatment of the content of the letter. Whatcom County PUD subsequently informed

BPA that release of the information in Document No. 8, as well as Document Nos. 9 and 10, would reveal its business strategy in providing power to its customers and would cause it competitive harm. Given this background, we believe that Whatcom County PUD would not normally make the information in Document No. 8 available to the public. Consequently we believe that the commercial information in this Document is confidential. However, while most of the withheld information was properly withheld pursuant to Exemption 4, there is some segregable non-commercial information that is not withholdable under Exemption 4. Specifically, the address block, greeting line and the first sentence of the first paragraph of the letter contain segregable information. Additionally, the first and last sentences of the last paragraph of the letter, the signature block and the "cc" line contain segregable, non-commercial information that is not withholdable under Exemption 4.

Document No. 9 is an agreement between BPA and Whatcom County PUD in which BPA agrees to conduct a study regarding a proposed project involving the feasibility of new interconnections for the transmission of electricity in a certain area. The only information withheld in this document is the information regarding the proposed changes to the electrical transmission system in a specific area. We find that this information is commercial since it relates to Whatcom County PUD's plans for providing electric power to its customers. Further, this information was obtained by a person. This information was obtained involuntarily since Whatcom County PUD was required to put this information in the agreement. Consequently, such information is confidential only if its disclosure would either (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the government obtained the information. See National Parks, 498 F.2d at 770. We believe that release of the withheld information in this document would cause competitive harm to Whatcom County PUD. BPA has informed us that electric energy markets in the Pacific Northwest have become highly competitive and that it believes that release of the information could impair Whatcom County PUD's ability to compete in this market. We believe that competitors could gain a commercial advantage if they could find out details concerning where and how Whatcom County PUD sought to add extra electric load capacity. Thus, we believe that the information withheld in Document No. 9 is confidential commercial information that was properly withheld under Exemption 4.

Document No. 10 is Whatcom County PUD's application for electric transmission service to obtain interconnection facilities to obtain two new points of delivery for electricity. The only information withheld in this document was a table entitled "10 Year Monthly Electric Load Forecast-Year 2000 Loads" (Forecast) that Whatcom County PUD provided with its application. (5) The withheld information is commercial and was supplied by a person. Document No. 10 was submitted pursuant to a formal request for transmission services and thus was not voluntarily provided. Applying the National Parks analysis, we believe that release of the Forecast would cause competitive harm to Whatcom County PUD. Release of the Forecast would give competitors significant insight into Whatcom County PUD's future business strategy and thus cause substantial harm to the competitive position of Whatcom County PUD. Consequently, we believe that the withheld information is confidential and properly withheld pursuant to Exemption 4. However, there is some segregable, non- commercial information consisting of the title and column table headings in the Forecast that may not be protected by Exemption 4.

PSE argues that the information BPA withheld under Exemption 4 is not confidential because BPA has not met the agency's burden of proof to establish that the withheld information is "confidential." PSE apparently defines "confidential" as information that is not known to other companies or people. PSE's definition is at odds with the meaning of "confidential," for Exemption 4 purposes, as defined by the courts. See supra. PSE's arguments notwithstanding, we believe that the information BPA has provided us, along with the very nature of the withheld information, allow us to conclude that most of the information withheld pursuant to Exemption 4 in Documents Nos. 8, 9, and 10 is confidential commercial information and was properly protected pursuant to Exemption 4.

C. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-

agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified several traditional privileges that fall under this definition of exclusion, such as: the attorney-client privilege, the attorney work product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). All of these privileges are at issue in the present case.

1. Attorney-Client and Attorney Work Product Privileges

The attorney-client and the attorney work product privileges are frequently confused with each other. The attorney-client privilege exists to protect confidential communications between attorneys and

their clients made for the purpose of securing or providing legal advice. In Re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039 (11th Cir. 1990); In Re Grand Jury Subpoena of Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982). Not all communications between attorney and client are privileged, however. Clarke v. American Commerce National Bank, 974 F.2d 127 (9th Cir. 1992) (Clark). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The attorney work product privilege protects from disclosure documents that reveal “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947). This privilege is also limited. It does not extend to every written document generated by an attorney. In order to be afforded protection under the attorney work product privilege, a document must have been prepared either for trial or in anticipation of litigation. See, e.g., Coastal States, 617 F.2d at 865.

Documents Nos. 5 and 6 were withheld pursuant to the attorney-client privilege. Document No. 5 is a BPA Office of General Counsel memorandum outlining the potential legal consequences of a certain proposed business transaction between BPA and Whatcom County PUD. Its purpose is to provide legal advice to BPA decision makers regarding the proposed transaction. Consequently, we believe that the entire document should be protected by Exemption 5's attorney-client privilege. Document No. 6 is a compilation of six electronic mail (e-mail) messages sent between various BPA employees. Two of the six messages are marked "attorney-client confidential information" and are dated April 28, 1995 and May 1, 1995. (6)While BPA has not specifically indicated which sections of this document were withheld pursuant to which privilege, we will assume that the two e-mail messages marked "attorney-client confidential information" were withheld pursuant to the attorney- client privilege. The April 28, 1995 message is an e-mail from an attorney at BPA's Office of Chief Counsel generally summarizing legal precedent regarding a particular type of transaction and asking for additional details regarding the transaction as well as requesting further consultation regarding a potential legal issue. The May 1, 1995 message is from a BPA attorney, requests information about a proposed project, and offers a tentative legal opinion regarding the project. Both e-mail messages were sent to obtain and provide legal advice regarding the proposed transaction and as such are properly protected by the attorney-client privilege. However, the e-mail headings for each of these e-mails and the first paragraph of the May 1, 1995 e-mail message consist of segregable, non- confidential material that, on remand, should be either provided to PSE or withheld pursuant to another determination outlining under which FOIA exemption the material is being withheld.

PSE challenges the application of attorney-client privilege to Documents Nos. 5 and 6 asserting that, to the extent that these messages contain information provided by a third party, that information is not protected by the privilege. PSE cites Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983) (Schlefer), as support for this proposition. We disagree with PSE's assertion and find PSE's reliance on Schlefer

misplaced. In Schlefer, the Chief Counsel of the Maritime Administration had issued memorandum opinions regarding fact situations provided by outside applicants seeking a ruling on agency loans or similar benefits. Because neither the third-party factual information nor the agency officials' communications transmitting the information to the Chief Counsel concerned confidential information concerning the agency itself, the Court held that attorney-client privilege did not apply. Schlefer, 702 F.2d at 245. Thus, Schlefer does not hold that material obtained from third parties can never be protected by attorney-client privilege; instead Schlefer holds that such information may not be protected by attorney-client privilege unless it is part of an agency communication containing confidential information about the agency itself. See id. ("The outsider's communications to the [agency] official do not contain any confidential information *concerning the Agency*; when the official transmits the relevant facts to the Chief Counsel, no new or confidential information *concerning the Agency* is imparted."); Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 619 (D.C. Cir 1997) (TA). One must keep in mind when considering the BPA in the FOIA context that BPA is a commercial enterprise. See supra note 1. The communications in Documents Nos. 5 and 6 involve BPA officials seeking legal advice on BPA's behalf regarding a proposed project involving the BPA's participation as an entity. Consequently, even if BPA in these communications used factual material obtained from third-parties, the material in Documents Nos. 5 and 6 contains confidential information about BPA and thus is protected by attorney-client privilege. See TA, 117 F.3d at 620 (agency communications containing both third-party information and confidential information is protectable by attorney-client privilege); see also Coastal States, 617 F.2d at 863 (when government is dealing with its attorneys as would any private party seeking advice to protect personal interests, it needs assurance of confidentiality so it will not be deterred from full and frank communications with its counsel).

Document No. 7 is a document containing a summary of a proposed BPA power sale to Whatcom County PUD and a private firm. The document also contains notes as to factual issues about which the author inquired as well as comments regarding a potential procedural issue. BPA asserts that this document was prepared in anticipation of a challenge to a potential cost allocation proposal in BPA's 1996 administrative rate hearing and, as such, it is protected by the deliberative process and attorney work product privileges. However, BPA failed to indicate, and it is unclear to us, which privilege applies to which portions of the document. Consequently, on remand, BPA should issue another determination regarding Document No. 7 that specifies which portions of the document are being withheld pursuant to which specific Exemption 5 privilege.

2. Deliberative Process Privilege

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose

of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, the document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

PSE argues that BPA has not definitively established the predecisional character of the documents it

withheld pursuant to the deliberative process privilege. It goes on to argue that BPA's response does not establish the date the relevant decision was made, the nature of the process about which the predecisional deliberations occurred, the ultimate decision the documents lead up to, and whether any portions of the documents reflect the decision-making process. (7) We need not conduct an exhaustive inquiry of this particular information. Instead, we believe that we have obtained sufficient information from BPA to understand fully the nature of the documents and decide whether their predecisional nature has been established.

Document No. 1 is a copy of a letter a BPA official sent to a private firm regarding a new interconnection point to a BPA power line. Attached to the letter is a preliminary design diagram and a table listing the division of responsibilities for the project between the parties. BPA withheld the entire document pursuant to Exemption 5's deliberative process privilege. PSE argues that since this document was provided to a private individual outside of BPA, the deliberative process privilege was waived. We agree with PSE. FOIA exemptions may be waived if a document has been disclosed to others. See Carlson v. Department of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir 1980). With regard to Document No. 1, it appears that the document was willingly disclosed to a private individual. Any deliberative process privilege that may have been applicable was waived by BPA's disclosure of the document. On remand, BPA should either promptly release Document No. 1 to PSE or issue another determination explaining under what exemption the document may be properly withheld. (8)

Documents Nos. 2 and 3 each consists of an e-mail message from a BPA official to other BPA officials with attached proposed schematic designs for a proposed project. The concerned parties have not yet agreed to the proposed project. Document No. 2 also contains a chart with preliminary cost figures for three separate design options for the project. With regard to the e-mail message within Document No. 2, portions of the message that are non-deliberative, such as the headings on top of the page, the last sentence, and the closing line, are not withholdable under the deliberative process privilege. The attached table in Document No. 2 contains information regarding costs for the three project options which are predecisional and deliberative and therefore withholdable pursuant to deliberative process privilege. However, most of the column headings to the attached table are segregable, non-deliberative information. The schematic diagrams are predecisional, deliberative material, which were properly protected in their entirety by Exemption 5. The e-mail message of Document No. 3 contains mostly predecisional, deliberative material. However, most of the e-mail headings, the last sentence, and the closing line, contain no deliberative material and, as such, are not protectable by the deliberative process privilege. The attached schematic diagram of a proposed option for the project is predecisional and deliberative and was properly protected in its entirety. On remand, BPA should release the non-deliberative portions of Documents Nos. 2 and 3 or issue another determination explaining under which FOIA exemption the material may be withheld.(9)

Document No. 4 consists of a BPA's employee's memorandum regarding Whatcom County PUD's proposed electrical service to another firm. Two sentences were withheld in the background section. The first sentence does not appear to be deliberative in nature but instead is a statement of fact. It therefore is not protectable pursuant to deliberative process privilege. The second sentence represents an opinion of the author as to who would be responsible with regard to a cost issue. This sentence is predecisional and deliberative and was therefore properly protected. Portions of text were also withheld in the section entitled "Current Situation." The portion withheld in the first sentence of this section does not appear to be deliberative. The withheld last two sentences of this section represent the opinions of the author and are predecisional and deliberative. They were therefore properly withheld pursuant to deliberative process privilege. The section title at the bottom of the first page is non-deliberative material and should not have been withheld pursuant to the deliberative process privilege. It is uncertain whether the withheld material at the bottom of the second page represents BPA's stated policy or the opinion of the author. On remand, BPA should issue another determination regarding the non-deliberative material in Document No. 4 and either release the material or explain why such material is withholdable under the FOIA. Additionally, BPA should make another determination regarding the material withheld at the bottom of the second page. If this material represents BPA adopted policy, it may not be protected by the deliberative process

privilege.

Document No. 6 consists of a compilation of six e-mail messages. As discussed above, we believe that most of the two messages marked "Attorney-Client Confidential Information" were properly withheld pursuant to Exemption 5's attorney-client privilege. The remaining four e-mail messages consist of discussions and opinions by BPA officials regarding a proposed BPA project. BPA has informed us that no final decision has been reached with regard to the project. This material is therefore deliberative and predecisional and protected by Exemption 5. However, the e-mail headings are non-deliberative material. On remand, BPA should release the headings or explain the reason the material may be withheld pursuant to the FOIA.

Documents Nos. 11, 12, 13 and 16 are drafts of a Facilities Studies Agreement No. 98TX30171. These drafts represent BPA's proposed language for the agreement. However, the drafts are in the form of a letter to a private individual outside of BPA. BPA has informed us that it is uncertain whether any of these drafts were in fact disclosed to an outside individual. Consequently, we will direct on remand that BPA determine whether any of these drafts were disclosed outside of BPA. If so, BPA may have waived any deliberative process privilege that attached to the drafts. Document No. 12 contains a copy of the e-mail message that forwarded the draft. The e-mail message contains no deliberative material that could be protected by the deliberative process privilege.

Documents Nos. 14 and 15 contain a proposed timeline chart for completion of a Whatcom County PUD project and the proposed schematic design diagram for the project developed by BPA personnel. Both of these documents represent BPA proposals regarding the design and schedule for the proposed project. No agreement has been reached between BPA and Whatcom County PUD concerning this project. Thus both documents are predecisional, deliberative documents and were properly protected under Exemption 5. However, with regard to Document No. 14, some segregable non-deliberative information is not exempt. Specifically, the material consisting of all of the column headings of the chart, should either be released to PSE or BPA should issue another determination explaining under which FOIA exemption any of this material, such as the proposed location of the project, may be withheld.

BPA has informed us that Documents Nos. 17 and 18, while described differently to PSE in its determination letter, are actually the same document. This document is a letter from a BPA employee to a private firm. By disclosing it, BPA has waived any deliberative process privilege that may have attached to this document. Consequently, on remand BPA shall either release Documents Nos. 17-18 to PSE or issue another determination regarding this document.

Document No. 19 is an e-mail from a BPA employee regarding the proposed BPA project. BPA withheld the attachment to this e-mail, which consists of a list of the individual BPA team members for this project, their positions and their phone numbers, along with a description indicating the location of the proposed project. The withheld information, other than the proposed location of the project, is not deliberative or predecisional and is not witholdable pursuant to deliberative process privilege. BPA is concerned that release of these team members' names and phone numbers could subject these individuals to harassment. However, Exemption 5 only protects predecisonal, deliberative documents. The withheld list, other than the location of the proposed project, is purely factual and contains no deliberative elements. On remand, BPA should issue another determination regarding Document No. 19 and should either release the withheld information (other than the proposed location) or justify withholding the information pursuant to another FOIA exemption. (10)

Document Nos. 20 and 21 are e-mail communications from a BPA employee with attached notes. BPA has informed us that the attachments were prepared by an outside consultant firm. Because BPA's original determination does not describe how the deliberative process privilege applies to these non-government-created documents, we will order BPA, on remand, to issue another determination regarding these documents.

D. The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that BPA properly applied Exemptions 4 and 5 to a significant portion of the requested information, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. With regard to the material properly withheld in this matter pursuant to Exemption 5, the requested information consists of the opinions of individuals regarding different aspects of BPA decisions regarding the potential new business projects and the legal ramifications pertaining to these projects. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion and seriously impede BPA's ability to obtain legal advice from its counsel. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

E. Conclusion

While BPA correctly applied Exemptions 4 and 5 to a significant portion of the withheld material, we also find that some of the withheld material may not be withheld pursuant to the stated reasons given in BPA's Determination Letter. Further, BPA failed to segregate releasable material from exempt material. Consequently, we will remand this matter to BPA so that it may either release the information improperly withheld or issue another determination explaining why the material may be withheld pursuant to the FOIA. We will therefore grant PSE's appeal in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Puget Sound Energy, Inc. on February 12, 1999, Case No. VFA-0477, is hereby granted in part as set forth in Paragraph (2).

(2) This matter is remanded to the Bonneville Power Administration for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 15, 1999

(1)BPA is a self-financing, federal power marketing administration created to market power generated by federal dams on the Columbia River system. BPA also owns and operates approximately 80 percent of the bulk electric transmission system (e.g., power lines) in the Pacific Northwest. BPA markets both electric power and electric transmission service to various customers in the Pacific Northwest.

(2)Whatcom County PUD #1 is an electric utility in the business of supplying customers with electric power.

(3)In its Appeal, PSE argues that it did not receive a timely response to its FOIA Request from BPA. We can find no authority in the DOE regulations that gives us jurisdiction to supervise or otherwise regulate the conduct of DOE agencies regarding time delays in processing FOIA requests. However, if a requester does not receive a response at the end of the 20-day period, the requester shall be deemed to have exhausted his administrative remedies and has a right to a review in a district court of the United States. 5 U.S.C. § 552(a)(4)(B), (6)(A)(i), and (6)(C)(i); cf. Pollack v. Department of Justice, 49 F. 3d 115, 118-19 (4th Cir. 1995) cert. denied, 516 U.S. 843 (1995) (case decided under prior 10-day deadline).

(4)For the purposes of Exemption 4, the term "person" refers to a wide range of entities including partnerships, corporations, associations, and public or private organizations other than an agency. See Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Thus, for Exemption 4 purposes, a utility such as Whatcom County PUD is considered to be a person.

(5)The Forecast estimates the amount of electricity Whatcom County PUD will provide to its customers in the next 10 years.

(6)The propriety of using Exemption 5 regarding the remaining four e-mail messages will be discussed infra in the next section of this Decision devoted to the BPA's application of the deliberative process privilege.

(7)We note that courts have held that an agency is not required to specifically point to an agency final decision to which a document has contributed. See Sears, 421 U.S. at 151 n.18.

(8)On Appeal, BPA has stated that it believes that a number of the withheld documents such as Documents Nos. 1, 17/18, 20 and 21 contain commercially sensitive information which would be protected by Exemption 5's qualified commercial privilege. See Federal Open Market Committee, 443 U.S. 340 (1979). Because BPA did not assert this privilege in its determination letter to PSE, we will not now issue an opinion regarding the applicability of that privilege to these documents. On remand, BPA may issue another determination asserting that privilege.

(9)BPA should review the headings in Documents Nos. 2 and 3 to determine if information describing the location and voltage of the proposed project is withholdable.

(10)We note that Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). We express no opinion regarding the potential applicability of Exemption 6 to the documents at issue in this case.

Case No. VFA-0478, 27 DOE ¶ 80,196

March 23, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: International Brotherhood of Boilermakers

Date of Filing: February 16, 1999

Case Number: VFA-0478

On March 2, 1999, the law firm of Blake & Uhlig, on behalf of the International Brotherhood of Boilermakers (IBB), filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Oak Ridge Operations Office (OR) issued to IBB on January 28, 1999. The determination concerned a request for information that IBB submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to IBB.

I. Background

On September 22, 1998, IBB filed a FOIA request with OR for: (1) a copy of the contract that Lockheed Martin Energy Systems, Inc., the management and operating contractor of Oak Ridge National Laboratory (ORNL), awarded to Thermal Engineering International (TEI) for work performed on the boilers at the X-10 Steam Plant at ORNL; (2) the request for proposal (RFP) that preceded the contract, and (3) information about the hourly wages of the individuals who worked on the boilers. Letter from IBB to OR (September 22, 1998) (Request Letter). OR released some responsive documents to IBB, but withheld unit prices and the total price of the contract. In a determination letter, OR indicated that the release of this material would impair TEI's competitive position and give TEI's competitors an unfair advantage over TEI in future procurements. Letter from OR to IBB (January 28, 1999). IBB then filed this Appeal, stating that OR provided very little

relevant wage information pertaining to the employees who worked on the X-10 Steam Plant project.(1) Letter from Blake & Uhlig, P.A. to Director, OHA (February 10, 1999).

II. Analysis

The FOIA generally requires that agency records be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA provides nine exemptions for specific types of information that the agency may withhold at its discretion. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The exemption asserted in this case, Exemption 4, permits an agency to withhold from release "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). The contract material withheld in any case is clearly commercial information, and it was obtained from a person, defined to include a corporation such as TEI. *See International Brotherhood of Electrical Workers (IBEW)*, 27 DOE ¶ 80,152 (1998). Documents submitted

on a non-voluntary basis, such as material submitted as part of a contract with the agency, are confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*).

In its determination letter, DOE/OR indicated that the disclosure of TEI's unit and total pricing information would "seriously impair TEI's competitive position, thus giving competitors a clear advantage over TEI for future procurements . . . ." Letter from OR to IBB (January 28, 1999). Thus, OR implies that the *National Parks* standard of confidentiality has been met. However, we have previously stated frequently and it is well accepted that an initial DOE determination that material should be withheld under Exemption 4 because its disclosure is likely to cause substantial harm to the submitter must include the reasons for believing that such harm will result to the competitive position of the person from whom the information is obtained. *William E. Logan, Jr. & Associates*, 27 DOE ¶ 80,185 (1999);*Baker, Donelson, Bearman & Caldwell*, 27 DOE ¶ 80,164 (1998); IBEW, 27 DOE ¶ 80,152 (1998); *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993); *Covington & Burling*, 20 DOE ¶ 80,124 at 80,569 (1990) (*Covington & Burling*). An adequate explanation would, for example, indicate the type of competitive injury that would result from disclosure, or the manner in which the information, if disclosed, could be utilized by a competitor to damage the firm's market position. *See Covington & Burling*, 20 DOE at 80,569.

We reviewed the withheld material, and all other documents released to IBB. Our review disclosed that although OR withheld unit prices for two of the three items in the contract, they disclosed the unit price of Item No. 002, the installation of two economizers. *See* Memorandum of Telephone Conversation between Linda Chapman, OR, and Valerie Vance Adeyeye, OHA (March 16, 1999); Facsimile from Linda Chapman, OR, to Valerie Vance Adeyeye, OHA, at 10 (March 2, 1999). Thus, the only prices not disclosed were Item 001, the economizers (total of two), and Item 003, access doors (total of four).

We find that OR presented an inadequate justification for withholding the unit prices and the total contract price. This office has consistently held that the total price of a contract, after the contract has been awarded, usually does not reveal details of the submitter's bidding strategy and thus cannot normally be withheld under Exemption 4. *See Baker, Donelson, Bearman & Caldwell*, 27 DOE ¶ 80,164 (1998*) (*citing *Covington & Burling*, 20 DOE at 80,571*); Morgan, Lewis & Bockius*, 20 DOE ¶ 80,165 at 80,688 (1990) (stating that after contract is awarded, the proposal as a whole ceases to be unique and confidential). As for unit prices, this office generally has approved withholding such prices provided there is adequate demonstration of the potential for competitive harm in their disclosure. *See FOIA Group,* Inc., 27 DOE ¶ 80,111 (1998); *Cascade Scientific, Inc.*, 26 DOE ¶ 80,156 (1997). We note, however, that in this case, even though this contract contains only three items, OR has already disclosed the unit price of a very significant item. Under these circumstances, it is possible that disclosure of the contract's total price would allow TEI's competitors to calculate unit prices, causing substantial harm to TEI's competitive position. OR, however, has not demonstrated such harm. (2) Therefore, we will remand this matter to OR for the issuance of a new determination. In the new determination, OR shall either release the price information in the contract or present a specific explanation as to why each component of the pricing information the appellant seeks should be withheld under Exemption 4. (3) If OR is considering releasing the material, DOE regulations require it to solicit TEI's views on the matter. *See IBEW*, 27 DOE ¶ 80,152 (1998).

It Is Therefore Ordered That:

(1) The Appeal filed on February 16, 1999 by International Brotherhood of Boilermakers, OHA Case No. VFA-0478, is hereby granted as set forth in paragraph (2) below and denied in all other respects.

(2) This case is hereby remanded to the Oak Ridge Operations Office, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 23, 1999

(1)OR supplemented its initial response; however, IBB did not receive the supplement until after it had filed this Appeal. In the supplement, OR informed IBB that some of the requested wage information had never been prepared and did not exist because it was not required by the Service Contract Act, 41 U.S.C. § 351, *et seq.* Letter from OR to IBB (February 10, 1999).

(2)We draw OR's attention to recent court decisions that deny Exemption 4 protection to unit prices when the submitter fails to demonstrate substantial harm "with sufficient specificity." *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40-41 (D.D.C. 1997); *Comdisco, Inc. v. General Services Administration*, 864 F. Supp. 510, 516 (E.D. Va. 1994)

(3)IBB also requested the hourly wages of all employees who worked on the contract. We have previously held that labor rates can properly be withheld under Exemption 4. *See Morgan, Lewis & Bockius*, 20 DOE at 80,688. Nonetheless, OR should also address this issue in its new determination.

Case No. VFA-0480, 27 DOE ¶ 80,195

March 23, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Matthew Cherney, M.D.

Date of Filing:February 23, 1999

Case Number: VFA-0480

On February 23, 1999, Matthew Cherney, M.D. (Appellant), filed an Appeal from a determination issued to him on February 10, 1999, by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). That determination denied a request for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Decision and Order, we will consider whether the DOE must conduct a further search for documents responsive to the Appellant's FOIA request.

I. Background

On January 27, 1999, the Appellant filed a request under the FOIA with DOE's FOIA/Privacy Act Division in which he sought "a list of documents declared 'B5' in the OHA decision dated January 19th. A rough description of the documents in question along with the author(s), the date written and the date each one arrived in Washington will suffice." The documents in question pertain to an unsolicited proposal which the Appellant made to the DOE, and were the subject of an OHA FOIA Decision, Matthew Cherney, M.D., 27 DOE ¶ 80,181 (1999) (Cherney). On February 1, 1999, the FOIA/Privacy Act Division referred the request to OHA for a response. On February 10, 1999, OHA

issued a determination to the Appellant. OHA stated it had searched its own office and also referred the FOIA request to the DOE's Office of Utility Technologies, Energy Efficiency and Renewable Energy (EE) and to DOE's Office of General Counsel (OGC). OHA found that the list the Appellant requested of documents withheld under Exemption b(5) of the FOIA, i.e., the Index of Documents Not Released (index), had already been provided to the Appellant and the Appellant had actually provided the same document to OHA. Therefore, since the Appellant already had it, OHA did not enclose a copy of the document with its February 10, 1999 determination. In addition, although OHA determined what date the underlying documents were sent to Washington, D.C., from the Oak Ridge Operations Office (OR), no information was discovered as to the date that they arrived in Washington, the precise item of information sought by the Appellant. Therefore, no documents were released to the Appellant in OHA's February 10, 1999 determination. See Letter from Thomas O. Mann, Deputy Director, OHA, to Appellant (February 10, 1999). On February 23, 1999, the

Appellant filed the present Appeal of the February 10, 1999 determination, in which he contends that OHA's search for documents was inadequate.(1)

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

Those OHA staff members who processed the Appellant's request informed us that the index at issue in Cherney was the only list of documents they were aware of that listed the documents withheld under Exemption b(5) and provided information as to the description, authors and dates of creation. In view of the Appellant's continued request for this document, we have decided to release the index again to the Appellant. We will forward that material to the Appellant under separate cover. We then reviewed how the search had been conducted with respect to documents relating to the date that each item in the index arrived in Washington from OR. We learned that OGC, which originally received the documents from OR, did not record or stamp the date received on any of the documents or the cover forwarding memorandum. See Record of Telephone Conversation between Paul Lewis, OGC, and Dawn Goldstein, OHA (March 4, 1999).(2) In reviewing this Appeal, we compared the withheld documents with the list that is the subject of this Appeal. We have determined that with two brief exceptions, the author, description, and date of creation of each document, if known, was supplied.(3) We are convinced that this is the only list of withheld documents which is responsive to the Appellant's request. Since no information exists regarding the other information requested (with the minor exceptions described in Footnote 3 above), we find that an adequate search was made for documents responsive to the Appellant's request. Given the above facts, we therefore find that this Office's search for responsive documents was adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew Cherney, M.D., on February 23, 1999, Case Number VFA-0480, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 23, 1999

(1)1/ This Appeal was processed by an OHA staff different from the one which processed the Appellant's FOIA request.

(2)2/ In our February 10, 1999 determination, we did inform the Appellant as to the date of the postmark demonstrating when the documents were mailed from Tennessee.

(3)3/ The two exceptions are first, that the author of item No. 1 of the index is Marc Simpson. See Fax from Robert Stivers, Oak Ridge Operations Office, to Dawn Goldstein (March 8, 1999). Second, we

discovered items No. 2 and No. 4 of the index appear to be the same document.

Case No. VFA-0481, 27 DOE ¶ 80,194

March 22, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Los Alamos Study Group

Date of Filing:March 2, 1999

Case Number: VFA-0481

The Los Alamos Study Group (the "Study Group") files this Appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552; 10 C.F.R. § 1004. The Study Group had requested information from the Department of Energy's Albuquerque Operations Office (the "Albuquerque Office"). In its most recent response, the Albuquerque Office sent the Study Group responsive documents from which substantial amounts of material had been redacted, and the Study Group appealed. As explained below, we will remand this matter to the Albuquerque Office.

In the background of this case is a report issued by the Albuquerque Office, titled "Site Wide Environmental Impact Statement (the "SWEIS"). In July 1997, the Study Group requested a copy of a document called "TA-55 SWEIS Key Parameter Data Report" (the "Data Report"). The Data Report was used to prepare the SWEIS. The Albuquerque Office informed the Study Group in October 1998 that it would not release the Data Report, claiming that it was protected from disclosure by Exemption 5 of the FOIA.

The Study Group appealed the October 1998 determination. We made three findings in our decision issued after consideration of the appeal. First, we required the Albuquerque Office to provide a "detailed explanation of the reason that release of the withheld information would expose the deliberative process." Second, we directed the Albuquerque Office to review the Data Report to decide whether its release would be in the public interest, and, if not, to provide the reasons for its decision. Third, we directed the Albuquerque Office to explain how release of any of the withheld material would result in foreseeable harm to the basic institutional interests that are protected by Exemption 5. *Los Alamos Study Group*, 27 DOE ¶ 80,177 (1999).

On remand, the Albuquerque Office released a redacted copy of the Data Report: a three-page index, a page of introductory text, and a graphic of the TA-55 facility. The remaining fifty-one pages of the released version of the Data Report were blank, except for headings that were included in the index. In its determination letter, the Albuquerque Office stated that the "withheld information is factual rather than deliberative in nature." It further explained that:

There is foreseeable harm to the Department in releasing the information. Disclosure of the report would reveal the Department's deliberative process in preparing the SWEIS because a comparison between the information contained in the draft report and the SWEIS would reveal what material supplied by contractors was deemed appropriate for inclusion in the SWEIS. It is precisely this disclosure of a deliberative process that Exemption 5 is meant to protect.

Finally, by revealing the larger body of facts from which specific facts were drawn would not significantly further the public interest in gaining insight as to how the Department operates. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the Department's willingness to collect a large amount of factual information to assist in the making of a discretionary decision.

The Study Group then filed the present appeal, contending that the Albuquerque Office's decision to withhold information is not adequately explained in its determination letter.

The FOIA generally requires that federal agencies covered by the act release documents to the public upon request. 5 U.S.C. § 552(a)(3). There are, however, nine exemptions in the FOIA for types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). At issue in this case is Exemption 5 of the FOIA, which allows an agency to withhold "inter- agency or intra-agency memorandums or letters which would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears*) (footnote omitted). The courts have identified several privileges that fall under this definition. These privileges include the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege permits an agency to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for Exemption 5 to shield a document, it must be both pre-decisional, *i.e*., generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id*. Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. A common application of the deliberative process privilege is to protect draft documents. The fact that a document is a draft, however, does not end the analysis; in addition, the agency must consider whether Exemption 5 can be applied in a manner consistent with the guidance contained in the Memorandum from the Attorney General dated October 4, 1993). The Attorney General's Memorandum applies a presumption in favor of disclosure unless an agency articulates a reasonably foreseeable, specific harm to a specific interest protected by an exemption. *See U.S. Solar Roof*, 25 DOE ¶ 80,112 at 80,530 (1995); *William D. Lawrence*, 24 DOE ¶ 80,139 at 80,599 (1994).

In analyzing the withholding of material under Exemption 5, we begin with "the simple test that factual material must be disclosed but advice and recommendations may be withheld." *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988). While this fact/opinion test offers "a quick, clear, and predictable rule of decision," it must not be applied mechanically. This is because Exemption 5 serves to protect the deliberative process itself, not merely documents containing deliberative material. *Id*. Therefore, when an agency withholds material under Exemption 5, it "must examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *Id*.

A series of decisions by the District of Columbia Circuit illustrates how the deliberative process privilege can protect factual matter. In *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), the requester sought summaries of an administrative record that aides had prepared for the administrator of the Environmental Protection Agency. The summaries had been compiled to help the administrator determine

whether the pesticide DDT was harmful to the environment. The court upheld the agency's decision to withhold the summaries under Exemption 5. In its decision, the court reasoned that "when a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under Exemption 5 of the FOIA." *Montrose Chemical*, 491 F.2d. at 71.

Similarly, in *Russell v. Department of the Air Force*, 682 F. 2d 1045 (D.C. Cir. 1982), and *Dudman v. Department of the Air Force*, 815 F. 2d 1565 (D.C. Cir. 1987), the court shielded draft versions of official Air Force histories. The histories covered operations conducted during the Vietnam War. In protecting the drafts from disclosure, the court found that they were produced to inform future policy decisions. *Russell*, 682 F.2d at 1046, 1047; *Dudman Communications*, 815 F.2d at 1566.

On the other hand, in *Playboy Enterprises, Inc. v. Department of Justice*, 677 F.2d 931 (D.C. Cir. 1982), the court held that the FOIA required the disclosure of a report. The report had been compiled by staff members of the Department of Justice at the request of the Attorney General to inform the Senate Judiciary Committee concerning activities of a certain FBI informant

In *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993), the court shielded from disclosure a report on Kurt Waldheim's activities during World War II. The Justice Department had compiled the report for the Attorney General in deciding whether Waldheim was eligible to enter the United States. In holding that the Waldheim Report was properly withheld under Exemption 5, the D.C. Circuit explained its reasoning in the cases cited above.

It is true that the products of such labors can loosely be characterized as factual, in the sense that the issues ultimately being addressed have a prominent factual component: What is the evidence indicating that DDT is dangerous? What actions did the Air Force undertake, and what results did it achieve in a certain set of operations? Was substantial evidence adduced on a particular point at trial? In cases such as this, however, the selection of the facts thought to be relevant clearly involves "the formulation or exercise of … policy-oriented *judgment*" or "the process by which*policy* is formulated," *Petroleum Info. Corp*., 976 F.2d at 1435 (emphasis in the original), in the sense that it requires "exercises of discretion and judgment calls," *id.* at 1435….

As our later cases make plain, the key to *Montrose Chemical* was not the relationship between the requested summaries and the public record, but that between the summaries and the decision announced by the EPA Administrator. *See Playboy Enterprises*, 677 F.2d at 936 (distinguishing *Montrose Chemicals* on grounds that it involved "a complex decision in an adjudicatory proceeding" as opposed to an investigative report "prepared only to inform"); *Petroleum Info. Corp.*, 976 F.2d at 1437 (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in the original). Like the information requested in *Montrose Chemical*, the majority of the … factual material [requested in *Mapother*] was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action. Therefore, we conclude that the Department properly withheld the product of this process.

Mapother, 3 F.3d at 1539. In summary, when a draft document is requested, the nature of the final document must be examined carefully to determine the applicability of Exemption 5. If the SWEIS were prepared "only to inform," then materials used to prepare it, such as the Data Report, would be analogous to the report in *Playboy Enterprises*. It would not therefore be shielded by Exemption 5. If, however, the SWEIS is part of a process by which policy is formulated, then the Data Report is analogous to the material protected in *Montrose Chemical, Russell, Dudman Communications*, and *Mapother*. In other words, disclosure of the Data Report would reveal the deliberative process, and it could be shielded under Exemption 5.

Nothing in the determination letter from the Albuquerque Office addresses whether the SWEIS is an

informational or policy document. We are therefore unable to determine from the record available to us whether Exemption 5 is applicable to the Data Report. Consequently, we will remand this matter to the Albuquerque Office for further proceedings consistent with this Decision.

It Is Therefore Ordered That:

(1) The Appeal filed by the Los Alamos Study Group, Case No. VFA-0481, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Official of the Albuquerque Operations Office of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 22, 1999

Case No. VFA-0482, 27 DOE ¶ 80,197

April 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: BP Exploration, Inc.

Date of Filing: March 10, 1999

Case Number: VFA-0482

This Decision and Order concerns an Appeal that BP Exploration, Inc. (BP) filed from a determination issued to it by the Department of Energy's (DOE) Strategic Petroleum Reserve Project Management Office (SPRP). In this determination, SPRP granted in part a request for information that BP filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. In its appeal, BP contests the adequacy of SPRP's determination, and requests the release of certain withheld information.

I. Background

In its FOIA request, BP asked for a copy of the lease between the DOE and Exxon Co., USA (Exxon) for the Bryan Mound Distribution System in Texas. SPRP released this document to BP in redacted form, withholding under 5 U.S.C. § 552(b)(4) (Exemption 4) the formula used to determine the amounts to be paid by Exxon to the DOE. Exemption 4 protects from mandatory disclosure trade secrets and privileged or confidential commercial or financial information that is obtained from a person. SPRP explained its application of Exemption 4 in the following manner:

Exxon claims that this information is confidential and privileged, and that its release would cause substantial competitive harm to Exxon. Disclosure of this underlying cost data would place Exxon at a commercial disadvantage with potential customers and competitors.

SPRP Determination Letter at 1. In its Appeal, BP contests the adequacy of this determination, and contends that SPRP improperly applied Exemption 4 in withholding the price information.

II. Analysis

Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (Kleppe); Digital City Communications, Inc., 26 DOE ¶ 80,149 at 80,657 (1997); Data Technology Industries, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption

was accurately applied. Tri-State Drilling, Inc., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, an agency withholding material under Exemption 4 must explain how that exemption was applied. William E. Logan, Jr. & Associates, 27 DOE ¶ 80,185 (1999) (Logan). If, for example, the agency believes that disclosure is likely to cause substantial competitive harm, it must state its reasons for this finding. Larson Associated, Inc., 25 DOE ¶ 80,204 (1996); Milton L. Loeb, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. Public Citizen Health Research Group v. F.D.A., 704 F.2d 1280, 1291 (D.C.Cir. 1983); Kleppe.

The circumstances in Logan are quite similar to those in the case that is presently before us. In Logan, the requester sought access to lease and purchase agreements between the DOE and an oil company concerning a crude oil pipeline and terminal. The agency released redacted copies of the agreements, withholding information relating to costs under Exemption 4. On appeal, we found the agency's determination to be deficient because it did not adequately explain the manner in which that Exemption was applied. We stated that in Exemption 4 cases, the agency must first determine whether the information in question is a trade secret or is commercial or financial information. If the former, then the agency's analysis is complete and the material may be withheld under Exemption 4. Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). However, we said that if the agency determines the material is commercial or financial information, obtained from a person, and privileged or confidential, then there is an additional analysis that must be performed. First, the agency must decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992). If it was involuntarily submitted, the information may be withheld under Exemption 4 if disclosure would either impair the government’s ability to obtain similar information in the future or cause substantial harm to the competitive position of the person from whom the government obtained the information. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

The determination letter issued by SPRP to BP does not adequately justify the agency's application of Exemption 4 in withholding the price-related information. Because the determination letter mentions substantial competitive harm, it appears that SPRP categorized the price data as involuntarily submitted commercial or financial information. However, SPRP did not provide any explanation of how it arrived at this categorization. As a result, we cannot evaluate whether SPRP applied the proper standard in withholding the price information. Furthermore, the determination letter does not specify the competitive harm that disclosure of the information would cause, nor does it provide any basis for its apparent finding that such harm would be "substantial." Consequently, the determination letter consists of the type of conclusory or general allegations of competitive harm that the courts have found to be inadequate, and it does not permit either a meaningful appeal or an appropriate review.

We will therefore remand this matter to SPRP. On remand, SPRP should either release the withheld information or provide a new justification for withholding it. If SPRP continues to withhold the information under Exemption 4, it must fully explain its analysis, including the nature of the competitive harm that disclosure would cause and SPRP's reasons for believing that such harm would be "substantial."

It Is Therefore Ordered That:

(1) The Appeal filed by BP Exploration, Inc., Case No. VFA-0482, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office, to

issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 8, 1999

Case No. VFA-0483, 27 DOE ¶ 80,233

September 28, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing:March 11, 1999

Case Number: VFA-0483

The National Security Archive filed an Appeal from a determination issued to it on February 24, 1999, by the Deputy Director, Communications and Information, Headquarters Air Combat Command of the Department of the Air Force (Deputy Director). In that determination, the Deputy Director denied in part a request for information that the National Security Archive filed with the Air Force on February 25, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Some of the information deleted from the document the Air Force released in that determination was withheld pursuant to a review of the documents by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to instruct the Deputy Director that the DOE no longer requires the classification and withholding of information that the Air Force withheld on the DOE's behalf.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 25, 1994, the National Security Archive submitted a request under the FOIA to the Department of the Air Force for a copy of Strategic Air Command Study 109, "Operation Recovery, 17 January-7 April 1966." The Air Force sent portions of the document to the DOE for classification review. The DOE completed that review and responded to the Air Force in March of 1996. In October of 1998 the Air Force asked the DOE to perform a second classification review, because it believed that changes in the DOE's classification policies in the intervening period might lead to a different result. The DOE completed its second review and advised the Air Force on November 20, 1998, that the document contained classified information that it considered exempt from mandatory disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). On February 24, 1999, the Air

Force released to the National Security Archive a copy of the requested report from which it withheld information that the DOE claimed was exempt from disclosure under the FOIA, as well as additional information that the Air Force withheld on its own behalf under another exemption of the FOIA.

In its Appeal to the DOE, the National Security Archive seeks the disclosure of the information on pages

285-290 of the report, which the Air Force withheld at the request of the DOE. The National Security Archive contends that the information the DOE has identified as classified on those pages should be declassified and released, because they concern an overseas nuclear weapons accident that occurred decades ago, and any general information on that topic would not assist nuclear proliferants.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, meets the above criteria, and therefore information withheld under that Act must also be withheld under the FOIA. See, e.g., Hans M. Kristensen, 27 DOE ¶ 80,182 (1999); Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

Upon referral of the Appeal from the Office of Hearings and Appeals, the Office of Security Affairs again reviewed those portions of pages 285-290 for which the DOE had claimed exemptions from mandatory disclosure under the FOIA. That Office has now concluded that those pages no longer contain any information that needs to remain classified by the DOE. The information, though no longer classified by the DOE, may still be classified by the Air Force. The DOE will advise the Air Force of its determination and the Air Force will then inform the National Security Archive of its own determination concerning that information. Accordingly, the National Security Archive's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on March 11, 1999, Case No. VFA-0483, is hereby granted.

(2) The Department of Energy's Office of Security Affairs shall inform the Deputy Director, Communications and Information, Headquarters Air Combat Command of the Department of the Air Force, that pages 285-290 of Strategic Air Command Study 109, "Operation Recovery, 17 January-7 April 1966" contain no DOE classified information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 28, 1999

Case No. VFA-0484, 27 DOE ¶ 80,198

April 9, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:William E. Logan, Jr.

Date of Filing:March 12, 1999

Case Number: VFA-0484

On March 12, 1999, William E. Logan, Jr. filed an Appeal from a determination issued to him in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Assistant Project Manager for Management and Administration (Authorizing Official) of the Strategic Petroleum Reserve Project Management Office (SPR) issued the determination on February 12, 1999. This Appeal, if granted, would require that the Authorizing Official release responsive information withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 18, 1998, William E. Logan, Jr. filed a request with the SPR for information concerning lease agreements between Shell Pipe Line Corporation (now doing business as Equilon Pipeline Company LLC) and the DOE for the Bayou Choctaw crude oil pipeline and St. James Terminal. The Authorizing Official responded to this FOIA request in a December 3, 1998 letter and provided documents responsive to Mr. Logan's request, but redacted Equilon's payment equations (also known as formula rates) pursuant to Exemption 4 of the FOIA. Following the Authorizing Official's determination, Mr. Logan filed an appeal with the Office of Hearings and Appeals of the DOE (OHA). On January 21, 1999, the OHA issued a decision in which it remanded the appeal to the SPR for a new determination to either release the payment equations or provide a new justification for withholding. William E. Logan, Jr., 27 DOE ¶ 80,185 (1999). Finally, on February 12, 1999, the SPR issued a new determination in which it continued to withhold the payment equations pursuant to Exemption 4 of the FOIA.

II. Analysis

In his Appeal, Mr. Logan claims that the SPR incorrectly applied Exemption 4 to the responsive information. Mr. Logan states that the formula rates are not fee schedules used for the sale of any of Equilon Pipeline Company's services, but are formulas for rental payment amounts paid to the federal

government for use of the pipeline. Furthermore, he states that there are several reasons the formula rates are not proprietary. First, the federal government obtained these rates from Equilon through a negotiation. Second, the contract between Equilon and the federal government did not contain a trade secret, proprietary information or confidentiality clause. Finally, he states, since the federal government "is one of the contracting parties and is receiving revenue from this contract," that unless the federal government "claims that the information is classified . . . ," the SPR must disclose the information. For these reasons, Mr. Logan argues that the OHA must reverse the SPR's determination and disclose the withheld information.

As an initial matter, we note that Mr. Logan's arguments do not directly address the requirements for an agency to withhold a document pursuant to Exemption 4. Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (Critical Mass). By contrast, information a submitter provided to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879.

In appropriate cases, Exemption 4 protects the release of the type of information the requester seeks. We have reviewed the redacted information and find that it contains payment equations negotiated between the SPR and Shell Pipeline Corporation for rental of the pipeline. These negotiated payment equations are confidential commercial information within the meaning of Exemption 4. The SPR obtained this material from a "person" as Exemption 4 requires, since the FOIA considers corporate entities as persons for the purposes of that exemption. See John T. O'Rourke & Associates, 12 DOE ¶ 80,149 (1985). In this case, once the SPR began negotiations with Shell Pipeline Corporation, the SPR required the firm to submit a proposed rental amount for use of the pipeline. See April 5, 1999 Record of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Deanna Harvey, SPR Program Analyst, and Pat Sigur, SPR Realty Officer. Since the submission of this rental amount was necessary to complete the lease agreement, we find that the firm's submission was involuntary. Thus, the information Shell Pipeline Corporation submitted is "confidential" if it meets the test set out in National Parks. We conclude that the payment equations are confidential because their release would substantially harm the submitter's competitive position. A competitor could use the release of these payment rates to easily determine how to adjust its proposed rental payments to offer more favorable terms than the submitter in an attempt to obtain another similar agreement with the federal government. In fact, the contract between the SPR and Equilon allows for the possibility of a pipeline rental recompetition. See April 5, 1999 Record of Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Deanna Harvey, SPR Program Analyst, and Pat Sigur, SPR Realty Officer. Moreover, release of these lease terms would provide a competitor with detailed information revealing the submitter's financial strategy and methods in its negotiations with the federal government.

III. The Public Interest in Disclosure

The DOE regulations provide the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. We have determined that Exemption 4 requires the continued withholding of negotiated payment equations between the SPR and Equilon. However, in cases involving material

determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal William E. Logan, Jr. filed on March 12, 1999, Case No. VFA-0484, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 9, 1999

Case No. VFA-0485, 27 DOE ¶ 80,202

April 30, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kristine Anne Horpedahl

Date of Filing: March 22, 1999

Case Number: VFA-0485

On March 22, 1999, Kristine Anne Horpedahl (Horpedahl) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Office of the Inspector General (OIG) issued to Horpedahl on March 9, 1999. The determination concerned a request for information that Horpedahl submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to Horpedahl.

I. Background

On January 27, 1999, Horpedahl filed a FOIA request with the OIG for "a copy of the OIG Administrative Report to Management, MRD File, IG-98-INV-08, Case No. I96AL021 and any other OIG documentation naming [Horpedahl]." Letter from Horpedahl to OIG (January 27, 1999) (Request Letter). On March 9, 1999, the OIG advised Horpedahl that the case file that she requested was still open, and that she should resubmit her request after the case closed. Letter from OIG to Horpedahl (March 9, 1999) (Determination Letter). The OIG went on to state that it had reviewed the case file documents, and "[a]t this time, those documents are being withheld in their entirety pursuant to . . . Exemption 7(A)." *Id.* According to the OIG, "[r]elease of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding." *Id.* In addition, pursuant to DOE regulations, the OIG further determined that it was not in the public interest to release the investigative information. *Id.* Horpedahl then filed this Appeal. Letter from Horpedahl to Director, OHA (March 22, 1999).

II. Analysis

The FOIA generally requires that agency records be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA provides nine exemptions for specific types of information that the agency may withhold at its discretion. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9).

The exemption asserted in this case, Exemption 7(A), permits an agency to withhold at its discretion "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(I). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

A. Exemption 7(A)

In order to qualify for exemption from disclosure under FOIA Exemption 7(A), an investigatory record must meet two criteria: (1) it must be compiled for law enforcement purposes, and (2) its release could reasonably be expected to interfere with an ongoing enforcement proceeding. *See Solar Sources, Inc. v. U. S.*, 142 F.3d 1033, 1037 (7th Cir. 1998) (*Solar Sources*); *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989); *Bevis v. Department Of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (*Bevis*).

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *See Scripps Institute of Oceanography,* 27 DOE ¶ 80,160 (1998) (*Scripps*); *William Payne,* 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). We have consistently found that the OIG compiles information for law enforcement purposes within the meaning of Exemption 7. *SeeScripps*, 27 DOE at 80,648; *Richard Levernier,* 26 DOE ¶ 80,182 (1997); *Keci Corporation*, 26 DOE ¶ 80,149 (1997). The OIG informed us that it accumulated the requested information as part of an ongoing enforcement proceeding. *See* Memorandum of Telephone Conversation between Jackie Becker, OIG, and Valerie Vance Adeyeye, OHA (March 30, 1999). Therefore, we find that the responsive documents were compiled for law enforcement purposes.

In order to withhold documents compiled for law enforcement purposes, the agency must show that disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings. *Solar Sources*, 142 F.3d at 1037; *Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978) (*NLRB*). It is well-established that the agency may justify its withholdings by reference to generic categories of documents, rather than on a document-by-document basis. *See, e.g., Bevis*, 801 F.2d at 1389; *Murray*, 25 DOE at 80,575; *North v. Walsh,* 881 F.2d 1088, 1097 n.10 (D.C. Cir. 1989). The courts have allowed agencies to take a generic approach and to "group documents into relevant categories that are sufficiently distinct to allow a court to grasp how each . . . category of documents, if disclosed, would interfere with the investigation." *See Bevis*, 801 F.2d at 1389, quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (*Crooker*).

In *Bevis*, the court described a three-step process that an agency must use to make a generic determination pursuant to Exemption 7(A). We restated that process in *Murray*:

First, the government must define its categories functionally. Second, it must conduct a document by document review in order to assign documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings.

Murray, 25 DOE at 80,575-576. According to the court, in order for a category to be acceptable in a functional sense, it must allow the court to trace a rational link between the nature of the document and the alleged likely interference. *Bevis*, 801 F.2d at 1389, quoting *Crooker*, 789 F.2d at 64, 67. Thus, in order to use the generic approach, the OIG must establish a connection between the categories of documents that Horpedahl requested and alleged interference with the investigation if those documents were disclosed.

B. The Determination Letter

As an initial matter, we note that the Determination Letter did not name any categories of documents. Thus, we have no indication that the OIG has defined any categories in this case. We note that the Determination Letter referred only to the "case file documents." There was no mention of the second part of Horpedahl's request (i.e., other OIG documents that referred to her by name).

As previously stated, an agency must justify its withholdings under Exemption 7(A) either by document or by categories of documents. However, the determination letter made no reference to a document-by-

document analysis or to a category analysis. Nonetheless, even though the OIG did not define any relevant categories in this case, we are permitted to infer two categories for purposes of a *Bevis* analysis. We have previously classified each item in an appellant's request as a separate category. For instance, in *Murray*, the appellant listed six items in its request, and OHA interpreted each numbered item as a category. *See Murray*, 25 DOE at 80,573-574. In the instant case, Horpedahl requested two items: (1) the investigative case file, and (2) all other OIG documents mentioning her name. Thus, for the purpose of this analysis, we shall treat each item as a category.

1. The Investigative Case File

We find that the OIG properly withheld the investigative case file from the requester.(1) The case file contains information relating to an ongoing enforcement proceeding. That information, if disclosed, could logically be expected to "impede an appropriate resolution of the investigation" by prematurely revealing evidence, prematurely disclosing enforcement efforts, or providing individuals involved in the investigation an opportunity to fabricate or destroy evidence or intimidate witnesses. Determination Letter at 1-2. Thus, we find that there is a rational link between the investigative material in the file and the alleged interference with the proceeding that is likely to occur if the contents are released.

2. Any Other OIG Documents Naming the Requester

We find that the Determination Letter is insufficient as regards this category of documents. This office has previously stated that "an authorizing official must clearly specify the categories of documents upon which he is making his determinations of interference." *Murray*, 25 DOE at 80,577. The OIG did not indicate whether it is in possession of any responsive material that is not contained in the investigative file. In fact, the OIG did not address this category at all. Accordingly, we shall remand this matter to the OIG for release of any existing, non-exempt responsive material, or for issuance of a written justification for further withholding.

It Is Therefore Ordered That:

(1) The Appeal filed on March 22, 1999 by Kristine Anne Horpedahl, OHA Case No. VFA-0492, is hereby granted as set forth in paragraph (2) below and denied in all other respects.

(2) This case is hereby remanded to the Office of the Inspector General, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 30, 1999

(1)We have previously stated that in cases in which we uphold a determination that the release of a category of documents would interfere with an enforcement proceeding, no review of portions of individual documents for segregability is necessary. *See Murray*, 25 DOE at 80,577.

Case No. VFA-0486, 27 DOE ¶ 80,207

May 20, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Hans M. Kristensen

Date of Filing:March 23, 1999

Case Number: VFA-0486

Hans M. Kristensen filed an Appeal from a determination issued to him on January 25, 1999, by the Chief, Information Control Branch, of the Communications and Information Directorate of the Department of the Air Force (Branch Chief). In that determination, the Branch Chief denied in part a request for information that Mr. Kristensen filed with the Air Force on November 30, 1995, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Some of the information deleted from the document the Air Force released to Mr. Kristensen in that determination was withheld pursuant to a review of the documents by the Office of Declassification of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the DOE to instruct the Branch Chief that the DOE no longer requires the classification and withholding of the information that the Air Force withheld on the DOE's behalf.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 30, 1995, Mr. Kristensen submitted a request under the FOIA to the Department of the Air Force for a number of documents, including one entitled "History of Strategic Air Command, Historical Study No. 73, 1 January 1958- 30 June 1958." On May 28, 1996, the Air Force sent the documents to the DOE for classification review. In response to that request, the DOE advised the Air Force on June 17, 1998, that the document contained classified information that it considered exempt from mandatory disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). The Air Force did not release the results of its own classification review at that time. On January 25, 1999, the Air Force released to Mr. Kristensen excerpts from this document, from which it withheld information that the DOE claimed was exempt from disclosure under the FOIA.

In his Appeal to the DOE, Mr. Kristensen seeks the disclosure of those portions of the excerpts that the Air Force withheld at the request of the DOE. Mr. Kristensen contends that the information the DOE has identified as classified should be declassified and released, because the records are over 40 years old and because continued withholding of this information is contrary to the FOIA's spirit of "maximum responsible disclosure."

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Hans M. Kristensen, 27 DOE ¶ 80,182 (1999); Barton J. Bernstein, 22 DOE 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). The portions that the DOE deleted under Exemption 3 were withheld on the grounds that they contain nuclear weapons data and information about military allocation, planning, and deployment that was classified as Formerly Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

Upon referral of the Appeal from the Office of Hearings and Appeals, the Office of Security Affairs again reviewed those portions of the excerpts for which the DOE had claimed exemptions from mandatory disclosure under the FOIA. That Office has now concluded that the document no longer contains any information that needs to remain classified by the DOE. The information, though no longer classified by the DOE, may still be classified by the Air Force. The DOE has advised the Air Force of its determination and the Air Force will now inform Mr. Kristensen of its own determination concerning that information. Accordingly, Mr. Kristensen's Appeal will be granted.

It Is Therefore Ordered That:

(1) The Appeal filed by Hans M. Kristensen on March 23, 1999, Case No. VFA-0486, is hereby granted.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 20, 1999

Case No. VFA-0487, 27 DOE ¶ 80,201

April 22, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Puget Sound Energy, Inc.

Date of Filing: March 25, 1999

Case Number: VFA-0487

On March 25, 1999, Puget Sound Energy, Inc. (Appellant) filed an Appeal from a final determination issued on January 5, 1999 by the Department of Energy's Bonneville Power Administration (BPA).(1) This Appeal, if granted, would require BPA to release the withheld information and to conduct an additional search for responsive documents.

I. BACKGROUND

On December 30, 1998, the Appellant submitted a FOIA request to the BPA. On February 24, 1999, BPA issued a determination letter releasing 29 documents responsive to the Appellant's request. However, BPA withheld, under Exemption 5 of the FOIA, 9 documents that were responsive to the Appellant's request. On March 24, 1999, the appellant submitted the present Appeal, challenging the extent of the search that BPA conducted for responsive documents and BPA's application of Exemption 5 to the 9 withheld documents.(2)

II. ANALYSIS

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Eugene Maples*, 23 DOE ¶ 80,106 (1993);*Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

The Appellant contends that BPA's search was inadequate. Specifically, it asserts that: (1) BPA's search produced a smaller number of documents than the Appellant expected to receive; (2) the "documents tended to have been generated within very short time-frames in different years;" and (3) most of the material appears to come from only a small group of people. Appeal at 2, 7.

None of these arguments consists of anything but speculation. "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Safecard Services, Inc. v. Department of Justice*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). The adequacy of a search cannot be judged on the basis of whether it produced the number of documents that expected by the requester. The search in the present case identified 38 responsive documents, which, on its face, does not appear to be an inordinately small number of documents.

We reviewed the search conducted by BPA and found it to be adequate. The search was conducted by Tim Johnson, Esq., a BPA attorney with extensive knowledge of the subject matter area. Mr. Johnson informed us that he sent a memorandum to all BPA employees involved in evaluating the issues that were the subject of the request, instructing them to inform him of any documents that might be responsive to the request. As a result, 38 responsive documents were identified. Accordingly, we reject the Apellant's claim that BPA's search for responsive documents was inadequate.

B. Exemption 5

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those “privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context.” *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Among the privileges that fall under this exclusion is the executive or deliberative process privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for the deliberative process to shield a document, it must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

BPA has withheld nine documents under the deliberative process privilege. The Appellant challenges these withholdings claiming that BPA must relate each withheld document to a particular decision in order to claim that it was predecisional. Appeal at 7-8. This contention is without merit. In order to determine whether a document is predecisonal, an agency does not have to specifically identify a particular agency decision, but rather must merely indicate "what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States*, 617 F.2d at 868. As the Supreme Court has held:

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not

ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 151 n. 18.

After reviewing the nine withheld documents, we are convinced that BPA properly applied Exemption 5 to them. Each of the documents reflects internal communications consisting solely of candid and frank discussions of policy, political, practical, legal and economic implications of a potential large- scale business transaction. The frank and candid discussions include the weighing of various strategic and tactical aspects of the policies being considered. They are thus clearly pre-decisional and deliberative in nature and are clearly the type of information that Exemption 5's deliberative process privilege was designed to protect.

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that BPA properly applied Exemption 5, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. *See* Reno Memorandum at 1, 2. With regard to the material properly withheld in this matter pursuant to Exemption 5, the requested information consists of the opinions of individuals regarding different aspects of BPA decisions about potential new business projects and the legal and political ramifications pertaining to these projects. The release of this information would in our opinion have a chilling effect on the willingness of employees and managers to make candid statements of opinion and seriously impede BPA employees' ability to engage in candid discussions about important decisions. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the requested documents would not be in the public interest.

III. Conclusion

Since the Appellant has not shown that the search for responsive documents conducted by BPA was inadequate and since we have concluded that BPA properly withheld nine documents under Exemption 5, we find that the present Appeal shall be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Puget Sound Energy, Inc. on March 25, 1999, Case No. VFA-0487, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 22, 1999

(1)BPA is a self-financing federal agency created to market power generated by federal dams on the Columbia River system. BPA also owns and operates approximately 80 percent of the bulk electric transmission system (e.g., power lines) in the Pacific Northwest. BPA markets both electric power and electric transmission service to various customers in the Pacific Northwest.

(2)In its Appeal, the Appellant also argues that it did not receive a timely response to its FOIA Request from BPA. The DOE regulations do not give us jurisdiction to oversee time delays in processing FOIA requests. However, if a requester does not receive a response within the 20-day deadline provided by statute, the requester is deemed to have exhausted his administrative remedies and has a right to a review in a district court of the United States. 5 U.S.C. § 552(a)(4)(B), (6)(A)(i), (6)(C)(i); *cf. Pollack v. Department of Justice*, 49 F. 3d 115, 118-19 (4th Cir. 1995), *cert. denied*, 516 U.S. 843 (1995) (case decided under prior 10-day deadline).

Case No. VFA-0488, 27 DOE ¶ 80,212

June 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Matthew Cherney, M.D.

Date of Filing: April 13, 1999

Case Number: VFA-0488

On April 13, 1999, Matthew Cherney, M.D., filed an Appeal from determinations issued by the Office of Power Technologies, Energy Efficiency and Renewable Energy (DOE/EE). The determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

Dr. Cherney requested from the DOE all documents in its possession related to an unsolicited proposal he had submitted to the DOE. The proposal concerned a system for collecting solar energy invented by Dr. Cherney. Dr. Cherney's request specified the following categories of documents relating to the proposal:

(1) All documents received by DOE and given consideration;

(2) All written comments from all evaluators (and any calculations): Dr. Allan Hoffman, Dr. Joseph Galdo, Jeff Muhs, Slo Rajic, Marc Simpson, and Anthony Schaffhauser;

(3) All comments from any other evaluators;

(4) Transcripts of any oral comments made by any evaluator;

(5) Any other documents in the file; and

(6) Any electronic communications or telephone recordings.

On July 24, 1998, DOE/EE issued a partial response to the Appellant's request in which it released copies of 26 responsive documents. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Dr. Matthew Cherney, Sunbear

Systems (July 24, 1998). DOE/EE issued another partial response on September 18, 1998. In that determination, DOE/EE released an additional 35 documents in their entirety, released 4 other documents with information redacted from them, and identified 31 documents that it withheld in their entirety. DOE/EE stated that the information it was withholding was exempt from disclosure under Exemption 5 of the FOIA. Letter from Allan R. Hoffman, Acting Deputy Assistant Secretary, Office of Utility Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (September 18, 1998). DOE/EE issued a third partial response on January 5, 1999, releasing an additional 21 documents. Letter from Allan R. Hoffman, Associate Deputy Assistant Secretary, Office of Power Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (January 5, 1999). On March 8, 1999, DOE/EE issued a final response to the Appellant's request in which it released 10 responsive documents with information redacted under FOIA Exemptions 5 and 6. Letter from Allan R. Hoffman, Associate Deputy Assistant Secretary, Office of Power Technologies, Energy Efficiency and Renewable Energy, to Matthew Cherney, M.D., Sunbear Systems (March 8, 1999).(1)

We discern three arguments in Dr. Cherney's Appeal. First, he states that he has “never received a bona fide list of the documents denied with appropriate descriptions, dates, authors, etc. . . . Nowhere were the documents described adequately.” Appeal at 1. Second, the Appellant disputes the adequacy of the DOE's search for documents responsive to his request. Id. at 2. Third, Dr. Cherney asks us to reconsider a finding we made in a decision on a prior Appeal. Id. at 1; Electronic mail from Matthew Cherney, M.D., to Steven Goering, OHA (May 14, 1999). The decision on Dr. Cherney's prior Appeal (Case No. VFA-0459) upheld in part DOE/EE's withholding of information under FOIA Exemption 5 in its first two partial responses. Matthew Cherney, M.D., 27 DOE ¶ 80,181 (1999).

Dr. Cherney styles his present submission a Motion for Reconsideration of our earlier decision, which we issued after DOE/EE had issued two partial responses to his request. However, Dr. Cherney's first two arguments, regarding the adequacy of DOE/EE’s determination and the adequacy of its search, logically apply to DOE/EE’s response as a whole, i.e. all four responses taken together. Thus, with respect to these two issues, we consider Dr. Cherney’s submission as a new Appeal of DOE/EE’s entire response to his request. We will also address below the Appellant’s request that we reconsider the finding in Case No. VFA-0459 to which he refers.

II. Analysis

A. Adequacy of DOE/EE's Description of Responsive Documents

As noted above, Dr. Cherney argues that he has “never received a bona fide list of the documents denied with appropriate descriptions, dates, authors, etc. . . . Nowhere were the documents described adequately.” Appeal at 1. In several recent cases, we have addressed the extent to which information withheld from a requester must be described in response to a FOIA request. We have held that “agency determinations to deny release of documents need only provide a general description of the withheld material, and a statement of the reason for withholding each document.” Tammi D. Mourfield Selvidge, 27 DOE ¶ 80,170 at 80,675 (1998); Missouri River Energy Services, 27 DOE ¶ 80,165 at 80,658 n.1 (1998); William Payne, 27 DOE ¶ 80,162 at 80,652 (1998). In the present case, DOE/EE specifically identified in each of its four responses to the Appellant the documents it located in its search that were responsive to the request. Where documents were identified but not released, DOE/EE specified under which FOIA Exemption it was withholding the information, and the basis for invoking the exemption. Thus, DOE/EE's responses permitted the appellant to formulate the basis for his appeal, and permitted the appellate authority to understand the DOE’s assertion of exemption. Therefore, we reject Dr. Cherney's request for a more detailed description of documents.

B. Adequacy of DOE/EE's Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search

for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

After receiving Dr. Cherney's Appeal, we contacted DOE/EE to obtain additional information regarding its search for documents responsive to the appellant's request. The individual responsible for conducting the search of DOE Headquarters for responsive documents was Joseph Galdo, a DOE/EE employee. Dr. Galdo informed us that he identified two locations where he believed responsive documents would be located, specifically, his file concerning Dr. Cherney's proposal and a file maintained by another DOE/EE employee. Because he had a copy in his file of the contents of the file maintained by the other DOE/EE employee, he believed that his file contained the universe of documents at DOE Headquarters responsive to the appellant's request.

Also considered by DOE/EE to be responsive to Dr. Cherney's request were documents under the jurisdiction of the DOE's Oak Ridge Operations Office (DOE/OR). We contacted the DOE/OR and we were informed that DOE/OR conducted a search of its procurement and contracts division, and also forwarded the request to the Oak Ridge National Laboratories (ORNL). ORNL is operated under contract with the DOE by Lockheed Martin Energy Systems and Lockheed Martin Energy Research. Because Dr. Cherney's proposal was the subject of litigation involving Lockheed Martin, the documents at ORNL related to his proposal had already been gathered by the Lockheed Martin counsel's office. Documents considered responsive to the appellant's request were forwarded by both DOE/OR and ORNL to DOE Headquarters for processing as part of DOE/EE's response to request.

Dr. Galdo further informed us that the DOE/EE's Office of Power Technologies maintains a chronological file of correspondence, which includes correspondence between that office and Members of Congress. He indicated that while that file may contain correspondence from Members of Congress on behalf of Dr. Cherney, Dr. Galdo did not consider documents in that file to be responsive to Dr. Cherney's request.

While we understand Dr. Galdo's interpretation of the request, we believe that any correspondence between DOE Headquarters and Members of Congress that reference Dr. Cherney's proposal would be responsive to Dr. Cherney's request for "all documents related to" his proposal. Although Dr. Cherney listed specific categories of documents that he stated his request included, our reading of the request is that this listing was intended to be illustrative, not exhaustive. Therefore, we will remand this matter to DOE/EE so that it may issue a new determination to the appellant. Before issuing its new determination, DOE/EE should reconsider the scope of its search in light of the interpretation of Dr. Cherney's request we adopt here, that is, all documents in the possession of DOE that relate in any way to Dr. Cherney's proposal.(2)

C. Request for Reconsideration of Finding Made in Case No. VFA-0459

As noted above, in our decision on Dr. Cherney's Appeal in Case No. VFA-0459, we found that DOE/EE properly withheld some material from the Appellant under FOIA Exemption 5. Exemption 5 of the FOIA shields from public disclosure, among other things, records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985). Thus in our decision, we considered which documents responsive to Dr. Cherney's request were predecisional. On this issue Dr. Cherney argued that, although he received a letter from DOE dated March 23, 1998, stating that the DOE would not fund his proposal, the actual decision on his proposal was made prior to that date. We reviewed the documents withheld from the appellant and the letters sent to

him on March 23, 1998, and we concluded that none of the documents evidenced an agency decision on Dr. Cherney's proposal prior to March 23, 1998. Dr. Cherney would like us to now reconsider that conclusion.

A request for reconsideration is treated as an application for modification or rescission under the OHA's general procedural regulations, 10 C.F.R. Part 1003. Under these regulations, we will process an application for modification or rescission only if "the applicant demonstrates that it is based on significantly changed circumstances; . . ." 10 C.F.R. § 1003.55(b)(1). "For purposes of this subpart, the term 'significantly changed circumstances' shall mean--

(i) the discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) the discovery of a law, rule, regulation, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application is based and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) there has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

Applying the above definition, the only "changed circumstances" we can find described by Dr. Cherney relate to the first category, i.e. "the discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based[.]" Specifically, Dr. Cherney refers to documents of which he has recently become aware, either by receiving the documents from the DOE or because our office has referred to them in a response to a separate FOIA request. These documents allegedly support Dr. Cherney's contention that the DOE's decision on his proposal was made prior to March 23, 1998.

With respect to the documents that Dr. Cherney's states he received from the DOE, we asked the appellant to provide copies of those documents, but he did not. Nonetheless, we requested from DOE/EE copies of documents that fit the description given by Dr. Cherney. We have reviewed these documents, and again find that none of them evidences an agency decision on Dr. Cherney's proposal prior to March 23, 1998.

In his Appeal, Dr. Cherney also refers to the OHA's response to his January 22, 1999 FOIA request. In that FOIA request, Dr. Cherney sought a list of the documents we found to be properly withheld under FOIA Exemption 5 in our decision on his Appeal in Case No. VFA-0459, and also requested information as to when those documents "arrived in Washington." In a February 10, 1999 response to this request, the OHA stated that it did not locate documents indicating when the documents in question arrived in Washington. Based on this response, Dr. Cherney now argues that "if you cannot say for sure when something arrived in [W]ashington, it is not" protected by FOIA Exemption 5. There is no doubt that, in order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give and take of the consultative process. Coastal States, 617 F.2d at 866. This is why our conclusions in VFA-0459 regarding the predecisional nature of the requested documents rested in part on when the documents were generated, not when they "arrived in Washington." Because Dr. Cherney's argument does not address when documents were generated, but only when they arrived in Washington, which is irrelevant for these purposes, it provides no basis for reconsidering our finding in Case No. VFA-0459.

D. Conclusion

For the reasons stated above, we are remanding this matter to DOE/EE for the limited purpose of

conducting a new search for documents in response to the appellant's request. In conducting this search, DOE/EE should consider responsive to the request not only those categories of documents specifically described by the appellant in his request, but also all documents in the possession of DOE that relate in any way to Dr. Cherney's proposal. We note that on remand DOE/EE is only required to conduct “a search reasonably calculated to uncover the sought materials,” not the “absolute exhaustion” of DOE's files. Miller v. Department of State, 779 F.2d 1378, 1384-85. DOE/EE should then issue a new determination identifying to the appellant any documents in the possession of the DOE that are responsive to this broader interpretation of the request, but were not so identified in DOE/EE's previous determinations, and either releasing those documents or explaining why they may be withheld pursuant to a FOIA exemption. With respect to all other issues Dr. Cherney has raised, we will deny his Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew Cherney, M.D., Case No. VFA-0488, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Power Technologies, Energy Efficiency and Renewable Energy, for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 24, 1999

(1)DOE/EE did not identify any documents responsive to items 3 and 4 of the Appellant's request in any of its responses.

(2)In his Appeal, Dr. Cherney alleges a “high level of participation” by DOE's Office of General Counsel (DOE/GC) in the DOE's decision regarding his proposal. While we are aware of no evidence supporting Dr. Cherney's allegation, DOE/EE should consider as responsive to Dr. Cherney's request any document in the possession of DOE/GC related to his proposal, since Dr. Cherney's request was made to DOE generally and not DOE/EE specifically.

Case No. VFA-0489

September 26, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Greenpeace

Date of Filing: April 5, 1999

Case Number: VFA-0489

Hans M. Kristensen filed an Appeal, on behalf of Greenpeace, from a determination that Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) issued to Greenpeace on March 31, 1999. In that determination, Albuquerque denied in part a request for information that Greenpeace submitted on January 19, 1994, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. It provided copies of two documents from which information was withheld. That information was withheld as the result of the DOE's Office of Declassification, as well as the Department of Defense (DOD) and the Department of State (DOS), reviewing the documents and determining that they contained classified information. This Appeal, if granted, would require the DOE to release the information that it withheld from those two documents. A third document was requested but not located at DOE; that document is not a part of this Appeal.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 19, 1994, Greenpeace requested information under the FOIA concerning three specific topics. Albuquerque responded to the requests by stating that it was unable to locate any documents relating to the first topic, "U.S. Navy INF Potential, 1988," and providing one document responsive to each of the other topics. Information was deleted from each of those documents pursuant to a DOE determination that some of the withheld information warranted protection from disclosure under Exemptions 1 and 3 of the FOIA and determinations by the DOD and the DOS that the remainder of the withheld information was classified and therefore warranted protection from disclosure under the FOIA. These two documents were identified as "Modular Weapons Systems and Insertable Nuclear Components" (Document 1) and "An Overview of Tactical-Nuclear-Weapon Employment in Central Europe, Korea, and the Middle East" (Document 2).

The present Appeal seeks the disclosure of the withheld portions of the two documents described above. In his Appeal, Mr. Kristensen contends that the withholdings are "based on outdated guidance, unreasonable, and out of sync with recent FOIA reform."

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. *See National Security Archive*, 26 DOE ¶ 80,118 (1996); *Keith E. Loomis*, 25 DOE ¶ 80,183 (1996); *A. Victorian*, 25 DOE ¶ 80,166 (1996).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of Security Affairs (now the Director of Security and Emergency Operations) (Director) reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that both documents contain information concerning nuclear weapon plans and employment, as well as other details of military utilization of nuclear weapons. These types of information have been classified as Formerly Restricted Data (FRD) under the DOE's current classification guidance. Document 1 also contains information regarding nuclear weapons design, which has been classified as Restricted Data (RD) under the DOE's current classification guidance. Under the Atomic Energy Act of 1954, RD and FRD are forms of classified information, and are therefore exempt from mandatory disclosure under Exemption 3. The Director has also informed us that some of the material withheld from each of the documents relates to military plans, targeting priorities, and intelligence information. As such, it is defined as National Security Information under Section 1.5(a) and (c) of Executive Order 12958, and is therefore exempt from mandatory disclosure under Exemption 1 of the FOIA. The material that the DOE continues to withhold under Exemptions 1 and 3 of the FOIA is identified in the margin of the documents as "DOE (b)(1)" and "DOE (b)(3)."

In performing his review the Director requested that the DOD and the DOS also review the validity of the deletions each of those agencies originally made from the two documents. Each agency has completed its review. The Director has marked all deletions made at the direction of the DOD, under Exemptions 1 and 3 of the FOIA, as "DOD" in the margin of the documents. The denying official for these withholdings is Mr. H.J. McIntyre, Director, Freedom of Information and Security Review, Department of Defense. In addition, the DOS has instructed the Director to withhold one passage in Document 2 under Exemption 1 of the FOIA, which has been marked "DOS (b)(1)" in the margin. The denying official for this withholding is Margaret P. Grafeld, Director, Office of Information Resource Management Programs and Services, Department of State.

Based on the Director's review, we have determined that Executive Order 12958 and the Atomic Energy Act require the continued withholding of significant portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive

order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the DOD and the Director have reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Because some previously deleted information may now be released, newly redacted versions of the two documents reviewed in this Appeal will be provided to Greenpeace under separate cover. Accordingly, Greenpeace's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Greenpeace on March 31, 1999, Case No. VFA-0489, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the documents entitled "Modular Weapons Systems and Insertable Nuclear Components" and "An Overview of Tactical-Nuclear- Weapon Employment in Central Europe, Korea, and the Middle East," in which additional information is released, will be provided to Greenpeace.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 26, 2001

Case No. VFA-0490, 27 DOE ¶ 80,203

May 5, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Roy Chavez

Date of Filing: April 6, 1999

Case Number: VFA-0490

On April 6, 1999, Roy Chavez filed an Appeal from a determination issued to him by the Director of the FOIA /Privacy Act Division of the Department of Energy's (DOE) Office of the Executive Secretariat (hereinafter referred to as "the Director"). This determination was issued in response to a request for information that was processed under the Freedom of Information Act (FOIA), 5 U.S.C § 552, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Parts 1004 and 1008, respectively.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. 5 U.S.C. § 552(b)(1)-(b)(7); 10 C.F.R. § 1004.10(b)(1)-(b)(9).

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. The Act also requires each agency to permit a requester to gain access to information pertaining to him which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, under the Privacy Act, agencies may provide that some systems of records are not subject to the Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(j), (k).

I. Background

This proceeding was initiated by Mr. Chavez's request under the Privacy Act for a copy of his security clearance file. To afford him greater access to his records, the request was processed under both the Privacy Act and the FOIA. The DOE's Office of Safeguards and Security located this file in the DOE-43 "Personnel Security Clearance Files" system of records. The DOE has provided that this system of records is excepted from the disclosure provisions of the Privacy Act to the extent that the records contain

information that is subject to the Act's exemptions. 10 C.F.R. § 1008.12(b)(3)(ii). In his determination, the Director released to Mr. Chavez copies of all of the documents in his file except one. This one document, a memorandum of a telephone conversation between two DOE employees, was withheld in its entirety under Exemption k(5) of the Privacy Act, 5 U.S.C. § 552a(k)(5), and Exemption 7(D) of the FOIA, 5 U.S.C. § 552(b)(7)(D). Exemption k(5) of the Privacy Act permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an

express promise that the identity of the source would be held in confidence . . . " 5 U.S.C. § 552a(k)(5). Exemption 7(D) of the FOIA provides that "records or information compiled for law enforcement purposes" may be withheld, "but only to the extent that the production of such" documents "could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis . . . and, in the case of a record or information compiled by . . . an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). The Director concluded that release of the withheld document would disclose both the identity of a source who requested and was promised confidentiality, and the information that that source provided in confidence.

II. Analysis

In his Appeal, Mr. Chavez contests the Director's application of Exemption k(5) of the Privacy Act. (1) Specifically, he contends that release of the memorandum would not reveal the identity of a confidential source because he is already aware of the source's identity, that the confidentiality agreement has been waived by the source's wide dissemination of information concerning the source's contact with the other DOE employee described in the memorandum, and that the continued withholding of the memorandum deprives him of his Privacy Act right to correct erroneous information in his file and of his constitutional right to due process under the Fifth Amendment. For the reasons set forth below, we reject Mr. Chavez's claims, and find that the Director properly withheld the memorandum under Exemption k(5).

In previous cases, we have stated that a requester's alleged knowledge of the identity of a source is irrelevant to a determination of the applicability of Exemption k(5). Dale R. Callaghan, 20 DOE ¶ 80,150 (1990); Jeffrey L. Turek, 11 DOE ¶ 80,142 (1983). See also Volz v. Department of Justice, 619 F.2d 49 (10th Cir. 1980) (Volz). In Volz, the court said

It is clear that the primary purposes of the exemption [k(5)] are to protect the privacy of confidential informants and facilitate governmental access to investigatory material which would not be made available absent a promise of confidentiality . . . These purposes would not be realized if disclosure could be compelled merely because the one seeking disclosure is aware that the source has given information of some sort to the agency. Not only the fact that an individual has talked to the agency but also the information thus obtained is protected from disclosure.

Id. at 50 (citations omitted). Mr. Chavez has not convinced us that the holdings in these cases are incorrect. We therefore conclude that his alleged knowledge of the identity of the source is irrelevant to the issue of whether the Director properly applied Exemption k(5).

Mr. Chavez's next contention is that confidentiality was waived when the person whom he believes to be the source wrote about communications with the other DOE employee mentioned in the withheld memorandum, and widely disseminated those writings. We find this argument to be equally unavailing. In Nemetz v. Department of the Treasury, 446 F. Supp 102 (N.D. Ill. 1978), the court held that a source did not waive confidentiality under Exemption k(5) when he discussed the content of the withheld information with the requester's attorney, stating that "[i]f an individual is to waive the express protections of [k(5)], it must be unequivocal. [The source] may have revealed a large portion of the contents of his interview to the [requester's] attorney, but he expressly refused to give a written authorization for release." Id. at 106. See also Lesar v. Department of Justice, 636 F.2d 472, 491 (D.C. Cir. 1980) (no waiver of confidentiality under analogous Exemption 7(D) of the FOIA where confidential information has become public). In the case before us, the source asked for and was promised confidentiality before providing information to the DOE. Moreover, the Director had contacted the source, who reiterated a desire for confidentiality. Determination Letter at 2. Under these circumstances, we cannot find a waiver of confidentiality.

Finally, Mr. Chavez argues that the withholding of the memorandum denies him his right under the Privacy Act to correct erroneous information in his personnel security file, and his constitutional right to be apprised of the charges against him. Although the Privacy Act does grant individuals access to

government files containing information about them, that access is circumscribed by other provisions of the Act. As we previously stated, the Act permits agencies to protect certain systems of records from disclosure to the extent that those records contain information that falls under one of the Act's exemptions. 5 U.S.C. § 552a(j), (k). The withheld document is contained in the system of records denominated as DOE-43, "Personnel Security Clearance Files," which has been excepted from the access provisions of the Act pursuant to Exemption k(5). 10 C.F.R. § 1008.12(b)(3)(ii). Therefore, the withheld memorandum is not subject to disclosure or amendment under the Act. Any other result would effectively eviscerate Exemption k(5). The requester "can have access to the records, except parts identifying [the source] . . . unless they are otherwise exempted . . . There is some impediment by operation of the exemptions but that must be accepted unless the exceptions are to be destroyed." Hernandez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982).

We find Mr. Chavez's constitutional argument to be equally without merit. The record does not indicate that any disciplinary proceeding against Mr. Chavez has been initiated. Therefore, no formal charges, of which Mr. Chavez would have to be apprised, have been brought. Should such charges be brought, the extent to which he will be advised of material in his security clearance file is an issue that will have to be considered carefully. The Director's determination withholding the memorandum at this time does not deprive Mr. Chavez of life, liberty or property without due process of law pursuant to the Fifth Amendment of the Constitution. For the reasons set forth above, we will deny Mr. Chavez's Appeal.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal filed by Roy Chavez on April 6, 1999 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552a(g). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 5, 1999

(1)Mr. Chavez does not contest the Director's determination with regard to Exemption 7(D) of the FOIA. However, we have reviewed the Director's application of that Exemption, and we conclude that he properly withheld the memorandum under 7(D).

Case No. VFA-0491, 27 DOE ¶ 80,204

May 5, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wilma Louise Ingram

Date of Filing: April 9, 1999

Case Number: VFA-0491

On April 9, 1999, Wilma Louise Ingram filed an Appeal from an April 1, 1999 determination of the Director of the Office of External Affairs of the Department of Energy's (DOE) Richland Operations Office (Director). The Director issued that determination in response to Ms. Ingram's request for information filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The Appeal, if granted, would require the DOE's Richland Operations Office to release the requested information.

Background

Ms. Ingram filed a request under the Privacy Act in which she sought copies of medical and school records pertaining to her. In her determination, the Director informed Ms. Ingram that the DOE does not have any school records pertaining to her. Furthermore, the Director stated that her office conducted a search using Ms. Ingram's name and social security number, but found no medical records pertaining to her. Ms. Ingram contends that she was subjected to radiation releases from Hanford while she attended elementary school in the Spokane, Washington area. She believes that the DOE must have records pertaining to her exposure to these radiation releases. For this reason, Ms. Ingram requests that the DOE conduct a further search for responsive information.

Analysis

The Privacy Act requires, *inter alia*, that each federal agency permit an individual to gain access to information pertaining to him contained in any system of records the agency maintained. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information can be retrieved by using the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

We have investigated the Director's search made in response to Ms. Ingram's request and find it fully complies with the requirements of the Privacy Act. In response to Ms. Ingram's request, the Director conducted a thorough search of the relevant system

of records using Ms. Ingram's name and her social security number, but found no information responsive to Ms. Ingram's request. The Director's representative further indicated that the system of records searched, DOE-33 "Personnel Medical Records," is the only system of records likely to contain

information pertaining to medical records. See Record of April 20, 1999 Telephone Conversation between Leonard Tao, OHA Attorney, and Angela Lowman, Richland Operations Office. Based on the foregoing, we conclude that the Director has adequately searched all the systems of records under Richland's control that might reasonably be expected to contain the material sought by Ms. Ingram.

Furthermore, since Ms. Ingram remembers being tested for radiation exposure while attending elementary school, we asked the Director's representative to search Richland's records using the names of the elementary schools Ms. Ingram attended. The Director's representative searched records entitled "Dietary Studies for Local School Children" and confirmed that the DOE had some records for schools in the Tri-Cities area near Hanford, but no records for the schools Ms. Ingram attended in the Spokane area. Id. Accordingly, we must deny the present Appeal.

It Is Therefore Ordered That:

(1) The Privacy Act Appeal Wilma L. Ingram filed on April 9, 1999, OHA Case No. VFA- 0491, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 5, 1999

Case No. VFA-0492, 27 DOE ¶ 80,205

May 7, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wray & Kracht

Date of Filing: April 9, 1999

Case Number: VFA-0492

Wray & Kracht (Wray) filed this Appeal on April 9, 1999 with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE's Strategic Petroleum Reserve Project Management Office (SPRO) issued to Wray on March 10, 1999. The determination concerned a request for information that Wray submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, SPRO would be required to release any responsive material.

I. Background

Wray is a law firm that represents a subcontractor of SPRO's management and operating contractor, DynMcDermott Petroleum Operations Company (DM). On December 18, 1998, Wray requested copies of several categories of documents, including (1) DOE Performance Evaluation Committee Reports (PECs) from September 1996 to September 1998; and (2) a copy of DM's Responses to the PECs (Responses).(1) On March 10, 1999, SPRO provided some responsive material to Wray, but withheld the PECs and Responses in their entirety. Letter from SPRO to Wray (March 10, 1999) (Determination Letter). In its determination, SPRO withheld the PECs and Responses under Exemption 5, and justified its action by explaining that "[t]he subject documents are recommendatory in nature and consist of opinions which are part of the process by which governmental decisions and policies are formulated." Determination Letter at 2.

Wray appeals this determination on several grounds. First, Wray argues that SPRO has waived the deliberative process privilege by incorporating the withheld material into the Award Fee Letter, which SPRO released to Wray in response to the FOIA request. Letter from Wray to Director, OHA (April 9, 1999) (Appeal) at 3. Second, Wray argues that SPRO did not comply with DOE regulations, which require a statement explaining why discretionary release was not appropriate, and also require SPRO to address the issue of releasing any segregable, nonexempt factual material. Appeal at 1. Finally, Wray contends that the documents at issue contain only "objective, factual reports" of DM's performance and thus are not associated with the deliberative process. Appeal at 3.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation

with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*NLRB*). The "deliberative process" privilege falls under this definition of exclusion, and this is the privilege that SPRO relied upon in its determination. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. *See Matthew Cherney, M.D.*, 27 DOE ¶ 80,187 (1999); *Los Alamos Study Group*, 27 DOE ¶ 80,177 (1999) (*LASG*); *Edwin S. Rothschild*, 27 DOE ¶ 80,150 (1998) (*Rothschild*). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) *(Mink)* (quoting*Kaiser Aluminum & Chem. Corp., v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *NLRB*, 421 U.S. at 151 (1975).

Wray contends that SPRO waived the deliberative process privilege by incorporating material from the PECs and Responses into the Award Fee Letter. Wray states that "information which may otherwise be privileged is discoverable if the Government incorporates it either expressly or by reference into the agency's preliminary or final decision. This is consistent with . . . the principle articulated by the Supreme Court in *Mink* that statements of policy and deliberations that become final policy are not privileged . . . ." Appeal at 3. We do not agree. We reviewed *Mink* and found no support for Wray's interpretation of that case asserted here. Rather, *Mink* supports our conclusion that the privilege continues to apply to pre-decisional material used in the deliberative process even after the agency has determined and disclosed to the public its final policy. *See Mink*, 410 U.S. at 87 (advisory opinions merit privilege in order to promote frank discussions of policy matters in writing). *See also Vaughn*, 523 F.2d at 1144 (predecisional material is privileged under Exemption 5 so long as it is part of the agency's deliberative process); *Rothschild*, 27 DOE at 80,614 (1998) (deliberative, pre-decisional material does not lose its privilege under the FOIA when that material is subsequently used as the basis for final agency policy). Therefore, we find that SPRO did not waive the deliberative process privilege when it released the Award Fee Letter to Wray.

Wray also argues that the determination letter did not address the issues of discretionary disclosure and the release of segregable, nonexempt factual material. DOE regulations provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 522 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. Thus, under DOE regulations, SPRO is obligated to consider release of the withheld documents if such release is in the public interest. (2) In addition, the FOIA requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). S*ee also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). Since the determination letter did not consider the issue of discretionary disclosure or identify segregable, nonexempt factual material, we find SPRO's determination to be insufficient in this regard.

Finally, Wray submits that the withheld documents contain only factual material. After a careful review of the documents, this office finds that the responsive information contains both factual and non-factual material. Much of the information is purely opinion and reflects the observations of various individuals on DM's performance during a six-month period. Nonetheless, the documents also contain some reasonably segregable factual information (*e.g.*, dates of subcontract awards, project completion dates, report dates) that may not be withheld under Exemption 5 unless inextricably intertwined with exempt material.

III. Conclusion

Our review of the documents at issue reveals that they contain reasonably segregable factual material that is subject to release. However, these documents were withheld in their entirety. In addition, the Determination Letter did not address the issues of whether release of the withheld material would be in the public interest. Accordingly, we shall remand this matter to SPRO. On remand, SPRO must review the withheld documents and segregate and release all purely factual portions of the documents, or issue a new determination that justifies further withholding. In addition, in the new determination, SPRO must address discretionary disclosure and the issue of the public interest in the withheld material.(3)

It Is Therefore Ordered That:

(1) The Appeal filed on April 9, 1999 by Wray & Kracht, OHA Case No. VFA-0492, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office, for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 7, 1999

(1)SPRO evaluates DM's performance as management and operating contractor every six months using PECs, recommendations from the Award Fee Board, and DM's self- assessment. *See, e.g.*, Letter from Deputy Assistant Secretary, SPRO, to Project Manager, DM (May 15, 1998) (Award Fee Letter). Using these documents, SPRO determines DM's award fee for that evaluation period in accordance with the provisions of the contract. *Id.*

(2)We note that Wray has not provided any arguments which would support a conclusion that it would further the public interest if the withheld material were disclosed.

(3)We note that it is DOE policy with respect to Exemption 5 to withhold only information that if released would result in foreseeable harm to the interests that it protects. Thus, SPRO may withhold information under Exemption 5 only if its disclosure would result in foreseeable harm to the interests that are protected by the deliberative process privilege. *See LASG*, 27 DOE at 80,692-693.

Case No. VFA-0493, 27 DOE ¶ 80,209

May 28, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Matthew Cherney, M.D.

Date of Filing: April 19, 1999

Case Number: VFA-0493

Matthew Cherney, M.D., (Dr. Cherney) filed this Appeal in response to a determination that the Department of Energy's Office of the Inspector General (OIG) issued to him on April 5, 1999. The determination dealt with a request for information that Dr. Cherney submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department at 10 C.F.R. Part 1004. In his Appeal, Dr. Cherney requests the release of responsive material. As explained below, we will remand Dr. Cherney's request to the OIG for a new determination.

I. Background

On March 9, 1999, Dr. Cherney filed a request under the FOIA for copies of documents relating to an inquiry conducted by the OIG. On April 5, the OIG advised Dr. Cherney that the documents would be withheld because the inquiry was still open. The OIG explained that:

A review of the responsive documents ... has been made.... The responsive documents are being withheld in their entirety pursuant to ... Exemption 7(A).... There has not been a final determination concerning this matter. Accordingly, Exemption 7(A) has been applied to the responsive documents. Release of the material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding.

II. Analysis

The basic policy of the FOIA is to promote disclosure of agency records. 5 U.S.C. § 552(a)(3). However, the FOIA provides nine exemptions for specific types of information that the agency may withhold at its discretion. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)-(b)(9). The exemption asserted by OIG in this case, Exemption 7(A), permits an agency to withhold at its discretion “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A); 10 C.F.R. § 1004.10(b)(7)(i).

In order to qualify for exemption from disclosure under Exemption 7(A), an investigatory record must meet two criteria: (1) it must be compiled for law enforcement purposes, and (2) its release could reasonably be expected to interfere with an enforcement proceeding. *Solar Sources, Inc. v. U. S.*, 142 F.3d 1033, 1037 (7th Cir. 1998) (*Solar Sources*); *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989); *Bevis*

v. Department Of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (*Bevis*). We will consider the two criteria separately.

1. Whether the Documents Were Compiled for Law Enforcement Purposes

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for "law enforcement purposes." *Scripps Institute of Oceanography,* 27 DOE ¶ 80,160 (1998) (*Scripps*); *William Payne,* 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). Dr. Cherney argues strenuously that the OIG is not a law enforcement agency, and that its files are therefore not compiled for law enforcement purposes. He contends that "OIG is not a law enforcement operation. They do audits, write reports and the like.... [OIG has] no capacity to act as law enforcement does. They cannot indict someone. They cannot arrest someone."

Dr. Cherney's arguments are beside the point. The determination as to whether a particular activity is for "law enforcement purposes" in terms of Exemption 7 does not turn on the agency's ability to issue indictments or make arrests. Instead, courts have reasoned that "law enforcement purposes" include not only investigations based on civil and criminal law, but statutes involving administrative and regulatory proceedings as well. *Center for National Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1973) (*Center for National Policy Review)*. Consequently, courts have extended Exemption 7 protection to many activities other than traditional police work. We cite the following examples of successful assertions of Exemption 7: *Center for National Policy Review* (investigation by the Office of Civil Rights of the Department of Health, Education, and Welfare); *Kay v. F.C.C.* (867 F. Supp. 11 (D.D.C. 1994) (investigation by the Federal Communications Commission for determining whether a license holder violated FCC rules); *Ehringhaus v. F.T.C*., 525 F. Supp. 21 (D.D.C. 1980) (investigation by the Federal Trade Commission into cigarette advertising practices); *Mittleman v. Office of Personnel Management,* 76 F.3d 1240 (D.C. Cir. 1996) (background investigation for an individual's security clearance).

The OIG is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). Thus, we have consistently found that the OIG compiles information for law enforcement purposes within the meaning of Exemption 7. *Scripps*, 27 DOE at 80,648; *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *Keci Corporation*, 26 DOE ¶ 80,149 (1997). Similarly, courts have found that the Inspector General's offices in other agencies exercise the requisite law enforcement functions to protect their investigatory files under Exemption 7. *E.g., Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). We therefore reject Dr. Cherney's arguments, and find that the OIG's inquiry file was compiled for law enforcement purposes.

2. Whether Release of the Documents Could Reasonably be Expected to

Interfere with Enforcement Proceedings

In order to withhold documents compiled for law enforcement purposes, the agency must show that disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings. *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978) (*NLRB*);*Solar Sources*, 142 F.2d at 1037; *Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*).

However, in asserting interference, the agency need not make a determination on a document-by-document basis. Instead, it may take a generic approach and “group documents into relevant categories that are sufficiently distinct to allow a court to grasp how each ... category of documents, if disclosed, would interfere with the investigation.” *Bevis*, 801 F.2d at 1389, quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (*Crooker*). An acceptable category must be functional; that is, it must allow a court to trace a rational link between the nature of the document and the alleged likely interference. *Crooker*, 789 F.2d at 64, 67. If the category of records is of the type that could

reasonably be expected to interfere with enforcement proceedings generally, the agency need not make any particularized, document-specific showing of interference. *NLRB*, 437 U.S. at 224.

It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis*, 801 F.2d at 1389. Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray, Jacobs, and Abel*, 25 DOE ¶ 80,130 at 80576 (1995).

We recognize that in categorizing the responsive material, "a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." *Curran v. Department of Justice*, 813 F.2d 473 at 475 (1st Cir. 1987). However, courts have provided guidance as to what constitutes an adequate "generic category" for purposes of Exemption 7(A). The general principle uniting these decisions is that the "functional" description of the withheld material must be sufficient to indicate the type of interference threatening the law enforcement proceeding. *Crooker*, 789 F.2d at 67.

Thus, describing material withheld under Exemption 7 as "details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; [and] investigative reports furnished to the prosecuting attorneys," constitutes sufficient functional categories. *Spannaus v. Department of Justice*, 813 F.2d 1285 at 1287, 1289 (4th Cir. 1987). Similarly, functional categories describing withheld material as "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" are sufficient. *Bevis*, 801 F.2d at 1390.

On the other hand, categories describing material "only as 'teletypes,' 'airtels,' or 'letters'" are insufficient. *Id.* In following these principles, the U.S. District Court for the District of Columbia has determined that:

The ... descriptions of the materials withheld pursuant to Exemption 7(A) [as] "an administrative inquiry file which is currently pending" and "records or information [in an investigation file] that were garnered from an administrative inquiry ... which is still pending" ... are patently inadequate to permit the Court to determine whether Exemption 7(A) was properly invoked.

Putnam v. Department of Justice, 873 F. Supp. 705, 714 (D.D.C. 1995) (*Putnam*).

III. Conclusion

In its determination letter, OIG stated that it was withholding all responsive documents on the ground that "there has not been a final determination concerning this matter." We find that this explanation for withholding under Exemption 7(A), like the one rejected by the court in *Putnam*, does not describe a functional category or categories with sufficient detail to permit us to determine the type of interference threatening the law enforcement proceeding. *Firearms Training Systems*, 21 DOE ¶ 80,119 (1991); *Stephen Quakenbush*, 16 DOE ¶ 80,125 (1987). Because OIG did not conduct a document-by-document review to assign each document to a functional category, and did not explain how the release of information from a functional category would interfere with a law enforcement proceeding, we will remand this matter for a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew Cherney, M.D., Case No. VFA-0493, is hereby granted as set forth in Paragraph 2 below.

(2) This matter is hereby remanded to the Director of the Office of the Inspector General, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 28, 1999

Case No. VFA-0494, 27 DOE ¶ 80,206

May 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Vladeck, Waldman, Elias & Engelhard

Date of Filing: April 13, 1999

Case Number: VFA-0494

On April 13, 1999, Vladeck, Waldman, Elias & Engelhard (Appellant) filed an Appeal from a final determination issued on March 15, 1999 by the Department of Energy's Savannah River Operations Office (SR). In that determination, SR released several documents in response to a June 25, 1998 Request for Information concerning a DOE contractor's Affirmative Action Programs. This request was filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, SR also withheld some responsive information under FOIA Exemption 4. This Appeal, if granted, would require SR to release the withheld information.

I. BACKGROUND

On March 15, 1999, SR issued a determination letter releasing several documents to the Appellant. However, SR withheld all or portions of ten documents under FOIA Exemptions 4 and 6. Determination Letter at 1. The present Appeal was submitted on April 13, 1999, challenging SR's withholdings under Exemption 4. (1)

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(4) (Exemption 4). Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g. Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending).

The Court of Appeals for the Second Circuit has specifically held that the term "commercial" as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Next the agency must determine whether the information is "obtained from a person." It is well settled that information generated by the federal government is not "obtained from a person" and is therefore excluded from Exemption 4's coverage. *See, e.g. Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980). Next the agency must determine whether the information is "privileged or confidential." If the information is subject to a valid claim of legal privilege on the part of its submitter, it may properly be withheld under Exemption 4.

In order to determine whether the information is "confidential" the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained before withholding it under Exemption 4. *National Parks*, 498 F.2d 765 *at* 770; *Critical Mass*, 975 F.2d 871 *at* 879, *cert. denied*, 113 S. Ct. 1579 (1993).

In addition, once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). On the other hand, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C.Cir. 1983); *Kleppe*, 547 F.2d at 680 ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

We contacted SR to discuss its withholdings under Exemption 4. As a result of our discussions, SR has agreed to release a substantial portion of the information it originally withheld under Exemption 4. Specifically, SR agreed to release the documents identified by the Appellant as Request Nos. 1, 2, 7(a), 7(c), and 9. Accordingly, the portions of the present appeal relating to those documents are moot.

We turn now to our consideration of SR's withholding of the document identified by the Appellant as "Request No. 4: Letter re: WSRC Self Evaluation." During our discussions with SR about this document, SR advanced a justification for withholding under Exemption 4 different from the one it provided in the Determination Letter. Accordingly, we shall remand this matter to SR for a thorough articulation of this new justification for withholding.

SR also withheld a document described by the Appellant as: "Request No. 7b: WSRC Discrimination charges." After reviewing this document, we find that it cannot be withheld under Exemption 4. The document is a listing of discrimination charges filed against the DOE contractor tasked with the management and operation of DOE's Savannah River Site. The document, which was prepared by the

DOE Contractor, lists each claim's filing date, the type of claim, the alleged discriminatory action, the agency that each claim was filed with and the status of each claim. In addition, the document lists the name, gender and race of each claimant. In our discussions, SR was unable to articulate how release of this document could reasonably be expected to cause its submitter substantial competitive harm. The only justification provided by SR in our discussions was that release of this information could result in an invasion of personal privacy. While that justification may be valid, it cannot be used to withhold information under Exemption 4. Moreover, any invasion of personal privacy could be prevented by providing the Appellant with a copy of this document with the individuals' names and other identifying information redacted.

Accordingly, on remand, SR should either release this document in its entirety or release a redacted version of it with a new determination letter that fully explains and justifies any withholdings or redactions.

We now turn our consideration to the document described by the Appellant as "Request No. 8: Craft Activity at SRS." SR has informed us that it released to the Appellant all of this document except for individuals' Social Security numbers, which it withheld under Exemption 6, and the wage rates that it pays members of certain professions. Since the Appellant is not appealing SR's withholdings under Exemption 6, we have confined our analysis of this document to SR's withholding of wage rates. SR explained that release of the wage rates could reasonably be expected to result in substantial harm to the submitter, a DOE Contractor. Specifically, SR indicated that release of this information would facilitate "raiding" of the submitter's staff by competitors. We agree. Accordingly, we are upholding SR's withholding of wage rates under Exemption 4.

Finally we turn our consideration to the documents described by the Appellant as "Request No. 10: Diversity findings from Towers Perrin Survey" and "Request No. 11: WSRC Executive Summary." SR agrees that its determination letter does not adequately justify the withholding of these documents and has therefore requested that this portion of the appeal be remanded to it so that it can provide a more thorough justification. We will therefore remand this portion of the appeal to SR for further action consistent with this determination.

III. CONCLUSION

We are remanding several portions of the present Appeal to SR, specifically, those portions of the Appeal concerning Request Nos. 4, 7b, 10 and 11. On remand, SR shall either release the withheld information or provide a new justification for withholding. If SR continues to withhold information under Exemption 4, it must explain which Exemption 4 test it is applying. In doing so, it must provide more than a simple restatement of the applicable test. Instead, it should include a statement of the reason for any withholding, and a brief explanation of how the exemption applies to the matter withheld. 10 C.F.R. § 1004.7(b)(1); *William H. Payne*, 26 DOE ¶ 80,221 at 80,861 (1997); *Davis Wright & Jones*, 19 DOE ¶ 80,104 at 80,510 (1989). Since SR has convinced us that the remainder of its withholdings under Exemption 4 were proper, the rest of the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Vladeck, Waldman, Ellis & Engelhard, Case No. VFA-0494, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Savannah River Operations Office, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are

situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 12, 1999

(1)The Appeal does not contest SR's withholdings under Exemption 6.

Case No. VFA-0496, 27 DOE ¶ 80,210

June 7, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Sowell, Todd, Laffitte, Beard & Watson, L.L.C.

Date of Filing: May 10, 1999

Case Number: VFA-0496

Sowell, Todd, Laffitte, Beard & Watson, L.L.C. (Sowell Todd) filed an Appeal from a series of five determinations issued to the firm in March and April 1999, by a number of offices at Department of Energy (DOE) Headquarters and the DOE's Savannah River Operations Office (Savannah River). Those determinations, taken together, constitute the response to two requests for information that Sowell Todd filed with the DOE, dated November 23, 1998 and February 23, 1999, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Altogether, the DOE identified more than 90 documents as responsive to the requests. Of that number, some were released to Sowell Todd in their entirety, some were withheld in whole or in part, and some have not yet been the subject of a determination regarding release. This Appeal, if granted, would require the DOE to release all responsive documents in their entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

The November 19 request was directed by DOE Headquarters to the Office of the Inspector General (OIG) for response.(1) The OIG's determination is one of the five determinations that Sowell Todd has appealed. It was issued on March 23, 1999 (Case No. 9811230001) and it identified 63 documents as responsive to the request. Each of these documents was handled in one of four ways: (a) it was released in its entirety to Sowell Todd (five documents, including one released earlier); (b) it was referred to Savannah River, because that office created the document (some of these 25 documents contained OIG redactions under Exemptions 5, 6 or 7(C), or a combination of these exemptions, of the Freedom of Information Act (FOIA)); (c) it was referred to the Office of Worker and Community Transition, because that office created the document (two documents); or (d) it was withheld in whole or in part under Exemption 5, 6 or 7(C), or a combination thereof (31 documents).

On April 14, 1999, Savannah River issued a partial determination with respect to the 25 documents that OIG referred to it. Savannah River named this case SR-99-020, and this is the second of the five determinations that Sowell Todd has appealed. In its determination, Savannah River released to the

requester eight of the 25 documents in their entirety. The remaining 17 documents are still under consideration at this time. Because each of the documents was either released in full or is not yet the subject of a determination regarding its release, we find no grounds exist upon which to appeal this determination. OHA's jurisdiction in FOIA appeals extends only to cases where there has been a denial of a request for records. See 10 C.F.R. § 1004.8(a); David E. Ridenour, 27 DOE ¶ 80,143 (1998). We shall therefore dismiss that portion of Sowell Todd's appeal which relates to this determination letter. (2)

The Office of Worker and Community Transition responded to the November 19 request on April 8, 1999, and this response is the third of the five determinations under consideration on this appeal. Because this office released in their entirety the two documents that had been referred to it, there is no issue ripe for appellate review. We will therefore dismiss that portion of Sowell Todd's appeal which relates to this determination letter.

The fourth and fifth determination letters that Sowell Todd has appealed arise from a separate request that the firm submitted to Savannah River on February 23, 1999. In this request, Sowell Todd sought any documents regarding Savannah River's Voluntary Separation Program (VSP) and a review conducted by Savannah River to determine if violations of the VSP had occurred. This request was assigned Case No. SR-99-013. In a partial response to this request, on March 30, 1999, Savannah River identified 30 responsive documents, and released 25 of them in their entirety. This letter is the fourth of the five determinations that Sowell Todd has appealed and it challenges the withholding of portions of three of the five remaining documents under Exemption 6 of the FOIA. The other two responsive documents originated at Headquarters and, for that reason, Savannah River referred them to Headquarters for a determination.(3) Headquarters assigned the referral Case No. 9904070001. The fifth determination letter that Sowell Todd has appealed to us is one dated April 12, 1999 that advises the firm that the Office of the Executive Secretariat (DOE Headquarters) had received the referral from Savannah River; it contains no determination regarding the release of the two referred documents. Because the documents have not yet the subject of a determination regarding their release, no determination exists upon which an appeal can be taken, as discussed above. We therefore shall dismiss that portion of Sowell Todd's appeal which relates to this fifth determination letter.

This appeal, then, concerns the material withheld from 34 documents that the DOE identified as responsive to Sowell Todd's November 19, 1998 and February 23, 1999 requests.(4) OIG withheld information under Exemptions 5, 6, and 7(C) from 31 documents in its March 23, 1999 determination letter. Savannah River withheld information under Exemption 6 from three additional documents in its March 30, 1999 determination letter. All other responsive documents have either been released to Sowell Todd or are documents on which no release determinations have been completed. We have notified the affected offices that they should complete processing those documents as soon as possible.

In its appeal Sowell Todd argues that the application of Exemption 7(C) to the documents is inappropriate since the documents were not collected for law enforcement purposes. Additionally, it argues that material withheld pursuant to Exemption 6 was inappropriately withheld since release of such material would not constitute an unwarranted invasion of personal privacy. Sowell Todd asserts that the release of the withheld material would be in the public interest. Lastly, Sowell Todd argues that the documents should be released in their entirety because the documents at issue will become the subject of "subsequent requests for substantially the same records under 5 U.S.C. § 552(2)(D)." Appeal Letter from Marcy W. Johnson, Sowell Todd, to Director, OHA (April 29, 1999) at 2.

II. ANALYSIS

We have reviewed each of the documents at issue in the present case. We find that OIG and Savannah River properly withheld pursuant to the FOIA the vast majority of the information redacted from the documents. However, we have also determined that there is a small amount of material that was not properly withheld pursuant to the exemptions cited in the OIG's determination letter.

As an initial matter, Sowell Todd has advanced a general argument that all of the documents should be released because they "are likely to become the subject of subsequent requests for substantially the same records under 5 U.S.C. § 552(2)(D)." Appeal Letter from Marcy W. Johnson, Sowell Todd, to Director, OHA (April 29, 1999) at 2. We were unable to find this statute. We assume, however, that Sowell Todd refers to 5 U.S.C. § 552(a)(2)(D) which states:

Each agency, in accordance with published rules shall make available for public inspection and copying . . . .copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records . . .

5 U.S.C. § 552(a)(2)(D). This section provides that when agencies determine that previously released documents (including those released pursuant to the FOIA) might be the subject of future requests, such documents are to be made available for public inspection in an agency reading room or web site. This provision does not mandate that exemptions from mandatory disclosure become inapplicable to documents that are subjects of repeated FOIA requests. We therefore reject this argument.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, the document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

OIG withheld, in whole or in part, eight documents pursuant to Exemption 5's deliberative process privilege. (5) OIG Document No. 2, is a draft copy of a document entitled "Summary Abstract Report of Inspection on Allegation Regarding Voluntary Separation Program, Inspection No. S97IS030, Report No. " (Abstract). OIG Document No. 2 also contains a separate sheet ("Report Reference Sheet") detailing comments about the draft. The Abstract and Report Reference Sheet are predecisional and deliberative. Consequently, we conclude that most of the material was properly protected by Exemption 5. However, the Report Reference Sheet does contain a small amount of segregable factual material consisting of column headings, which should have been released to Sowell Todd. Additionally, the Abstract has some

segregable material consisting of all section titles, other than those referring to an individual, and the address and signature blocks. Consequently, on remand OIG should either release this material or issue another determination explaining why this material is exempt pursuant to the FOIA. (6)

OIG Document No. 36 consists of two almost identical memoranda, one of which has been signed, transmitting a copy of a draft document entitled "Report on Inspection of an Allegation Regarding the Voluntary Separation Program at the Savannah River Operations Office" (Report). The memoranda do not appear to contain any deliberative material. Thus, the memoranda themselves are not withholdable pursuant to Exemption 5. The draft Report, however, contains predecisional, deliberative material that is protectable under Exemption 5. There is some segregable factual material, such as the title page and table of contents (other than the listings under "Findings and Recommendations"), which may be released. Additionally, most of the section titles in the Report may also be released except for those that are withholdable in the table of contents. On remand, OIG should either release this material or issue another determination explaining why this material may be withheld pursuant to the FOIA.

OIG Document No. 37 is two copies of a memorandum from Savannah River to OIG transmitting its one-page response to the draft Report. (7) While most of the memorandum itself contains predecisional, deliberative material describing Savannah River's opinions regarding the draft Report, there is some segregable non-deliberative material. Specifically, the address block, the first paragraph, as well as the last paragraph and all material below it on page one of the memorandum, consists of non-deliberative material not protectable pursuant to Exemption 5. With regard to the one-page response, the page titles and the first sentence are also non-deliberative and can be released. On remand, OIG should either release this material or issue another determination explaining why the material is withholdable under the FOIA.

OIG Document No. 51 consists of three pages describing suggested changes to the draft Report along with a copy of the draft Report with some suggested changes handwritten into the draft. The first

three pages describing the suggested changes are predecisional and deliberative and are properly protected by Exemption 5. The handwritten comments on the draft Report are also protectable under Exemption 5. The remainder of the draft Report was properly withheld under Exemption 5 with the exceptions noted earlier (segregable material in the title page, table of contents and section headings).

OIG Document No. 54 consists of a draft copy of the Report and Abstract. As described earlier, these are basically predecisional, deliberative documents, which are properly protected by Exemption 5. However, there is a small amount of segregable factual material that can be separated as described in our discussion of OIG Document Nos. 2 and 36. On remand, OIG should either release this material or issue another determination letter explaining why this material can be withheld under the FOIA.

OIG Document No. 56 is a document entitled "Disposition Review: WSRC Voluntary Separation Program." Three sentences of this document were withheld pursuant to Exemption 5.(8) These sentences describe opinions of the author regarding the inspection and as such are predecisional and deliberative. Consequently, we find that OIG properly withheld them pursuant to Exemption 5. OIG Document No. 59 is a Memorandum of Interview authored by an OIG investigator. Two paragraphs were withheld pursuant to Exemption 5. The paragraphs consists of a report indicating with whom the inspector spoke and the substance of their conversations. This material is not deliberative and as such is not protectable under Exemption 5. On remand, OIG should either release the material withheld in OIG Document No. 59 pursuant to Exemption 5 or issue another determination explaining why this material may be withheld under the FOIA.

OIG Document No. 62 is a one page handwritten note that contains various items apparently relating to the inspection at Savannah River. Because it is unclear from the document itself if these items represent information obtained in the inspection or represent opinions of the author, we will remand this document to OIG so that, on remand, it may issue a more detailed determination explaining why this document should be protected under Exemption 5 or another FOIA exemption. If OIG decides that no FOIA

exemption is applicable, then the document should be released.

B. Exemptions 6 and 7(C)

1. OIG Documents

OIG withheld portions of 25 documents pursuant to both Exemptions 6 and 7(C).(9) In these documents, OIG withheld identifying information such as, names, job titles and salary information mentioned in these documents. (10)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted

invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3 (Exemption 6); Stone v. FBI, 727 F. Supp. 662, 663-64 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard may be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). Sowell Todd asserts that OIG is not a law enforcement agency and thus Exemption 7(C) may not be invoked to withhold material in the OIG documents.

The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (Ortiz) and cases cited therein. In the present case, the OIG Documents were created pursuant to an

investigation of alleged misconduct concerning the Voluntary Separation Program at DOE's facility at Savannah River. Consequently, the OIG Documents at issue were created for a law enforcement purpose.(11)

(i) Privacy Interest

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals mentioned in law enforcement files, whether they be suspects, witnesses or investigators. See, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990); Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897, 904 (D.C. Cir. 1996) (Computer Professionals). Accordingly, we find that the individuals whose identities were withheld in this case have significant privacy interests in maintaining their confidentiality.

(ii) Public Interest in Disclosure

In its appeal, Sowell Todd argues that release of all the withheld information in the documents would be in the public interest but does not specifically articulate how disclosure would be in the public interest. In Reporters Committee, the Supreme Court found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's basic purpose. Reporters Committee, 489 U.S. at 772. The Court identified the basic purpose of the FOIA as "'to open agency action to the light of public scrutiny.'" Id. (quoting Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)). Therefore, the Court held that official information that sheds light on an agency's performance of its statutory duties falls squarely within the FOIA's statutory purpose. Id. at 773. The Court further found that information about private citizens that is contained in government files but reveals little or nothing about an agency's own conduct does not further the basic purpose of the FOIA. Id. After examining the documents in question, it is not apparent that release of the individuals' names and identifying information would contribute to the public's understanding of the DOE's behavior or performance in carrying out its duties. Thus, in the present case, we conclude there is little or no public interest in the disclosure of the names and identifying information withheld in the documents at issue in the present case.

(iii) The Balancing Test

Because release of the individuals' names or other identifying information could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against little or no public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute an unwarranted invasion of personal privacy. Consequently, we find that the OIG properly withheld the information redacted from OIG Document Nos. 4, 5, 13, 14, 18, 21-24, 27-31, 33, 34, 41, 45, 47-50, 56, 59 and 63 under Exemptions 6 and 7(C).

2. SR Documents

Savannah River withheld the names of individuals from SR Document Nos. 11d, 13 and 13a pursuant to Exemption 6 alone. SR Document No. 11d is a letter responding to the OIG's inspection of Savannah River's Voluntary Separation Program. This letter explains the process of how a particular person's application for the Voluntary Separation Program was handled. SR Documents Nos. 13 and 13a consist of a letter and attachment in which another individual's subcontracting costs have been deemed to be unallowable and the charges have been withdrawn from Westinghouse Savannah River Corporation (WSRC), the Management and Operating contractor at Savannah River. Only the individuals' names are withheld in each of these documents.

The individual named in SR Document 11d has a strong privacy interest in keeping his or her identity private especially in light of the fact that his or her name is mentioned in response to an OIG investigation.

The individual mentioned in SR Document Nos. 13 and 13a has a lesser privacy interest in not having his or her name associated with the improper charging of WSRC for costs related to the individual's services. As discussed above, we balance these privacy interests against whether or not release of the documents would further the public interest by shedding light on the operations and activities of the Government. In this case, we find no public interest which would be furthered by release of the names withheld in the SR Documents since the names would add little or no additional information about DOE's own conduct. Because release of the withheld names in SR Document Nos. 11d, 13 and 13a would not further the public interest and because the individuals have privacy interests in keeping their names private, we find that release of the names in the SR Documents would constitute a clearly unwarranted invasion of personal privacy. Consequently, we believe that Savannah River properly applied Exemption 6 to SR Documents Nos. 11d, 13 and 13a.

C. The Public Interest in Disclosure of the Withheld Material

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that OIG properly applied Exemption 5 to a portion of the requested information, we must consider whether the public interest nevertheless demands disclosure of the Exemption 5 material pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. With regard to the material properly withheld in this matter pursuant to Exemption 5, the requested information consists of the opinions and recommendations of OIG investigators regarding an OIG inspection. The release of this information would in our opinion impair the willingness of OIG investigators to make frank statements of opinion on sensitive issues such as whether individuals or DOE entities have committed violations of DOE regulations. Therefore such release would seriously impede OIG's ability to investigate fraud, waste and abuse in DOE programs. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest. We need not make a determination of this sort with respect to the information withheld under Exemptions 6 and 7(C) because, as discussed above, we have already considered the public interest in release of that information.

It Is Therefore Ordered That:

(1) The Appeal filed by Sowell, Todd, Laffitte, Beard & Watson, L.L.C. on May 6, 1998, Case No. VFA-0496, is hereby dismissed with respect to the determinations that the DOE's Savannah River Operations Office issued on April 14, 1999 and the DOE's Office of Worker and Community Transition issued on April 8, 1999. The Appeal is also dismissed with regard to the letter issued on April 12, 1999 by the Office of the Executive Secretariat. The Appeal is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Office of Inspector General for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 7, 1999

(1)This request was also directed to Savannah River, which responded separately on January 25, 1999, in Case No. SR-98-073, with the release of three documents. Sowell Todd has not appealed this determination.

(2)If a requester does not receive a response at the end of the 20-day period, the requester may deem his administrative remedies as exhausted and has a right to a review in a district court of the United States. 5 U.S.C. § 552(a)(4)(B), (6)(A)(i), and (6)(C)(i); cf. Pollack v. Department of Justice, 49 F.3d 115, 118-19 (4th Cir. 1995) cert. denied, 516 U.S. 843 (1995) (decided under prior 10-day deadline).

(3)In a final response to the February 23, 1999 request, Savannah River issued a determination on April 12, 1999, in which it identified another document responsive to the request. That document was withheld in part under Exemption 5 of the FOIA. Sowell Todd has not appealed this determination.

(4)The documents as to which OIG issued a determination regarding in its March 23, 1999 letter and that are the subject of this appeal will be referred to as "OIG Documents." The documents on which SR issued a final determination in its March 30, 1999 letter and which are the subject of this appeal will be refereed to as "SR Documents." This appeal will review the DOE's determinations regarding OIG Document Nos. 2, 4, 5, 13, 14, 18, 21-24, 27-31, 33, 34, 36, 37, 41, 45, 47-51, 54, 56, 59, 62 and 63 as well as SR Document Nos. 11d, 13 and 13a.

(5)OIG Document Nos. 2, 36, 37, 51, 54 and 62 were withheld in their entirety pursuant to Exemption 5. OIG Document Nos. 56 and 59 were withheld in part pursuant to Exemption 5.

(6)OIG informed us that its policy with regard to draft documents deemed responsive to a FOIA request is to generally withhold them in their entirety since the material that is releasable, specifically, portions of the drafts that are expressly incorporated into the final version of a document, are already in the possession in the requester when he or she receives the final version of the document. The OIG determination letter informs the requester that if he or she wishes a redacted portion of a draft document OIG will promptly issue a redacted version of the draft document. Because we are remanding this matter to OIG so that non-deliberative material can be released to Sowell Todd, OIG should also review all of the material withheld pursuant to Exemption 5 as described in its determination letter and release any material that has been expressly adopted in any final versions of OIG documents articulating a final agency position. See Sears, 421 U.S. at 161 (documents lose protection of deliberative process privilege if such documents are expressly adopted or incorporated by reference).

(7)One of the copies is signed by the manager at Savannah River.

(8)Other portions of this document as well as OIG Document No. 59 were withheld pursuant to Exemptions 6 and 7(C). These withholdings are discussed in the next section infra.

(9)The OIG documents which had material withheld pursuant to Exemptions 6 and 7(C) were OIG Document Nos. 4, 5, 13, 14, 18, 21-24, 27-31, 33, 34, 41, 45, 47-50, 56, 59 and 63. This material consists of documents such as Memoranda of Interviews with various individuals, OIG memoranda to the file and the working papers of OIG investigators.

(10)One handwritten sentence withheld at the bottom of OIG Document No. 22 does not relate to any individual and as such does not implicate any privacy interest. Consequently, it is not protectable pursuant

to Exemption 6 or 7(C). However, because the withheld segment refers to an investigator's deliberative, predecisional analysis of the investigation, we find that it may nevertheless be withheld pursuant to Exemption 5.

(11)Because the SR documents were withheld pursuant to Exemption 6 alone we will specifically discuss the applicability of Exemption 6 to those documents infra.

Case No. VFA-0497, 27 DOE ¶ 80,208

May 26, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Gary S. Foster

Date of Filing:May 10, 1999

Case Number: VFA-0497

On May 10, 1999, Gary S. Foster (the Appellant) filed an Appeal from a determination the Authorizing Official of the Department of Energy's Oak Ridge Operations Office (DOE/OR) issued to him on April 22, 1999. In that determination, the Authorizing Official stated that DOE did not possess records responsive to the request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Authorizing Official further stated that the records were owned by a DOE contractor. In his Appeal, the Appellant asserts that DOE/OR's search for records was inadequate. Further, he stated that even if the requested records were owned by a DOE contractor, they should be subject to release under the FOIA.

Background

In his April 13, 1999 request for information, the Appellant sought photographs that were taken as a result of a concern regarding health and safety practices (known as an employee concern) that he had filed with a DOE office, the Employee Concerns office (EC). The photos were of locations the Appellant identified in his employee concern as possibly containing beryllium. With his request, he included the employee concern report issued by EC which noted that these photos were taken by a photographer with the Lockheed Martin Energy Systems, Inc. (LMES) General Counsel. In her determination, the Authorizing Official stated that no agency records exist regarding this request since the photos were solely owned by either Lockheed Martin Energy Research Corporation or LMES. She further stated that DOE did not possess copies of the photos and her search had not extended to the files of the contractor. Therefore, she denied the request. The Appellant responded that he believes copies of the photos exist at EC and therefore DOE/OR's search was inadequate. In addition, he argued that these photos were created using taxpayers' funds, and thus should be subject to release under the FOIA. Finally, he noted that since DOE should be able to get access to the contractor's records, the records should be considered to be agency records. In addition, he wanted to know why DOE/OR searches contractor-possessed records for some FOIA requests but did not in his case.

Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of

reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted DOE/OR to determine how it conducted the search. We learned that DOE/OR began its search with the LMES photographer who took the requested photos. The photographer informed DOE/OR that the photos were taken at the direction of the LMES General Counsel. The General Counsel had requested that these photos be taken for use in defending LMES against potential charges of evidence destruction in workers' compensation litigation concerning alleged beryllium exposure. The photos have at all times remained in LMES' sole possession. Records of Telephone Conversations between Amy Rothrock, Authorizing Official, DOE/OR, and Dawn L. Goldstein, Staff Attorney, Office of Hearings and Appeals (May 12 and 24, 1999). We believe that LMES was the logical starting place for DOE/OR's search, since the Appellant had included the Employee Concerns report which stated that the photos were taken by an LMES photographer. When Ms. Rothrock found out from LMES that the contractor had never circulated its files to any DOE office, it was reasonable for her to stop her search. We therefore find that DOE/OR conducted an adequate search of records in its possession.

We then inquired whether documents in the possession of LMES might be subject to mandatory release under the FOIA or DOE regulations. The Appellant asserted in his Appeal that all taxpayer- funded records are subject to release under the FOIA. This assertion is incorrect. See International Brotherhood of Electrical Workers, 27 DOE ¶ 80,152 at 80,620 (1998). Our threshold inquiry in this case is whether any of the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that these LMES-possessed photos never became "agency records" of DOE's, and are instead the exclusive property of the contractor. Therefore, they are not subject to release under either the FOIA or DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as LMES, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595-96.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976) (Orleans), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

LMES is a privately owned and operated company. While the DOE exercises general control over the contract work performed by LMES, it does not supervise the company's day-to-day operations. See Contract No. DE-AC05-84OR21400. We therefore conclude that LMES is not an "agency" subject to the FOIA. Radian International, 26 DOE ¶ 80,126 (1996).

Although LMES is not an agency for the purposes of the FOIA, the requested photos could be considered "agency records" if the DOE obtained them and they were within the DOE's control at the time the Appellant made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that none of the photos the Appellant seeks was in the agency's control at the time of his request. See May 12, 1999 Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein. Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Nevertheless, the Appellant also argues that because he believes that DOE/OR could get access to the photos, this should suffice to make them “agency records.” However, access alone is not enough to make a record an “agency record” for FOIA purposes. As stated in Tax Analysts, it is the agency’s assertion of control over a record that could potentially convert a record in a private contractor’s possession into an “agency record.” The Circuit Court of Appeals for the District of Columbia has enumerated the factors used to determine when this situation has occurred: (1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files. Burka v. Department of Health & Human Serv., 87 F.3d 508, 515 (D.C. Cir. 1996). None of these control-indicating facts has been shown to be present in the case at issue. As explained above, the photos relevant to this case were excluded from DOE’s ownership and ability to dispose of such records, and have remained exclusively in the contractor’s control. Accordingly, the requested photos do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86. See also The Cincinnati Enquirer, 26 DOE ¶ 80,205 (1997).

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1). We therefore next look to the contract between DOE and LMES to determine the status of the requested records. That contract generally states,

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . .

Contract No. DE-AC05-84OR21400, Section H.30 (a). Therefore, unless the photos reasonably fall within the excluded categories of documents described in Paragraph (b), they will be considered the property of DOE and potentially releasable under 10 C.F.R. § 1004.3(e).

We conclude that the photos fall within Paragraphs (b)(7) and (b)(8) of the ownership of records section of the contract. Paragraph (b)(7) excludes “internal legal files” from government ownership. Paragraph (b)(8) states that “files involving litigation by or against the Contractor with respect to which the costs are unallowable” are owned by the contractor. Ms. Rothrock has informed us that LMES’ litigation costs for the workers’ compensation claims are not reimbursed by DOE. Record of Telephone Conversation between Amy Rothrock and Dawn L. Goldstein (May 12, 1999). Accordingly, because LMES owns the photos, we find that they are not subject to release under the DOE regulations.

Finally, it is clear that DOE/OR could not search LMES' files for the requested records, as it has done in other cases. In the case cited by the Appellant in his Appeal, Burlin McKinney, 26 DOE ¶ 80,215 (1997), the requester sought records relating to beryllium. Such records would not, on their face, appear to fall within one of the categories of contractor-owned records laid out in the DOE/LMES contract. Therefore, in that case, DOE/OR was obligated to conduct a search of those LMES records which were DOE-owned. In the instant case, DOE/OR was able to determine based on its conversations with LMES that the photos are in fact contractor-owned and not subject to release under the FOIA or DOE regulations. Thus, no search of LMES' records was necessary.

Accordingly, since DOE/OR conducted an adequate search, and the requested photos are neither "agency records" nor subject to release under 10 C.F.R. § 1004.3, we must deny the Appeal at issue.

It Is Therefore Ordered That:

(1) The Appeal filed by Gary S. Foster on May 10, 1999, Case No. VFA-0497, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 26, 1999

Case No. VFA-0498, 27 DOE ¶ 80,218

July 20, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeffrey Walburn

Date of Filing: June 14, 1999

Case Number: VFA-0498

This Decision and Order concerns an Appeal that Jeffrey Walburn filed from a determination issued by the Department of Energy's (DOE) Office of Inspector General (OIG). In this determination, OIG granted in part a request for information that Mr. Walburn filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release.

In his FOIA request, Mr. Walburn asked for copies of any and all documents contained in investigation file number I98RR059. In its determination, OIG released certain documents in part, withholding segments of those documents pursuant to Exemptions 6 and 7(C) of the FOIA. Exemption 6 protects from disclosure "[p]ersonnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . " Exemption 7(C) provides that "records or information compiled for law enforcement purposes" may be withheld from disclosure, but only to the extent that the production of such documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . " In addition to the material withheld under these exemptions, OIG went on to state that "[d]ocuments 4, 9 through 36 and 38 through 40 are not being processed back to you since these documents were either written by you or addressed to you." Determination at 2.

In his Appeal, Mr. Walburn contests the OIG's "withholding" of documents 10, 21 through 23, 30 through 36, and 38. According to the determination letter, all of these documents were either generated by Mr. Walburn or addressed to him. Mr. Walburn subsequently informed us that he does not have copies of these documents. See memorandum of June 30, 1999 telephone conversation between Mr. Walburn and

Robert Palmer, OHA Staff Attorney. In response to Mr. Walburn's Appeal, OIG informed us that it wished to review these documents to determine whether they should be released under the FOIA.(1) See memorandum of July 7, 1999 telephone conversation between Robert Palmer, OHA Staff Attorney, and Ruby Isla, OIG.

We believe that OIG's policy in FOIA matters regarding documents previously provided to, or originating from, a FOIA requester is reasonable and in most instances reflects the wishes of the requester. However, in this case, the requester has made it clear that he seeks copies of all responsive documents, including those that he authored or that were previously provided to him. Since the FOIA does not exempt such documents from its provisions, we will remand this matter to the OIG for a determination regarding these materials. On remand, OIG should consider making available to Mr. Walburn copies of any relevant

documents that were previously and properly provided to him. Any applicable FOIA exemptions have probably been waived with respect to such information. See, e.g., Hanford Advisory Board, 26 DOE ¶ 80,216 (1997). With regard to documents written by Mr. Walburn, we have previously found that the DOE may sometimes withhold information that is exempt under the FOIA, even if that material was authored by the requester. See, e.g., David E. Ridenour, 27 DOE ¶ 80,143 (1998). If OIG seeks to invoke Exemptions 6 or 7 with respect to documents he authored, however, it should take into account the source of the withheld material in assessing the privacy interests that are involved.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey Walburn, Case No. VFA-0498, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General for further action in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 20, 1999

(1)Apparently, such a review did not occur during OIG's consideration of Mr. Walburn's request because it was believed that the documents were already in his possession.

Case No. VFA-0499, 27 DOE ¶ 80,215

July 7, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Frank E. Isbill

Date of Filing: May 28, 1999

Case Number: VFA-0499

On May 28, 1999, Frank E. Isbill (Isbill) filed an Appeal from a determination that the Office of the Inspector General (IG) of the Department of Energy (DOE) issued to him. In that determination, the IG released copies of some documents in their entirety, released some with redactions, and withheld one in its entirety. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In 1998, Isbill wrote to the FOIA/Privacy Act Division at DOE headquarters and requested all records and information pertaining to his complaints about fraud and mismanagement to DOE's Office of Scientific and Technical Information in Oak Ridge, Tennessee from February 1, 1997 to the time of his request. Letter from Isbill to DOE (June 9, 1998). The FOIA/Privacy Act Division forwarded the request to the IG. The IG conducted a search of its files and located 74 responsive documents. On February 25, 1999, the OIG notified Isbill in a determination letter that it was releasing 11 documents in their entirety, withholding Document 68 in its entirety, and making a partial disclosure of 18 other documents. (1) Material in each of the 18 documents was withheld

pursuant to FOIA Exemptions 6 and 7(C). Additionally, material in Documents 1, 6, 28, 42, 67, 73, and 74 was withheld pursuant to Exemption 7(D). Nine additional documents originated in other offices and were transferred to those offices, which were instructed to contact Isbill directly. (2) In this Appeal, Isbill challenges the IG's withholding of names and documents.

II. Analysis

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982) *(Abramson*). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). *See Burlin McKinney*, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripkis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripkis*, 746 F.2d at 3 (Exemption 6); *Stone v. FBI*, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., David Ridenour*, 27 DOE ¶ 80,143 (1998); *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *K.D. Moseley*, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the responsive documents that were withheld pursuant to Exemptions 6 and 7(C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

1. Privacy Interest

In its determination, the IG stated that the withheld portions of the responsive documents contain names and information that would tend to disclose the identity of certain individuals involved in the IG investigation of Isbill's complaints. According to the IG, these individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 1.

This office reviewed all of the documents that were withheld from Isbill. Those documents contained

many names of individuals who had some relation to the investigation. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *See Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"); *Safecard Services, Inc., v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*);*Blumberg, Seng, Ikeda & Albers*, 25 DOE ¶ 80,124 at 80,563 (1995); *James Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991). Therefore, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." *See, e.g., Safecard*, 926 F.2d at 1205. In his Appeal, Isbill did not offer any explanation of why he believes release of the material would be in the public interest. In fact, he did not address this issue at all. Therefore, we find that there is no public interest in the disclosure of the responsive material.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard*, 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Isbill has not provided any information about the existence of a public interest in the disclosure of the withheld information. After a thorough examination of the responsive material, we found no public interest in the withheld material. Therefore, we find that the public interest in disclosure of the withheld material is outweighed by the real and identifiable privacy interests of the named individuals.

B. Exemption 7(D)

The IG also invoked the protection of Exemption 7(D) in withholding information in eight documents from Isbill. Exemption 7(D) protects from mandatory disclosure records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source who furnished information on a confidential basis. 5 U.S.C. § 552(b)(7)(D); 10 C.F.R. § 1004.10(b)(7)(iv). Exemption 7(D) is meant to protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential. *Ortiz v. Department of Health and Human Services*, 70 F.3d 729, 732 (2d Cir. 1995) (*Ortiz*). "A source is confidential if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id., citing U.S. v. Landano*, 508 U.S. 165; 113 S. Ct. 2014, 2019 (1993). We reviewed Document 68, the unredacted document in which the source first requested confidentiality, and we also reviewed other material where the IG referred to this request. We conclude that an assurance of confidentiality could be reasonably inferred from the correspondence in the file. Accordingly, we find that the IG properly withheld the identity of the

confidential source under Exemption 7(D).(3)

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Our review of the documents (both redacted and unredacted) found that the IG did release all reasonably segregable, factual, non-exempt material (e.g., document titles, factual narrative). Therefore, we find that the IG properly disclosed the non-exempt, reasonably segregable portions of the responsive material to Isbill.

It Is Therefore Ordered That:

(1) The Appeal filed by Frank Isbill on May 28, 1999, OHA Case No. VFA-0499, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 7, 1999

(1)The IG did not release 35 of the 74 responsive documents to Isbill because those documents were either written by him or addressed to him. Letter from IG to Isbill, February 25, 1999 (Determination Letter).

(2)Document 68 was withheld in its entirety pursuant to Exemptions 6, 7(C), and 7(D). Later, Isbill received unredacted copies of Documents 24, 53, and 54 in June 1999 for his use as the complainant in a Part 708 proceeding under the DOE Contractor Employee Protection Program. *See* Memorandum of Telephone Conversation between Jackie Becker, IG, and Valerie Vance Adeyeye, OHA Staff Attorney (June 18, 1999).

(3)The applicability of Exemption 7(D) is based on the circumstances under which the exemption is provided (i.e., granting confidentiality to a source), and not exclusively on the harm resulting from disclosure, as with Exemptions 6 and 7(C). Therefore, there is no balancing test applied under Exemption 7(D). *See Jones v. F.B.I.*, 41 F.3d 238, 247 (6th Cir. 1994) (stating that if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure); *Parker v. Department of Justice*, 934 F.2d 375, 380 (D.C. Cir. 1991).

Case No. VFA-0500, 27 DOE ¶ 80,213

June 30, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: STAND of Amarillo, Inc.

Date of Filing: June 3, 1999

Case Number: VFA-0500

On June 3, 1999, STAND of Amarillo, Inc. (STAND), filed an Appeal from a determination issued by the Department of Energy's Rocky Flats Field Office (DOE/RF). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA setting forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 22, 1998, STAND requested from DOE/RF

the following information regarding the evaluation of the Pantex plant(1) for long term storage of plutonium metals and oxides presently at the Department of Energy's Rocky Flats Environmental Technology Site (RFETS). This evaluation was reported in the February 29, 1998 Kaiser Hill Corporation letter: "Acceleration Strategy for Integrated Nuclear Material Disposition." For all items the documents requested are for the period February 1, 1997 to June 22, 1998.

1. A copy of all documents evaluating the storage of plutonium metals and oxides at the Pantex Plant.
2. A copy of the project proposal or equivalent document for evaluating storing of plutonium metals and oxides at the Pantex Plant.
3. A copy of all correspondence--email, letters, memorandums--regarding the storage of plutonium metals and oxides at the Pantex Plant and/or the relocation of the Plutonium Stabilization and Packaging System; between DOE's Rocky Flats Field Office and/or its contractors and the DOE's Albuquerque Operations Office, Amarillo Area Office and/or its contractors.

Letter from Don Moniak, STAND, to Freedom of Information Officer, DOE/RF (June 22, 1998).

On April 20, 1999, DOE/RF sent a response to STAND stating that it located one document responsive to STAND's request, entitled "Should Rocky Flats Environmental Technology Site Pursue Accelerated

Shipments of Non-Pit Plutonium Metal to Pantex." Letter from Jessie M. Roberson, DOE/RF, to Don Moniak, STAND (April 20, 1999). However, it withheld this document in its entirety from STAND, citing FOIA Exemption 5. Id. On June 3, 1999, STAND filed the present appeal, contesting both the withholding of this document and the adequacy of DOE/RF's search for responsive documents. Appeal at 1-2.

II. Analysis

A. Withholding of Document Under FOIA Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The three principal privileges that fall under this definition of exclusion are the attorney-client privilege, the attorney work product privilege, and the "deliberative process" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, DOE/RF relied upon the deliberative process privilege of Exemption 5.

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. Benedetto Enterprises, Inc., 19 DOE ¶ 80,106 (1989); Darci L. Rock, 13 DOE ¶ 80,102 (1985). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

In order for Exemption 5 to shield a document, the document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

In the present case, DOE/RF cited Exemption 5 in withholding the one responsive document it had located, a draft report entitled "Should Rocky Flats Environmental Technology Site Pursue Accelerated Shipments of Non-Pit Plutonium Metal to Pantex." In its letter to STAND, DOE/RF stated that "the disclosure of deliberative data would inhibit frank and open discussion of the matter, would hinder the Government's ability to reach sound and well reasoned resolutions, and is likely to result in public confusion about the rationale(s) for Departmental actions."

STAND argues in its Appeal that (1) the draft report "is neither a memo or a letter;" (2) the draft report cannot be predecisional and deliberative as it is dated after DOE had reached a decision on where to ship non-pit plutonium; (3) under the National Environmental Policy Act (NEPA), any proposal to send non-pit plutonium to Pantex would have required a change to a public Record of Decision; and (4) there is a strong public interest in the DOE's decisions as to where to ship plutonium. Appeal at 1-2; Memorandum from Don Moniak, STAND, to Steven Goering, OHA (June 21, 1999). After reviewing a copy of the report in question, we reach the following conclusions regarding the Appellant's arguments.

First, we disagree with the appellant that the draft report is not a memorandum, as it clearly is a written communication intended to convey ideas between RFETS personnel. Moreover, while the text of Exemption 5 refers to "memoranda or letters," the courts have extended the exemption to all "documents . . . normally privileged in the civil discovery context," Sears, 421 U.S. at 149 (emphasis added). Analysis in the courts focuses on the nature of the content of a document rather than whether the document is accurately characterized as a memorandum or letter.

Second, that the report in question may have been drafted after the agency announced a decision on where to ship RFETS's non-pit plutonium does not preclude the application of Exemption 5. As the Supreme Court has stated,

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 151 n.18. In the present case, the document in question clearly reflects the deliberations of RFETS on an alternative for storage of non-pit plutonium, and those deliberations should be shielded by Exemption 5 whether they preceded a particular pronouncement of agency policy, or whether they postdated that pronouncement and merely reflected RFETS's "continuing process of examining their policies." Similarly, whether those deliberations were conducted in compliance with NEPA does not alter their status as deliberation, and thus does not enter into our determination as to the applicability of FOIA Exemption 5.

Finally, under 10 C.F.R. § 1004.1, material determined to be exempt from mandatory disclosure under the FOIA may be released if disclosure is determined to be in the public interest. Regarding information withheld under the deliberative process privilege, we find that the public interest is served by the frank and open expression of views by agency employees. The release of this deliberative material could have a chilling effect upon this expression. The ability and willingness of personnel to make honest and open recommendations concerning similar matters in the future could well be compromised. If personnel were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. Fulbright & Jaworski, 15 DOE ¶ 80,122 at 80,560 (1987). Consequently, we conclude that release of the withheld material protected under Exemption 5 would result in foreseeable harm to the interests that are protected by the deliberative process privilege. FAS Engineering, Inc., 27 DOE ¶ 80,126 at 80,562 (1998); see Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

We agree with STAND that there is a high public interest in DOE's decision as to where plutonium from RFETS should be shipped. We also note the Appellant's concern that the DOE's deliberations "failed to involved known stakeholders." Memorandum from Don Moniak, STAND, to Steven Goering, OHA (June 21, 1999). But we must distinguish these interests from the public's interest in ideas and opinions an agency may bandy about in its internal deliberations, but which the agency has never incorporated into its policy.

The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.

Sears, 421 U.S. at 152.

In sum, after reviewing the document in question, we find that it contains material that reflects RFETS's deliberative process and is therefore exempt from disclosure under the FOIA. However, this does not justify withholding the document in its entirety. Exemption 5 covers only the subjective, deliberative portion of a document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971). We therefore must remand this matter to DOE/RF, and order it to issue a new determination to the appellant releasing the factual, non-deliberative portions of this document.

B. Adequacy of DOE/RF's Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

The DOE/RF FOIA Officer informed us that it identified two locations where documents responsive to STAND's request might be located: in the offices of Kaiser-Hill Company, the DOE prime contractor responsible for managing RFETS, and in the office of DOE/RF's Assistant Manager for Material Stabilization & Disposition. The FOIA Officer therefore forwarded the request to both offices. Personnel in the latter office responded that it had located no documents responsive to the request.(2) Kaiser-Hill responded that it had located one document, the draft report discussed above. To obtain more detail on the search conducted at Kaiser-Hill, we contacted the individual at the company responsible for searching for responsive documents. She explained that she identified one department within Kaiser-Hill (Nuclear Operations) and separate operations managed by three Kaiser-Hill subcontractors as possible locations of responsive documents. Each of the three subcontractors responded that it did not locate responsive documents, and the document ultimately located by Kaiser-Hill was found within the Nuclear Operations department of the company.

We find that the search for responsive documents coordinated by the DOE/RF FOIA Officer extended to the offices within DOE/RF and RFETS where it is reasonable to believe those documents would be located. We therefore conclude that DOE/RF’s search was reasonably calculated to uncover the documents sought by the Appellant.

C. Conclusion

For the reasons stated above, we are remanding this matter to DOE/RF for the limited purpose of issuing a new determination to the appellant either releasing the factual, non-deliberative portions of the document it withheld, or explaining why that information may be withheld pursuant to another FOIA Exemption. With respect to any other issues the Appellant has raised, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND of Amarillo, Inc., Case No. VFA-0500, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Department of Energy's Rocky Flats Field Office for further

proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 30, 1999

(1)The Pantex Plant, located near Amarillo, Texas, is a DOE facility that assembles and disassembles nuclear weapons.

(2)In the course of evaluating STAND's Appeal, we requested that the Appellant provide copies of two letters from Kaiser-Hill that it had cited in its Appeal. Each of these letters is on Kaiser-Hill letterhead and is addressed to the former Deputy Manager of DOE/RF, and each references earlier letters from the Deputy Manager regarding storage and shipment of plutonium and DOE/RF's plutonium stabilization and packaging system. We contacted DOE/RF to check whether either of the letters from the Deputy Manager might be responsive to STAND's request. DOE/RF confirmed that neither letter mentions the Pantex Plant, and therefore would not be responsive to the Appellant's FOIA request.

Case No. VFA-0501, 27 DOE ¶ 80,214

July 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:American Friends Service Committee

Date of Filing:June 4, 1999

Case Number: VFA-0501

On June 4, 1999, American Friends Service Committee (AFSC) filed an Appeal from a determination issued to it in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Assistant Inspector General for Inspections of the Office of Inspector General (AIG) issued that determination on May 3, 1999. This Appeal, if granted, would require that the DOE conduct a further search for responsive documents and release information withheld pursuant to FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6), (7)(C).

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 13, 1997 and March 3, 1998, the AFSC filed requests with the DOE for all documentation from 1969 to the present concerning the deposit, presence and/or impact of radioactive materials at the Industrial Excess Landfill site in Uniontown, Ohio. The AIG released two documents in their entirety, but withheld information in 13 documents pursuant to FOIA Exemptions 5, 6 or 7(C). 5 U.S.C. § 552(b).

II. Analysis

In its Appeal, AFSC states that the DOE should conduct a further search for responsive information since several DOE offices have yet to respond to the FOIA request. In addition, AFSC contends that the DOE applied Exemptions 6 and 7(C) in an overly broad manner. Specifically, AFSC states that the AIG should not have redacted information from the titles of three documents and other information, such as the name of a government agency and a discussion topic, that do not relate to personal privacy interests.

A. Adequacy of the Search

We have confirmed, as AFSC states in its appeal, that various DOE offices have not yet completed determinations concerning the releasability of responsive information. See Record of June 23, 1999

Telephone Conversation between Joan Ogbazghi, FOIA and Privacy Act Division, and Leonard M. Tao, OHA Staff Attorney. Since final determinations have not been made on a portion of the AFSC request, the adequacy of the search portion of this appeal is not ripe for our review. See 10 C.F.R. § 1004.8(a). Accordingly, we must dismiss that portion of this appeal as not yet ripe for adjudication.

B. Exemption 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3; Stone v. FBI, 727 F. Supp. 662, 663-64 (D.D.C. 1990) .

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard may be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(c) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, the Office of Inspector General (OIG) is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (Ortiz) and cases cited therein. In the present case, the OIG Documents were created pursuant to an investigation of alleged misconduct concerning the Industrial Excess Landfill site in Uniontown, Ohio. Consequently, the OIG documents at issue were created for a law enforcement purpose.

By and large, the redactions that were made were proper. AIG redacted from the titles of three documents the names of individuals who were contacted in the OIG's investigation (redactions the AFSC incorrectly assumed contained releasable factual information). Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy

interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY- TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990). The AIG states that the individuals named in the responsive documents have a privacy interest in remaining "free from intrusions into their professional and private lives." We agree that there is a privacy interest for these individuals providing information to government investigators.

However, in our review, we have discovered a repeated deletion that is questionable. There are several instances, such as in Document 15, where the AIG redacted the name of a government agency. It is not clear what connection the name of the government agency has to the privacy interest of any of the named individuals. Accordingly, we must remand this matter to the AIG for a new determination to either release the name of the government agency or provide an adequate justification for its withholding.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal the American Friends Service Committee filed on June 4, 1999 (Case Number VFA-0501) is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Assistant Inspector General for Inspections of the Office of Inspector General of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 1, 1999

Case No. VFA-0502, 27 DOE ¶ 80,221

August 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Charles E. Washington

Date of Filing:July 1, 1999

Case Number: VFA-0502

On July 1, 1999, Charles E. Washington (the Appellant) completed the filing of an Appeal regarding four determinations that various offices of the Department of Energy's headquarters location issued to him.(1) In those determinations, documents were released to the Appellant as a result of his four requests for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Some of these documents were released in whole, and some were redacted under Exemption 6 of the FOIA. In his Appeal, the Appellant asserts that DOE's searches for records were inadequate and that its deletions were incorrect.(2) If granted, this Appeal would require the DOE to conduct further searches and/or release the withheld information.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

Background

Four information requests are involved in this Appeal. In a July 17, 1998 request for information, the Appellant sought personnel information regarding three named DOE employees. In an August 5, 1998 request for information, the Appellant sought personnel information regarding three DOE offices, the Office of Nonproliferation and National Security, the Office of Energy Intelligence and the Office of Counterintelligence. In an August 31, 1998 request for information, he sought information on civil rights practices and trends in these three DOE offices. In an October 29, 1998

request for information, he sought information on the ombudsman for DOE's Office of Economic Impact and Diversity. He was issued determinations for each of these requests on November 9, 1998, March 31, 1999, May 27, 1999, and March 24, 1999, respectively.(3)

In his Appeal, the Appellant complains about the length of time the DOE offices took to issue their determinations. We note that the remedy for this delay was the Appellant's right to sue in federal court; under law, 20 days after DOE received each FOIA request and the Appellant failed to receive a determination, he could have deemed his administrative remedies exhausted and utilized his right to a review in a district court of the United States. 5 U.S.C. § 552(a)(4)(B), (6)(A)(i), (C)(i); cf. Pollack v. Department of Justice, 49 F.3d 115, 118-19 (4th Cir. 1995) cert. denied, 516 U.S. 843 (1995) (decided under prior 10-day deadline). However, on receiving each determination as described earlier, he was required to exhaust his administrative remedies by filing an appeal with this Office.(4)

Analysis

I. July 17, 1998 request

In his July 17, 1998 request for information, the Appellant sought personnel information held by DOE regarding three employees, Notra Trulock, John Bloodsworth, and Edward Curran. For the two latter employees, DOE possessed little such information because these employees were detailed from other agencies.(5) Regarding Notra Trulock, the Appellant received several documents in their entirety, but other documents regarding Mr. Trulock were redacted in part under FOIA Exemption 6. The following information was redacted: social security number, date of birth, birthplace, home address, home telephone number, private sector earnings, private sector supervisors' names and phone numbers, references, and information regarding any prior employment problems, arrests or convictions, relatives employed in the federal government and federal debt. In addition, the DOE withheld the name of one of Mr. Trulock's federal supervisors and the name of the Federal Bureau of Investigation supervisor of Mr. Curran who signed the Interagency Personnel Agreement detailing Mr. Curran to DOE.

The Appellant challenged the adequacy of the search by asserting that the search should have uncovered an "original version of Mr. Bloodsworth's detail paperwork, not the one that was subsequently changed to make him Deputy Director of Counterintelligence." See Letter from Appellant to Dawn L. Goldstein (June 24, 1999).

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We found out from the person responsible for this determination that there was only one detail agreement for Mr. Bloodsworth in the personnel files. Any draft agreements are typically destroyed once a final one was signed. See Record of Telephone Conversation between Marilyn Greene, HEPS, and Dawn L. Goldstein (July 8, 1999). However, Ms. Greene also believed that it was possible that the Office of Nonproliferation and National Security may have some responsive documents on file. See Email from Marilyn Greene to Dawn L. Goldstein (July 12, 1999). In addition, Ms. Greene believed that the persons responsible for hiring Mr. Curran and Mr. Bloodsworth may have a copy of a resume or similar responsive document utilized in the hiring process. See Record of Telephone Conversation between Dawn L. Goldstein and Marilyn Greene (July 9, 1999). Ms. Greene also informed us that she does not believe that Mr. Curran's and Mr. Bloodsworth's Standard Form 52s (which she stated the DOE possesses) were released, even though these items would be responsive. Finally, HR did not release Mr. Bloodsworth's Interagency Personnel Agreement which it possesses. See Record of Telephone Conversation between Marilyn Greene and Dawn L. Goldstein; Email from Marilyn Greene to Dawn L. Goldstein (July 21, 1999). For these reasons, we are remanding this search to the DOE FOI and Privacy Acts Division so that it may coordinate a further search for relevant materials with the Office of Nonproliferation and National Security or any other offices that may hold responsive documents, such as the Executive Secretariat. All material relevant to the Appellant's request must be identified.

In addition to the Appellant's contention regarding the adequacy of the search for this request, the Appellant also appealed the withholding of various data from Mr. Trulock's SF-171 that were redacted under Exemption 6 of the FOIA. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982) (Washington Post). All withheld information was located in the employee's personnel file.

In order to determine whether an agency may withhold a record under Exemption 6, it must undertake a three-step analysis. First, the agency must determine whether or not a substantial privacy interest would be invaded by the disclosure of the record. If the agency identifies no privacy interest or a de minimis privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772-73 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. Ripskis, 746 F.2d at 3.

In applying the balancing portion of the Exemption 6 test, we must examine the types of information redacted, identify any privacy interest involved, and weigh that against any public interest in the material as defined by the Supreme Court. According to the Determination Letter, disclosure of the withheld information, which included his social security number, home address, home telephone number, private sector earnings, private sector supervisors' names and phone numbers, references, and information regarding any prior employment problems, arrest or convictions, relatives employed in the federal government or federal debt, would result in a clearly unwarranted invasion of personal privacy of Mr. Trulock within the meaning of Exemption 6. The DOE withheld identifying information from the personnel records because of a concern that its release might allow someone to access Mr. Trulock's financial and credit information, and subject him to unsolicited communications, embarrassment and other personal intrusions. In such circumstances, the courts have consistently recognized significant privacy interests. We find that Mr. Trulock has a privacy interest in the above-listed information. See Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 497-501 (1994) (home addresses); Reporters Committee, 489 U.S. 747, 767 (1989) (criminal history); Barvick v. Cisneros, 941 F. Supp. 1015 (D. Kan. 1996) (home addresses and telephone numbers, dates of birth, maiden names, life insurance and annuity information); Oliva v. HUD, 756 F. Supp. 105 (E.D.N.Y. 1991) (social security numbers); Douglas L. Miller, 13 DOE ¶ 80,122 at 80,575 (1985) (reasons for leaving prior employment, criminal history) .

As noted above, once we identify a privacy interest, we must then determine whether there is a FOIA-defined public interest in release of the withheld material. In Reporters Committee, the Supreme Court greatly narrowed the scope of the public interest in the context of the FOIA. Justice Stevens, writing for the Court, distinguished between the general benefits to the public that may result from the release of information, and those benefits that Congress sought to provide the public when it enacted the FOIA. He found that in the FOIA context, the public interest in disclosure must be measured in terms of its relation to the FOIA's core purpose. Reporters Committee, 489 U.S. at 773. The Court identified the core purpose of the FOIA as "public understanding of the operations or activities of the Government." Id. at 775. Consequently, the Court held, only information that contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." Id. The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." Id.; see also National Ass'n of Retired Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

The only public interest that the Appellant has suggested in the withheld information is that it may shed some light on whether Mr. Trulock is properly qualified for his current position and whether he was chosen fairly for his current position. The high-level position which he occupies is Director of the DOE Office of Intelligence. Although there is some level of public interest in the hiring process for this position, little of the withheld information would shed any light on this process. The employee's social

security number, date of birth, birthplace, home address, home telephone number, private sector earnings, private sector supervisors' names and phone numbers, and amount of federal debt do not provide any information that may be used to determine the propriety of his hiring. However, we find that there is some small amount of public interest, due to the high-level nature of the position, in the employee's references and information regarding any prior employment problems, arrests or convictions and relatives employed in the federal government.

The Exemption 6 balancing test presupposes that there is some public interest to balance. Thus, where there is no public interest to balance, as with the majority of information here, the privacy interest in non-disclosure, however small, must prevail. Maynard v. Central Intelligence Agency, 986 F.2d 547, 566 n.21 (1st Cir. 1993); Federal Labor Relations Auth. v. Department of Defense, 984 F.2d 370, 374 (10th Cir. 1993). Accordingly, we find that the DOE employee's privacy interest in his social security number, date of birth, birthplace, home address, home telephone number, private sector earnings, private sector supervisors' names and phone numbers, and amount of federal debt outweighs the lack of a FOIA-defined public interest, and that this information was properly withheld from disclosure. With regard to the remainder of the information, including his references, any prior employment problems, arrests or convictions and relatives employed in the federal government, we have examined this withheld information and found the privacy interest in this information to heavily outweigh the public interest in its release. Accordingly, we uphold all of HR's withholdings, with the exception of two.

HEPS redacted Mr. Curran's Federal Bureau of Investigation supervisor's name from the Interagency Personnel Agreement detailing Mr. Curran to DOE. In addition, HEPS redacted the identity of Mr. Trulock's supervisor at his federal position between 1995 and 1998 from a page of his SF-171. Ms. Greene was unable to tell us who had made these two deletions or why they had been made. A determination must adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. Paul W. Fox, 25 DOE ¶ 80,150 (1995).(6) Since this has not been done, and we are unable to infer the basis for the decision, we must remand this portion of the determination to HEPS to either release the withheld information or provide an adequate reason why the information is exempt from release.

II. August 5, 1998 request

In this request, the Appellant seeks various information about the Office of Nonproliferation and National Security, the Office of Energy Intelligence and the Office of Counterintelligence. On March 31, 1999, he received a response for ten out of the eleven items of his request. As stated above, a response to the eleventh item will be issued soon. Regarding the first ten, the Appellant argues that HEPS' choice to provide statistical extracts to respond to his requests rather than releasing original documents was a violation of the FOIA.

We spoke to HEPS and found out that it chose to release information to the Appellant in the form of computer printouts and statistical extracts, rather than the underlying personnel documentation, because it would have redacted much of that documentation in order to withhold information exempt under Exemption 6. It also believed that it would be more straightforward to simply provide answers to the Appellant rather than all of the underlying data. See Record of Telephone Conversation between Marilyn Greene, HEPS, and Dawn L. Goldstein (July 1, 1999). We find that it was logical, reasonable and customer-friendly for HEPS to take this position. However, the Appellant now makes clear that he does wish to see all responsive documents, and under the FOIA, he is entitled to receive a copy of all responsive, non-exempt documents. Therefore, we will remand this portion of the case for a further determination. HEPS should either promptly release all additional, responsive information or explain the reason for the withholding of any such information.(7)

III. August 31, 1998 request

In this request, the Appellant requested information regarding DOE records about civil rights practices and trends since 1992 in the Office of Nonproliferation and National Security (NN), its predecessor organization, and subordinate organizations. In a May 27, 1999 response, he received nine documents in their entirety. Since the Appellant is generally appealing the adequacy of the searches that were done for the four requests, we contacted Tyrone Levi of the DOE's Office of Economic Impact and Diversity (ED), who was responsible for coordinating the response to this request, to determine how the search was conducted.

Tyrone Levi informed us that all information of the type sought is kept within the Office of Civil Rights and a list of this information is kept in computer systems. The computer records showed that ED possessed nine responsive documents and all of these documents were then released to the Appellant. See Record of Telephone Conversation between Tyrone Levi, ED, and Dawn L. Goldstein (August 4, 1999). It appears that this search was forwarded to the appropriate office in possession of responsive documents. We therefore find that ED conducted an adequate search of records in its possession.

IV. October 29, 1998 request

In this request, the Appellant requested various items of information about the Ombudsman for ED, such as the position description, travel budget and number of cases handled. In the March 24, 1999 response, he received six documents with redactions. Some of the information requested by the Appellant was not found in ED's search. The Appellant is appealing both the redactions and the adequacy of the search.

Regarding the redactions, for the same reasons discussed in the analysis of the July 17, 1999 request, we find that the redactions made from the current Ombudsman's SF-171 form were correct. Regarding the adequacy of the search, the appellant has argued that DOE should possess three of the requested items.(8) First, no travel budget for the Ombudsman was discovered. Gloria Smith, who conducted ED's search, informed us that the Ombudsman had no separate travel budget of her own, because her travel funds were part of ED's general travel funds. This is a reasonable explanation for ED's not possessing a travel budget for the Ombudsman. See Record of Telephone Conversation between Gloria Smith, ED, and Dawn L. Goldstein (July 7, 1999). Second, ED did not provide any records regarding the number of cases handled by the Ombudsman. Ms. Smith explained to us that the Ombudsman uses an informal, confidential process, and for this reason, no records regarding the number of cases handled are kept. Id. This also appears to be a reasonable explanation for the lack of records regarding this request. Third, ED did not provide information about other funding used by the Ombudsman. Ms. Smith explained that any other funding was not broken out in any records specifically for the Ombudsman and therefore this information could not be located. Id. This too appears to be a reasonable explanation for the lack of records on this issue. We therefore find ED's search to have been adequate.

In conclusion, we are remanding this matter for new searches for responsive material by the FOI and Privacy Acts Division Office and HEPS in the limited respects noted above. In addition, HEPS must release some of the redacted information or provide a justification for its withholding. HEPS must also release additional non-exempt information responsive to the August 5, 1998 request. We have however upheld the adequacy of the searches by ED. Therefore, we will partially grant the Appeal.(9)

It Is Therefore Ordered That:

(1) The Appeal filed by Charles E. Washington on June 24, 1999, Case No. VFA-0502, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Office of FOI and Privacy Act Division and to the Office of Headquarters and Executive Personnel Services for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial

review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 12, 1999

(1)1/ We note that due to the number of issues involved and the difficulty we encountered in obtaining required information, we requested a 15-work-day extension of time from Mr. Washington to issue our Decision and Order, which he granted. See Record of Telephone Conversation between Dawn L. Goldstein, Office of Hearings and Appeals, and Appellant (July 19, 1999).

(2)2/ In his Appeal, the Appellant also requested the names and titles of all employees providing or withholding data. In the four determination letters, the Appellant received the names and titles of the Authorizing or Denying Officials responsible for the determination.

(3)3/ The March 31, 1999 response to his August 5, 1998 request was a partial response, which made a determination regarding ten of the eleven items of his request. A final determination with regard to the eleventh document should be forthcoming. See Email from Marilyn Greene, Office of Headquarters and Executive Personnel Services (HEPS), to Dawn L. Goldstein (July 12, 1999). However, the March 31, 1999 determination is reviewable at this time with respect to the ten items for which the DOE issued a final determination.

(4)4/ The Appellant delayed in filing his appeal with respect to three of the DOE determinations beyond the thirty-day deadline specified in our regulations. See 10 C.F.R. § 1004.8(a). We note with regard to the November 9, 1998 determination, he was informed that he should send his appeal to the Office of Hearings and Appeals. Instead, he sent it to the office that issued the determination, the Office of Human Resources Management (HR). Although HR should have forwarded the appeal immediately to this Office, it failed to do so, creating a significant delay. The Appellant was again informed of the requirements to appeal a FOIA determination in the March 24, 1999 determination, yet he did not attempt to appeal the three determinations he had received by contacting this Office until June 9, 1999, when this Office received his appeal letter. (We note that the March 31, 1999 FOIA determination from HEPS failed to inform the Appellant of his appeal rights. See 10 C.F.R. § 1004.7(b)(4).) Even then, the Appellant failed to comply with the requirement to include the determination letters with his appeal until June 24, 1999, when the Office received copies of three of the four determinations from him. See 10 C.F.R. § 1004.8(b). (We received the fourth determination from the issuing office on July 1, 1999.) We have spoken with each of the three offices issuing determinations and none has suggested that its response to his appeal would be any different, if his appeal had been timely. Given the foregoing circumstances, we have chosen in our discretion to accept the appeal of these three determinations.

(5)5/ The Appellant contends in his Appeal that he was denied these two employees' employment information and salaries because of Exemption 6. However, as explained, the DOE has not taken this exemption with regard to this information; instead it stated that it does not possess such information. The Appellant may be able to obtain these employees' employment information and salaries by filing FOIA requests at their employing agencies.

(6)6/ In fact, the redaction of the name of Mr. Trulock's federal supervisor may even have been an accident on HR's part, since the November 9, 1998 determination letter only refers to the deletions of the names of private sector supervisors.

(7)7/ In addition, we inquired, regarding item number three of this request, as to why DOE released salary amounts for some detailees and not others. In addition, one of the answers to this item appears to be incorrect, because it listed a GS-15 employee having a salary of $53,276. The lowest GS-15 salary is well above that amount. Ms. Greene agreed to look into this matter, correct any errors and either release any additional responsive information DOE possesses or justify its withholding. See Record of Telephone Conversation between Marilyn Greene and Dawn L. Goldstein (July 23, 1999).

(8)8/ The Appellant also asserted in a June 21, 1999 letter to the Office of Hearings and Appeals that the name of the Ombudsman was withheld. That name, Shirley Thomas, in fact was provided to the Appellant in the determination of this request.

(9)9/ In addition, we note that the Appellant complained that the DOE offices responsible for the determinations failed to segregate non-exempt information. We do not find that to be the case. All the redactions made were to specific blocks of information within personnel records and therefore all non-exempt information appears to have been properly segregated.

Case No. VFA-0503, 27 DOE ¶ 80,216

July 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:B.P. Exploration, Inc.

Date of Filing:June 9, 1999

Case Number: VFA-0503

On June 9, 1999, B.P. Exploration, Inc. (BP), filed an Appeal from a determination the Strategic Petroleum Reserve Project Management Office (SPR) of the Department of Energy (DOE) issued to it on May 13, 1999. In that determination, SPR denied a request for information that BP filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In a January 14, 1999 request for information, BP sought a copy of a lease agreement between the SPR and Exxon Pipeline Company (Exxon) for certain specified DOE pipelines. In its February 8, 1999 determination, SPR released a redacted copy of the lease agreement in which the various rental fees Exxon would pay DOE for use of the pipelines were withheld. SPR withheld the fees pursuant to Exemption 4 of the FOIA. BP subsequently appealed SPR's February 8 determination to this Office. In an April 3, 1999 Decision, we found that the SPR's February 8 determination letter did not adequately justify SPR's withholding of the fee information by specifically explaining how Exemption 4 applied to the withheld information. See B.P. Exploration, Inc., 27 DOE ¶ 80,197 at 80,746 (1999). Consequently, we remanded the case to SPR so that it could either issue another determination adequately explaining why the information was properly withheld pursuant to Exemption 4 or release the withheld information. Id.

SPR issued another determination on May 13, 1999. In this determination SPR again withheld the rental fee information. SPR asserted that the confidential fee information had been obtained from Exxon and this information was confidential. SPR stated that Exxon had informed it that it would suffer commercial harm from the release of the fee information. Specifically, the determination letter stated that release of the fee information would compromise Exxon's negotiating position with potential pipeline shippers and that competitors would be able to determine how Exxon establishes its tariff rates to charge other firms. SPR noted that release of the withheld fee information would damage DOE's own commercial interests since it shares from the revenue from the leased pipelines. SPR also asserted in its May 13 determination letter that release of the withheld information would

impair the government's ability to obtain necessary information in the future. BP subsequently filed the appeal before us now.

In its submission, BP challenges the application of Exemption 4 to the fee information. Specifically, BP asserts that the fee information in the lease agreement was created by the federal government. Thus, such information is not "obtained from a person" as required by Exemption 4. BP also challenges the fee information's characterization as "confidential" information. BP asserts that the competitive harm rationale explained in the determination letter does not support a finding that release of the information would cause Exxon competitive harm. BP also argues that commercial harm to the government itself would not be sufficient justification to invoke Exemption 4 to the withheld fee information. Lastly, BP argues that release of the fee information would further the goal of the FOIA to promote open government and would shed light on the public's evaluation of an agency's performance in the area of government contracting.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information a submitter provides to an agency voluntarily is "confidential" if it is of a kind that the provider would not customarily make available to the public. Critical Mass, 975 F.2d at 879. Because Exxon was required to submit a proposed rental fee in negotiating the lease agreement with SPR, we find that the withheld information was "involuntarily" submitted to SPR. William E. Logan, Jr., 27 DOE ¶ 80,198 (1999). Thus, for the information to be withheld under Exemption 4, the National Parks test must be met.

Under National Parks, the first requirement for Exemption 4 protection is that the withheld rental fee information contained in the pipeline leases must be "commercial" information. Second, the information must be "obtained from a person." We find that the withheld rental rates are "commercial" information. With regard to whether the information was "obtained from a person," SPR's May 13 determination asserts that the fee information was so obtained because corporate entities such as Exxon are considered to be "persons" for Exemption 4 purposes and because in negotiating the lease agreement Exxon was required to submit to SPR a proposed rental amount for the use of the pipeline. BP challenges SPR's assertion that the withheld fee information was "provided" by Exxon. BP believes that the fees incorporated into the lease agreement were probably not the fees proposed by Exxon in its initial offer but fees derived as a result of negotiation between Exxon and SPR. Consequently, the fees in the lease agreement were not in fact obtained from Exxon.

BP directs our attention to Comstock International (U.S.A.) v. Export-Import Bank of the United States, 464 F. Supp. 804 (D.D.C. 1979) (Eximbank) as support for this argument. In Eximbank, the requester sought a copy of a loan agreement entered into between Eximbank, a federal agency, and a private firm. The Court noted in its decision that the information contained in the loan agreement "is not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." 464 F. Supp. at 807-08. Thus, BP asserts that Eximbank holds that information resulting from negotiations between a private firm and the federal government can not be considered as having been "obtained" from the non-governmental party.

We believe that BP has misconstrued the Court's holding in Eximbank. The portion of the decision quoted by BP was in reference to the Court's discussion of whether information in a certain document was

"confidential," specifically, whether disclosure of the loan agreement would threaten the government's ability to obtain similar information in the future. Id. That discussion does not affect the Court's explicit holding that the loan agreement had been obtained from a person. Id. at 806. Because the withheld rental fee information was a result of a negotiation between Exxon and SPR, we find that the withheld fee information was "obtained from a person" for Exemption 4 purposes. See William E. Logan, Jr., 27 DOE ¶ 80,198 (1999).

To qualify for Exemption 4 protection under National Parks, information must also be "confidential." The withheld information is "confidential" if it meets the test set out in National Parks. In this case, the withheld rental fee information would be considered "confidential" if release would impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of Exxon. In its May 13 determination letter, SPR noted that Exxon had stated that it would suffer competitive harm since the amount that Exxon pays DOE for the lease is part of the overall expense to Exxon for that pipeline. Release of the fee information, it is claimed, would compromise Exxon's negotiating position with potential pipeline shippers. Exxon also claims that it would suffer harm in that release of the fee information would show competitors how Exxon establishes its tariff rates for transporting oil through the pipeline. SPR also noted in its May 13 determination that because DOE shares in the revenue generated by the pipeline, DOE financial interests would also be undermined by release of the rental fee information. SPR also found that release of the rental fees would impair its ability to obtain necessary information in the future.

BP asserts that release of the withheld information would cause no competitive harm. First, BP points out that Exxon does not compete with pipeline shippers; indeed, such firms are in reality Exxon's customers. BP points out that any competitive harm in Exxon's negotiating position with pipeline shippers resulting from release of the information is essentially nullified by the regulatory environment in which oil pipeline carriers operate. Specifically, BP notes that Exxon, by regulation, is required to set its pipeline tariff rates to its customers based upon its costs, including pipeline leasing costs. Further, BP asserts that, since Exxon must justify its tariff rates to the Federal Energy Regulatory Commission based upon its cost of service, there is little likelihood that Exxon could be placed at a commercial disadvantage if the rental fees contained in the lease agreement are disclosed to its customers. BP also asserts that the withheld information would be made available in connection with a protest filed against Exxon tariff rates. Additionally, BP argues that in the absence of a reasonable expectation of confidentiality on the part of a submitter of information, Exemption 4 does not apply. In the present case, Exxon could not have had a reasonable expectation that the rental rates would be treated as confidential since there was no confidentiality provision in the lease itself. BP also argues that SPR has not demonstrated that release of the withheld information would impair its ability to obtain similar information especially in light of the fact that the withheld information resulted from a negotiation between Exxon and SPR and was not submitted or obtained from Exxon. BP also asserts that overall price and unit terms in government contracts are routinely disclosed to the public and cites numerous cases to that effect.

SPR's explanation concerning potential competitive harm is insufficient for us to make an affirmative finding on this issue. While SPR alleges that release of the rental fees would enable Exxon's potential customers to negotiate lower rates, it fails to specifically explain how potential customers could use this information to negotiate lower rates or how these lower rates (and presumably lower profit margins) would significantly reduce its competitive position. Further, Exxon does not give a sufficiently detailed explanation of how competitor oil transportation firms could use the rental rates to determine Exxon strategy in setting tariffs for its pipeline operations and why this would adversely effect Exxon's competitive position. (1) Further, economic harm to the DOE's financial interest would not satisfy the National Parks "competitive harm" test. The harm referred to in National Parks is the harm to the person from whom the government obtained the information. National Parks, 498 F.2d at 770. Thus, in the present case, the only competitive harm which is relevant is that potentially occurring to Exxon.

Similarly, we do not have enough information to conclude from the information contained in the May 13 Determination Letter that the withheld information is confidential by virtue of the fact that release would

impair the government's ability to collect similar information in the future. SPR did not specifically identify any reasons why the release of the rental fees would inhibit its ability to collect similar information in the future. While SPR did state that its financial interest would be harmed if Exxon's negotiating position with potential customers were impaired, this consideration does not address the National Parks "impairment" prong for determining confidentiality for Exemption 4 purposes.

With regard to the present case, we have already remanded this case once to SPR for a more detailed justification of how Exemption 4 applies to the withheld rental rates. Our normal practice would be for us to make our own analysis of possible economic harm based upon the information available and decide on the applicability of Exemption 4. However, any analysis of potential economic harm is complicated by the fact that the Federal Energy Regulatory Commission regulates the rates and practices of oil pipeline companies engaged in interstate transportation. See 18 C.F.R. §§ 340-348. In light of the unique environment in which pipeline companies operate, the complexity of the issues, and the fact that SPR and Exxon are the best sources of information on this issue, we will give SPR one more opportunity to specifically detail what competitive harm Exxon would suffer from release of the rental rates. Consequently, on remand SPR shall issue another determination letter either releasing the rental fee rates or fully providing a detailed description of how Exemption 4 applies to the withheld material. If SPR again withholds the information, BP may then appeal to this Office and we will issue a final determination.

It Is Therefore Ordered That:

(1) The Appeal filed by B.P. Exploration, Inc. on June 9, 1999, Case No. VFA-0503, is granted in part as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 8, 1999

(1)We note however, that we are also not convinced by BP's arguments regarding the lack of potential economic harm to Exxon. In the event that Exxon's pipeline rates were protested to the Federal Energy Regulatory Commission or required to be provided to FERC to justify its proposed tariff rates, it is not certain that commercial information such as Exxon's lease rate for the pipeline would be made available to the public. FERC could subject the lease rates or other commercial information to an order which would protect them from disclosure or other non-litigation use by the protestor. See Memorandum of telephone conversation between Dave Ulevich, Regulatory Gas Utility Specialist, FERC, and Richard Cronin, OHA Staff Attorney (June 29, 1999). Thus, we do not find in any event the withheld rental fees would become common knowledge to Exxon's competitors. While BP is correct that the lease itself does not have a confidentiality provision, SPR has submitted a letter dated on the same day the lease agreement was signed. In this letter, Exxon states that it considers portions of the lease, including the rental fee information, to be commercial information that is privileged and confidential. See January 13, 1999 letter from George G. Persyn, Project Manager, Hoover Offshore Pipeline System, Exxon, to Patricia C. Sigur, Realty Officer, SPR. We believe that this letter provides sufficient evidence that Exxon had an expectation

of confidentiality regarding the rental fees.

The "unit price" cases cited by BP are not determinative regarding the lack of competitive harm. In many of these cases courts have held that the release of "unit prices" would not provide information that would competitively harm the submitter of the information because the unit prices are themselves composed of many components which would still remain hidden or are highly variable. See, e.g., Pacific Architects & Engineers v. Department of State, 906 F. 2d 1345 (9th Cir. 1990); Acumenics Research & Tech., Inc. v. Department of Justice, 843 F. 2d 800 (4th Cir. 1988). Unlike those cases, the rental fees in this case would constitute a single price element of Exxon's cost in operating its pipeline.

Case No. VFA-0504, 27 DOE ¶ 80,217

July 14, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: David A. Lappa

Date of Filing: June 16, 1999

Case Number: VFA-0504

On June 16, 1999, David A. Lappa (Appellant) filed an Appeal from final determinations issued to him on April 14, 1999, May 18, 1999, and May 19, 1999, by the Department of Energy's Oakland Operations Office (Oakland). This Appeal, if granted, would require Oakland to release the withheld information and to grant the Appellant a fee waiver.

I. BACKGROUND

The Appellant submitted a FOIA request, which included a request for a fee waiver, to Oakland on December 17, 1998. On April 14, 1999, Oakland issued a determination letter denying the Appellant's request for a fee wavier. On May 18, 1999 and May 19, 1999, Oakland issued two determination letters releasing a number of responsive documents to the Appellant. However, Oakland withheld some information responsive to the Appellant's request under Exemption 5 of the FOIA. On June 16, 1999, the Appellant submitted the present Appeal, challenging Oakland's application of Exemption 5 to the withheld information, and denial of the fee waiver request.

II. ANALYSIS

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter- agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Oakland has withheld information under the deliberative process and attorney-client privileges. The Appellant challenges these withholdings, claiming that the withheld documents cannot be withheld under Exemption 5 because (1) they would normally be disclosed in litigation, (2) they are factual in nature, and (3) their authors eventually concurred with a final decision.

The Appellant's contentions are based upon inaccurate interpretations of the case law and overly broad and

unsupported assumptions. Accordingly, we find that they are without merit. However, our review of Oakland's determination reveals that it is inadequate in several aspects.

Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper. It also provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters adequately describe the results of searches, clearly indicate which information was withheld, and specify the exemption(s) or privileges under which information was withheld. *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. *Id.*

While the determination letters issued to the Appellant clearly indicate that responsive documents were withheld under Exemption 5's deliberative process and attorney-client privileges, they did not sufficiently identify the documents they withheld. Nor did the determination letters indicate which of the two claimed privileges was applied to a particular document. Moreover, while the determination letters briefly explained why Oakland applied the deliberative process privilege, they did not explain why Oakland applied the attorney-client privilege. As a result, we are left without information that we need in order to determine whether Oakland's application of Exemption 5 was adequate.

Accordingly, we shall remand this matter to Oakland with instructions to issue a new determination letter. The new determination letter must specifically identify all information that Oakland withheld under Exemption 5 and must clarify which information is being withheld under each claimed privilege. Moreover, the new determination letter must provide a sufficient explanation of its application of the attorney-client privilege.

The FOIA provides that fees be assessed in response to FOIA requests. 5 U.S.C. §552(a)(4). However, the FOIA also mandates that fees be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(A)(3).

On April 14, 1999, Oakland issued a determination letter denying the Appellant's request for a fee waiver. Oakland's determination letter merely stated that the Appellant "did not meet the standard for a waiver of fees." The determination letter did not explain why Oakland had concluded that the appellant had not met the standard. Accordingly, we find that this determination was also inadequate. Therefore, we are remanding this portion of the Appeal as well. On remand, Oakland must either grant the Appellant's request for a fee waiver or explain why the Appellant does not meet the standard for a fee waiver.

III. Conclusion

Because we found Oakland's determinations were inadequate, we are remanding this matter to that office for further processing in accordance with the guidance and instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by David A. Lappa on June 16, 1999, Case No. VFA-0504, is hereby granted in part as set forth in Paragraph (2) below, and denied in all other aspects.

(2) This matter is hereby remanded to the Oakland Operations Office for further processing in accordance with the guidance and instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 14, 1999

Case No. VFA-0505, 27 DOE ¶ 80,219

July 27, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Edwin P. Harrison

Date of Filing:June 23, 1999

Case Number: VFA-0505

Edwin P. Harrison files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Harrison appeals from a determination letter issued to him by the Department of Energy's (DOE) Savannah River Operations Office (SROO). As explained below, we will grant the appeal and remand Harrison's request to SROO for a further search for responsive materials.

I. Background

The FOIA generally requires that all federal agency records be made available to the public, subject to certain specified exemptions. On June 2, 1999, Harrison submitted a request to the DOE under the FOIA. Harrison requested "the name and dollar amount of all subcontracts awarded by Westinghouse Savannah River Company [WSRC] ... from 1989 to the present." He added that he "would also like the dollar amounts and approval dates for any extensions or change orders" on the subcontracts, and explained that he was "primarily interested in knowing the awarded dollar amount and ultimate (final) cost of all awarded subcontracts."

The DOE's Savannah River Office responded with a determination letter dated June 17, 1999. The determination letter stated:

The documents responsive to your request are neither owned nor possessed by [the DOE]. Specifically, DOE's contract with [Westinghouse Savannah River], DE-AC09-96SR18500, Clause H-27, provides:

The following records are considered the property of the contractor and are not Government documents: non-

accounting records relating to any procurement action by the Contractor.

The records you have requested are procurement-related records of WSRC. Therefore, they are not Government records and not covered under the FOIA. Further, DOE performed a search, and we have no documents responsive to your request.

II. Analysis

Our threshold inquiry in this case is whether the records that Harrison requested can be considered

"agency records," and thus subject to the FOIA. The language of the FOIA does not define what constitutes an "agency record." However, courts have established that a record is an agency record for purposes of the FOIA if it meets a two-part test: it must be (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*).

A. WSRC is not an agency within the terms of the FOIA.

In general, entities are not considered government agencies for FOIA purposes, if they "are neither chartered by the federal government nor controlled by it." H.R. Rep. No. 93-1380, at 14 (1974)); *Forsham v. Harris*, 445 U.S. 169, 179-80 (1980) (a privately controlled organization, though financed entirely by grants from a federal agency, is not subject to the FOIA). An entity is not considered to be controlled by the federal government if it is not subject to day-to-day supervision by federal government and its employees or management are not considered government employees. *Gilmore v. Department of Energy*, 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998).

Under its contractual relationship with DOE, WSRC is the contractor responsible for maintaining and operating the Savannah River site. While DOE exercises general control over contractual work, it does not supervise the day-to-day operations of WSRC. We have therefore found that WSRC is not an agency subject to the FOIA. *Louthian & Louthian*, 27 DOE ¶ 80,190 (1999).

B. WSRC's records were not in DOE's possession at the time of Harrison's request.

Although WSRC is not an agency for purposes of the FOIA, its records responsive to Harrison's request could be deemed agency records if DOE obtained them and they were under DOE's control at the time of the request. *Tax Analysts*, 492 U.S. at 144-46; *Forsham*, 445 U.S. at 182. However, SROO stated in its determination letter that it had performed a search and found no responsive records. In addition, we contacted Thomas Reynolds, Deputy Director of the Contracts Management Division at SROO. He confirmed that the records sought by Harrison are not maintained in the possession or control of the DOE.

Based on our finding that WSRC is not an agency for purposes of the FOIA, and on statements by personnel at SROO that no responsive records were located, we conclude that the requested records do not qualify as agency records under the *Tax Analysts* test.

C. The contract provides that certain records are DOE property.

DOE regulations state that "when a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1). Thus, even if records are not agency records, they still may be subject to release under this regulation if the contract between DOE and the contractor provides that they are the property of DOE.

We examined the contract between DOE and WSRC to determine the status of the requested records. As stated in the determination letter, the contract provides that all records generated by WSRC in its performance of the contract shall be the property of the DOE, except for certain specified excluded items. Among the excluded items are "non-accounting records relating to any procurement action" by WSRC. Contract DE-AC09-96SR18500 (October 1, 1996), Section H.27, Paragraphs (a) and (b)(3). Thus, the contract implies that accounting records relating to procurement actions by WSRC are the property of DOE.

We believe it possible that the information sought by Harrison - name and dollar amounts of subcontracts, subcontract extensions, and subcontract change orders - could be wholly or partially contained in accounting records relating to procurement by WSRC. We asked SROO about the accounting records, and received the response that "the accounting records may be difficult to understand if the records show

company names and contract numbers in one file and contract numbers with payment amounts in another file. We will not know what is available until a search is performed."

III. Conclusion

Notwithstanding difficulties in understanding the records, since WSRC accounting records are apparently the property of the DOE, and possibly contain material responsive to Harrison's request, they must be searched. We will therefore remand this matter to SROO to issue a new determination. That determination shall either release the material responsive to the request, or provide a justification for withholding.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Edwin P. Harrison, Case Number VFA-0505, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Savannah River Operations Office to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 27, 1999

Case No. VFA-0506, 27 DOE ¶ 80,259

February 24, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:The National Security Archive

Date of Filing: June 25, 1999

Case Number: VFA-0506

The National Security Archive (Appellant) filed an Appeal from a determination that the National Archives and Records Administration (NARA) issued to it on May 7, 1999. In that determination, NARA denied in part a request for information that the Appellant filed on November 29, 1993, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information deleted from the documents that NARA released to the Appellant in that determination was withheld after reviews of the documents had been performed by the Office of Declassification (now the Office of Nuclear and National Security Information (ONNSI)) of the Department of Energy's (DOE) Office of Security Affairs, as well as by the Department of State and the Office of the Secretary of Defense. This Appeal, if granted, would require DOE to release the information that it instructed NARA to withhold in its May 7, 1999 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 29, 1993, the Appellant submitted a request under the FOIA to NARA for a group of documents including a report by Carl Kaysen on “Strategic Air Planning and Berlin,” which was attached to a memorandum from General Maxwell Taylor to General Lyman Lemnitzer, dated September 6, 1961. The Appellant has restricted the scope of its Appeal to the material withheld

from this one document and its attachments (annexes). ONNSI reviewed this document along with other documents responsive to the request, determined that it contained information properly classified, and returned it to NARA, identifying the Departments of State and Defense as other agencies that should review the document prior to public release. On May 7, 1999, after all three agencies had completed their reviews, NARA released to the Appellant a copy of the document and its annexes, from which it withheld information it claimed to be exempt from release under the FOIA as classified information. The material that NARA withheld at the direction of DOE was information that DOE identified as Formerly Restricted Data pursuant to the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3 of the FOIA.(1)

The present Appeal seeks the disclosure of the portions of the documents that DOE withheld. Specifically, the National Security Archive contends that additional portions of annexes A and B to the report, initially withheld by DOE, may be released without jeopardizing the national security.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., Barton J. Bernstein, 26 DOE ¶ 80,203 (1997); William R. Bolling, II, 20 DOE ¶ 80,134 (1990). According to ONNSI, the portions that the DOE deleted from the requested document under Exemption 3 were withheld on the grounds that they contained information about nuclear weapons yields, numbers and locations that had been classified as Formerly Restricted Data under the Atomic Energy Act and were therefore exempt from mandatory disclosure.

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the memorandum and its annexes for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

In performing his review the Director of SA considered the concerns the Appellant specifically raised in his appeal, and performed as well a general review of the material under the current joint DOE/Department of Defense (DOD) classification guidance. In his re-evaluation of the report, the Director of SA determined that only the information withheld concerning the yields of specific nuclear weapons remains protected by DOE and will continue to be withheld as Formerly Restricted Data. DOE will not, however, continue to withhold the remaining information that DOE initially withheld from the Appellant. Although DOE no longer withholds this information, the Director of SA notes it may nevertheless continue to be classified as Formerly Restricted Data by the DOD based on agreements with other nations. DOE has no access to these agreements and therefore cannot determine the sensitivity of this information. Accordingly, the report and its annexes have been returned to NARA, and NARA should coordinate further review by the Departments of State and Defense, so that DOD may consider whether the remaining information that DOE initially withheld continues to be properly classified as DOD Formerly Restricted Data, and so that both Departments may review this information to consider any other bases for withholding it. After those reviews have been completed, NARA will inform the National Security Archive of its determination concerning the release of the information the DOE initially withheld from the annexes.

Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the annexes that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on July 25, 1999, Case No. VFA-0506, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Department of Energy’s (DOE) Office of Security Affairs withholds from disclosure only the yields of specified weapons from Annexes A and B to a report by Carl Kaysen on “Strategic Air Planning

and Berlin," which was attached to a memorandum from General Maxwell Taylor to General Lyman Lemnitzer, dated September 6, 1961.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 24, 2000

(1)In its determination letter, NARA stated that all the deleted material had been identified as National Security Information by DOE, the Department of State, or the Department of Defense (DOD), and exempt from mandatory disclosure pursuant to Exemption 1 of the FOIA. In fact, however, DOE had informed NARA that it had identified the material it was withholding as information classified as Formerly Restricted Data, a different category of classified information. Accordingly, we will analyze the DOE withholdings as having been taken to protect Formerly Restricted Data.

Case No. VFA-0507, 27 DOE ¶ 80,222

August 13, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: ABC News

Date of Filing: July 14, 1999

Case Number: VFA-0507

On July 14, 1999, ABC News (hereinafter referred to as "ABC") filed an Appeal from a partial determination issued to it by the Department of Energy's (DOE) Office of Inspector General (OIG). The OIG issued this determination in response to a request for information that ABC submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OIG to release certain information that it withheld under the FOIA.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, ABC sought access to documents relating to an OIG audit report regarding a grant to a university research foundation by the Oak Ridge Operations Office. In its determination, the OIG identified 38 documents as being responsive to ABC's request. Of these documents, 22 originated with the Oak Ridge Office, and that portion of ABC's request was referred to Oak Ridge for processing. Nine documents were released in their entirety, and seven were released with material withheld under Exemptions 5 or 6 of the FOIA. 5 U.S.C. § 552(b)(5) or (b)(6).

In its Appeal, ABC does not contest the OIG's application of Exemption 6. Instead, it requests that we review the OIG's decision to withhold portions of Documents 16, 17, 19, 21 and 28 under Exemption 5. Specifically, ABC contends that this exemption "applies primarily to attorney-client

matters," and that since the withheld material does not fall under that category, it should be released. Appeal at 1. (1)

II. Analysis

Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5

U.S.C. § 552(b)(5). As such, the U.S. Supreme Court has construed it to "exempt those documents, and only those documents, that are normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). Therefore, although this Exemption does encompass the attorney work-product and attorney-client privileges, it is well- settled that the Exemption also includes the deliberative process privilege. See, e.g., Sears; Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). This privilege shields from mandatory disclosure communications that are “predecisional,” i.e., that were created during agency consideration of a proposed action, and "deliberative," in that they "make recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). See also Darci L. Rock, 13 DOE ¶ 80,102 (1985); Texaco, Inc., 1 DOE ¶ 80,242 (1978). The privilege serves to insure open, uninhibited and robust debate of various options by eliminating the fear of disclosure of preliminary viewpoints. Coastal States, 617 F.2d at 866. Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions is enhanced. Sears, 421 U.S. 132, 149-51. Purely factual material, however, is generally not considered to be deliberative in nature, and must therefore be released unless it is inextricably intertwined with exempt material, or unless the selection of factual material for inclusion in the document reveals the agency's deliberative process. See, e.g., U.S. Solar Roof, 25 DOE ¶ 80,112 (1995).

In order to properly evaluate the OIG's application of Exemption 5, we conducted a de novo review of the withheld material. Document 16, entitled "Summary of Grants Closed in our Sample," is an OIG auditor's worksheet which summarizes the preliminary results of the audit team's review of certain "closed" grants. This document consists of spreadsheets detailing the planned and actual completion dates and other pertinent information for a number of grants administered by the Oak Ridge Office, and the auditor's notes concerning these grants. These notes include information concerning the status of funds and reporting, performance period dates, and the auditor's observations concerning each grant. The spreadsheets were provided to ABC without deletion. However, that portion of document 16 which comprises the auditor's notes was withheld in its entirety.

Our review of these notes leads us to conclude that portions of them are clearly predecisional and deliberative, and therefore exempt from mandatory disclosure. These notes were generated during an OIG review of the performance of the Oak Ridge Office concerning a number of grants, and include the preliminary impressions and opinions of the auditors about the grants. These opinions do not represent a final agency position concerning the performance of the Oak Ridge Office, but instead are a part of the process by which the auditors examined and evaluated various aspects of these grants. We therefore conclude that portions of these notes were properly withheld under Exemption 5. However, the notes also contain purely factual material, including the dates between which the grants "ran," the dates on which the final grant amounts were "drawn down," and whether or not final reports had been waived. This material is not inextricably intertwined with exempt material, and does not appear to reflect a deliberative process to the extent that release of this information would compromise that process. We find that this information is subject to the FOIA's mandatory disclosure provisions.

Document 17, entitled "Open Questions Resulting from grant files reviewed at the Oak Ridge Operations Office," consists of questions posed by the OIG auditors to Oak Ridge concerning various grants. These questions arose during the auditors' review of the grants, and concern actions taken by Oak Ridge during its administration of the grants. The redacted document released to ABC consists of the cover page and the various headings on subsequent pages. Since these questions are a part of the process by which the auditors collected information about how the grants were administered, they are predecisional and deliberative. Although this document does contain some factual material about the grants, that material was provided by the auditors as a basis for the questions that they posed. We therefore find that release of these facts would reveal the deliberative process of which these questions are a part. The OIG properly applied Exemption 5 in withholding portions of Document 17.

Document 19 consists of audit worksheets concerning grants that had been inactive for more than nine months. The auditors' opinions as to why these grants were still open and what needed to be done to close

them were not released to ABC. The OIG properly withheld this predecisional and deliberative information under Exemption 5.

Document 21 consists of spreadsheets concerning these inactive grants. One of the 11 columns of information set forth in these spreadsheets was withheld from ABC. This column, entitled "Reasons for Inactivity," sets forth the auditors' preliminary opinions as to why the individual grants have been inactive. This information is predecisional and deliberative in that it sets forth the auditors' views as to why the grants had not been closed out and does not represent an agency finding on this issue. The OIG did not err in redacting this material from the copy of Document 21 provided to ABC. However, the final four pages of this document comprise the auditors' notes concerning the grants. These notes, like those in document 16, contain factual information concerning the amount of money expended pursuant to the grants. We do not find this factual information to be deliberative in nature, and we conclude that it should be released to ABC.

Document 28 is entitled "Individual Meetings with Grants Administration Officials (Contract Specialists) at the Oak Ridge Operations Office." This document is a memorialization of notes taken by the auditors during interviews with the individual Grants Administration Officials at Oak Ridge. The portion of this document that the OIG withheld under Exemption 5 is a paragraph at the bottom of page one and the top of page two entitled "Conclusion." This paragraph sets forth the auditors' opinion, based on the interviews, as to why the inactive grants had not been closed out, and their reaction to some of the statements made by the interviewees. The OIG properly withheld this predecisional and deliberative information under Exemption 5.

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1.

We find that release of the properly withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which its government operates, we find that interest to be attenuated by the fact that the properly withheld portions of the documents are composed mainly of predecisional, nonfactual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the properly withheld material is substantially outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of this information would result in foreseeable harm to the interests that are protected by the deliberative process privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie the deliberative process privilege).

III. Conclusion

For the reasons set forth above, we find that the OIG properly withheld portions of Documents 16, 17, 19, 21 and 28. However, because Documents 16 and 21 contain factual information that should have been provided to ABC, we will remand this matter to the OIG. On remand, the OIG should review these two documents in accordance with the guidelines set forth above, and issue a new determination to ABC.

It Is Therefore Ordered That:

(1) The Appeal filed by ABC News on July 14, 1999 is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Inspector General for further proceedings consistent

with the guidelines set forth in this Decision and Order.

(3) This is a final Decision and Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 13, 1999

(1)ABC also requests further information concerning the OIG's response as to Documents 32 and 35. The requester points out that in the determination letter, Document 32 is listed both as being released in its entirety and as being released with material withheld under Exemption 6. In addition, ABC states that Document 35 consists only of the cover page and preface of a report, and asks if the entire report will be released.

In a telephone conversation with Robert Palmer of this Office on August 5, 1999, Ruby Isla of the OIG said that document 32 was erroneously listed in the determination letter as being released in its entirety, and that the investigator who obtained document 35 for the OIG only requested the title page and the preface. These pages therefore constitute a complete release of all of the report that is in the OIG's possession.

Case No. VFA-0509, 27 DOE ¶ 80,224

August 27, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Coalition for Fair Contracting, Inc.

Date of Filing: July 22, 1999

Case Number: VFA-0509

On July 22, 1999, the Coalition for Fair Contracting, Inc. (Coalition) filed an Appeal from a determination issued to it on June 7, 1999, by the Nevada Operations Office (NV) of the Department of Energy (DOE). The determination concerned a request for information that the Coalition submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Appeal, if granted, would require NV to release the requested information.

I. Background

On April 27, 1999, the Coalition filed a FOIA request with NV, seeking documentation pertaining to Solicitation WAMO-BN-97, Aerial Measurement Operations at Andrews Air Force Base, Maryland. Specifically, the Coalition sought: (1) a list of all the subcontractors and independent contractors to include, if available, company addresses and the general type of work to be performed on this project, (2) the "number" of labor standard interviews conducted on this project by anyone to date, (3) copies of the certified payroll records conducted on this project by anyone to date, and (4) the dollar amount of the total project. See April 27, 1999 Request. In a determination letter, NV responded that DOE did not possess or own the requested documents. See NV Determination Letter at 1. Rather, the records requested related to a procurement action by Bechtel Nevada (BN), the management and operating (M&O) contractor for NV. Id. According to NV, pursuant to the M&O contract with the DOE, all records related to any procurement action by BN are considered the property of BN. Id. The Coalition appealed this determination, asserting that the requested records should be considered agency records. Id.

II. Analysis

Our threshold inquiry in this case is whether the material requested can be considered "agency records" and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552 (f) (describing the scope of the term "agency" under the FOIA). Records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R.

§ 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but

merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as BN, are subject to the FOIA. See, e.g., International Brotherhood of Electrical Workers, 27 DOE ¶ 80, 152 (1998); BMF Enterprises, 21 DOE ¶ 80, 127 (1991); William Albert Hewgley, 19 DOE ¶ 80, 120 (1989); Judith M. Gibbs, 16 DOE ¶ 80, 133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595.

A. BN Is Not An Agency Under the FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552 (f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F.Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C.Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with DOE, BN is the contractor responsible for maintaining and operating NV. While DOE obtained BN's services and exercises control over the contract work, it does not supervise the day-to-day operations of BN. See Memorandum from Michael Brown, NV, to Kimberly Jenkins-Chapman, OHA Staff Attorney (August 6, 1999). We therefore conclude that BN cannot be considered an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control at The Time Of Request

Although BN is not an agency for the purposes of the FOIA, its records which are relevant to the Coalition's request could become "agency records" if DOE obtained them and they were within DOE's control at the time the Coalition made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989); see Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, NV has informed us that the information that the Coalition seeks, with the exception described below, was not in the agency's control at the time of the Coalition's request. See Record of Telephone Conversation Between Michael Brown, NV, and Kimberly Jenkins-Chapman, Staff Attorney, OHA (August 17, 1999). Based on the facts, the responsive documents, other than the certified payroll records, clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

C. The Contract Provides That Procurement-Related Records Are Contractor Property

Even if the contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and the contractor provides that they are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of

the government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).” 10 C.F.R. § 1004.3(e)(1).

We next look to the contract between DOE and BN to determine the status of the requested records. The contract provides that all records “acquired or generated” by the contractor in its performance of the contract shall be the property of DOE “[e]xcept as provided in paragraph b . . .” Contract DE- AC08-96NV11718 (September 23, 1995), Section H.32, Paragraph (a). Paragraph (b) of the DOE- BN contract states that all records related to any procurement action by BN are considered the property of the Contractor. Because the documents at issue are related to a procurement action by BN, we find that the requested records are not agency records and thus not subject to release under DOE regulations.

D. Certified Payroll Records Are Agency Records

We note however that the Coalition requested copies of certified payroll records. It appears that these records are agency records because they were in the possession of NV at the time of the request. BN is required to submit these records to the agency for the purpose of complying with the Davis-Bacon Act. See Memorandum from Michael Brown, NV, to Kimberly Jenkins-Chapman, OHA Staff Attorney (August 18, 1999). In addition, these records were in NV’s control at the time the Coalition made its FOIA request. Therefore, we shall remand this matter to NV to either release to the Coalition the requested certified payroll records or to issue a new determination adequately supporting the withholding of these documents. If a new determination is issued, NV should include a statement of the reason for denial, a specific explanation of how an exemption applies to the documents withheld and a statement why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). NV should further review each document for the possible segregation of non-exempt material. See 10 C.F.R. § 1004.7(b)(3).

It Is Therefore Ordered That:

(1) The Appeal filed by the Coalition of Fair Contracting, Inc, OHA Case No. VFA-0509, on July 22, 1999, is hereby granted in part as set forth in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Nevada Operations Office of the Department of Energy which shall either release the certified payroll records withheld in its June 2, 1999 Determination or issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 27, 1999

Case No. VFA-0510, 27 DOE ¶ 80,226

August 31, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Sowell Todd Lafitte Beard and Watson LLC

Date of Filing: August 3, 1999

Case Number: VFA-0510

On August 3, 1999, Sowell Todd Lafitte Beard and Watson LLC (Sowell) completed the filing of an Appeal from a determination issued to it in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Authorizing Official of the Savannah River Operations Office of the DOE (Authorizing Official) issued that determination on June 25, 1999. This Appeal, if granted, would require that the DOE release information withheld pursuant to FOIA Exemptions 5, 6 and 7(C). 5 U.S.C. § 552(b)(5), (6), 7(C).

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 19, 1998, Sowell filed a request with the DOE for all information concerning the Westinghouse Savannah River Company's voluntary separation program. The Authorizing Official released several documents in their entirety, but withheld names, social security numbers, and home addresses of non-federal employees from 15 documents pursuant to FOIA Exemption 6. The Authorizing Official also stated in his determination letter that the DOE's Office of Inspector General (OIG) deleted information from four of the documents pursuant to FOIA Exemptions 5, 6 and 7(C).

II. Analysis

In its Appeal, Sowell states that the DOE should release the withheld information. Specifically, Sowell states that release of the information will reveal whether the DOE had properly performed its statutory duties regarding a DOE voluntary separation program at the Savannah River Operations Office.

A. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in

litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified several privileges that fall under this definition. These privileges include the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The OIG, pursuant to Exemption 5, redacted handwritten notes from three documents. We reviewed these handwritten notes and found that they contain some mathematical calculations and editorial comments made during OIG's investigation of the matter. We find that this redacted information is both predecisional and deliberative pursuant to Exemption 5. Furthermore, these redactions do not contain any segregable factual information. Accordingly, we must deny this portion of Sowell's appeal.

B. Exemption 6 and 7(C)

The majority of the documents contained information withheld pursuant to Exemption 6 alone. As stated above, these redactions included names, social security numbers, and home addresses of non-federal employees. Only three documents contained information withheld pursuant to both Exemptions 6 and 7(C). In these three documents the OIG redacted names and other information that could be used to identify individuals.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities

of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3; Stone v. FBI, 727 F. Supp. 662, 663-64 (D.D.C. 1990).

1. The Privacy Interest

As stated above, the majority of documents contained information withheld pursuant to Exemption 6 alone. With regard to these documents, the Authorizing Official determined that there was a privacy interest in the identity of Westinghouse employees and other contractor employees, their social security numbers and home addresses. We agree that substantial privacy interests exist in this type of personal information concerning private citizens due to the great potential that a commercial entity could misappropriate names and addresses for commercial purposes. The courts have also reached this conclusion. See Sheet Metal Workers v. Department Of Veterans Affairs, 135 F.3d 891 (3rd Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); Painting and Drywall Work Preservation Fund v. Department of Housing and Urban Dev., 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identities of contractor employees, their social security numbers and home addresses.

We will now consider the OIG's redactions made pursuant to both Exemptions 6 and 7(C). The documents withheld pursuant to Exemptions 6 and 7(C) were compiled pursuant to an investigation of the voluntary separation program at Savannah River. In prior cases in which both Exemption 6 and 7(C) were invoked, we stated that provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). If we find that the OIG compiled three documents for law enforcement purposes, any of these documents that satisfy Exemption 7(C)'s "reasonableness" standard may be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, the Office of Inspector General (OIG) is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (Ortiz) and cases cited therein. In the present case, the OIG documents were compiled pursuant to an investigation of the voluntary separation program at Savannah River. Consequently, the OIG documents at issue were compiled for a law enforcement purpose.

We find that the OIG's redactions pursuant to both Exemptions 6 and 7(C) were proper. The OIG redacted the names of individuals who were contacted in the OIG's investigation. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY- TV) (finding that withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶

80,109 (1990). We agree that there is a privacy interest for these individuals providing information to government investigators.

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. See Marlene Flor, 26 DOE ¶ 80,104 at 80,511 (1996) (Flor). The requester has the burden of establishing that disclosure would serve the public interest. Flor, 26 DOE at 80,511 (quoting Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987)). In its Appeal, Sowell states that release of the withheld information will reveal much regarding a DOE voluntary separation program at the Savannah River Operations Office.

We find that there is a minimal public interest in the release of the withheld information. Sowell has not demonstrated how the disclosure of specific names, addresses and social security numbers of non-federal employees or the names of OIG's investigative sources will reveal anything of importance regarding the voluntary separation program or how it would serve the public interest. Also, revealing the names of private citizens, their addresses and social security numbers will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with the Authorizing Official and find that there is a minimal public interest in the disclosure of the material withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether documents may be withheld pursuant to either Exemption 6 or 7(C) courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Reporters Committee, 489 U.S. at 762 (1989); Safecard, 926 F.2d 1197 (D.C. Cir. 1991). We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names of the contractor employees or investigative sources. Therefore, we find that the public interest in disclosure of the information withheld pursuant to Exemption 6 or 7(C) is outweighed by the real and identifiable privacy interests of the named individuals.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Since the Authorizing Official withheld only names, addresses and social security numbers, and the OIG also withheld only names and identifying information, we find that there is no reasonably segregable, factual, nonexempt material available for disclosure.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal Sowell Todd Lafitte Beard and Watson LLC filed on August 3, 1999 (Case Number VFA-0510) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 31, 1999

Case No. VFA-0511, 27 DOE ¶ 80,231

September 13, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Energy Market & Policy Analysis, Inc.

Date of Filing: July 29, 1999

Case Number: VFA-0511

Energy Market & Policy Analysis, Inc., (EMPA) files this Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. EMPA appeals from determination letters issued to it by the Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy (EERE) and Oak Ridge Operations Office (OROO). As explained below, we will deny the Appeal.

EMPA submitted a request for the following five categories of material.

1. All documents relating to the award of a subcontract or subcontracts by Lockheed Martin Energy Research Corporation to the firm of Bob Lawrence and Associates relating to the preparation of two reports ...

2. The subcontract or subcontracts and any related documents including but not necessarily limited to defining or modifying the subcontract or subcontracts, the scope of work, the funding, or dates for completion of work.

3. All documents ... reflecting a review of draft reports and/or providing comments on draft reports submitted pursuant to the subcontract or subcontracts, including comments by DOE employees, if any.

4. Correspondence or other documents relating to the subcontract or subcontracts not included above, including correspondence with members of Congress or Congressional Committees, Subcommittees or staff relating to the contract or subcontracts.

5. Documents showing the cost of the work to the U.S. Treasury of the work completed under the specified subcontract or subcontracts.

EMPA received a determination letter from OROO, providing all documents that "could be located ... in response to items 1 and 3 of [EMPA's] request. No information could be located in response to items 2, 4, and 5 of [EMPA's] request." OROO's determination letter also notified EMPA that its "search did not extend to the files which are the property of the contractor, Lockheed Martin Energy Research Corporation [LMERC]. Since procurement-related records, such as the records pertaining to these subcontracts, are the property of the contractor and not agency records pursuant to an ownership of records clause, they are not accessible under the FOIA."

EMPA also received a determination letter from EERE, stating that the office "has investigated this matter and has found that no requested documents exist here. The Lockheed Martin Energy Research Corporation

executed the award and has all associated documentation.... We understand that this FOIA request has also been made to the Lockheed Martin Energy Research Corporation. They hold any existing subject documents and will provide all those pertinent to your request for which FOIA is applicable."

EMPA presents three requests for relief in its appeal. The first is a general request that we "direct the appropriate officials at DOE Headquarters, Oak Ridge Operations Office, and, if appropriate, Lockheed Martin Energy Research Corporation, to comply fully with [its] FOIA requests ... without further delay." EMPA adds that

at least one of the reports published as a result of the subcontract makes very clear that the work was done for and was funded by the Office of Energy Efficiency and Renewable Energy.... The obvious involvement of EERE casts doubt on [its] assertion that no documents covered by my request exist at DOE Headquarters.... Documents provided by [OROO] make clear that Dr. James Daley and Dr. Christine Platt of EERE participated in the review of draft reports and, apparently, attended one or more meetings where the subcontract work was discussed. These facts cast further doubt on the assertion that no documents covered by [the] request exist at DOE Headquarters.

We contacted Dr. James Daley, who works in EERE, about EMPA's request. Concerning the report referred to above, Dr. Daley explained that his office's involvement was limited to approving the funding and reviewing a draft. He said his office reviewed a draft and returned it to the author with some notes. He stated that EERE kept no copies of documents relating to either the subcontract or the reports produced by the subcontract. In addition, we contacted OROO and were informed that personnel there conducted a search for documents relating to the subcontract. Consequently, we are convinced that EREE and OROO complied fully with the FOIA in searching for documents responsive to EMPA's request.

In its second request, EMPA asks that we "resolve the apparent contradiction between the assertions in the letters from [EERE] and [OROO] concerning access to documents in the possession of Lockheed Martin Energy Research Corporation." EMPA characterizes the two determination letters as "contradictory and perhaps evasive," because EERE said that LMERC would provide responsive records, while OROO said that LMERC records are not accessible under the FOIA.

While the FOIA requires agencies to make certain records available to the public, it does not require agencies to respond to questions. Nevertheless, we asked Dr. Daley to clarify his office's response. Dr. Daley said that he drafted EERE's determination letter. He explained that he used the name "Lockheed Martin Energy Research Corporation" to refer generally to the Oak Ridge site, since LMERC is the management and operating contractor at the site. Thus, given Dr. Daley's explanation, there is no contradiction between EERE's and OROO's letters. EERE intended to inform EMPA that it would refer the request to OROO, but incorrectly used the name of the management and operating contractor at the Oak Ridge site.

EMPA's third request asks "if DOE's contract with Lockheed Martin does, in fact, place documents 'outside the reach' of a FOIA request, please provide a reference to DOE's legal authority for including such a provision in the contract. Nearly all the work performed by Oak Ridge National Laboratory is paid for by U.S. taxpayers. There appears to be no logical reason to keep taxpayers from seeing pertinent documents covering work paid with tax dollars."

We note again that the FOIA does not require agencies to respond to questions. Nevertheless, we have reviewed EMPA's request. In framing this request, EMPA assumes that materials paid for by tax revenues are thereby subject to the FOIA. This assumption is incorrect. *International Brotherhood of Electrical Workers*, 27 DOE ¶ 80,152 at 80,620 (1998). The FOIA applies only to records that are maintained by agencies within the executive branch of the federal government. 5 U.S.C. § 552(f). It does not apply to materials that are paid for by tax revenues, but that are outside the executive branch, such as materials held by federal courts and Congress. E.g., *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990) (Congress); *Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979) (federal courts).

Agency records are defined as those documents created or obtained by an agency, and under agency custody and control at the time of the request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). Our first question, then, is whether the requested materials were created by an "agency."

In *United States v. Orleans*, 425 U.S. 807 (1976) (*Orleans*), a case that did not involve the FOIA, the Supreme Court defined the conditions under which a private organization is considered a federal agency. The Court determined that "the question here is not whether the . . . [organization] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Id*. at 815. Subsequently, the Supreme Court ruled that the *Orleans* standard provides the basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980).

LMERC is a privately owned and operated company. While the DOE exercises general control over the contract work performed by LMERC, it does not supervise the company's day-to-day operations. *See* Contract No. DE-AC05-84OR21400. We therefore conclude that LMERC is not an "agency" subject to the FOIA. *Gary S. Foster*, 27 DOE ¶ 80,208 (1999).

Materials that were not created by an agency may nevertheless be subject to the FOIA under the *Tax Analysts* test if the agency obtained them and they were within the agency's control when the request was made. *Tax Analysts*, 492 U.S. at 144-46. In this case, we contacted representatives of both EERE and OROO and have determined that DOE did not have actual control of the requested materials.

Even if contractor records fail to qualify as "agency records," they may still be subject to release under DOE regulations if the contract between DOE and the contractor provides that the records in question are the property of the DOE. The DOE regulations provide that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. 1004.3(e)(1). We therefore examined the contract between DOE and LMERC. The contract, designated DE-AC05-84OR21400, provides in Section H.30 that:

(a) Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government ...

(b) Contractor's Own Records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) above....

(9) Records related to:

(i) Procurement actions by the Contractor.

Therefore, records of LMERC's procurement agreement with Bob Lawrence & Associates fall within the categories of records excluded from government property.

We conclude that materials responsive to Items 2, 4, and 5 of EMPA's request were neither created nor obtained by the DOE, nor under the custody and control of the DOE at the time of the request. Consequently, these documents are not subject to release under the FOIA. In addition, we have determined that these records are not subject to release under the provisions of 10 C.F.R § 1004.3(e). We will therefore deny EMPA's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Energy Market & Policy Analysis, Inc., Case No. VFA-0511, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be

sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 13, 1999

Case No. VFA-0512, 27 DOE ¶ 80,223

August 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert G. Smith

Date of Filing: July 30, 1999

Case Number: VFA-0512

On July 30, 1999, Robert G. Smith (Smith) filed an Appeal from a determination that the Richland Operations Office (Richland) of the Department of Energy (DOE) issued to him. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, Richland released some responsive information to Smith. This Appeal, if granted, would require the DOE to release the remainder of the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In December 1998, Smith applied for the position of Personnel Management Specialist, Vacancy Announcement 99 MP-10, in Richland, Washington. He was not selected for that position. According to Smith, a Richland employee informed him in May 1999 that the vacancy had been canceled, and that the job had been filled internally. (1) Smith indicated that he was never notified of the cancellation. Smith then wrote to Richland's Office of External Affairs and requested, *inter alia*, "a copy of the notification of job cancellation, to include date of cancellation and a list of applicants notified of this cancellation, if germane." Letter from Smith to Office of External Affairs, Richland (May 25, 1999) (Request Letter). Richland released some of the responsive

information, but withheld the names of applicants notified of the cancellation under Exemption 6 of the FOIA. Letter from Richland to Smith (June 29, 1999) (Determination Letter). In this Appeal, Smith challenges Richland's withholding of the names of all unsuccessful applicants.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of

which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripkis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripkis*, 746 F.2d at 3.

1. Privacy Interest

Richland determined that there was a privacy interest in the identity of the unsuccessful job applicants. According to Richland, each applicant made a "personal choice" to apply for the vacant position, and Richland invoked the FOIA to protect that choice from public disclosure. Determination Letter at 2.

Courts have similarly found that the disclosure of the identities of unsuccessful federal job applicants constitutes a clearly unwarranted invasion of personal privacy For instance, *Core v. U. S. Postal Service*, 730 F.2d 946 (4th Cir. 1984), presents a fact pattern similar to this case.(2) Core was an unsuccessful applicant for a vacancy at the U. S. Postal Service ("the Service"). He argued that the Service had violated hiring regulations, and then requested information about the other unsuccessful job applicants. (3) The Service invoked Exemption 6 and withheld responsive information about the unsuccessful applicants, determining that harm could arise from such a disclosure. The Court upheld the withholding and found that "disclosure may embarrass or harm applicants who failed to get a job." *Core*, 730 F.2d at 949. The court reasoned that present or prospective employers or coworkers could learn that others were deemed better qualified for a competitive appointment. *Id. See also Barvick v. Cisneros*, 961 F. Supp. 1015, 1021 (D. Kan. 1996) (upholding agency's nondisclosure of identifying information on the unsuccessful applicants because it could lead to embarrassment or adversely affect their future employment or promotion prospects) (*Barvick*); *Holland v. C.I.A.*, 1992 WL 233820, at *13-*14 (D.D.C. Aug. 31, 1992) (finding a privacy interest in the identity of an unsuccessful applicant for position of general counsel). Therefore, we find that there is a substantial privacy interest in the identities of unsuccessful federal job applicants.

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2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). In his Appeal, Smith stated that release of the withheld information "will further the public interest by shedding light on particular hiring activities, at the Richland [Human Resources Office] HRO, which may be in violation of . . . regulations

and Veteran's Law." Letter from Smith to Director, OHA (July 3, 1999).

We find that there is a minimal public interest in the release of the withheld information. Smith has not demonstrated how the disclosure of information about unsuccessful job applicants is necessary for the public to evaluate either Richland's hiring practices or the competence of the individual who received the appointment. Simply alleging that an agency has engaged in violations of hiring regulations does not justify releasing personal information. *See Barvick,* 941 F.Supp. at 1022 (quoting *Hopkins v. U. S. Department of Housing and Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991) (invocation of a legitimate public interest cannot itself justify the release of personal information)). Therefore, we agree with Richland and find that there is a minimal public interest in the disclosure of the responsive material.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard,* 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names of the unsuccessful applicants. Therefore, we find that the public interest in disclosure of the withheld material is outweighed by the real and identifiable privacy interests of the named individuals.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Because Smith requested a list of names, we find that there was no reasonably segregable, factual, non-exempt material available for disclosure.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert Smith on July 30, 1999, OHA Case No. VFA-0512, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 24, 1999

(1)Richland informed OHA that the vacancy was canceled and then re-issued under a new vacancy number. *See* Memorandum of Telephone Conversation Between Dorothy Riehle, Richland, and Valerie Vance Adeyeye, OHA Staff Attorney (August 11, 1999).

(2)We note, however, that in this case the applicants were not actually "unsuccessful" because Richland canceled the vacancy.

(3)Core also requested, and received, information about the successful applicants. *Core*, 730 F.2d at 947.

Case No. VFA-0514, 27 DOE ¶ 80,230

September 7, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Vladeck, Waldman, Elias & Engelhard, P.C.

Date of Filing: August 3, 1999

Case Number: VFA-0514

On August 3, 1999, Vladeck, Waldman, Elias & Engelhard, P.C. (Vladeck) filed an Appeal from a final determination that the Savannah River Operations Office (SR) of the Department of Energy (DOE) issued on June 29, 1999. In its determination, SR withheld portions of three documents that were responsive to a request for information that Vladeck filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. BACKGROUND

In a request for information dated May 18, 1998 (Request), Vladeck requested copies of reports and data submitted to the DOE regarding contractor compliance with federal equal employment laws and contractor conduct regarding personnel matters. On March 15, 1999, SR issued a determination letter releasing copies of various documents and indicating that information contained in ten documents were being withheld pursuant to Exemptions 4 and 6 of the FOIA. Vladeck appealed SR's determination to the Office of Hearings and Appeals (OHA) regarding the information withheld in the documents pursuant to Exemption 4. See Vladeck, Waldman, Elias & Englehard, P.C., 27 DOE ¶ 80,206 (1999) (Vladeck). In Vladeck, we remanded the case to SR so that it could issue another, more detailed and explicit, determination regarding Vladeck's Request Item Nos. 4, 7b, 10 and 11. Id. at 80,764-65.

Pursuant to our instructions in Vladeck, SR issued another determination on June 29, 1999, regarding documents responsive to Request Item No. 4, 7b, 10 and 11. In this determination, SR withheld portions of two documents (Documents No. 10 and 11) pursuant to Exemption 4. SR asserted that these documents had been submitted to SR on a "voluntary basis" and that the withheld information in the documents was of a type that the submitter of the information in the documents, Westinghouse Savannah River Company (WSRC), would not customarily disclose to the public. SR withheld portions of another document (Document No. 4) pursuant to the deliberative process privilege of Exemption 5. SR stated that Document No. 4 was created at the DOE's request and that it contained a self-evaluation of WSRC's performance in operating the DOE's Savannah River facility. SR determined that Document No. 4 was a predecisional, deliberative document and that

release of this document would impair the DOE's ability to obtain candid written assessments in the future. (1)

In its submission, Vladeck challenges SR's use of Exemptions 4 and 5 to withhold the information in Document Nos. 4, 10 and 11. Specifically, Vladeck asserts that Document No. 4 was improperly withheld

pursuant to Exemption 5 because the document was not created by a DOE consultant to assist DOE in arriving at a policy decision; instead, Vladeck claims that Document No. 4 was a document that WSRC submitted to DOE so that DOE could assess its compliance with Executive Order 11246. (2)Vladeck argues that documents submitted to the government to assess the submitter's compliance with affirmative action law may not be withheld pursuant to the deliberative process privilege of Exemption 5.

Vladeck also challenges SR's determination that Documents No. 10 and 11 were "voluntarily submitted" to DOE for Exemption 4 purposes. Vladeck asserts that these documents should not be considered "voluntarily submitted" since the documents were required to be submitted by Executive Order 11246 and "other federal regulations." Because these documents were "involuntarily submitted," Vladeck argues that SR should have used the Exemption 4 test articulated for such submissions. Vladeck argues that there could be no competitive harm to WSRC if Document Nos. 10 and 11 were released and thus, under the case law interpreting the application of Exemption 4 to involuntarily submitted documents, the information should be released.

II. ANALYSIS

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." (3) National Parks and Conservation Ass'n V. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. Id. at 770. By contrast, information a submitter provides to an agency voluntarily is "confidential" if it is of a kind that the provider would not customarily make available to the public. Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992) (Critical Mass). SR withheld portions of Documents Nos. 10 and 11 pursuant to Exemption 4.

We reject Vladeck's argument that Document Nos. 10 and 11 should be considered to be "involuntarily submitted" since the documents were required to be submitted pursuant to Executive Order 11246. Section 202 of Executive Order 11246 requires that contractors file Compliance Reports containing information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor. See Executive Order 11246, § 202 (1965). Document No. 10 is a summary of the "Towers-Perrin Survey" conducted on WSRC employees. This document provides a summary of a survey of the various opinions of the WSRC employees concerning employment issues. Document No. 11 is an Executive Summary of the "Towers-Perrin Survey" which describes in greater detail the opinion survey results. Neither of these documents is the type of report mandated by Executive Order 11246 or similar federal regulations. In addition, SR has informed this Office that Vladeck was provided all monthly reports containing the information requested in Executive Order 11246 and that WSRC was not required to submit Document Nos. 10 and 11 to SR. See Memorandum of telephone conversation between Pauline Conner, SR, and Richard Cronin, OHA Staff Attorney, (August 25, 1999). Consequently, we believe that Documents No. 10 and 11 were voluntarily submitted to SR.

Because we find that Document Nos. 10 and 11 were voluntarily submitted to SR, these documents would be protected from disclosure by Exemption 4 if they contain information which WSRC would not customarily release to the public. As described above, Document Nos. 10 and 11 contain frank assessments of WSRC employee opinions regarding workplace issues and management practices. We find

it highly unlikely that WSRC would customarily make such potentially sensitive information available to the public. Consequently, we believe that SR properly applied Exemption 4 to Document Nos. 10 and 11. Further, we find that SR segregated and released all non- withholdable information contained in these documents.

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified several traditional privileges that fall under this definition of exclusion, such as the attorney-client privilege, the attorney work product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In the present case, SR withheld portions of Document No. 4 pursuant to the deliberative process privilege.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, the document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

Document No. 4 is a letter from a WSRC official to an official of the DOE's WSRC Award Fee Board. This document contains WSRC's self-evaluation of performance for the period October 1, 1996 to March 31,1997. The withheld portions contain the WSRC official's assessment as to what he believes WSRC's accomplishments were in various areas along with his assessment of areas in which he believes WSRC can make improvements. SR has informed us that WSRC submitted this letter to SR in furtherance of WSRC's attempt to establish that it is eligible to receive an award fee from the DOE. See memorandum of telephone conversation between Pauline Conner, SR, and Richard Cronin, OHA Staff Attorney (August 26, 1999).

In assessing whether this document is properly within the deliberative process privilege, we take note of the fact that the creator of the document, a WSRC official, is not a DOE employee. For this reason, the document does not appear to be an "intra- or inter-agency" document. However, courts have used a "functional" approach when determining whether a document generated from a non- governmental entity may be considered to be an "intra- or inter-agency" document. See Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir 1988). Under this approach, documents generated by outside entities upon which agency officials rely in making agency decisions can be deemed to be "intra- or inter-agency" documents for Exemption 5 purposes. See Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989). In Document No. 4, WSRC provided SR with the necessary factual analysis to use in making its determination regarding a fee award. Functionally, Document No. 4 supplied information critical to the decision-making

process. Consequently, we find that Document No. 4 is an "intra- or inter-agency" document for Exemption 5 purposes.

We have also determined that Document No. 4 is predecisional and deliberative. Document No. 4 contains WSRC's assessment of its accomplishments and shortcomings. While the bulk of the withheld material concerning WSRC's accomplishments is factual, disclosure of these facts would reveal WSRC's deliberations and opinions as to the areas of its performance that should merit an award from DOE. The portion of Document No. 4 concerning potential areas of improvement for WSRC operations also consists of deliberative and predecisional material. Further, we find that SR properly released all of the segregable, non-deliberative material contained in Document No. 4. In sum, we find that the predecisional, deliberative portions of Document No. 4 were properly protected by the deliberative process privilege and Exemption 5. (4)

C. The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that SR properly applied Exemptions 4 and 5 to Document Nos. 4, 10 and 11, we must consider whether the public interest demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. See Reno Memorandum at 1, 2. With regard to the material properly withheld in this matter pursuant to Exemption 5, the requested information consists of the opinions of a WSRC official concerning strengths and weaknesses of WSRC's management of the DOE Savannah River facility. The release of this information would in our opinion have a chilling effect on the willingness of WSRC and other contractors to give DOE accurate self-assessments, including frank appraisals of their own shortcomings, so that DOE may not only appropriately award contractors for good performance but also monitor their efforts at improvement. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard articulated by the Attorney General and that the release of the material protected pursuant to Exemption 5 contained in the requested documents would not be in the public interest.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., Chicago Power Group, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. Consequently, we will deny Vladeck's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Vladeck, Waldman, Elias & Engelhard, P.C. on August 3, 1999, Case No. VFA-0514, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 7, 1999

(1)SR withheld information in Document No. 7b pursuant to Exemption 6. Vladeck does not challenge SR's determination regarding information withheld pursuant to Exemption 6.

(2)Executive Order 11246 provides generally that a federal contractor not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and that it take affirmative action on their behalf, § 202, and also provides that it file reports demonstrating compliance with this policy, § 203.

(3)For the purposes of Exemption 4, the term "person" refers to a wide range of entities including partnerships, corporations, associations, and public or private organizations other than an agency. See Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996).

(4)Vladeck directs our attention to Witten v. A.H. Smith & Co., 100 F.R.D. 446 (D. Md. 1984) (Witten), for the proposition that the deliberative process privilege cannot be used to protect from disclosure critical self-evaluations concerning affirmative action plans and Equal Employment Opportunity (EEO) reports. We believe Vladeck has misconstrued Witten. The court in Witten held that the critical self-analysis privilege does not protect such documents from discovery. Witten, 100 F.R.D. at 452. It did not consider whether the deliberative process privilege could be applied to those documents. Moreover, none of the documents at issue in the present case is an affirmative action plan or an EEO report.

Case No. VFA-0515, 27 DOE ¶ 80,228

September 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.

Date of Filing: August 4, 1999

Case Number: VFA-0515

On August 4, 1999, Smith, Pachter, McWhorter & D'Ambrosio, P.L.C. (Smith), a law firm, filed an Appeal from a final determination that the Strategic Petroleum Reserve Project Management Office (SPR) of the Department of Energy (DOE) issued on July 7, 1999. In its determination, SPR withheld various documents that were responsive to a request for information that Smith filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. BACKGROUND

In a March 30, 1999 request for information (Request), Smith requested copies of documents relating to two specific Strategic Petroleum Reserve Life Extension projects at the Strategic Petroleum Reserve's Big Hill and Bayou Choctaw sites. (1) After subsequent discussions with SPR officials, SPR provided Smith with an index of files (Index) which could contain responsive documents and asked Smith to select from the Index those files it wanted searched. Smith subsequently provided SPR with a list of the files from which it was requesting documents. On July 7, 1999, SPR issued a determination letter (Determination Letter) releasing copies of various documents. However, SPR's Determination Letter stated that "the summary sheets and bid item sheets . . . contain detail[ed] cost information, including indirect cost figures of the unsuccessful bidders and are being withheld pursuant to Exemption 4." Determination Letter at 2. The Determination Letter went on to state that "Exemption 4 provides that an agency can withhold such data . . . if release would cause substantial harm to the competitive position of the person from whom the information was obtained or impair the Government's ability to obtain such information in the future." Id.

Smith argues that SPR failed to provide it with a list of the withheld documents or a description of the withheld information. Smith also argues that it was not provided any explanation as to why Exemption 4 is applicable to the withheld information or why redacted copies of the withheld documents cannot be produced. Smith asks that we order SPR to provide it with a Vaughn Index of the withheld documents that includes a complete description of all withheld documents, a statement of why a FOIA exemption is applicable to each of the withheld documents, and a statement of why a redacted version of the documents cannot be provided. (2)

II. ANALYSIS

After conducting a search for responsive documents under the FOIA, an agency is required by statute to provide the requester with a written determination notifying the requester of the results of that search and,

if applicable, of the agency's intention to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. Id.

The written determination serves to inform the requester of the results of the agency's search for responsive documents and of any information that the agency has withheld. In doing so, the determination letter allows the requester to decide if the agency's response was adequate and proper and provides this Office a record upon which to base its consideration of an administrative appeal. Research Information Services, Inc., 26 DOE ¶ 80,139 (1996) (RIS).

An agency therefore has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. F.A.C.T.S., 26 DOE ¶ 80,232 at 80,888 (1997); RIS, 26 DOE at 80,592. Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. Paul W. Fox, 25 DOE ¶ 80,150 (1995). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. Id. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. RIS, 26 DOE at 80,592.

As an initial matter, we do not find that SPR should be required to produce a Vaughn Index of the documents at issue in this case. We have consistently held that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. Rockwell International, 21 DOE ¶ 80,105 at 80,526-27 (1991).

Nonetheless, we have reviewed the SPR determination letter and find that it falls short of the basic requirements outlined in our discussion above. The Determination Letter, on its face, does identify the withheld documents as being summary sheets and bid item sheets contained in a particular file described in the Index. However, there is no indication of how many documents are being withheld or any description of these documents beyond that of "summary sheets or bid item sheets." Additionally, the Determination Letter contains no specific explanation regarding how Exemption 4 applies to the withheld documents. The only explanation provided is a statement that the documents contain "detail[ed] cost information, including indirect cost figures of the unsuccessful bidders" along with a restatement of the Exemption 4 standard for withholding information involuntarily submitted to the government.(3) Both the FOIA and the Department’s regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (Kleppe); Digital City Communications, Inc., 26 DOE ¶ 80,149 at 80,657 (1997); Data Technology Industries, 4 DOE ¶ 80,118 (1979). This allows the requester to determine whether the claimed exemption was accurately applied. Tri-State Drilling, Inc., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. Larson Associated, Inc., 25 DOE ¶ 80,204 (1996); Milton L. Loeb, 23 DOE ¶ 80,124 (1993). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. Public Citizen Health Research Group v. F.D.A., 704 F.2d 1280, 1291 (D.C. Cir. 1983); Kleppe, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Given our finding that the Determination Letter fails to meet the requirements for an adequate FOIA determination, we will remand this matter to SPR so that it may issue another determination regarding Smith's Request. Additionally, on remand, SPR may wish to consider whether there is releasable non-Exemption 4 material contained on the withheld summary sheets and bid item sheets. See Puget Sound Energy, Inc., 27 DOE ¶ 80,193 (1999). Consequently, we will grant Smith's Appeal in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Smith, Pachter, McWhorter & D'Ambrosio, P.L.C. on August 4, 1999, Case No. VFA-0515, is hereby granted in part as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 1, 1999

(1)The projects are part of the Strategic Petroleum Reserve Life Extension Program which seeks to upgrade or replace most major systems in the Strategic Petroleum Reserve by the year 2000, and to streamline Strategic Petroleum Reserve facilities to reduce operating and maintenance costs.

(2)A Vaughn Index is recognized in the context of FOIA as an index identifying each responsive document, the exemption under which it is being withheld and an explanation why that exemption is applicable, or in the alternative a similar document describing each withholding. See Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir 1974).

(3)Commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. See National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

Case No. VFA-0516, 27 DOE ¶ 80,229

September 7, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:David E. Ridenour, P.E.

Date of Filing: August 9, 1999

Case Number: VFA-0516

David E. Ridenour, P.E., filed an Appeal from a determination the Department of Energy Office of Inspector General (DOE/IG) issued to him on July 8, 1999. The determination responded to a March 27, 1998 request Ridenour submitted to the DOE. If we were to grant this Appeal, we would require DOE/IG to release, in their entirety, all documents responsive to Ridenour's request.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Ridenour requested from the DOE “a copy of the directives under which the DOE IG conducts and/or reports the results of IG investigations. These documents are usually referred to as the 'IG Investigations Manual(s)' or 'IG Investigative Procedures.'” Letter from David E. Ridenour, P.E., to Abel Lopez, Director, FOIA/Privacy Act Division, DOE (March 27, 1998). In its response to Ridenour's request, the DOE/IG identified 41 documents as responsive to the request. These documents, together, comprise the “Investigations Manual” of the DOE/IG's Office of Investigations. Of the 41 documents, 27 were released to Ridenour in their entirety, while 14 were released with material redacted. Some of the redacted information orginated at other federal agencies or the DOE Office of General Counsel and was therefore referred to those agencies and that office for review. The other redacted information was withheld by the DOE/IG under FOIA Exemption 7(E). In his Appeal, Ridenour asserts that DOE/IG should release all of the redacted information.

II. Analysis

First, regarding the information that the DOE/IG has referred elsewhere for review, any issues arising are not yet ripe for review. The Office of Hearings and Appeals has jurisdiction to consider Freedom of Information Act Appeals when “the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees.” 10 C.F.R. § 1004.8(a).

This means that we do not exercise FOIA Appeal jurisdiction if a DOE office has not issued a determination in response to a FOIA request. Thus, to the extent that the DOE/IG has simply referred Ridenour's request to other offices, it has not issued a determination that Ridenour can appeal to the OHA. We do have jurisdiction over the DOE/IG's determination to withhold information under FOIA Exemption 7(E). We review this determination below.

A. Exemption 7(E) of the FOIA

Exemption 7(E) of the FOIA protects "records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

The threshold test for withholding information under Exemption 7 is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995). Thus, we conclude that the "Investigations Manual" of the DOE/IG's Office of Investigations was compiled for law enforcement purposes.

Exemption 7(E) contains two clauses, each of which provides a separate basis for withholding. The first exempts information that "would disclose techniques and procedures for law enforcement investigations or prosecutions" and the second covers information that "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). In its response to Ridenour's FOIA request, the DOE/IG relied upon the first clause as the basis for withholding certain information.

The first clause of Exemption 7(E), unlike the second clause and some other FOIA exemptions, does not require a particular harm (such as circumvention of the law) be cited in order to justify its application. See Fisher v. Department of Justice, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991) ("Law enforcement agencies' 'non-investigatory' law enforcement records, to the extent that they can be fairly regarded as reflecting techniques or procedures, are now entitled to categorical protection under Exemption 7.") Nonetheless, only techniques or procedures that are not well known to the public are entitled to Exemption 7(E) protection. See Albuquerque Publishing Co. v. Department of Justice, 726 F. Supp. 851, 858 (D. Ariz. 1989) ("[T]he government should avoid burdening the Court with an in camera inspection of information pertaining to techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television. These would include, it would seem to us, techniques such as eavesdropping, wiretapping, and surreptitious tape recording and photographing. Instead, the government should release such information to plaintiff voluntarily.").

Applicable to material exempt under the FOIA generally, but particularly important with regard to Exemption 7(E), is the provision of the DOE regulations specifying that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by

that exemption. See Reno Memorandum at 1, 2.

The Department of Justice has provided federal agencies with the following guidance regarding the relevance of the Reno Memorandum to the application of Exemption 7(E):

Exemption 7(E) is characteristically an exemption that protects, in the words of Attorney General Reno's FOIA Memorandum of October 4, 1993, “only a governmental interest.” As Attorney General Reno's FOIA Memorandum points out, such information is particularly well suited for discretionary disclosure when such disclosure can be made without “foreseeable harm.” The very broad, nonharm-based nature of Exemption 7(E)'s first clause leaves much room for discretionary disclosure upon application of the “foreseeable harm” standard.

Office of Information and Privacy, U.S. Department of Justice, Justice Department Guide to the Freedom of Information Act 406-07 (1998) (pre-publication copy).

B. Application of Exemption 7(E) to Information Withheld by DOE/IG

We have examined the information withheld by the DOE/IG under Exemption 7(E) and find that much of it does not meet the above requirements for application of the exemption. For example, information on page 2-4 of Document 9 describes the provisions of a federal statute. We cannot see how this information could possibly disclose a law enforcement technique or procedure, and certainly information contained in a federal statute, if not well known publicly, is readily available to the public. Similar information is contained on page 2-C-1 of the same document; page 5-F-2 of Document 15; pages 7-36 and 7-38 through 7-48 of Document 19; and pages 8-18, 8-21, 8-A-1, and 8-A-2 of Document 21.

Other information, though arguably disclosing a law enforcement technique or procedure, such as those concerning use of deadly force (page 3-22 of Document 11), oaths (pages 7-12 and 7-13 of Document 19), and Miranda-type warnings (page 7-D-1 through 7-F-1 of Document 19), fall into the category of “techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television,” Albuquerque Publishing, 726 F. Supp. at 858, are well known to the public, and are therefore outside the protection of Exemption 7(E).

Finally, to the extent that the information withheld by the DOE/IG would disclose techniques and procedures for law enforcement investigations or prosecutions, and those techniques or procedures are not well known to the public, the information should nonetheless be discretionarily released by the DOE/IG in accordance with the Reno Memorandum unless DOE/IG can articulate a reasonably foreseeable harm to an interest protected by Exemption 7(E) that would result from release of the information. Examples of information that might be safely released relate to employee appearance and grooming (Document 11, page 3-4), firearm care and safety (Document 11, pages 3-12, 3-18, 3-20, 3-21, 3-24, 3-25), general discussion of affidavits and their admissibility in administrative and court proceedings (Document 19, page 7-9), the standard format for reports of investigation, administrative reports to management, and office of investigations weekly OIG activity reports (Document 27, pages 11-5 through 11-8, 11-A-1, and 11-B-1; Document 31, page 13-J-1), and include a number of blank forms (e.g., Document 21, pages 8-E-2 and 8-L-1; Document 23, pages 9-A-1, 9-A-2, and 9-B-1; Document 29, page 12-A-2; Document 33, 14-I-1). We believe, however, that the DOE/IG is best equipped to review the information it has withheld, and articulate the reasonably foreseeable harm to an interest protected by Exemption 7(E) that would result from its release.

We recognize that the interests protected by Exemption 7(E) are extremely important ones and that material covered by the exemption should not be released lightly. Nevertheless, federal courts and the Office of the Attorney General have place significant limitations on the extent to which agencies can utilize this exemption. We therefore will remand this matter to the DOE/IG to (1) release the material we have found above would not qualify for withholding under Exemption 7(E), or to explain why that information may be withheld pursuant to the FOIA(1)and (2) with respect to that information covered by

Exemption 7(E), release the material to the extent that doing so would not result in an articulable and reasonably foreseeable harm to an interest protected by Exemption 7(E). In all other respects, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by David E. Ridenour, P.E., on August 9, 1999, Case No. VFA-0516, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Office of Inspector General for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 7, 1999

(1)On remand, the IG should also consider whether it would be more appropriate to apply the second clause of Exemption 7(E), which protects “guidelines for law enforcement investigations or prosecutions,” to the material withheld, in view of the fact that the manual in several places (e.g., introduction to Document 19, page 8-9 of Document 21) refers to its contents as “guidelines.”

Case No. VFA-0517, 27 DOE ¶ 80,225

August 31, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Myers Bigel Sibley & Sajovec

Date of Filing:August 12, 1999

Case Number: VFA-0517

On August 12, 1999, Myers Bigel Sibley & Sajovec (Appellant) filed an Appeal from a determination issued to it by the Federal Energy Technology Center (FETC) of the Department of Energy (DOE) on July 14, 1999. In that determination, FETC released some documents to the Appellant as the result of a request filed by the Appellant on May 27, 1999, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. That determination also withheld several documents pursuant to Exemption 4 of the FOIA. If the present Appeal were granted, the DOE would be ordered to release in its entirety the information that was withheld in the July 14, 1999 determination.

I. Background

In a submission dated May 27, 1999 (and supplemented on June 16, 1999), the Appellant filed a request for information under the FOIA for copies of documents regarding tests conducted in the course of a scientific project. In its July 14, 1999 determination letter (Determination Letter), FETC

released some documents and withheld others, citing Exemption 4 of the Freedom of Information Act. FETC stated as its only justification that the withheld information is “business confidential material.” See Determination Letter.

In its August 12, 1999 Appeal, the Appellant made various arguments as to why the withheld information should be released based on patent law. However, these arguments are premature because FETC has failed to adequately justify its determination that the withheld records are exempt from release under Exemption 4. Nor did FETC state whether any non-exempt material could be segregated for release. Therefore, we are remanding this matter to FETC for a new determination.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(4) (Exemption 4). Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. §

1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. Public Citizen Health Research Group v. FDA., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (Public Citizen). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. See, e.g. Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978). Next, the agency must determine whether the information is "obtained from a person." Corporations are deemed "persons" for purposes of Exemption 4. See Allnet Communications Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also Ronson Management Corp., 19 DOE ¶ 80,117 (1989). Then, the agency must determine whether the information is "privileged or confidential." If the information is subject to a valid claim of legal privilege on the part of its submitter, it may properly be withheld under Exemption 4.

In order to determine whether the information is "confidential" the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. If the information was involuntarily submitted, the agency must show that the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained before withholding it under Exemption 4. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992) (Critical Mass.), cert. denied, 113 S. Ct. 1579 (1993); National Parks, 498 F.2d 765 at 770. In this case, because the information was submitted as part of a solicitation, it is considered to have been submitted voluntarily. It is therefore considered "confidential" if it meets the test set out in National Parks. Nayar & Company, P.C., 23 DOE ¶ 80,185 at 80,710 (1994).

In addition, once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (Kleppe); Digital City Communications, Inc., 26 DOE ¶ 80,149 at 80,657 (1997). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. Tri-State Drilling, Inc., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. Wisconsin Project on Nuclear Arms Control, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. Larson Associates, Inc., 25 DOE ¶ 80,204 (1996); Milton L. Loeb, 23 DOE ¶ 80,124 (1993). In addition, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (Westlaw, DCT database) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict"); Public Citizen, 704 F.2d at 1291; Kleppe, 547 F.2d at 680 ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA.").(1) Consequently, we must remand this case so that FETC may give the Appellant a specific explanation as to why Exemption 4 applies to the information at issue in the present case.

We also point out that the FOIA requires that "[a]ny reasonably segregable portion of a record shall be

provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b) (1982). See EPA v. Mink, 410 U.S. 73, 89, 91 (1973); Mead Data Central, Inc. v. Air Force, 556 F.2d 242, 259-62 (D.C. Cir. 1977), cert. denied, 436 U.S. 927 (1978); Casson, Calligaro & Mutryn, 10 DOE ¶ 80,137 at 80,615 (1983). Segregation and release of non- exempt material is not necessary where it is "inextricably intertwined" with the exempt material so that release of the non-exempt material would "compromise" the withheld material, or where the amount of non-exempt material is small and so interspersed with exempt material that it would pose "an inordinate burden" to segregate. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83-86 (2d Cir. 1979). Consequently, FETC should consider whether non-exempt material can be released.

Accordingly, we will remand this case to FETC, which should promptly issue a new determination releasing any non-exempt information to the Appellant. FETC should clearly explain in its determination letter why release of any withheld information would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the information’s submitter. FETC should also state whether any non-exempt information can be segregated and released. For the reasons explained above, the present Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Myers Bigel Sibley & Sajovec, Case No. VFA-0517, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the DOE’s Federal Energy Technology Center, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 31, 1999

(1)*/ FETC should also be aware that it is bound to follow the requirements contained in 10 C.F.R. § 1004.11.

Case No. VFA-0518, 27 DOE ¶ 80,232

September 22, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Technology & Management Services, Inc.

Date of Filing: August 20, 1999

Case Number: VFA-0518

On August 20, 1999, Technology & Management Services, Inc. (TMS) filed an Appeal from a determination issued to it by the Assistant Inspector General for Investigations, Office of the Inspector General (the OIG). The OIG issued this determination in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the OIG to release additional information to TMS.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

I. Background

In its request, TMS sought access to "any and all statements, memoranda or other documentation which refers to" (i) allegations that TMS or any of its employees has charged the DOE improperly pursuant to any contract being performed for the DOE, (ii) Roger Legassie or any other employee in connection with a specified contract or subcontract, (iii) Barbara McKee, SoBran, Inc., or SoBran, Inc. President Amos Otis in connection with the allegations referred to above, and (iv), OIG guidelines and procedures for verifying that allegations of impropriety are factually based and made in good faith.

The OIG conducted a search and identified 120 documents as responsive to TMS' request. Twenty-five of these documents were released in their entirety, fifty-one

documents were released with portions withheld pursuant to Exemptions 6 and 7(C) of the FOIA, and four were released with portions withheld pursuant to Exemptions 5, 6 and 7(C). (1)

Under Exemption 5, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" may be withheld. 5 U.S.C. § 552(b)(5). In applying Exemption 5, the OIG stated that this provision "protects the deliberative and consultative process of government," and that the material withheld under the exemption is "predecisional deliberative data that was subject to further review and possible change." OIG Determination at 2. Exemption 6 protects from mandatory disclosure "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . " 5 U.S.C. § 552(b)(6).

Exemption 7(C) provides that “records or information compiled for law enforcement purposes” may be withheld from disclosure, but only to the extent that the production of such documents “could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ” 5 U.S.C. § 552(b)(7)(C). The OIG stated that it withheld "[n]ames and information that would tend to disclose the identity of . . . subjects, witnesses, sources of information, and other individuals" involved in the OIG's investigation of the allegations against TMS. OIG determination at 2. The OIG added that these individuals are entitled to privacy protections under Exemptions 6 and 7(C) so that they will be free from possible "harassment, intimidation and other personal intrusions." Id.

In its Appeal, TMS contests the adequacy of the OIG's determination with respect to Exemption 5, and the OIG's application of Exemptions 5, 6 and 7(C) in withholding portions of the responsive documents. TMS further contends that, even if the withheld material is subject to these exemptions, the information should be released in the public interest. (2)

II. Analysis

A. Exemption 5

1. Adequacy of the Determination

It is well established that a FOIA determination must contain a reasonably specific justification for withholding material pursuant to an FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to permit the requesting party to prepare a reasoned appeal and to allow this Office to perform an effective review of the initial agency determination. We have not hesitated to remand a determination letter where the issuing office has not explained its reasons for applying an exemption, but has instead merely restated the language of the exemption. See, e.g., Richard W. Miller, 25 DOE ¶ 80,120 (1995).

In its appeal, TMS argues that the OIG's justification for withholding material under Exemption 5 is "totally conclusory," and "contains nothing more than the test to be applied with regard to . . . Exemption 5." We do not agree. In the determination, the OIG does state that the withheld material is predecisional and deliberative, which is essentially the standard for applying this exemption, but it then goes to include its reason for this finding, i.e., that the information did not set forth a final agency position on the issues at hand, but was instead "subject to further review and possible change." Avoiding the confusion that might result from the release of preliminary or tentative agency opinions and findings is a legitimate justification for applying Exemption 5. We conclude that the OIG adequately explained its determination with respect to this exemption.

2. The OIG's Application of Exemption 5

As we stated previously, Exemption 5 shields from mandatory disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). As such, the Supreme Court has construed it to "exempt those documents, and only those documents, that are normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). Accordingly, the exemption has been held to encompass the attorney work-product, attorney-client and deliberative process privileges. See, e.g., Sears; Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980) (Coastal States). The deliberative process privilege shields from mandatory disclosure communications that are “predecisional,” i.e., that were made during agency consideration of a proposed action, and "deliberative," in that they "make recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). See also Darci L. Rock, 13 DOE ¶ 80,102 (1985); Texaco, Inc., 1 DOE ¶ 80,242 (1978). The privilege serves to insure open, uninhibited and robust debate of various options by eliminating the fear of

disclosure of preliminary viewpoints. Coastal States, 617 F.2d at 866. Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions is enhanced. Sears, 421 U.S. at 149-51.

In its appeal, TMS contends that the material withheld from documents 4, 27, 82 and 92 is neither predecisional nor deliberative, and that the DOE has waived any applicable privilege under Exemption 5. Document 4 is a Memorandum of Investigative Activity dated July 30, 1997, that was authored by an OIG investigator. This document consists of the investigator's notes of an interview with an individual concerning one of the allegations against TMS, and the investigator's preliminary opinions as to the validity of the allegations. Document 27 is a letter dated February 10, 1997, from a DOE employee to an Assistant U.S. Attorney for the Eastern District of Virginia. Document 82 is a memorandum from the OIG investigator to an OIG official setting forth the investigator's recommendation as to whether the investigation should continue. Document 92 is a Memorandum of Investigative Activity dated December 2, 1997. In each case, the material withheld from these documents under Exemption 5 is nonfactual in nature and is composed of the preliminary opinions of the individuals concerned as to the validity of the allegations or as to the future course of the investigation. The withheld material is predecisional in that it was generated prior to any DOE finding concerning the allegations against TMS, and deliberative in that it sets forth the opinions and recommendations of the investigator and other individuals.(3)

Finally, we reject TMS' contention that the OIG has waived any privilege under Exemption 5. This argument is based on Washington Post Co. v. Department of the Air Force, 617 F. Supp. 602 (1985), in which the United States District Court for the District of Columbia held that by releasing a summary that presented, in outline form, the entire substantive content of a document, the Air Force waived any Exemption 5 privilege with respect to that document. That case is inapposite to the matter before us, since the documents released to TMS in redacted form do not constitute summaries that set forth the entire substantive contents of the original documents. We find that the OIG has not waived privilege with respect to these documents.

3. The Public Interest

The fact that this material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which its government operates, we find that interest to be attenuated by the fact that the withheld portions of these communications are composed mainly of predecisional, nonfactual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would result in foreseeable harm to the interests that are protected by the deliberative process privilege. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie the deliberative process privilege). For these reasons, we find that the OIG properly applied Exemption 5 in this matter.

B. Exemptions 6 and 7(C)

We have previously considered cases in which both Exemption 6 and 7(C) were invoked and we have stated that in such cases we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., Valley Times, 23 DOE ¶ 80,154 (1993) (Valley Times). Exemption 6 allows an

agency to withhold information if its release would constitute a “clearly” unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). By contrast, Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes, if its release could constitute a “reasonably” unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). In such cases, it is only necessary to address the application of Exemption 7(C) to the withheld material since the information was compiled for law enforcement purposes and any material which satisfies Exemption 7(C)’s “reasonableness” standard will be protected. Similarly, information not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that the release of the information constitutes a “clearly” unwarranted invasion of personal privacy.

The threshold test under Exemption 7(C) is whether the withheld information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The Exemption 7 “law enforcement” exception to mandatory release of information under the FOIA encompasses compliance with both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). The OIG is charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. App. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). The documents provided to TMS in redacted form were generated in the course of an OIG investigation into allegations of improper conduct by a DOE contractor. The documents were therefore compiled for law enforcement purposes within the meaning of Exemption 7(C).

In determining whether the release of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, the courts have used a balancing test which weighs the privacy interests that would be infringed against the public’s interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989). In this case, TMS maintains that disclosure of the information withheld under Exemptions 6 and 7(C) would further the public interest in "maintaining the sanctity of the governmental investigatory process." Appeal at 1. The firm claims that the DOE's investigation of TMS was abusive in that it took an inordinately lengthy amount of time to complete and interfered with its contractual relationships, while resulting in no civil or criminal prosecutions. TMS therefore suggests that the information is needed in order to expose official misfeasance or malfeasance in the investigatory process.

At the outset, we note that the names of the OIG employees who participated in the investigation were provided to TMS. The information that the firm seeks would identify witnesses who spoke to the OIG about the allegations against TMS, and others who cooperated in the investigation. While we agree with TMS that the public has a significant interest in maintaining the integrity of the government's investigatory processes, we find that this goal may best be achieved by withholding information of this kind, not by releasing it. Revealing the identity of individuals who cooperate with OIG investigations could subject the individuals to harassment, retaliation, or invasions of privacy. See, e.g., Valley Times, 23 DOE at 80,632; James L. Schwab,

21 DOE ¶ 80,117 (1991) . Potential witnesses in future OIG inquiries would therefore be much less likely to cooperate if they knew that their identities could later be revealed to the subject of the investigation. Moreover, release of the withheld information, by itself, would add little to the public's understanding of the investigatory process. While TMS could conceivably use the information to gain some insight into how the investigation was conducted, we find that interest to be outweighed by the very serious impact that disclosure could have on the OIG's ability to obtain needed information in future investigations. We therefore conclude that the OIG properly applied Exemptions 6 and 7(C) in withholding the information in question.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Technology & Management Services on August 20, 1999 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 22, 1999

(1)The remaining forty responsive documents were generated by other offices and agencies, and the documents were referred to these offices and agencies for review.

(2)TMS also requests that it be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation of why that exemption is applicable. On previous occasions, we have stated that, although such an index may be required of the agency when it is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990). At the administrative level, determinations need only include a general description of the withheld material and a statement of the reason for the withholding. Therefore, we reject the Appellant's request for a Vaughn index.

(3)Because of a settlement agreement that was reached between the DOE and TMS on January 11, 1999, no final OIG report was issued. However, OIG has informed us that such a report would have been issued in the absence of a settlement.

Case No. VFA-0519, 27 DOE ¶ 80,235

September 30, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jurgis Paliulionis

Date of Filing: August 24, 1999

Case Number: VFA-0519

On August 24, 1999, Jurgis Paliulionis (Paliulionis) filed an Appeal from a determination that the Chicago Operations Office (CH) of the Department of Energy (DOE) issued to him. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, CH released some responsive information to Paliulionis. This Appeal, if granted, would require the DOE to release the remainder of the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 2, 1999, Paliulionis filed a FOIA request with CH seeking all documentation relating to the Argonne Group Rewards and Recognition Plan for the previous 12 month period. In a determination letter, CH indicated that it located the documents responsive to Paliulionis' request. CH released most of the responsive information. However, it withheld the specific amounts of incentive awards paid to Argonne Group employees under Exemption 6. In his Appeal, Paliulionis challenges the withholding of the amounts of the awards.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury

and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

CH determined that there was a privacy interest in the specific amounts of each incentive award given to Argonne Group employees. According to CH, releasing the specific dollar amounts of the awards "would allow direct comparisons between employee awards and almost certainly incite jealousy in those employees receiving lower awards." *See* Determination Letter at 2.

We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc*., 15 DOE ¶ 80, 115 at 80, 537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc*., 16 DOE ¶ 80, 102 at 80, 504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80, 120 at 80, 569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80, 104 at 80, 519 (1985). A similar privacy interest is involved in this case. It is important to note that Paliulionis has already been provided with a document listing the names of those employees in the Argonne Group who received incentive awards. If a document listing the dollar amounts of those awards were disclosed to the requester, the awards could be directly linked to the employees who received them. Release of this material would reveal considerable personal financial information about each Argonne Group employee given an incentive award and would certainly constitute a serious invasion of personal privacy. In addition, Courts have similarly found that even releasing favorable information about an employee, such as details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy among co-workers." *See Ripskis v. Hud*, 746 F.2d 1, 3 (D.C. Cir. 1984). These considerations govern our determination. We therefore find a significant privacy interest in the amounts of the incentive awards.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). In his Appeal, Paliulionis stated that disclosure of the withheld information "would provide the [awards] process with a built-in system of checks and balances, which presently is lacking and would inspire others to follow suit . . . [T]he open process would have an adverse effect on the ability to manipulate and abuse the system, such as granting unjustified and gratuitous awards." *See* Appeal Letter at 2.

We find that there is a minimal public interest in the release of the withheld information. Paliulionis has not demonstrated what public interest would be served by releasing the specific values of employees' incentive awards. Simply alleging that disclosure of this information *might* affect the ability to manipulate

and abuse the awards system does not justify releasing personal information. *See Hopkins v. Department of Housing and Urban Dev*., 929 F.2d 81, 88 (2d Cir. 1991) (invocation of a legitimate public interest cannot itself justify the release of personal information)). Therefore, we agree with CH and find that there is a minimal public interest in the disclosure of the responsive material.

3. The Balancing Test

In determining whether the disclosure of the amounts of the incentive awards could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989).

We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the specific amounts of the incentive awards. Therefore, we find that the public interest in disclosure of the withheld material is outweighed by the real and identifiable privacy interests of the Argonne Group employees.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b). We find that CH properly segregated and released all responsive information by withholding only the dollar amounts for each incentive award given.

It Is Therefore Ordered That:

(1) The Appeal filed by Jurgis Paliulionis on August 24, 1999, OHA Case No. VFA-0519, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 30, 1999

Case No. VFA-0520, 28 DOE ¶ 80,111

September 7, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Hans M. Kristensen

Date of Filing: August 30, 1999

Case Number: VFA-0520

Hans M. Kristensen filed an Appeal from a determination that the Department of Energy's Albuquerque Operations Office (Albuquerque) issued to him on July 12, 1999. In that determination, Albuquerque denied in part six requests for information that Mr. Kristensen submitted in May 1996, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. It provided copies of two particular documents, among others, from which information was withheld. That information was withheld as the result of the Department of Energy's Office of Declassification, as well as the Department of Defense's Defense Threat Reduction Agency (DTRA), reviewing the documents and determining that they contained classified information. This Appeal, if granted, would require the Department of Energy (DOE) to release the information that it withheld from those two documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In May 1996, Mr. Kristensen submitted a series of six requests under the FOIA to Albuquerque. Albuquerque responded to the requests by providing a number of documents. Among those documents were two from which information was

deleted pursuant to a DOE determination that some of the withheld information warranted protection from disclosure under Exemption 3 of the FOIA and a DTRA determination that the remainder of the withheld information warranted protection from disclosure under Exemptions 1 and 3 of the FOIA. These two documents were identified as "Lightning/Nuclear Weapon Accidents and Incidents Reported by FC/DASA in the Period from Early 1961 to February 1968," and "Nuclear Weapon Accident Photos– B52 Flying Alert over Goldsboro, N.C."

The present Appeal seeks the disclosure of the withheld portions of the two documents described above. In his Appeal, Mr. Kristensen contends that Albuquerque engaged in "excessive secrecy" and possibly outdated guidance when it withheld the volume of information that it did, particularly in light of the age of the information.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., National Security Archive, 26 DOE ¶ 80,118 (1996); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

In performing his review the Director of SA requested that DTRA also review the validity of the deletions made from the two documents. According to the Director of SA, DTRA withheld most of the information that was not disclosed to Mr. Kristensen. However, a small amount of information within the DTRA deletions was withheld by DOE as Formerly Restricted Data (FRD), concerning military utilization of nuclear weapons, or Restricted Data (RD), concerning weapons design information. These categories of information are still considered FRD or RD under current classification guidance. Under the Atomic Energy Act of 1954, this information is classified, and is therefore exempt from mandatory disclosure under Exemption 3. Nevertheless, the Director of SA has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations.

The Director of SA has also informed us that the material originally identified and redacted at the direction of DTRA is National Security Information (NSI) or FRD. Some of this material concerns military plans, weapons systems, or operations. As such, it is defined as National Security Information under Executive Order 12958, and DTRA therefore determined that it is exempt from mandatory disclosure under Exemption 1 of the FOIA, which exempts from mandatory disclosure matters that are classified under criteria established by an Executive Order. 5 U.S.C. § 552(b)(1). The remaining material that DTRA deleted is related to the military utilization of nuclear weapons. DTRA has determined this information to be Formerly Restricted Data under the Atomic Energy Act of 1954, and therefore exempt from mandatory disclosure under Exemption 3. As a result of its review, DTRA has, like DOE, reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. The denying official for the information withheld by DTRA is Major General William F. Moore, USAF, Deputy Director, DTRA.

Based on the review performed by the Director of SA, we have determined that the Atomic Energy Act requires the continued withholding of much of those portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Director of SA has now determined to be properly classified must be withheld from disclosure. However, because some previously deleted information may now be released as a result of the Director of SA's review, newly redacted versions of the two documents reviewed in this Appeal will be provided to Mr. Kristensen under separate cover. In these documents, the Director has marked all deletions made by the DOE as "DOE b(3)." The deletions now being made at the direction of DTRA are indicated on the documents as “DTRA b(1),” for those being withheld under Exemption 1 and “DTRA b(3),” for those being withheld under Exemption 3. Accordingly, Hans M. Kristensen’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Hans M. Kristensen on August 30, 1999, Case No. VFA-0520, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the documents entitled “Lightning/Nuclear Weapon Accidents and Incidents Reported by FC/DASA in the Period from Early 1961 to February 1968,” and “Nuclear Weapon Accident Photos– B52 Flying Alert over Goldsboro, N.C.”, in which additional information is released, will be provided to Mr. Kristensen.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 7, 2000

Case No. VFA-0521, 27 DOE ¶ 80, 234

September 30, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:William H. Keenan

Date of Filing:August 30, 1999

Case Number: VFA-0521

William H. Keenan filed this Appeal from a determination issued to him by the Albuquerque Operations Office (AOO) of the Department of Energy (DOE). The determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In his Appeal, Keenan challenges the adequacy of AOO's search for documents responsive to his request.

I. Background

Keenan submitted an e-foia request stating that:

In August or September 1968, I and a number of other athletes were part of some test at the University of California Nuclear Medicine Facility at the AEC - Los Alamos. We were told that the test had something to do with a "whole body" measuring method involving the natural radiation of human tissue.... I am interested in learning more about the "whole" nature of those or any other tests that were conducted on us at the time.

On August 10, 1999, AOO issued a determination stating that it had found no records responsive to Keenan's request. Keenan then filed the present Appeal.

In his Appeal, Keenan contends that AOO's search was inadequate. He states that in 1967 or 1968, he was an athlete preparing for the Mexico City Olympics. According to Keenan, he was a member of a group of athletes who participated in a series of tests at Los Alamos.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have often stated that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was inadequate. *See, e.g., Hideca Petroleum Corp.*, 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980).

In a case involving the adequacy of the agency's search, "the issue is not whether any further responsive

documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). To determine whether an agency's search was adequate, we therefore examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing Keenan's Appeal, we contacted officials at AOO to learn the extent of the search that they had conducted. Upon receiving Keenan's request, AOO searched its listing of "Z numbers," a registry of persons who are not employees of Los Alamos National Laboratory (LANL) but who enter the facility to participate in programs there. Also searched were the files of the Employee Information System (searched under both Retrieve Employee and Update Non-Lab Personal Information); the Official Personnel Files Office; the Radiation Protection Services (Dosimetry) Office; the Occupational Medicine Archives; and the LANL Information Records Center.(1)

We contacted personnel at AOO and forwarded them a copy of Keenan's Appeal. After reviewing the Appeal and notes of their original search, they informed us that they knew of no other files that might contain records responsive to Keenan's request. They added, however, that agencies other than the DOE and its predecessors may have conducted tests at Los Alamos similar to the test described by Keenan in his submissions. They did not expect any records of such tests to be in the custody or control of AOO, nor to be found in the course of a reasonable search by AOO under the FOIA.

Given the facts presented to us, we find that AOO conducted an adequate search that was reasonably calculated to discover documents responsive to Keenan's request. Therefore, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by William H. Keenan, Case No. VFA-0521, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 30, 1999

(1)In his Appeal, Keenan noted his concern that AOO "seemed to merely have examined employee records." Personnel at AOO acknowledged that some of the files they searched were employee records. They informed us that they searched these files to ensure they would not overlook any responsive material, not because they believed Keenan was an employee at LANL. They also noted that they searched files containing material relating to non- employees.

Case No. VFA-0522, 27 DOE ¶ 80,236

October 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: BP Exploration, Inc.

Date of Filing: September 1, 1999

Case Number: VFA-0522

On September 1, 1999, BP Exploration, Inc. (BP) filed an Appeal from a determination the Strategic Petroleum Reserve Project Management Office (SPR) of the Department of Energy (DOE) issued to it on August 11, 1999. In that determination, SPR denied BP's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In a January 14, 1999 request for information, BP sought a copy of a lease agreement between SPR and Exxon Pipeline Company (Exxon) for certain specified DOE pipelines. In its February 8, 1999 determination, SPR released a redacted copy of the lease agreement in which the various rental fees Exxon would pay the DOE for use of the pipelines were withheld. SPR withheld the fees pursuant to Exemption 4 of the FOIA. BP subsequently appealed SPR's February 8 determination to this Office. In an April 3, 1999 Decision, we found that SPR's February 8 determination letter did not justify SPR's withholding of the fee information because it did not adequately explain how Exemption 4 applied to the withheld information. BP Exploration, Inc., 27 DOE ¶ 80,197 at 80,746 (1999). Consequently, we remanded the case to SPR so that it could either issue another determination adequately explaining why the information was properly withheld pursuant to Exemption 4 or release the withheld information. Id.

SPR issued another determination on May 13, 1999. In this determination, SPR again withheld the rental fee information. SPR asserted that the fee information had been obtained from Exxon and that it was confidential. SPR stated that Exxon had informed it that Exxon would suffer commercial harm from the release of the fee information. BP subsequently appealed SPR's May 13 determination to this Office. In a July 8, 1999 Decision, we again found that SPR's justification for withholding the information was insufficient. BP Exploration, Inc., 27 DOE ¶ 80,216 (1999). However, we again remanded

the matter to SPR. We stated that we believed we did not have the expertise to analyze the potential economic harm to Exxon based upon the information available. Id.

SPR issued a third determination on August 11, 1999. In this determination, SPR again withheld the rental fee information. SPR asserts that the fee information is confidential because release of this information would cause competitive harm to Exxon. SPR states that Exxon intends to operate the leased pipeline

system as a common carrier, which involves the setting of a tariff in accordance with Federal Energy Regulatory Commission (FERC) requirements. SPR states that the integrity of this rate making process would best be served if information BP is requesting remains confidential unless and until FERC intervention is called for. In other words, SPR maintains that BP can obtain whatever data is relevant to the tariff setting process under the supervision of the FERC in the context of a protest proceeding. Alternatively, SPR claims that the DOE's ability to obtain this information in the future would be jeopardized should it release the information to BP.

BP argues that SPR has not provided an adequate justification for its decision to withhold the requested information. BP challenges SPR's claim of competitive harm by asserting that Exxon will not be injured by the release of the lease rates. Appeal Letter dated September 1, 1999, from David K. Monroe and Gregg S. Avitabile, Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C., Counsel for BP, to George B. Breznay, Director, Office of Hearings and Appeals (OHA), DOE, at 6. In fact, BP asserts that it will not agree to a negotiated rate unless it has the lease fee information. Moreover, BP argues that SPR's rationale for withholding the information assumes that the information is "confidential" without applying the statutory criteria that define the term. Finally, BP challenges SPR's rationale for its alternate basis for withholding the information-- that disclosure would impair the DOE's ability to obtain information in the future-- contending that SPR has again focused on injury to the financial interest of the government, an argument that OHA rejected in its May 13 determination.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. As we stated in our July 8, 1999 Decision, because Exxon was required to submit a proposed rental fee in negotiating the lease agreement with SPR, we find that the withheld information was "involuntarily" submitted to SPR. BP Exploration, Inc., 27 DOE ¶ 80,216 at 80,796 (1999); see William E. Logan, Jr., 27 DOE ¶ 80,198 (1999). Thus, as we held previously, for this information to be properly withheld under Exemption 4, the National Parks test must be met. In the July 8, 1999 Decision, we also found that the information was "commercial" and "obtained from a person." BP Exploration, Inc., 27 DOE at 80,796-97. Therefore, the only issue before us is whether this information is "confidential."

In this case, the withheld information would be considered "confidential" if release would (a) cause substantial harm to the competitive position of Exxon or (b) impair the government's ability to obtain the necessary information in the future. In its August 11 determination letter, SPR found that release would cause Exxon to suffer substantial competitive harm by hurting Exxon's negotiating position with potential pipeline shippers. Determination Letter dated August 11, 1999, from Michael McWilliams, Assistant Project Manager for Management and Administration, SPR, to Stephen J. Chrien, BP (August 11 Determination Letter). However, SPR still has not demonstrated how potential customers could use this information to negotiate lower rates and, therefore, cause competitive harm.

Understanding SPR's position requires reference to the FERC tariff proceedings. Specifically, there are two primary methods for setting the tariff under FERC guidelines. (1)

The first method is to negotiate a price with an unaffiliated shipper. This is what Exxon is currently attempting to do with BP. Under this method, SPR believes that the non-affiliated shipper could use the lease rate information to negotiate a lower tariff with Exxon, and thereby injure Exxon in a cognizable manner. However, SPR has failed to specifically explain how the non-affiliated shipper would be able to use this information to negotiate the lower tariffs and thereby cause Exxon competitive harm. BP Exploration, Inc., 27 DOE at 80,796. The second method is to consider the cost of service to determine the tariff. Under the cost of service method, the carrier determines the tariff and submits the supporting work papers to FERC. Again, SPR fails to explain how release of the withheld information would enable Exxon's competitors to injure Exxon economically for tariffs established under the cost of service method. It is true that we have found in FOIA cases that release of sensitive commercial information submitted to the DOE by a bidder in the procurement context could injure the bidder by allowing a competitor to undercut the bidder in succeeding procurement actions. See, e.g., William E. Logan, Jr., 27 DOE ¶ 80,198 (1999) (possibility of pipeline rental bid competition); City of Federal Way, 27 DOE ¶ 80,191 (1991). This is very different from the present situation, in which SPR has presented no evidence to support its contention that Exxon would suffer economic harm. Consequently, we can not find that SPR has demonstrated that disclosure of the lease rates would cause substantial harm to Exxon's competitive position.

Nor can we conclude that SPR has demonstrated that release of the information would impair the government’s ability to obtain the information in the future. SPR’s assertion that disclosing the lease fees would impair its ability to attract potential pipeline lessees in the future, in the absence of other information, is unpersuasive. Disclosure of contract prices have been found to be a "cost of doing business with the government." Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); see ATT Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986) ("strong public interest in release of component and aggregate prices in Government contract awards"). Moreover, SPR has attempted to equate the potential negative financial impact of a disclosure with the potential negative impact on its ability to obtain information in the future. SPR's financial argument simply does not address the criteria set forth in National Parks.

In essence, SPR seems to be arguing that the DOE should defer to FERC a decision on the releasability of the information BP requests, inasmuch as that information may be of significance in an eventual tariff proceeding at FERC. SPR refers us to no provision in the FOIA that would allow us to take into account of or give significance to the possibility of a later rate-making proceeding. Nor has SPR argued that the documents responsive to BP's request should be referred to FERC for processing. 10 C.F.R. § 1004.5(f) (setting forth the conditions under which referral to another agency is appropriate). The documentary information BP seeks is in the possession of the DOE, and the DOE has a statutory duty to reach a conclusion on the basis of the best information now available to it, including information about the likelihood of competitive harm.

Because SPR has failed to demonstrate that release of the withheld information would either cause substantial harm to the competitive position of Exxon or impair the government’s ability to obtain the necessary information in the future, we find that the withheld information is not "confidential" for Exemption 4 purposes. Thus, Exemption 4 was improperly applied by SPR to withhold the documents.

III. Conclusion

SPR has now had three opportunities to justify the withholding of the lease fees. SPR has once again failed to show that this information is “confidential” because it would either impair the government’s ability to obtain the information in the future or cause substantial harm to the competitive position of Exxon. Therefore, we will order the release of the lease fees in accordance with the notification provisions

of 10 C.F.R. § 1004.11.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by BP Exploration, Inc., on September 1, 1999, Case No. VFA-0522, is hereby granted as specified in Paragraphs (2) and (3) below.

(2) This matter is hereby remanded to the Strategic Petroleum Reserve Project Management Office of the Department of Energy which shall promptly release the requested information.

(3) Prior to the release of the information pursuant to Paragraph (2) of this Decision and Order, the Strategic Petroleum Reserve Project Management Office of the Department of Energy shall, in accordance with 10 C.F.R. § 1004.11, notify the submitter of the intended release no less than seven (7) calendar days prior to the intended disclosure of the information in question.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 8, 1999

(1)In its determination, SPR alleges that there are three methods to set a tariff rate. In fact, one of the three methods that SPR mentions, the market-based method, is only available should a carrier establish that it "lacks significant market power in the market in which it proposes to charge market-based rates." 18 C.F.R. § 348.1. This third method is not applicable here.

Case No. VFA-0523, 27 DOE ¶ 89,241

November 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nevaire S. Rich

Date of Filing: September 10, 1999

Case Number: VFA-0523

On September 10, 1999, Nevaire S. Rich (Rich) filed an Appeal from a determination that the Department of Energy (DOE) Freedom of Information Act and Privacy Act Division (DOE/HQ) issued to her. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, DOE/HQ released some responsive information to Rich. This Appeal, if granted, would require the DOE to release the remainder of the responsive information.

I. Background

On July 30, 1998, Rich submitted five requests to DOE/HQ. Rich asked for the following information: (1) all documents describing difficulties encountered during the processing of civil rights complaints when dealing with officials of the Office of Nonproliferation and National Security (NN) since 1992; (2) all documents regarding the civil rights practices and trends of NN; (3) all documents regarding the costs of processing civil rights complaints up to the time of resolution; (4) all documents regarding settlements, including the number of settlements, settlement amounts and the names of DOE officials who negotiated the settlements on behalf of DOE; and (5) the number, basis and geographic location of each civil rights complaint. See Letters from Rich to DOE/HQ (July 30, 1998). DOE/HQ combined the five requests into one, and assigned the request to the Office of Civil Rights (DOE/OCR) for a search of its files. Letter from Acting Director, DOE/HQ to Rich (August 7, 1998). DOE/OCR performed a search that located 11 responsive documents. DOE/HQ released those documents to Rich. Ten were released in their entirety and one was released with the names of complainants deleted. Letter from DOE/HQ to Rich (June 29, 1999) (Determination Letter). In her Appeal, Rich challenges the adequacy of the search, arguing that the final response failed to address several of her requests and that the search results were incomplete.

Letter from Rich to Director, OHA (September 10, 1999) (Appeal).(1) Rich does not appeal the withholding of complainants' names.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably

calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted DOE/OCR to ascertain the scope of the search, particularly in light of Rich's contention that she has copies of responsive letters that were not released to her. In addition, Rich argues that even though she made more than one civil rights complaint about NN to DOE/OCR herself, DOE/OCR produced no evidence of her complaints in the responsive material. Memorandum of Telephone Conversation between Rich and Valerie Vance Adeyeye, OHA (September 30, 1999). At that time, DOE/OCR did not provide any details about the search or explain their inability to locate the responsive material that Rich already had in her possession. Electronic Mail Message from DOE/OCR to Valerie Vance Adeyeye, OHA Staff Attorney (October 1, 1999). Nonetheless, DOE/OCR accepted a copy of the appeal and agreed to contact this office with further information about the search. *Id.*

Sometime thereafter, DOE/OCR contacted OHA and we met to discuss the search. As a preliminary matter, DOE/OCR stated that files were retired after three years, and that it had released all of the responsive information in its possession. Memorandum of Meeting between Lynn Hull, DOE/OCR, and Valerie Vance Adeyeye, OHA Staff Attorney (October 19, 1999). DOE/OCR informed this office that it had searched every complaint file, and also searched for a corresponding case in the "settlement drawer." *Id.* In response to Rich's argument that Rich is aware of settlements that were not included in the responsive material, Ms. Hull stated that some settlements may have been too recently negotiated to appear in DOE/OCR's files. In addition, settlements that are negotiated and agreed upon in the field are not recorded at DOE/OCR if the field personnel do not notify DOE/OCR of the settlement. In reference to Rich's request for information about problems dealing with officials in named DOE offices, DOE/OCR does not maintain records that identify the number of times that a complaint was filed against a certain manager. Thus, DOE/OCR could not respond to

Rich's request for documents about the difficulties encountered while processing complaints when dealing with officials of NN or other named offices. We therefore find that DOE/OCR conducted an adequate search of records in its possession.

Finally, DOE/OCR explained that it provided Rich a summary document of settlement information in response to one of her requests. We find that this was a logical, reasonable and user-friendly manner in which to present the data to the requester. *See Charles E. Washington*, 27 DOE ¶ 80,221 (1999). However, Rich has now made clear that she wishes to see all of the responsive documents, and under the FOIA, she is entitled to receive a copy of all responsive, non-exempt documents. *Id*. Accordingly, we shall remand this portion of the case to DOE/OCR for a further determination.(2) DOE/OCR should either promptly release all additional responsive material or explain the reason for the withholding of any such information.

It Is Therefore Ordered That:

(1) The Appeal filed on September 10, 1999 by Nevaire Rich, OHA Case No. VFA-0523, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the DOE Office of Civil Rights which will promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3 This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 15, 1999

(1)Rich filed this appeal after the thirty-day deadline specified in our regulations. *See* 10 C.F.R. § 1004.8(a). We advised DOE/OCR, and they informed us that, despite the delay, they had nothing to add to the initial response. Electronic mail message from Lynn Hull, OCR to Valerie Vance Adeyeye, OHA (September 24, 1999). In the interest of administrative efficiency, we then accepted the appeal.

(2)In her request, Rich also sought information about Equal Employment Opportunity case investigations that are performed in connection with civil rights complaints. DOE/OCR informed OHA, but not the requester, that there is a privacy interest in much of this material. DOE/OCR should address this issue in the new determination.

Case No. VFA-0525, 27 DOE ¶ 80,237

October 13, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: BNFL, Inc.

Date of Filing: September 14, 1999

Case Number: VFA-0525

On September 14, 1999, BNFL, Inc. (Appellant) filed an Appeal from a final determination issued on August 11, 1999 by the Department of Energy's Federal Energy Technology Center (the FETC). In that determination, the FETC released a number of documents in response to a June 28, 1999 Request for Information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, the FETC also withheld some responsive information under FOIA Exemptions 3, 4 and 5. This Appeal, if granted, would require FETC to release portions of the withheld information.

I. BACKGROUND

On June 28, 1999, the Appellant filed a Request for Information with DOE Headquarters' Freedom of Information Office. That office forwarded the Appellant's request to FETC and the DOE's Oak Ridge Operations Office (Oak Ridge). On August 11, 1999, FETC issued a determination letter informing the Appellant that it had completed its portion of the search. The determination letter further informed the Appellant that it located a number of responsive documents. FETC released a large number of documents to the Appellant in their entirety. FETC, however, withheld some responsive information under FOIA Exemptions 3, 4 and 5.

The present Appeal was submitted on September 14, 1999, challenging several of FETC's withholdings as well as the adequacy of the DOE's search for responsive documents.(1) Specifically, the Appellant contends FETC:

1) failed to identify other authorizing officials having responsibility for the denial of records;

2) improperly withheld a memo under Exemption 4;

3) improperly withheld five documents under Exemption 5;

4) failed to explain why a discretionary release would not be appropriate for the withheld information; and,

5) failed to conduct an adequate search for responsive documents.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). The only exemptions at issue in the present case are found at 5 U.S.C. § 552(b)(4) (Exemption 4) and 5 U.S.C. § 552(b)(5) (Exemption 5).

A. 10 C.F.R. § 1004.5(c)

The Appellant contends that FETC failed to comply with DOE FOIA regulation 10 C.F.R. § 1004.5(c) by failing to identify "any other Authorizing [or Denying] Officials having responsibility for the denial of records." Appeal at 2. This contention is without merit. The determination letter only applied to that portion of the search conducted by FETC. Therefore, the only Authorizing or Denying Official involved in the determinations at issue was the Director of FETC, who signed the determination letter.

B. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Eugene Maples*, 23 DOE ¶ 80,106 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

The Appellant contends that FETC's search must have been inadequate because it erred in processing other aspects of the determination. This contention is, in essence, mere speculation. "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Safecard Services, Inc. v. Department of Justice*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

The Appellant also contends that the DOE needs to search the Headquarters Office of Patent Counsel (OPC) of the DOE Office of General Counsel. The Appellant's attorney has indicated that he has had several conversations with various OPC representatives. These conversations apparently concerned the same subjects as the Appellant's FOIA request. Under these circumstances, the OPC's files should be included in the DOE's search for responsive documents. Accordingly, we are remanding this portion of the Appeal to the DOE Headquarters Freedom of Information Office, which should coordinate this additional search for responsive documents.

C. Exemption 4

FETC withheld three documents under Exemption 4. The Appellant is only appealing FETC's withholding portions of one of these three documents. Portions of this document, which was prepared by FETC officials using information supplied to them by the Appellant's subsidiary, were withheld because they contained confidential commercial information submitted by a person to the DOE. However, our review of this withholding revealed that the information that FETC withheld from the Appellant under Exemption 4, was submitted to FETC by the Manufacturing Sciences Corporation (MSC). MSC is a subsidiary of the Appellant. (2) It is well settled that under the FOIA, a privilege cannot be asserted against a requester if it is the party to be protected by the privilege. *See Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 771 (1989); *Department of Justice v. Julian*, 486 U.S. 1 (1988). Accordingly, we are remanding this portion of the Appeal to FETC, which should either promptly release this information to the Appellant or withhold it under another appropriate FOIA exemption.

D. Exemption 5

FETC withheld portions of six documents under Exemption 5. The Appellant contests the application of Exemption 5 to five of the six documents. These contested documents are identified as: (1) a Price Negotiation Memorandum (post-negotiation summary) dated 5/15/95, (2) a Price Negotiation Memorandum (pre-negotiation plan) dated 5/15/95, (3) a Price Negotiation Memorandum (pre-negotiation plan) dated 1/22/97, (4) correspondence from Jarr to Malhotra re: Covofinish Invention Being Used Under ORO Contract, and (5) correspondence dated 7/18/97 from Jarr to Marchick re: Covofinish Claim Re: DOE Rights in Patent No. 5,458,745.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those “privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context.” *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The determination letter indicates that FETC has withheld information from these five documents under the deliberative process privilege. It is well settled that the executive or deliberative process privilege is among the privileges that fall under this exclusion. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for the deliberative process to shield a document, it must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Our review of the withheld information indicates that FETC failed to segregate a great deal of non-deliberative factual information from its withholdings.

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Accordingly, even if a document can properly be withheld under Exemption 5, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. *See* Reno Memorandum at 1, 2.

Upon reviewing the information withheld by FETC under Exemption 5, it appeared that much of this information could be released to the public without revealing the agency's deliberations. The determination letter does not provide any indication or justification for withholding this information. Therefore, FETC has failed to articulate any foreseeable harm to a protected interest. On remand, FETC should review that

information again and either release any information that could not reasonable be expected to harm a protected interest or clearly explain how release of that information could reasonably be expected to cause such harm.

On remand, FETC should review each of the five contested documents and should release all factual or descriptive information, sufficiently justify any withholding under Exemption 5, or consider withholding it under other exemptions. (3)

III. CONCLUSION

We are remanding part of the present Appeal to FETC. On remand, FETC shall either release the information it withheld under Exemptions 4 and 5 or provide a new justification for withholding. If FETC continues to withhold information under Exemption 5, it must explain which Exemption 5 privilege it is applying. In doing so, it must provide more than a simple restatement of the applicable test. Instead, it should include a statement of the reason for any withholding, a brief explanation of how the exemption applies to the matter withheld and an explanation of how the information it is withholding could reasonably be expected to cause harm if released to the public. 10 C.F.R. § 1004.7(b)(1); *William H. Payne*, 26 DOE ¶ 80,221 at 80,861 (1997); *Davis Wright & Jones*, 19 DOE ¶ 80,104 at 80,510 (1989). In addition, we are remanding part of the present Appeal to the Headquarters Freedom of Information Office for an additional search for responsive documents. The rest of the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by BNFL, Inc., Case No. VFA-0525, is hereby granted in part as set forth in Paragraph (2) below and denied in all other aspects.

(2) The Appeal is hereby remanded to the Federal Energy Technology Center and to the Headquarters Freedom of Information Office for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 13, 1999

(1)The Appeal does not contest any of FETC's withholdings under Exemption 3.

(2)The Appellant's attorney indicates that he is also representing MSC. As MSC's representative, he has assured us that MSC has provided its consent to release this information to its parent.

(3)Some of this information might be appropriately withheld under the confidential commercial information privilege discussed at length in *Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979).

Case No. VFA-0527, 27 DOE ¶ 80,239

October 18, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Matthew Cherney, M.D.

Date of Filing:September 23, 1999

Case Number: VFA-0527

Matthew Cherney, M.D., filed this Appeal in response to a determination issued to him by the Department of Energy's Office of the Inspector General (OIG) on September 23, 1999. The determination deals with a request for information that Dr. Cherney submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In his Appeal, Dr. Cherney requests the release of responsive material. As explained below, we will deny Dr. Cherney's Appeal.

I. Background

On March 9, 1999, Dr. Cherney filed a request under the FOIA for copies of documents relating to an inquiry conducted by the OIG. On April 5, the OIG advised Dr. Cherney that it had located responsive documents, but would withhold them from release pursuant to Exemption 7(A) of the FOIA. Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

In its April 5 determination, the OIG explained that:

A review of the responsive documents ... has been made.... The responsive documents are being withheld in their entirety pursuant to ... Exemption 7(A).... There has not been a final determination concerning this matter. Accordingly, Exemption 7(A) has been applied to the responsive documents. Release of the material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding.

Dr. Cherney appealed this determination. In reviewing his Appeal, we found that the OIG's explanation for withholding under Exemption 7(A) was inadequate in view of the principles enunciated in *Bevis v. Department Of State,* 801 F.2d 1386, 1388 (D.C. Cir. 1986) (*Bevis*).

In *Bevis*, the court ruled that an agency withholding records under Exemption 7(A) "need not justify its withholding on a document-by-document basis," but instead may group the documents in categories. *Bevis*, 801 F.2d at 1389. Moreover, when an agency elects to describe records by this approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90.

In our review of the April 5 determination, we found that the determination letter did not assign each responsive document to a functional category. We therefore granted the Appeal and remanded Dr. Cherney's request for a new determination. *Matthew Cherney, M.D.*, 27 DOE ¶ 80,209 (May 28, 1999) (the May 28 decision).

On remand, OIG issued a new determination letter on September 23, 1999. In this determination, OIG continued to assert that the responsive documents are protected from withholding by Exemption 7(A). In addition, OIG grouped the responsive documents into nine functional categories. This determination is the subject of the present Appeal.

II. Analysis

Dr. Cherney's Appeal consists of five numbered items. Items 2, 3, and 4 consist of complaints about the performance of OIG and the Office of Hearings and Appeals. In regard to these items, we note that:

Under the FOIA an individual may only obtain access to records "written or transcribed to perpetuate knowledge or events" ... Therefore, FOIA neither requires an agency to answer questions disguised as a FOIA request ... or to create documents or opinions in response to an individual's request for information.

Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985) (citations omitted). Accordingly, we will regard these complaints as outside the scope of an appeal under the FOIA.

Item 1 of the Appeal states in full that "there is no identifiable category into which congressional correspondence, documents of public record previously ordered released, fits. Let's have any and all congressional correspondence without delay -- as previously ordered."

In response to this item, we contacted personnel at OIG and asked them if there was any congressional correspondence among the records identified as responsive to Dr. Cherney's reqeust. They informed us that there were no items that could be described as "congressional correspondence." We need not, therefore, determine whether congressional correspondence should be released, or whether it fits into any of the functional categories specified in the September 9 determination letter.(1)

Item 5 of the Appeal states in full that "the decision itself is improper, as it is unsigned." However, Dr. Cherney did not include a copy of the determination letter with his Appeal. We contacted Dr. Cherney to request a copy of the determination letter. He requested that we obtain a copy from OIG. When we received a copy from OIG, we noted that the determination was clearly signed by Sandra L. Schneider, the Assistant Inspector General for Inspections of OIG. Since Dr. Cherney's assertion lacks merit, we will give it no further consideration.

III. Conclusion

Dr. Cherney's Appeal rests on the assumptions that (1) the OIG has copies of congressional correspondence that are responsive to his request and (2) the determination letter is unsigned. Since both assumptions lack merit, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Matthew Cherney, M.D., Case No. VFA-0521, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 18, 1999

(1)Contrary to Dr. Cherney's assertion, the Office of Hearings and Appeals has not ordered OIG to release congressional correspondence. In our review of a previous Appeal by Dr. Cherney, the DOE's Office of Power Technologies informed us that it might have copies of congressional correspondence that it had not considered in its original response to him. We remanded the request to the Office of Power Technologies for a search for responsive records in its file of congressional correspondence, but did not order their release. *Matthew Cherney, M.D.*, 27 DOE ¶ 80,212 (June 24, 1999) (the June 24 decision). In contrast to the June 24 decision, the present decision considers the determination of the OIG, and does not involve records in the possession of the Office of Power Technologies.

Case No. VFA-0529, 27 DOE ¶ 80,249

December 22, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ashok K. Kaushal

Date of Filing: October 29, 1999

Case Number: VFA-0529

On October 29, 1999, Ashok K. Kaushal (Kaushal) filed an Appeal from a determination issued to him on September 14, 1999, by the Office of Inspector General (IG) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

Kaushal wrote to the FOIA/Privacy Act Division at DOE headquarters and requested all documents created in response to a complaint he filed against Sandia National Laboratory. The FOIA/Privacy Act Division forwarded the request to the IG. The IG conducted a search of its files and located 69 responsive documents. On September 14, 1999, the IG notified Kaushal in a determination letter that it was releasing three documents in their entirety, withholding three documents in their entirety, and making partial disclosure of the other documents. Material in the partially disclosed documents was withheld pursuant to FOIA Exemptions 6 and 7(C). Additionally, the material in the documents withheld in full, Documents 20, 56 and 60, was withheld pursuant to Exemptions 6, 7(C) and 7(D). These documents are memoranda of interviews submitted by individuals who requested confidentiality. In this Appeal, Kaushal challenges the IG's withholding of Documents 20, 56 and 60 in their entirety. As explained below, we will uphold the IG's determination regarding these three documents.

II. Analysis

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F.

R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We find that the withheld documents meet the threshold test of Exemption 6 as they are "similar files," the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982) *(Abramson*). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). *See Burlin McKinney*, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3 (Exemption 6); *Stone v. FBI*, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., David Ridenour*, 27 DOE ¶ 80,143 (1998); *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *K.D. Moseley*, 22 DOE ¶ 80,124 (1992). Since, as discussed below, the responsive documents that were withheld pursuant to Exemptions 6 and 7 (C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

1. Privacy Interest

In its determination, the IG stated that the three documents withheld in their entirety contain names and information that would tend to disclose the identity of certain individuals involved in the IG investigation of Kaushal's complaints. According to the IG, these individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 1.

This office reviewed the three documents that were withheld from Kaushal. Those documents contained names of individuals who had some relation to the investigation. Because of the obvious possibility of

harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *See Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"); *Safecard Services, Inc., v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*); *Blumberg, Seng, Ikeda & Albers*, 25 DOE ¶ 80,124 at 80,563 (1995); *James Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991). Therefore, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." *See, e.g., Safecard*, 926 F.2d at 1205. In his Appeal, Kaushal did not offer any explanation of why he believes release of the material would be in the public interest. In fact, he did not address this issue at all. Therefore, we find that there is no public interest in the disclosure of the three documents at issue.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard*, 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Kaushal has not provided any information about the existence of a public interest in the disclosure of the withheld information. After a thorough examination, we found no public interest in the withheld material. In the absence of any public interest to weigh against the real and identifiable privacy interest, the privacy interest must prevail.

B. Exemption 7(D)

The IG also invoked the protection of Exemption 7(D) in withholding three documents from Kaushal. Exemption 7(D) protects from mandatory disclosure records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential source who furnished information on a confidential basis. 5 U.S.C. § 552(b)(7)(D); 10 C.F.R. § 1004.10(b)(7)(iv). Exemption 7(D) is meant to protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential. *Ortiz v. Department of Health and Human Services*, 70 F.3d 729, 732 (2d Cir. 1995) (*Ortiz*). "A source is confidential if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id., citing U.S. v. Landano*, 508 U.S. 165; 113 S. Ct. 2014, 2019 (1993). We reviewed Documents 20, 56 and 60, the unredacted documents in which several sources requested confidentiality. We conclude that an assurance of confidentiality could be reasonably inferred from material in the documents. Accordingly, we find that the IG properly withheld the identity of the confidential sources under Exemption 7(D).(1)

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Our review of the documents found that the IG properly withheld the three documents in their entirety.

It Is Therefore Ordered That:

(1) The Appeal filed by Ashok K. Kaushal on October 29, 1999, OHA Case No. VFA-0529, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 22, 1999

(1)The applicability of Exemption 7(D) is based on the circumstances under which the exemption is provided (i.e., granting confidentiality to a source), and not exclusively on the harm resulting from disclosure, as with Exemptions 6 and 7(C). Therefore, there is no balancing test applied under Exemption 7(D). *See Jones v. F.B.I.*, 41 F.3d 238, 247 (6th Cir. 1994) (stating that if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure); *Parker v. Department of Justice*, 934 F.2d 375, 380 (D.C. Cir. 1991).

Case No. VFA-0530, 27 DOE ¶ 80,238

October 14, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Lewis R. Ireland, Ph.D.

Date of Filing:September 28, 1999

Case Number: VFA-0530

On September 28, 1999, Lewis R. Ireland, Ph.D., (the Appellant) filed an Appeal from a determination issued to him by the Authorizing Official of the Department of Energy's Savannah River Operations Office (DOE/SR). In that determination, the Authorizing Official stated that DOE did not possess records responsive to the request for information that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Authorizing Official further stated that the records were owned by a company called Project Management Institute (not a DOE contractor or subcontractor). In his Appeal, the Appellant asserted that DOE possesses responsive records. Further, he stated that even if the requested records were owned by PMI, they should be subject to release under the FOIA.

Background

In his August 30, 1999 request for information, the Appellant sought records referencing himself that were generated on October 1, 1998 or later. He stated that he believed these files to be in the possession of Westinghouse Savannah River Corporation (WSRC) employee Harold Reeve.(1) In his determination, the Authorizing Official stated that no agency records exist regarding this request since any responsive records are solely owned by PMI. Therefore, he denied the request. The Appellant responded that he believes DOE possesses copies of responsive records and that its search was inadequate. In addition, he argued that these records were created using taxpayers' funds, and thus should be subject to release under the FOIA. Finally, he raised new questions about the relationship between PMI and DOE/SR and also alleged that the documents contain evidence of a federal crime.

Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g., Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Eugene Maples, 23 DOE ¶ 80,106 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted DOE/SR to determine how it conducted the search. We learned that DOE/SR conducted a

search of WSRC, which uncovered responsive email from Mr. Reeve's WSRC account referencing the Appellant. WSRC did not find any other responsive documents in its files. However, it explained that Mr. Reeve is working under the auspices of a "shared executive program" between WSRC and PMI. Under this program, Mr. Reeve spends equal amounts of time working for WSRC and PMI, although PMI is not a contractor for WSRC or DOE. Under this program, Mr. Reeve conducts PMI business from his WSRC location and computer, and he is permitted to keep PMI records at his WSRC location. See Record of Telephone Conversation between Dawn Goldstein, Staff Attorney, Office of Hearings and Appeals, and Pauline Conner and Jim Durkis, Office of Chief Counsel, DOE/SR (September 28, 1999). DOE/SR did not request that Mr. Reeve turn over any of his PMI records. We believe that Mr. Reeve was the logical focal point for DOE/SR's search, since the Appellant had stated that all responsive records were in his possession. We therefore find that DOE/SR conducted an adequate search of records in its possession and WSRC's possession.

We then inquired whether any responsive PMI records held in WSRC offices or the responsive email might be subject to mandatory release under the FOIA or DOE regulations. The Appellant asserted in his Appeal that all taxpayer-funded records are subject to release under the FOIA. This assertion is incorrect. See International Brotherhood of Electrical Workers, 27 DOE ¶ 80,152 at 80,620 (1998). Our threshold inquiry in this case is whether any of the requested records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); see 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that no responsive record ever became an "agency record" of DOE's, or a record acquired or generated by WSRC in its performance of its DOE contract. Therefore, the responsive records are not subject to release under either the FOIA or DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as WSRC, are subject to the FOIA. See, e.g., BMF Enterprises, 21 DOE ¶ 80,127 (1991); William Albert Hewgley, 19 DOE ¶ 80,120 (1989); Judith M. Gibbs, 16 DOE ¶ 80,133 (1987) (Gibbs). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See Gibbs, 16 DOE at 80,595-96.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In United States v. Orleans, 425 U.S. 807 (1976) (Orleans), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. See Ciba-Geigy Corp. v. Matthews, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the Orleans standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." Forsham v. Harris, 445 U.S. 169, 180 (1980) (Forsham). See also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

WSRC is a privately owned and operated company. While the DOE exercises general control over the contract work performed by WSRC, it does not supervise the company's day-to-day operations. We therefore conclude that WSRC is not an "agency" subject to the FOIA. In addition, since PMI is also a

privately owned and operated company, and has no contractual connection to DOE, it also is not an "agency" subject to the FOIA.

Although neither WSRC nor PMI is an agency for the purposes of the FOIA, the requested records could be considered "agency records" if the DOE obtained them and they were within the DOE's control at the time the Appellant made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts); see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham, 445 U.S. at 182. In this case, we have determined that none of the records the Appellant seeks was in the agency's control at the time of his request. See Record of Telephone Conversation of Dawn Goldstein, Pauline Conner and Jim Durkis. Based on these facts, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46; see also Forsham, 445 U.S. at 185-86.

Moreover, because any responsive records were generated as a result of the business of PMI, with no relationship to WSRC or DOE, we do not believe they would be encompassed by the DOE contractor record regulation. This regulation provides that some contractor-owned records may be subject to release under certain conditions. One of those conditions is that the responsive items are "records acquired or generated by the contractor in its performance of the contract. . . ." See 10 C.F.R. 1004.3(e)(1). The responsive records in this case were not acquired or generated by WSRC in its performance of its contract with DOE. Although we believe the email to be WSRC property, since it utilized the WSRC server and a WSRC email account, it was not acquired or generated in WSRC's performance of its contract with DOE, because it exclusively relates to PMI business. Accordingly, we find that any responsive records that exist are not subject to release under the DOE regulations. Thus, since DOE/SR conducted an adequate search, and the requested records are neither "agency records" nor subject to release under 10 C.F.R. § 1004.3, we must deny the Appeal at issue.(2)

It Is Therefore Ordered That:

(1) The Appeal filed by Lewis R. Ireland, Ph.D., on September 28, 1999, Case No. VFA-0530, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 14, 1999

(1)1/ WSRC is the management and operating contractor at DOE's Savannah River site.

(2)2/ With regard to the new questions that the Appellant raises regarding the relationship between DOE/SR and PMI, these should be the subject of a new FOIA request that he may file with DOE/SR.

We also note that the allegation that responsive documents may contain evidence of a federal crime has no relevance to the FOIA analysis described above.

Case No. VFA-0532, 27 DOE ¶ 80,242

November 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:STAND, Inc.

Date of Filing: October 13, 1999

Case Number: VFA-0532

On October 13, 1999, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by STAND, Inc. STAND is appealing a determination by the Department of Energy's (DOE) Albuquerque Operations Office (Albuquerque). Albuquerque issued a determination on September 21, 1999, in response to a request for information submitted in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require DOE to conduct a further search for responsive materials.

On May 28, 1999, STAND, a community activist organization whose name stands for Serious Texans Against Nuclear Dumping, submitted a three part request for information to Albuquerque. On September 21, 1999, Albuquerque issued a determination letter indicating that its search had not identified any documents that are responsive to either of the first two portions of STAND's request. In its Appeal, STAND is only contesting the adequacy of Albuquerque's search for documents responsive to the first portion of its request. The first portion of STAND's request was for "A copy of all *Unusual Occurrence Reports* for the period November 1976 to June 1990." (Emphasis in the original). STAND contends that a DOE report, identified as LA-UR-96-150, indicates that there were approximately 1600 *Unusual Occurrence Reports* during this period. STAND specifically contends that the DOE's search for responsive documents should have included DOE Headquarters, the Idaho National Engineering and Environmental Laboratory, Sandia National Laboratory, Lawrence Livermore National Laboratory and the Pantex Plant.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

We reviewed the search for responsive documents conducted by Albuquerque and we are convinced that Albuquerque's search, which included the departmental elements cited in the appeal, was reasonably calculated to uncover the sought materials. However, in conducting our investigation of Albuquerque's search, we became aware that the requested documents may be in the custody of the DOE's Headquarters Office of Operating Experience Analysis, an element of the DOE's Office of Environment, Safety and

Health (ESH). Accordingly, we are remanding this matter to ESH to conduct a further search for responsive documents and to issue a determination to STAND regarding the results of that search.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND, Inc. on October 13, 1999, Case Number VFA-0532, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The portion of the Appeal concerning the search for responsive documents is hereby remanded to the Assistant Secretary for Environment, Safety and Health to conduct a further search for documents responsive to the Appellant's request and to issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 24, 1999

Case No. VFA-0533, 27 DOE ¶ 80,266

March 17, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The National Security Archive

Date of Filing: October 14, 1999

Case Number: VFA-0533

The National Security Archive filed an Appeal from a determination issued to it on September 16, 1999, by the Freedom of Information Manager, Department of the Air Force, 11th Wing (Air Force). In that determination, the Air Force denied in part a request for information that the National Security Archive filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Air Force stated that certain information deleted from the documents released to the National Security Archive was withheld after a review of the documents had been performed by the Office of Declassification (now Office of Nuclear and National Security Information (ONNSI)) of the Department of Energy's Office of Security Affairs. This Appeal, if granted, would require the Department of Energy (DOE) to release information that it withheld through the Air Force's September 16, 1999 determination.

The FOIA requires that federal agencies generally release to the public, upon request, documents in their possession and control. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 2, 1993, the National Security Archive submitted a request to the Air Force for four documents, including two RAND Corporation reports titled "The MIRV System and Some of its Implications: An Overview" and "The U.S. ICBM FORCE: Current Issues and Future Options.(1) Because these documents contained DOE information, the Air Force

referred the documents to the DOE's Office of Declassification (OD) for a determination concerning their possible release. OD responded by returning the documents to the Air Force after marking the information to be withheld and providing an explanation of each withholding. The Air Force released to the National Security Archive redacted versions of the requested materials in a determination issued on September 16, 1999.

On October 16, 1999, the National Security Archive filed this Appeal. In its determination letter, the Air Force explained that the information withheld could not be released under the Atomic Energy Act of 1954 and therefore was withheld under Exemption 3 of the FOIA. The information withheld contains information about the military utilization of atomic weapons that has been classified as Formerly

Restricted Data (FRD).

The present Appeal seeks the disclosure of the withheld portions from the reports that the Air Force provided to the National Security Archive. In its Appeal, the National Security Archive states that the Department of Defense has released information on the "warhead yields of Titan and Minuteman III warheads." Appeal Letter dated October 11, 1999, from William Burr, the National Security Archive, to Office of Hearings and Appeals, DOE. The National Security Archive further contends that this is the information withheld in the two documents at issue in this Appeal. Therefore, the National Security Archive argues that "when such information is already in the public record, the Department should be able to declassify it without violating statute or contributing, even indirectly, to nuclear proliferation." Id.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g.*,*Glen Milner*, 27 DOE ¶ 80,115 (1998); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992). According to ONNSI, the portions of the two reports that the DOE deleted under Exemption 3 were withheld on the grounds that they contain information that has been classified as Formerly Restricted Data under the Atomic Energy Act and is therefore exempt from mandatory disclosure.

The Director of the Office of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this Appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the two reports at issue for which the DOE had claimed an exemption from mandatory disclosure under the FOIA.

The Director of SA considered the concerns the National Security Archive specifically raised in its Appeal, and performed as well a general review of the material under the current classification guidance. Based on the review that the Director of SA performed, the DOE has determined that the Atomic Energy Act requires the continued withholding of the information withheld in the initial determinations. In accordance with current joint Department of Defense/DOE classification guidance, the withheld information, which reveals yields of specific weapons, nuclear vulnerability and hardening data, and reliability of specific weapons, is still classified as FRD. Section 142 of the Atomic Energy Act, 42 U.S.C. § 2162, prohibits the disclosure of such information. Consequently, this information was and is properly withheld pursuant to Exemption 3 of the FOIA.

A finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information. Nevertheless, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the two reports at issue that the Director of SA has determined to be properly classified must continue to be withheld from disclosure. Accordingly, the National Security Archive's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal that the National Security Archive filed on October 16, 1999, Case No. VFA-0533 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 17, 2000

(1)”MIRV stands for Multiple Independently Targeted Reentry Vehicle and ICBM stands for Intercontinental Ballistic Missile.

Case No. VFA-0534, 27 DOE ¶ 80,246

December 13, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Wayne L. Pretti

Date of Filing: November 12, 1999

Case Number: VFA-0534

On November 12, 1999, Wayne L. Pretti filed an Appeal from a final determination that the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) issued on September 30, 1999. In its determination, Rocky Flats denied Mr. Pretti's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Rocky Flats to release the information it withheld.

Background

In a letter dated June 16, 1999, Mr. Pretti submitted a FOIA request to Rocky Flats for a copy of a report issued after an investigation of the billing practices of Systems Engineering and Management Associates, Inc. (SEMA). SEMA was a third tier contractor to Dyncorp Colorado, Inc. (DCI), a subcontractor at Rocky Flats. Allegedly, SEMA billed DCI for all hours SEMA's employees worked on the contract, including overtime. The investigation concerned whether SEMA paid overtime to its employees. Request Letter dated June 16, 1999, from Wayne L. Pretti to Mary Hammack, FOIA/PA Officer, Rocky Flats. Mr. Pretti also requested any documents prepared by DOE, Kaiser-Hill (KH), DCI, or SEMA(1) in response to the report. On September 30, 1999, Rocky Flats denied his request, stating that it did not have a copy of the report. Further, Rocky Flats claimed that, under the contract between Rocky Flats and KH, the report is not defined as an "agency record" because the contract "clearly defines internal complaint records, procurement records, and records pertaining to wages, salaries and benefits . . . as being the property of the contractor." Determination Letter dated September 30, 1999, from Mary Hammack, FOIA/PA Officer, Rocky Flats, to Wayne L. Pretti.

In response, Mr. Pretti filed this Appeal. He argues that the information cannot be an internal complaint record, because it is a report by a federal government agency independent of the DOE, KH, DCI, and SEMA. He alleges that the report deals with a

violation of public law, not an internal complaint. He also argues that Rocky Flats has made an extremely broad interpretation of the contract language in order to reach its determination that the report is a record "related to any procurement action by the Contractor" and "pertaining to wages, salaries, and benefits." Appeal Letter dated October 25, 1999, from Wayne L. Pretti to Director, Office of Hearings and Appeals (OHA), DOE.

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985);*accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

The initial information Mr. Pretti requested is a report of an investigation into SEMA's billing practices. Mr. Pretti asserts that the investigation was conducted by a "federal government agency independent of the DOE, Rocky Flats, KH, DCI, and SEMA." Appeal Letter at 2. In fact, Rocky Flats has informed us that the investigation and subsequent report was completed by a contractor, but not KH. Memorandum of Telephone Conversation on December 1, 1999, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Mary Hammack, FOIA/PA Officer, Rocky Flats (December 1, 1999 Telephone Memorandum). Rocky Flats has stated that neither it nor KH possesses a copy of the report. Determination Letter dated September 30, 1999, from Mary Hammack, FOIA/PA Officer, Rocky Flats, to Wayne L. Pretti; December 1, 1999 Telephone Memorandum. Rocky Flats stated that both the DOE and KH parts of the facility were searched. The FOIA/PA Officer at Rocky Flats questioned DOE contracting officials, who would be most likely to possess knowledge about the report and the contractor. They were asked if any relevant information existed. The answer was negative. DOE personnel also checked the computer system that tracks all records maintained by Rocky Flats to confirm that no reference to SEMA or the report existed. It did not. *See* Memorandum of Telephone Conversation on November 29, 1999, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Mary Hammack, FOIA/PA Officer, Rocky Flats; Memorandum of Telephone Conversation on December 2, 1999, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Mary Hammack, FOIA/PA Officer, Rocky Flats. In addition, the FOIA/PA Officer contacted KH personnel who are responsible for maintaining the contract records. Likewise, KH reported that it did not have a copy of the report. *Id.*

However, we do not believe the search can stop with KH. Relevant records could exist at DCI and SEMA. The contract between the DOE and KH contains a clause regarding the ownership of records acquired or generated in the performance of the contract. Contract No. DE-AC34-95RF00825, Section H.4. For the most part, records acquired or generated in the performance of the contract are considered government records. *Id.* In addition, section H.4 contains a provision stating that KH shall include a similar record-ownership provision in all subcontracts that are of a cost-reimbursement type. *Id.* The contract between KH and DCI contains the ownership-of-records clause. *See* Memorandum of Telephone Conversation December 6, 1999, between Janet R. H. Fishman, Attorney- Examiner, OHA, and Ken Leonardi, Attorney, KH. Therefore, DCI's records must be searched to ascertain if it possesses a copy of the report. If DCI has the report, Rocky Flats must then determine whether it is subject to disclosure under the FOIA or applicable regulation. In addition, if the contract between DCI and SEMA contains the ownership-of-records section, SEMA's records must also be searched. Therefore, we will remand the matter so a search of DCI's records can be performed and so Rocky Flats can ascertain whether the SEMA records must also be searched.

In his original request, Mr. Pretti also requested any documents prepared by DOE, KH, DCI, or SEMA in response to the report in addition to a copy of the report. In a letter dated September 27, 1999, to Rocky Flats, Mr. Pretti indicated that his request could be fulfilled in two parts by sending him a copy of the report first followed by the other documents. *See* Letter dated September 27, 1999, from Wayne L. Pretti to Mary Hammack, FOIA/PA Officer, Rocky Flats. It is our understanding that Rocky Flats believes its determination of September 30, 1999, to be a final determination and to answer all Mr. Pretti's requests. Since Rocky Flats referred only to the report and not to the other requested documents, the determination is incomplete. Therefore, we will also remand the Appeal on this matter for a determination regarding the other requested information.

It Is Therefore Ordered That:

(1) The Appeal filed by Wayne L. Pretti, on November 12, 1999, Case No. VFA-0534, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Rocky Flats Field Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 13, 1999

(1)KH is the Integrating or Prime Contractor at Rocky Flats. DCI is a subcontractor of KH. SEMA was a subcontractor of DCI.

Case No. VFA-0535, 27 DOE ¶ 80,244

December 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner:Lewis R. Ireland, Ph.D.

Date of Filing:November 2, 1999

Case Number: VFA-0535

On November 2, 1999, Lewis R. Ireland, Ph.D. (Appellant) filed a Motion for Reconsideration (Motion) of a Decision and Order issued to him by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). Lewis R. Ireland, Ph.D., 27 DOE ¶ 80,238 (1999). In that Decision, we denied Dr. Ireland's Appeal regarding his Freedom of Information Act (FOIA) request to the DOE's Savannah River Operations Office (DOE/SR). In his current Motion, the Appellant requests reconsideration based on one additional material fact he is presenting to this Office for the first time.

Background

On August 30, 1999, the Appellant submitted a FOIA request to DOE/SR seeking records referencing himself that were generated on October 1, 1998 or later. He stated that he believed these files to be in the possession of Westinghouse Savannah River Corporation (WSRC) employee Harold Reeve.(1)In his determination, the Authorizing Official stated that no agency records exist regarding this request since any responsive records are solely owned by Project Management Institute (PMI), a private entity. (2) Therefore, he denied the request. The Appellant responded, in relevant part, that these records were created using taxpayers' funds, and thus should be subject to release under the FOIA. He also alleged that the documents contain evidence of a federal crime. In the OHA's October 14 Decision, we upheld the determination of DOE/SR. Specifically, the OHA found that the records, composed solely of emails, dealt solely with PMI business. Because the responsive emails had not been obtained or controlled by DOE at the time of the request, they were not agency records. Further, since the responsive emails were not acquired or generated by WSRC in its

performance of its contract with DOE, they were not subject to the DOE contractor records regulation, 10 C.F.R. § 1004.3. Therefore, the OHA upheld the DOE/SR determination. On November 2, 1999, the Appellant filed the present Motion challenging our Decision.

Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. See 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. Nathaniel Hendricks, 25 DOE ¶ 80,173 (1996). In the past, we have looked to the standards contained in OHA's procedural regulations for guidance as to the appropriate substantive standards for use in this type of case. See Ron Vader, 23 DOE ¶ 80,183 at 80,704

(1993).(3)Those provisions require a showing of "significantly changed circumstances" be made before such motions are considered. 10 C.F.R. §1003.35. According to this regulation, "significantly changed circumstances" include the discovery of material facts which were not known at the time of the initial proceeding. 10 C.F.R. § 1003.35(a)(1). The Appellant's Motion provides one material fact which the Appellant has not previously brought to the DOE's attention. Therefore, we have decided to consider this material fact noted by the Appellant in his Motion for Reconsideration.(4)

The Appellant informed us for the first time of his belief that the responsive emails were addressed either from or to a "srs [Savannah River Site].gov" email address. He contends that a ".gov" address means that the email server utilized belongs to a government entity, in this case, the DOE, and any email on that server must therefore be an agency record. The Appellant is incorrect. The server utilized for "srs.gov" emails belongs to WSRC. See Record of Telephone Conversation between Dawn L. Goldstein and James Durkis, Office of Chief Counsel, DOE/SR (November 8, 1999). These emails could therefore not be agency records under the FOIA since they were not created or obtained by an agency at the time of the initial request. Further, we also find that the DOE contractor records regulation does not apply. Emails on this WSRC-owned server are governed by the WSRC/DOE contract. Because that contract gives ownership to DOE only of "records acquired or generated by the contractor in its performance of the contract," these exclusively PMI-related emails are not subject to our contractor records regulation.(5) Consequently, the responsive emails to which the Appellant refers are not subject to mandatory release under either the FOIA or the DOE contractor records regulation. We shall deny the Appellant's Motion for Reconsideration.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Lewis R. Ireland, Ph.D., on November 2, 1999, Case Number VFA-0535, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 1, 1999

(1)1/ WSRC is the management and operating contractor at DOE's Savannah River site.

(2)PMI's only connection to DOE is a 1995 partnership agreement, which is not the type of agreement which would bring PMI under DOE contractor records regulation, 10 C.F.R. §1004.3. PMI has no contractual connection to WSRC.

(3)Counsel for PMI submitted a letter opposing the Appellant's Motion for Reconsideration. See Letter from Richard A. Goldberg, PMI General Counsel, to Dawn L. Goldstein, Staff Attorney, OHA, and George B. Breznay, Director, OHA (November 17, 1999). In that letter, PMI Counsel noted that the Appellant had not complied with the procedural requirements of 10 C.F.R. § 1003.53 regarding notice to aggrieved parties. It is unnecessary to decide whether that provision applies in this context of a Motion for Reconsideration of a FOIA Decision, because any notice deficiency was cured when PMI received notice of this Motion for Reconsideration from WSRC and DOE and was given an opportunity to respond.

(4)In the Motion, the Appellant also noted other facts which we do not find to be material. He again

argued that the responsive emails may contain evidence of a federal crime. As we stated in our prior Decision of this matter, this possibility has no bearing on our FOIA analysis. Second, the Appellant also noted his belief that at the time of the creation of the responsive emails, there was not a formal "shared executive program" between PMI and DOE, contrary to our statement otherwise in the original Decision. But regardless of whether Mr. Reeve was authorized to be conducting PMI business at the time of the responsive emails, the emails were not, in the words of Section 1004.3, "acquired or generated by the contractor in its performance of the contract," but instead dealt solely with PMI concerns. Therefore, neither fact would have changed our initial Decision.

(5)However, this server was searched and no responsive records were found. See Record of Telephone Conversation between Dawn L. Goldstein, and James Durkis (November 10, 1999).

In addition, we note that in researching the issues raised by this Appeal, we again confirmed that the emails do not relate to DOE or WSRC in any way. See Record of Telephone Conversation between Dawn L. Goldstein and Daniel Pushkin, Counsel, PMI (November 30, 1999).

Case No. VFA-0536, 27 DOE ¶ 80,245

December 2, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: November 2, 1999

Case Number: VFA-0536

On November 2, 1999, Barbara Schwarz filed an Appeal from determinations issued by the Department of Energy Headquarters Freedom of Information and Privacy Group (DOE/FOI) and by the Department of Energy's Office of Inspector General (DOE/IG). These determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA setting forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a request dated June 18, 1999, Ms. Schwarz requested from the DOE records on the following individuals or subjects:

1) As to that the Germans are behind the nuclear weapons and other weapons of nations that are hostile to the United States,

2) As to that the Germans are behind terror acts and wars against the United States or against other countries which the United States want to protect,

3) As to a civilian submarine in the Great Salt Lake, that protects it's [sic] residents from all kind of pollution and germs with the result that people stay young and have currently at least double the lifespan than people not living in this village,

4) As to L. Ron Hubbard and proposed energy programs and environmental programs and nuclear counterintelligence programs proposed by him,

5) As to Claude, Elizabeth, Phillip, Mark C., Harvey L., Edwin, Willard, Olivia Rathbun (de Rothschild) and proposed energy programs, environmental programs and nuclear counterintelligence programs proposed by them,

6) As to myself, Barbara Schwarz or misspelled version Schwartz,

7) As to if Mark C. Rathbun (de Rothschild)[,] members of his family, their attorneys or any Independent or Special Counsel inquired records pertaining to myself from the Dept. of Energy.

Letter from Barbara Schwarz to DOE (June 18, 1999).

On October 20, 1999, DOE/FOI sent a response to Ms. Schwarz. Letter from Abel Lopez, Director, DOE/FOI (October 20, 1999). DOE/FOI first stated that it had informed Ms. Schwarz in a July 19, 1999 letter that items 1 and 2 of her request "did not describe the records you were requesting with sufficient specificity for the DOE to conduct a search for responsive documents. This response, therefore, responds to items 3, 4, 5, 6 and 7 of your request." Id. The response then informed Ms. Schwarz that the

files of five offices at Headquarters were searched for documents responsive to your request. These offices were the Office of Congressional and Intergovernmental Affairs, the Policy, Standards and Analysis Division in the Office of Safeguards and Security, the Office of Headquarters and Executive Personnel Services, the Office of Inspector General, and the Office of the Deputy General Counsel for Litigation.

Id. DOE/FOI reported that (1) the searches of the first three offices listed produced no documents responsive to items 3 through 7 of her request; (2) DOE/IG has already provided a separate response to Ms. Schwarz; and (3) the search of the Office of the Deputy General Counsel for Litigation located only one document, the July 19, 1999 letter to Ms. Schwarz referred to above regarding the lack of specificity of the first two items of her request. Id. That document was provided to Ms. Schwarz in its entirety along with DOE/FOI's October 20, 1999 response.(1)

II. Analysis

Ms. Schwarz's November 2, 1999 Appeal contends that the DOE's search for documents responsive to her request was inadequate. She also takes issue with the DOE/FOI's opinion that items 1 and 2 of her request did not sufficiently describe the records she was seeking. Finally, Ms. Schwarz contends that DOE/FOI ignored her request for a waiver of fees associated with the processing of her FOI request.

A. Ms. Schwarz's Request for a Fee Waiver

The DOE FOIA regulations state that the Department "will charge fees [to FOIA requesters] that recoup the full allowable direct costs incurred" but also state that, with certain exceptions, the "DOE will provide the first 100 pages of duplication and the first two hours of search time without charge." 10 C.F.R. § 1004.9(a). In addition, the DOE "will furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and disclosure is not primarily in the commercial interest of the requester." Id. On July 24, 1999, Ms. Schwarz sent to DOE/FOI a request for a waiver of fees associated with the processing of her request. Letter from Barbara Schwarz to Abel Lopez, DOE/FOI (July 24, 1999). In her Appeal, Ms. Schwarz complains that DOE/FOI ignored her fee waiver request in its October 20, 1999 response, and insists that the DOE make a decision on this request. Appeal at 1. We will dismiss this portion of Ms. Schwarz's appeal as moot because Ms. Schwarz does not claim the DOE charged her any fees for processing her request, and DOE/FOI has confirmed that the Department charged Ms. Schwarz no fees. Electronic mail from Sheila Jeter, DOE/FOI, to Steven Goering, OHA (October 10, 1999).

B. Adequacy of DOE's Search for Responsive Documents

Ms. Schwarz makes several arguments regarding the adequacy of the DOE's search for documents responsive to her request. First, the Appellant notes that the DOE/FOI did not conduct a search of all

offices of the DOE, as she had specifically requested. Appeal at 1. Second, she states that she requested a "search certificate, a declaration by the officials that conducted the search. . . . I have a right to know who those people are and how they conducted exactly the search to retrieve those records." Id. at 2. Third, she refers to a letter she received from this office dismissing an earlier Appeal she filed after receiving a separate response to her request from DOE/IG. Id. at 3. We stated in that letter that Ms. Schwarz should wait until she received a final response to her request from DOE/FOI before filing an Appeal with our office. Letter from Thomas O. Mann, Deputy Director, OHA, to Barbara Schwarz (September 24, 1999) at 1. We also informed her that DOE/FOI assigned her request to DOE/IG, "as well as to DOE's Office of Management and Administration and the Office of Nonproliferation and National Security for searches." We went on to state that after "examining the documents you submitted, we have suggested that [DOE/FOI] also coordinate searches of DOE's Office of General Counsel, the Executive Secretariat, the Office of Public Affairs and the Office of Congressional and Intergovernmental Affairs." Id. Ms. Schwarz wants to know "why weren't those offices searched as it was promised . . . ?" Appeal at 3.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

First, applying the above standard, we cannot agree with Ms. Schwarz that the FOIA requires in the present case a search of every office in the DOE, no matter how small the probability of finding responsive documents. Such would be the epitome of an exhaustive search, far beyond the requirement that a search be reasonably calculated to uncover the materials Ms. Schwarz seeks.(2)

In support of her contention that she was entitled to a "search certificate," the Appellant cites Steinberg v. Department of Justice, 23 F.3d 548 (D.C. Cir. 1994). In that case, a U.S. Court of Appeals reviewed the lower court's granting of summary judgment to the Department of Justice. The Court of Appeals reversed the lower court, finding that the Justice Department had not shown that it had conducted a "reasonably thorough search of its records" because it had not described "in any detail what records were searched, by whom, and through what process." Id. at 551, 552. The Steinberg opinion, however, only addresses the showing an agency is required to make in support of a motion for summary judgment in a U.S. District Court. It does not state that an agency's response to a FOIA request must provide a detailed description of its search. In fact, the FOIA simply requires, without further elaboration, that an agency make a determination in response to a request and "notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; . . ." 5 U.S.C. § 552(a)(6)(A)(i). Nor do the DOE FOIA regulations contain such a requirement, stating only, "Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals." Thus we cannot agree with Ms. Schwarz that the DOE/FOI's response to her request was somehow deficient for not describing in detail the search for responsive documents.

Nonetheless, in order to determine for purposes of the present appeal whether the DOE conducted an adequate search, we have gathered additional information from the various offices responsible for carrying out the search. Initially, because Ms. Schwarz questions in her Appeal whether each of the offices mentioned in our September 24, 1999 letter to her were in fact searched, we sought to clarify to which offices DOE/FOI referred Ms. Schwarz's request. As DOE/FOI stated in its response, it referred the request to the "Office of Congressional and Intergovernmental Affairs, the Policy, Standards and Analysis

Division in the Office of Safeguards and Security, the Office of Headquarters and Executive Personnel Services, the Office of Inspector General, and the Office of the Deputy General Counsel for Litigation." Letter from Abel Lopez, Director, DOE/FOI (October 20, 1999). Subsequent to Ms. Schwarz filing her appeal, DOE/FOI informed us that it also coordinated searches of the Office of Public Affairs and the Office of Executive Secretariat. Electronic mail from Sheila Jeter, DOE/FOI, to Steven Goering, OHA (October 17, 1999); Electronic mail from Sheila Jeter to Steven Goering (October 10, 1999). Thus, it appears that DOE/FOI in fact coordinated searches of each of the offices mentioned in our September 24, 1999 letter.(3)

1. Office of Safeguards and Security

The Policy, Standards and Analysis Division in the Office of Safeguards and Security provided the following information regarding its search. First, the office's Central Personnel Clearance Index (CPCI) was searched for the names Barbara Schwartz and Barbara Schwarz. Memorandum of telephone conversation between Victor Hawkins, Office of Safeguards and Security, and Steven Goering, OHA (November 18, 1999). The CPCI is an computerized index of individuals who have held or been considered for security clearances. Id. The office also searched clearance documents on microfiche that predate the CPCI. Id. These microfiche documents are maintained in alphabetical order, and were searched under the names Barbara Schwartz and Barbara Schwarz. Id. Finally, a search was conducted of files of office correspondence dating from June 1993 to the present. The office searched these files by subject for correspondence related to the FOIA and Privacy Act. Id. The initial search of documents filed under this subject did not reveal documents that the office believed were responsive to the request. Id. A subsequent search, however, has revealed documents pertaining to L. Ron Hubbard that are arguably responsive to the request, and the Office of Safeguards and Security informs us that it will release these to the requester. Id.

2. Office of Public Affairs and Office of Congressional and Intergovernmental Affairs

One DOE management official coordinated the search for responsive documents in the Office of Public Affairs and the Office of Congressional and Intergovernmental Affairs. This official informed us that her standard procedure in response to FOIA requests is to send a memorandum to every staff member informing them of the request and asking them to get back to her by a date certain with any responsive documents located. Memorandum of telephone conversation between T.J. Hopkins, Office of Congressional and Intergovernmental Affairs, and Steven Goering, OHA (November 18, 1999). In the present case, no documents were located.

3. Office of Executive Secretariat

The official at DOE/FOI who coordinated the DOE's overall search also conducted a search of the DOE's Office of Executive Secretariat. Documents in this office are indexed in the Document On Line Coordination System (DOCS) system. The DOE/FOI official searched this system using the names of the individuals mentioned in Ms. Schwartz's request. This search only located one document, Ms. Schwarz's original FOIA request.

4. Office of Inspector General

After we contacted the DOE/IG regarding the present appeal, the office conducted a new search to confirm the results of its earlier search that found no responsive documents. Electronic mail from Jacqueline Becker, DOE/IG, to Steven Goering, OHA (October 19, 1999). We were informed that DOE/IG documents are maintained by three offices, the Office of Investigations, Office of Audits, and the Office of Inspections. Id. Each office has a computerized database in which any information maintained in a particular file can be retrieved electronically, and each office conducted computer database searches using the following keywords: Schwarz, Schwartz, Germans, Great Salt Lake, L Ron Hubbard, Hubbard, Eisenhower, Nazi, de Rothschild, and Rathbun. Id. These searches yielded no responsive documents. Id. The offices again distributed the request to DOE/IG Management, Directors and Team Leaders. Id. Upon

their review, none recalled any cases or information concerning the individuals or subject matter mentioned above. Id. Finally, the Office of Audits manually reviewed all DOE OIG semiannual reports from 1982 to present with regard to the above- mentioned subject-matter. Id. This review also yielded no responsive documents. Id.

5. Office of Headquarters and Executive Personnel Services

The Office of Headquarters and Executive Personnel Services informed us that it searched the following files and records for the names of Barbara Schwarz or Barbara Schwartz: Senior Executive Performance Appraisal Records (based on career and non-career executive personnel data) in the Executive and Technical Resource Division; Lending Library files and records in the Career Resource Management Center; Computer database, office files and old office records in the Employment and Classification Division; Medical records and files, performance, conduct, leave, and family-friendly records and requests (e.g., leave transfer) in the Employee and Labor Relations Division. Electronic mail from Marilyn Greene, Office of Headquarters and Executive Personnel Services, to Steven Goering, OHA. The office also performed a name search of the Corporate Human Resources Information System (CHRIS) and a name search of the Department of Energy Information Database (DOEInfo). Id. No records or files were found for the names Barbara Schwarz or Barbara Schwartz. Id.

6. Office of the Deputy General Counsel for Litigation

The attorney responsible for conducting a search of the Office of the Deputy General Counsel for Litigation told us that he first checked to see if his office had any litigation pending that might relate to the subpoenas referenced in her request. Electronic mail from Dow Davis, Office of the Deputy General Counsel for Litigation, to Steven Goering, OHA (November 22, 1999). This revealed no responsive information. Id. He then asked a document control specialist in the office to conduct a computer search of two databases that track the office's correspondence, using the names and subjects referenced in Ms. Schwarz's request. Id. As noted above, this search yielded only a copy of the July 19, 1999 letter from DOE/FOI to Ms. Schwarz.

Based on the above descriptions, we conclude that the searches of the Office of Public Affairs, Office of Congressional and Intergovernmental Affairs, Office of Inspector General, and the Office of the Deputy General Counsel for Litigation were reasonably calculated to uncover the records sought by Ms. Schwarz. Though there was not one uniform search method used, each office clearly made a thorough and conscientious effort to locate all responsive documents it might have, either by notifying employees of the request and asking them to provide responsive documents or by searching computerized document tracking systems, and in some cases by using both methods.

Similar methods were employed by both the Office of Safeguards and Security and the Office of Headquarters and Executive Personnel Services. We note, however, that the Office of Safeguards and Security limited its subject search to one subject (FOIA and Privacy Act) and both offices apparently limited their name searches to only that of Ms. Schwarz. For this reason, we find that these searches were reasonably calculated to locate some of the records sought by the requester, but clearly not all of them. We therefore will remand this matter to DOE/FOI to coordinate further searches of these two offices. For guidance in conducting a more thorough search, we suggest that these offices refer to the subject matter and name searches used by DOE/IG in its search, which we discuss in detail above.

C. Adequacy of Ms. Schwarz's Description of Documents Requested

The first two items of Ms. Schwarz's June 18, 1999 request sought records "[a]s to that the Germans are behind the nuclear weapons and other weapons of nations that are hostile to the United States," and "[a]s to that the Germans are behind terror acts and wars against the United States or against other countries which the United States want to protect, . . ." Letter from Barbara Schwarz to DOE (June 18, 1999). In a July 19, 1999 letter to Ms. Schwarz, DOE/FOI stated,

The DOE regulation that implements the FOIA provides, at 10 CFR 1004.4(c)(1), that a request "must enable the Department to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations." The regulations further states that, where possible, specific information regarding dates, titles, file designations, offices to be searched, and other information that may help identify the records should be supplied by the requester.

We have determined that items 1 and 2 of your request do not reasonably describe the records you are seeking. Please provide more specific information that identify the particular documents to which you seek access so the appropriate programs can be searched for records responsive to the request. For example, you should identify those countries that you consider ?hostile' to the United States and that the United States wants to ?protect.'

Letter from Abel Lopez, DOE/FOI, to Barbara Schwarz (July 19, 1999).

Ms. Schwarz responded to DOE/FOI's July 19, 1999 letter by providing the following details as to the information she was seeking:

There is Saddam Hussein in Iraq. Do you have any indication as to that the Germans secretly set him up to any of his Anti-American hostilities? Do you have any record hereto?

Same goes for Osama Bin Laden.

Same goes for Iran.

Same goes for China.

Same goes for Libya. You must know that the Germans build [sic] in this decade secretly chemical weapons plants in Lybia, by knowing that Ghadafi targeted the United States. Do you have any records hereto?

As to my observations there are German programs that target the United States, it's [sic] moral and it's [sic] finances, and the lifes [sic] of U.S. citizens by getting them involved in actions of war. E.g., two countries start to fight, e.g. Israel and Palestine, or India and Pakistan, Iran and Iraq, Iraq and Kuwait, Russia and Afghanistan, Serbs against Bosnians and Albanians, etc., with the purpose that sooner or later the United States have to move in to restore peace and human rights. Do you have any records hereto?

Do you have any records to that the former war between Iran and Iraq was a set up so that Iraq would get secret information on U.S. weapons, which Iraq would then use in a war against the U.S. to defeat the U.S. and that this was set up secretly by the Germans?

Do you have any records as to that the Germans set up the Chinese secretly to spy out U.S. weapons?

Do you have any records that the Germans have plans to set up a war between China, any other country and the United States?

Letter from Barbara Schwarz to DOE/FOI (July 24, 1999).

We understand the position of DOE/FOI expressed in its October 20, 1999 response that, even with the additional information provided by Ms. Schwarz, the first two items of her request leave ambiguities that need to be resolved before DOE should undertake a search for responsive documents. For example, Ms. Schwarz does not indicate whether her use of the term "Germans" refers to the German government or individual Germans, or both. Nor is it clear whether she is seeking documents related to activities of the "Germans" during a specified period of time. By providing these examples, we in no way imply that Ms. Schwarz should be required to narrow the scope of her request. However, even a request for a broad scope of documents must be clear enough for the agency to determine what documents are being requested.

Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding valid request encompassing over 1,000,000 computerized records: "The linchpin inquiry is whether the agency is able to determine ? precisely what records [are] being requested'" (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974)). Thus, on remand, DOE/FOI should "invite the requester to confer with knowledgeable DOE personnel" in an attempt to clarify Ms. Schwarz's description of the documents she is seeking in items 1 and 2 of her request. 10 C.F.R. § 1004.4(c)(2).

For the reasons explained above, we will grant Ms. Schwarz's Appeal to the extent that we will remand this matter to DOE/FOI to coordinate a further search for responsive documents as described above. In all other respects, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, Case No. VFA-0536, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Department of Energy Headquarters Freedom of Information and Privacy Group for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 2, 1999

(1)Ms. Schwarz apparently misunderstood DOE/FOI's October 20 letter as stating that the one document located in the search of the Office of the Deputy General Counsel for Litigation had been sent to her along with DOE/FOI's July 19, 1999 letter to her. Appeal at 2. We sought clarification from DOE/FOI, who informed us that the document located by that search was the July 19, 1999 letter. Electronic mail from Sheila Jeter, DOE/FOI, to Steven Goering, Office of Hearings and Appeals (OHA) (October 10, 1999).

(2)Ms. Schwarz also misreads the FOIA when she claims that she has "a right for [sic] two hours free search time and 100 copies of free document[s] from each of the offices of the Department of Energy." Appeal at 1. The statute simply provides that "[n]o fee may be charged by any agency under this section . . . for the first two hours of search time or for the first one hundred pages of duplication." 5 U.S.C. § 552(a)(4)(A)(iv). This simply means, for example, that the DOE may not charge for the first two hours of its search. It does not mean that the first two hours of the search of each DOE office is free. And the statute certainly does not require an agency (let alone each office within an agency) to expend a specified amount of its resources (e.g., spend two hours on each search) in response to a FOIA request.

(3)Two offices we mentioned in our September 24, 1999 letter, the Policy, Standards and Analysis Division in the Office of Safeguards and Security, and the Office of Headquarters and Executive Personnel Services, are offices within two of the offices searched, the Office of Nonproliferation and National Security and the Office of Management and Administration, respectively. We apologize to Ms. Schwarz for any confusion created by our September 24, 1999 letter.

Case No. VFA-0537, 27 DOE ¶ 80,243

November 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:STAND, Inc.

Date of Filing:November 3, 1999

Case Number: VFA-0537

Serious Texans Against Nuclear Dumping, Inc. (STAND) files this Appeal in response to a determination issued to it by the Department of Energy's Albuquerque Operations Office (Albuquerque). The determination deals with a request that STAND submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In its Appeal, STAND requests the release of material responsive to its request. As explained below, we will remand the request for further processing.

BACKGROUND

STAND requested from Albuquerque a copy of a document called the "Baseline Risk Assessment" (the Assessment). The objective of the Assessment is "to analyze the Pantex Plant site conditions in the absence of remedial action and to provide human health and environmental baseline data to be used in alternative remedial action evaluation."(1)

Albuquerque responded that it would not release any of the Assessment, claiming it was protected from release by the provisions of 5 U.S.C. § 552(b)(5) (Exemption 5). STAND then filed the present Appeal with the Office of Hearings and Appeals.

EXEMPTION 5

The FOIA generally requires that all federal agency records be made available to the public, subject to certain specified exemptions. The Act provides, however, for nine categories of records that are exempt from mandatory disclosure. At issue in this case is Exemption 5 of the FOIA, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). This provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making

governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

ALBUQUERQUE'S DETERMINATION LETTER

In its determination letter issued to STAND, Albuquerque explained its rationale for withholding as follows:

The document you are requesting is, indeed, in draft form and is currently in the process of being finalized. Therefore, this document is being withheld in its entirety pursuant to ... Exemption 5 of the FOIA which permits the withholding of predecisional information....

Current reviews between Texas Natural Resources Conservation Commission and the U.S. Department of Energy ... have involved extensive revisions. Premature release of this draft would have a chilling effect on the deliberative process being used in finalizing this document as it would likely inhibit creative thoughts and candid expression of ideas within the organizations involved, thereby undermining these organizations' abilities to perform their functions. After all reviews are complete, this document will be finalized and a copy will be placed in the DOE Reading Room in Amarillo, Texas.

The ... DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall be released regardless of their exempt status, unless the DOE determines that disclosure is contrary to public interest. For the reasons described above, I have determined that release of this information is not in the public interest.

CONCLUSION

The Determination Letter did not address the issues of whether the Assessment contains any releasable factual matter. Accordingly, we will remand this case to Albuquerque. On remand, Albuquerque shall review the withheld documents and segregate and release all factual portions of the Assessment, or issue a new determination that justifies their withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND, Inc. on November 3, 1999, (Case No. VFA-0537) is hereby granted as set forth in Paragraph (2) below.

(2) This matter is remanded to Albuquerque Operations Office for further processing in accordance with the instructions provided in this Decision.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 24, 1999

(1) This description is given in a document titled "Draft Baseline Risk Assessment Work Plan," which STAND submitted with its Appeal.

Case No. VFA-0538, 27 DOE ¶ 80,2447

December 16, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Valley Times

Date of Filing: November 17, 1999

Case Number: VFA-0538

On November 17, 1999, The Valley Times (The Times), a newspaper located in Pleasanton, California, completed the filing of an Appeal from a determination that the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) issued to it on October 6, 1999. In that determination, Albuquerque denied in part requests for information that The Times filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA requests, The Times asked for the names and salaries of all Sandia National Laboratories (SNL) employees, and the numbers of employees at SNL's California site whose salaries fall within each of the following ranges: $0 to $25,000; $25,001 to $50,000; $50,001 to $100,000; $100,001 to $150,000; and over $150,000. SNL is operated for the DOE by Sandia Corporation, which is a subsidiary of Lockheed Martin Company.(1) In its October 6, 1999 response, Albuquerque identified

as responsive to The Times' request Sandia Corporation's Report of Compensation, dated March 26, 1999. Sandia Corporation submitted this Report to the DOE in accordance with DOE Order 350.1, Contractor Human Resources Management Program, for contractor employee compensation information. Albuquerque released portions of this document to The Times, including the numbers of all Sandia Corporation employees whose salaries fall within the specified ranges, and a listing of all salaries in excess of $80,000. However, Albuquerque withheld information pertaining to employees' names, occupational codes and job titles pursuant to Exemptions 4 and 6 of the FOIA. 5 U.S.C. § 552(b)(4), (b)(6). In its Appeal, The Times contests Albuquerque's application of these Exemptions.

II. Analysis

A. Exemption 4

Exemption 4 shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. As previously stated, the Report of Compensation was submitted in compliance with a DOE Order. It was therefore involuntarily submitted, and we will employ the National Parks test in determining whether Albuquerque properly applied Exemption 4. It is undisputed that the withheld information is "commercial" in nature, and that it was submitted by a "person," as that term is used in Exemption 4. There is no claim that the withheld data are privileged in nature; therefore, unless it is "confidential," the information may not be withheld under this Exemption.

In its Appeal, The Times disputes Albuquerque's finding that the withheld information is confidential because its release would cause substantial harm to Sandia Corporation's competitive position. The Times argues that Sandia Corporation is a "government-funded institution" that competes for funding "primarily with other government-funded laboratories and universities, most of which release salary information on a regular basis." Appeal at 1. The Times concludes that release of the information would not result in a competitive disadvantage for Sandia Corporation. We do not agree. As an initial matter, we are not convinced by The Times' unsupported assertions concerning the practices of other laboratories. Moreover, we believe this is the type of information typically kept confidential by private concerns. Release of the withheld names and job codes would inform competitors and other technology-based companies of the salary levels of specific Sandia Corporation employees, thereby making it easier to hire them away. Losing highly qualified employees could damage Sandia Corporation's ability to meet its current contractual obligations or to compete for future government contracts. See, e.g., Glen M. Jameson, 26 DOE ¶ 80,236 (1997). We find that Albuquerque properly applied Exemption 4 in this case.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); FLRA v. Department of Treasury Financial Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at

762-770. See also Frank E. Isbill, 27 DOE ¶ 80,215 (1999); Sowell, Todd, Lafitte and Watson LLC., 27 DOE ¶ 80,226 (1999) (Sowell).

Applying these standards to the facts of this case, we believe that the individuals named in the report have a significant interest in maintaining the confidentiality of their employment status and salary level. Unlike federal government employees, whose names, job titles, work stations and salaries must be released under the FOIA (see 5 C.F.R. § 293.311), private sector employees have a reasonable expectation of privacy concerning the identity of their employers and the amounts of money that they are being paid. See Sowell (disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); see also Sheet Metal Workers v. Department of Veterans Affairs, 135 F.3d 891 (3rd Cir. 1998); Painting and Drywall Work Preservation Fund v. Department of Housing and Urban Dev., 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a significant privacy interest in the identities of contractor employees and their salaries.

Next, we do not believe that release of this information would further the public interest by shedding light on the operations of the federal government. Although the data might provide insights into Sandia Corporation's workforce composition and employment practices, Sandia Corporation is not a government agency, but is instead, as previously stated, a wholly-owned subsidiary of Lockheed Martin Company. The Times argues that because Sandia Corporation receives government funding and performs a vital function, it should be considered a government agency for purposes of the FOIA. We do not agree. The federal government contracts with a large number of private entities to provide a variety of important, and sometimes vital, goods and services. The Times' argument, if carried to its logical conclusion, would largely erase the distinction between government agencies and these private entities. The FOIA does not require such a result.

Because there is a significant privacy interest in maintaining the confidentiality of the withheld information, and because it does not shed light on the operations of government, release of the Sandia Corporation employees' names and salaries would constitute a clearly unwarranted invasion of personal privacy. Albuquerque correctly applied Exemption 6 in withholding this information. For the reasons set forth above, we will therefore deny The Times' Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by The Valley Times, Case No. VFA-0538, on November 17, 1999, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 16, 1999

(1)In its FOIA request and its Appeal, The Times refers to SNL as being the employer of the individuals whose salaries the Times seeks to learn. Actually, these people are Sandia Corporation employees, and shall be referred to as such in this Decision.

Case No. VFA-0539, 27 DOE ¶ 80,250

December 23, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: STAND, Inc.

Date of Filing: November 19, 1999

Case Number: VFA-0539

On November 19, 1999, STAND, Inc. (Serious Texans Against Nuclear Dumping) filed an Appeal from a determination issued to it in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on October 28, 1999 by the Albuquerque Operations Office (AL). This Appeal, if granted, would require that AL release responsive documents and grant STAND a fee waiver.

I. Background

STAND is a nonprofit, tax-exempt regional environmental and public policy citizens' group. On May 6, 1999, STAND submitted a FOIA request to AL for a copy of all news releases from DOE's Amarillo Area Office and its contractors between January 1, 1951 and May 3, 1999. In that letter, STAND also requested that AL waive all processing fees. Letter from STAND to FOIA Officer, AL (May 6, 1999). AL then informed STAND that without specific reasons why a fee waiver would be appropriate, AL was unable to make a determination on waiving fees for the request. Letter from AL to STAND (July 27, 1999). AL explained that the search costs would be substantial, due to the lengthy search required and the many pages of responsive records that could be released. *Id.* STAND responded with further information to justify the request for a fee waiver. Letter from STAND to AL (August 6, 1999) (Justification Letter). On September 30, 1999, AL denied the fee waiver, stating that the request was not likely to contribute significantly to public understanding of the operations and activities of the government. According to AL, the media had decided which releases were in the public interest, and had already published stories about those releases. Letter from AL to STAND (September 30, 1999) (Determination). AL told STAND that it could not process the request further without an agreement to pay processing costs. (1) STAND did not reply,

and AL closed the file. Letter from AL to STAND (October 28, 1999). On November 19, 1999, STAND filed this Appeal requesting that AL waive all processing fees on its FOIA request. Letter from STAND to Director, OHA (November 19, 1999) (Appeal).

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552 (a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in

considering whether to waive fees. The two prongs can be summarized as the "public interest prong" and the "commercial interest" prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998) (*Murphy*). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government. 5 U.S.C. § 552 (a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. *Id.* The requester bears the burden of satisfying the two-prong test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997) (*Ott*).

In order to determine whether the requester meets the first prong (i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities) the DOE considers four factors:

(A) The subject of the request: whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure;

(D) The significance of the contribution to public understanding: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. §1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997).

In denying STAND's fee waiver request, the AL FOIA Officer wrote:

Also, I have determined that your request is not likely to contribute significantly to public understanding of the operation and activities of the government. News releases are given to the local press and those "experts" decide what is in the public interest in Amarillo and print what is of interest; thus putting the majority of the information requested in the public domain. . . . The information in your letter [of August 6, 1999] does not convince me that other news release information not in the public domain already would contribute significantly to public understanding of the operations or activities of the government; therefore, your request does not meet the requirements for a fee waiver.

Determination Letter at 1. Thus, AL concluded that STAND failed to satisfy Factor D, and based its determination on that conclusion. In addition, in response to OHA's request for comments on the Appeal, the Office of the Chief Counsel at AL concurred in the FOIA Officer's denial and concluded that STAND did not provide sufficient justification to satisfy any of the factors. Memorandum from Jake Chavez, AL Office of Chief Counsel, to AL FOIA Officer (December 8, 1999).

Factor A

STAND alleges that the requested information concerns activities of the federal government because the Pantex Nuclear Weapons Plant is a federal facility, even though it has been operated by independent contractors since 1951. Justification Letter at 1. According to STAND, Pantex is an integral part of the nation's nuclear posture and national security strategy. We have reviewed copies of recent press releases, and find that they provide information about Pantex operations. The releases often contain quotes from Pantex executives and give the general public information about events and occurrences at the plant. AL argues that because the contractor has its own management and operating structure, press releases from the plant only describe activities of the contractor. We disagree. The plant is owned by a federal agency, and

is considered part of the federal nuclear weapons complex. The general public views events occurring at Pantex and the other nuclear weapons plants as government activities and not merely the operations of a private company. Thus we find that STAND has satisfied the requirement of Factor A.

Factor B

The focus of this factor is on whether the information is already in the public domain or otherwise common knowledge among the general public. *See Ott*; *Seehuus Associates*, 23 DOE ¶ 80,180 (1994) (*Seehuus*). As we stated in *Seehuus*, "[i]f the information is already publicly available, release to the requester would not contribute to public understanding and a fee waiver may not be appropriate." AL contends that the material has already been released, and is in the public domain. We acknowledge that the information in those recent releases that were chosen by the media for publication is in the public domain. Nonetheless, "the mere fact that particular records have been released to other requesters does not mean that the information contained in the records is readily available to the public." *Compare Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) *with Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (holding that availability in an agency's public reading room does not necessarily justify denial of fee waiver). It is likely that the information contained in older press releases is not readily available to the interested public today. Therefore, we find that STAND has satisfied Factor B.

Factor C

This test requires us to consider whether the requested documents would contribute to the understanding of the subject by the public. *Ott*, 26 DOE at 80,780. To satisfy this factor, the requester must have the ability and intention to disseminate this information to the public. *Id; see also Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

We find that STAND has provided sufficient evidence of its ability and intention to disseminate this information to the public. The organization provided us a copy of its newsletter, *the Nuclear Examiner*, which it states is distributed to over 2,000 people. STAND also holds news conferences several times a year, operates a library available to the public, gives interviews to local television stations and newspapers, and distributes press releases. Justification Letter at 2-3. STAND gave us copies of several print articles with references to the organization and its program director, copies of press releases, and an article written by its program director. Therefore, we find that STAND has satisfied the Factor C test.

Factor D

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. "To warrant a fee waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent." *Ott*, 26 DOE at 80,780 (quoting *1995 Justice Department Guide to the Freedom of Information Act* 381 (1995)); *see also Seehuus*.

STAND argues that disclosure of the press releases is likely to contribute to an understanding of the operations and activities of the government. STAND contends that Pantex has a history of secrecy in its public affairs operations that has resulted in misperceptions of its safety record, environmental legacy, and impact on the region. Justification Letter at 2. According to STAND, "[a]nalysis of the Pantex public relations program, by focusing on its news releases over time, will substantially help people understand the validity of past and present statements concerning Pantex's impacts on their health, safety, and the environment." *Id.* STAND argues that the requested information is critical to raising the level of the public's understanding of Pantex operations because STAND, as a "nuclear

watchdog group," provides information to counterbalance the often inaccurate press releases emanating from Pantex. Justification Letter at 3. As an example, STAND refers to a 1998 Pantex press release stating that workers followed standard procedures during disassembly operations that resulted in a fire. Pantex Plant News Release, "Weapons, Personnel In No Danger During Small Fire" (Dec. 30, 1998). However, after an investigation, DOE recommended a penalty for violations of nuclear safety requirements relating to the fire. Pantex Plant News Release, "DOE Issues Preliminary Notice of Violation" (September 23, 1999). According to STAND, this demonstrates that press releases are often inaccurate, those inaccuracies may go uncorrected for a long period of time, and the public can be lulled into a false sense of security about the plant's safety. STAND has requested copies of the original Pantex press releases in order to "dissolve public myths about past Pantex operations, and to further the debate on the role of federal agencies and their contractors in shaping public opinion." Justification Letter at 3.

We find that the release of past press releases would significantly enhance the public's level of understanding of the credibility of information that Pantex releases to the public. (2) As noted above, STAND has provided us with information that reflects serious inaccuracies in the press releases distributed by Pantex's public affairs organization.(3) *See also The Nuclear Examiner* at 5 (June 1999) (Pantex redefined a public description of its plutonium pits). Moreover, the group has proven its commitment to providing the community with accurate information about the operations of the Pantex nuclear weapons plant. Therefore, we find that STAND has satisfied the test for Factor D.

Having determined that STAND has satisfied the regulatory fee waiver requirements discussed above, we find that STAND should be granted a fee waiver regarding its May 6, 1999 FOIA request.(4) Accordingly, we shall grant this Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by STAND, Inc. on November 19, 1999 (Case Number VFA-0539) is hereby granted in part as set forth in Paragraph (2) below.

(2) The fees assessed for complying with STAND's May 6, 1999 FOIA request shall be waived in full.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 23, 1999

(1)AL has provided STAND with copies of recent (within the past two years) press releases. Memorandum from R. O'Dowd, AL Office of Chief Counsel, to C. Becknell, AL FOIA Officer (December 8, 1999).

(2)We reject AL's argument that the press releases that were not published as news stories do not contain information in the public interest. Memorandum from Ron O'Dowd, AL to Carol Becknell, AL (December 9, 1999). There are many reasons that a newspaper could decide not to publish a story from a press release, and we have no evidence that those decisions are based on the public interest.

(3)Although conclusory statements will not support a fee waiver request, the regulations do not require that the requester provide a certain amount or particular type of information to justify the significance to the public of the information sought. *See Pederson v. Resolution Trust Corporation*, 847 F. Supp. 851, 855

(D.Colo. 1994) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

(4)AL contends that the required search would be burdensome. However, the fee waiver standards do not permit consideration of these concerns with regard to whether a fee waiver should be granted to a requester. *See Government Accountability Project*, 25 DOE ¶ 80,203 at 80,762 n.2. Nonetheless, we strongly encourage STAND to honor its repeated offers to work with AL to narrow the scope of the search and reduce processing time and costs. Justification Letter at 1; Appeal at 4.

Case No. VFA-0540, 27 DOE ¶ 80,248

December 20, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: TIC Holdings, Inc.

Date of Filing: November 19, 1999

Case Number: VFA-0540

On November 19, 1999, TIC Holdings, Inc. (TIC) filed an Appeal from a final determination that the Strategic Petroleum Reserve Management Office (SPR) of the Department of Energy (DOE) issued on October 19, 1999. In its determination, SPR informed TIC that records responsive to its request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 were not agency records but instead belonged to DynMcDermott Petroleum Operations Company (DynMcDermott), the management and operating contractor for the DOE's Strategic Petroleum Reserve. Thus the responsive documents were not subject to the FOIA. (1) Consequently, SPR did not provide a copy of the responsive documents to TIC. This Appeal, if granted, would require SPR to release the information it withheld.

Background

In a March 30, 1999 request for information (Request), TIC, through its counsel, Smith, Pachter, McWhorter and D'Ambriosio, P.L.C., requested copies of documents relating to two specific Strategic Petroleum Reserve Life Extension projects at the Strategic Petroleum Reserve's Big Hill and Bayou Choctaw sites. (2) After subsequent discussions with SPR officials, SPR provided Smith with an index of files (Index) which could contain responsive documents and asked Smith to select from the Index those files it wanted searched. Smith subsequently provided SPR with a list of the files from which it was requesting documents. On July 7, 1999, SPR issued a determination letter

(Determination Letter) releasing copies of various documents. SPR's July 7 Determination Letter withheld Summary & Bid Item Sheets (cost summaries) created by unsuccessful competitors for the two Life Extension projects. TIC subsequently appealed the SPR's July 7 Determination Letter. In a September 1, 1999 Decision, we remanded the matter to SPR so that it could issue a more detailed, adequate response to TIC's Request. See Smith, Pachter, McWhorter and D'Ambriosio, P.L.C., 27 DOE ¶ 80,228 (1999). On October 19, 1999, SPR issued another determination letter regarding TIC's Request. In the October 19 Determination Letter, SPR found that the cost summaries were not "agency" records and thus were not subject to the FOIA. In response, TIC filed this Appeal. TIC argues that according to the provisions of the Department of Energy's Acquisition Regulations (DEAR), the withheld documents are the property of the Department of Energy and as such are subject to the FOIA. (3)

Analysis

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as DynMcDermott, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997) (LASG). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See LASG, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). In making the determination whether an entity is an agency for purposes of the FOIA, the Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 180 & n. 11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, the DOE does not supervise DynMcDermott's day-to-day operations. See Memorandum of telephone conversation between Deanna Harvey, SPR, and Richard Cronin, Assistant Director, OHA (December 9, 1999). We therefore conclude that DynMcDermott is not an "agency" subject to the FOIA.

Although DynMcDermott is not an agency for the purposes of the FOIA, its records relevant to the Appellant's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time the Appellant made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). In this case, none of the potentially responsive documents was in the DOE's control or possession at the time of the Appellant's request. See Memorandum of telephone conversation between Deanna Harvey, SPR, and Richard Cronin, Assistant Director, OHA (December 9, 1999). Based on these facts, the documents clearly do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46. (4)

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the documents in question are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

The relevant provisions in the contract between DOE and DynMcDermott's are provided below:

I. 103. DEAR 970.5204-79 - ACCESS TO AND OWNERSHIP OF RECORDS (JUN 1997)

(a) Government's Records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the process of the work, or in any event, as the Contracting Officer shall direct upon completion or termination of the contract.

(b) Contractor's Own Records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) of this clause.

. . . .

(3) Records relating to any procurement action by the Contractor, except for records that under 48 C.F.R. (DEAR) 970.5204-9 Accounts, records, and Inspection, are described as the property of the Government . . . .

(c) Contract completion or termination. In the event of completion or termination of this contract, copies of any of the Contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to the DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act) as appropriate.

Contract No. DE-AC96-93PO18000, Modification M130 (DOE-DynMcDermott contract). (5)

Our examination of the cost summaries indicates that they are related to DynMcDermott's procurement of services and material for the SPR Life Extension Program. The provisions of Paragraph I.103 therefore dictate that these records are contractor records and not government records. Thus, we find that the cost summaries are not DOE records for the purposes of 10 C.F.R. § 1004.3(e).

We reach this finding notwithstanding the two arguments asserted by TIC. First, TIC argues that paragraph (b) of DEAR Section 970.5204-79 gives the contracting officer discretion to identify which categories of documents are contractor documents. (6) Further, paragraph (b) of this section does not mandate which categories of documents be deemed contractor records in a DOE contract. TIC goes on to assert that DOE failed to specify in its determination letter which DEAR contractor records provisions the contracting officer inserted in the contract between DOE and DynMcDermott. November 18, 1999 Appeal Letter from Kit L. Kramer, Senior Attorney, TIC, to George B. Breznay, Director, Office of Hearings and Appeals, at 3. Thus, TIC believes that the cost summaries may have been designated as government records by the provisions of the DOE-DynMcDermott contract. Second, TIC points out that paragraph (c) of DEAR Section 970.5204-79 provides that when contractor records are delivered to DOE they become the property of the DOE. TIC asserts that the cost summaries have been delivered to DOE and consequently the cost summaries are now DOE records. As discussed below, we find both of these arguments to be without merit.

With regard to TIC's first argument, Paragraph I.103(b) of the contract provides that records relating to procurement actions by DynMcDermott are deemed contractor property. The cost summaries themselves relate to bid pricing information from unsuccessful bidders for the SPR Life Extension projects. Consequently, as discussed earlier, we believe that pursuant to the DOE-DynMcDermott contract, the cost summaries are DynMcDermott-owned documents. With respect to the second argument, paragraph (c) of DEAR Section 970.5204-79 (which is incorporated verbatim in Paragraph I.103(c) of the DOE-DynMcDermott contract) is only operative when the contract between the DOE and the contract is completed or terminated. In the present case, the contract between DOE and DynMcDermott is currently on-going. Further, we have been informed by a contracting official at SPR that the SPR contracting officer has not requested possession of any of the cost summaries. See Memorandum of telephone conversation between Anne Quern, Contracting Specialist, SPR, and Richard Cronin, Assistant Director, OHA. (December 8, 1999). Consequently, neither DEAR Section 970.5204-79 nor Paragraph I.103 of the DOE-DynMcDermott contract has transferred title of the cost summaries to the government.

In sum, the cost summaries were not in the control or possession of DOE at the time of TIC's Request. Further, the cost summaries are not DOE records but are DynMcDermott-owned records. As such, they are not subject to the FOIA. Therefore, TIC’s appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by TIC Holdings, Inc., on November 19, 1999, Case No. VFA-0540, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 20, 1999

(1)In its October 19 Determination Letter, SPR also cited Exemptions 3 and 4 as justifying withholding the documents in the event the withheld documents are considered to be agency records.

(2)The projects are part of the Strategic Petroleum Reserve Life Extension Program, which seeks to upgrade or replace most major systems in the Strategic Petroleum Reserve by the year 2000, and to streamline Strategic Petroleum Reserve facilities to reduce operating and maintenance costs.

(3)TIC also argued that the cost summaries are not protected by Exemption 3 or 4. Because we find that the cost summaries are not agency records and thus are not subject to the FOIA, we need not decide on the applicability of Exemptions 3 and 4 to these documents. Additionally, TIC argued that it had still not been given an adequate description of the withheld documents. In this regard, TIC is further advised that the cost summaries consist of two documents that contain bid pricing information created by two unsuccessful bidders for the Life Extension projects.

(4)We note that the fact that SPR subsequently obtained possession of the cost summaries for the purpose of responding to TIC's Request does not make the cost summaries under SPR's control for FOIA purposes. A document must be in the agency's control *at the time of* a FOIA request. See Tax Analysts , 492 U.S. at 145; Sangre de Cristo Animal Protection, Inc., 25 DOE ¶ 80,121 at 80,551 (1995)

(5)Section 970.5204-9 of the DEAR referenced in paragraph (b)(3) of the DOE-DynMcDermott contract refers to government ownership of records relating to "financial and cost reports, books of account and supporting documents and other data evidencing costs allowable, revenues, and other applicable credits" pertaining to a contract. See DEAR Section 970.5204-9(d). None of the withheld documents relate to DOE-DynMcDermott contract accounts.

(6)DEAR Section 970.5204-79 is a form contract clause. Portions of this section of the DEAR were inserted verbatim in Paragraph I.103 of the DOE-DynMcDermott contract. This section also provides a list of form contract clauses to be used by the contracting officer in a contract to describe which categories of documents may be deemed contractor property.

Case No. VFA-0541, 27 DOE ¶ 80,251

January 5, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Robert A. Speir

Date of Filing:December 7, 1999

Case Number: VFA-0541

On December 7, 1999, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by Robert A. Speir appealing a determination by the Department of Energy's (DOE) Office of Inspector General (the IG). (1) That determination was issued by the IG on November 4, 1999 in response to a request for information submitted by Speir in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the IG to release any responsive documents it is withholding.

I. Background

The request sought access to documents containing information about the following four items:

(1) Copies of all records given to any member of Congress or congressional committee related to Speir's receipt of a cash award from the Project on Government Oversight;

(2) All internal records related to DOE consideration of the requests by members of Congress for materials, documents and records related to Speir's receipt of a cash award from the Project on Government Oversight, and also records related to any DOE review regarding the appropriateness of the award;

(3) Records relating to Speir's receipt of a cash award from the Project on Government Oversight provided to the Department of Justice or any other element of the Executive Branch of the Federal Government; and

(4) Copies of records of any contact with members of the press as related to this award.

On November 4, 1999, the IG issued a determination letter withholding an unknown quantity of responsive documents in their entirety under FOIA Exemption 7(A). (2)

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(7)(a) (1994 & Supp. II

1996). Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. " *Id.*

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *See F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982); *William Payne*, 26 DOE ¶ 80,144 (1996) (*Payne*). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority).

The IG is such an organization. The IG is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). Accordingly, we have consistently found that the IG compiles information for law enforcement purposes within the meaning of Exemption 7. *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *Keci Corporation*, 26 DOE ¶ 80,149 (1997). The courts have similarly found that the Inspector General's offices in other agencies exercise the requisite law enforcement functions to protect their investigatory files under Exemption 7. *E.g., Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Therefore, we find that the documents at issue in this case satisfy the threshold test for application of Exemption 7.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective; and (2) whether release of information about it could reasonably be expected to cause some articulable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993)(agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3rd Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. United States Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. United States Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has failed to provide a sufficient justification of its withholdings under Exemption 7(A). The IG's determination letter does not provide any description of the documents it is withholding. As a result, we are unable to determine how release of the withheld information could reasonably be expected to interfere with the investigation.

Accordingly, we are remanding this portion of the Appeal to the IG. On remand, the IG should release the withheld information, withhold it under an alternative FOIA exemption, or issue a new determination letter which includes a description of the withheld documents that is sufficient to provide a reviewer with an opportunity to grasp how disclosure of the documents could reasonably be expected to interfere with an on-going investigation.

It Is Therefore Ordered That:

(1) The Appeal filed by Robert A. Speir on December 7, 1999, Case Number VFA-0541, is hereby granted in part and remanded to the Office of Inspector General which shall promptly implement the instructions set forth above.

(2) The portion of the Appeal concerning the timeliness of DOE's response to Speir's FOIA requests is dismissed.

(3) The Appeal is denied in all other aspects.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 5, 2000

(1) Apparently, several other DOE offices are conducting separate searches for documents responsive to Speir's requests. The determination letter issued by the IG, and our review of the present Appeal, concern only the IG's withholdings under Exemption 7(A) of those responsive documents in its possession.

(2) Speir's Appeal also challenges the timeliness of DOE's response to his FOIA requests. However, this office does not have jurisdiction to consider Appeals concerning the timeliness of the agency's response to FOIA requests. 10 C.F.R. § 1004.8(a). Accordingly, we will dismiss that portion of the present appeal concerning the timeliness of DOE's response to Speir's FOIA requests.

Case No. VFA-0542, 27 DOE ¶ 80,252

January 10, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American Friends Service Committee

Date of Filing: December 10, 1999

Case Number: VFA-0542

On December 10, 1999, American Friends Service Committee (AFSC) filed an Appeal from a final determination that the Office of Inspector General (OIG) of the Department of Energy (DOE) issued on November 3, 1999. That determination concerned a request for information submitted by AFSC pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the OIG would be required to release the withheld portion of one document.

Background

On June 13, 1997, and March 3, 1998, AFSC submitted a FOIA request for "all documentation from 1969 to the present which addresses the deposit, presence and/or impact of radioactive materials at the Industrial Excess Landfill site in Uniontown, Ohio." Request Letter date June 13, 1997, from Gregory D. Coleridge, Director, AFSC, to Chief, FOIA/PA Branch, DOE (Request Letter); Letter dated March 3, 1998, from Gregory D. Coleridge, Director, AFSC, to Abel Lopez, Acting Director, FOIA/PA Division, Office of the Executive Secretariat, DOE. On May 3, 1999, OIG responded, releasing nine documents, two in their entirety.(1) OIG indicated that it was referring other documents to the Environmental Protection Agency (EPA), Nuclear Regulatory Commission (NRC), the DOE's Albuquerque Operations Office, and the DOE's Ohio Field Office.

On November 3, 1999, OIG issued another determination releasing documents it had numbered 10 and 20 through 60. Determination Letter from Sandra L. Schneider, Assistant Inspector General for Inspections, OIG, to Gregory D. Coleridge, AFSC (Determination Letter). Seven documents were released in their entirety. The remainder were released with material withheld pursuant to Exemptions 6 and 7(C) of the FOIA. *Id.* In response, AFSC filed this Appeal. AFSC appeals only the information withheld from

Document 39,(2) a letter on EPA letterhead addresed to John C. Layton, Inspector General, DOE. AFSC argues that the withheld portions of Document 39 are outside the scope of Exemptions 6 or 7(C). Appeal Letter at 4-5, dated December 7, 1999, from Gary L. Cutler, Curtis, Mallet-Prevost, Colt & Mosle, to Director, OHA, DOE (Appeal Letter).

Analysis

In its Appeal, AFSC contends that the OIG applied Exemptions 6 and 7(C) in an overly broad manner.

AFSC states that OIG should not have redacted information from the document under Exemption 6 because it is not a document found in a personnel or medical file. Further, since the deletions "obviously refer to federal agency employees acting in their official capacities," they cannot be withheld under Exemption 7(C).

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *See Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3; *Stone v. FBI*, 727 F. Supp. 662, 663-64 (D.D.C. 1990) .

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., K.D. Moseley*, 22 DOE ¶ 80,124 (1992). A document compiled for law enforcement purpose may be protected from disclosure if it satisfies Exemption 7(C)'s "reasonableness" standard. Conversely, a document not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that release constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). In the present case, Document 39 was created by EPA's Office of Inspector General during an investigation of alleged misconduct concerning the Industrial Excess Landfill site in Uniontown, Ohio. Further, Document 39 was written in response to a letter from the DOE's OIG to EPA. By law, OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. *Ortiz v. Department of Health and Human Servs.*, 70 F.3d 729, 732-33 (2d Cir. 1995) (*Ortiz*) and cases cited therein. Consequently, Document 39 was created for a law enforcement purpose.

We agree with AFSC that the names of the federal officials acting in their official capacity should not have been redacted. We will remand the matter to OIG for it to release the names and titles of the federal agency officials where it is apparent that the officials were acting in their official capacity unless it can provide any other justification for its withholding. However, contrary to AFSC's assertion, not all of the redactions involved the names of federal agency officials. One of the deletions contains the name of a private individual. Because of the obvious possibility of harassment, intimidation, or other personal

intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *Safecard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985); *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,109 (1990). OIG states that the individual named in Document 39 has a privacy interest in remaining free from intrusions into his or her professional and private life. OIG believes that release of this name would put its investigation in jeopardy. This individual originally approached OIG with a complaint concerning the Industrial Excess Landfill site in Uniontown, Ohio. We agree that there is a privacy interest for this individual providing information to government investigators. Accordingly, we will uphold the OIG's withholding of the private individual's name, but we will remand this matter to OIG for a new determination releasing the names and titles of the federal agency officials unless it can provide another justification.

It Is Therefore Ordered That:

(1) The Appeal filed by American Friends Service Committee, on December 10, 1999, Case No. VFA-0542, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 10, 2000

(1) AFSC appealed the May 3, 1999 determination to the Office of Hearings and Appeals (OHA) on June 3, 1999. OHA issued its decision on July 1, 1999, partially granting AFSC's appeal, and remanding the matter to OIG. *American Friends Service Committee*, 27 DOE ¶ 80,214 (1999).

(2)OIG sent Document 39, a letter from an EPA employee to John C. Layton, Inspector General, DOE, to EPA for consideration of its releasability under the FOIA. EPA returned it to OIG, stating that it was not from its file. We find it difficult to understand how a letter on EPA letterhead could not be an EPA document, and we believe that it may have been overlooked when the thirty or more documents were reviewed by EPA. However, authorship of Document 39 does not alter our analysis in this case.

Case No. VFA-0544, 27 DOE ¶ 80,280

May 31, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Ashok K. Kaushal

Date of Filing: December 10, 1999

Case Number: VFA-0544

Ashok K. Kaushal files this Appeal in response to a determination issued to him by the Department of Energy's Albuquerque Operations Office (AO). The determination deals with a request that Kaushal submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In his Appeal, Kaushal requests the release of material responsive to his request. As explained below, we will remand Kaushal's request for further processing.

I. Background

Kaushal's FOIA request sought the release of documents relating to a complaint he had filed against Sandia National Laboratory (SNL). Twenty-four documents were found that were responsive to Kaushal's request. AO released twenty-one of these documents and withheld three in their entirety, claiming the documents were exempted from mandatory release pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). Kaushal then filed the present Appeal with the Office of Hearings and Appeals.

II. Analysis

A. Exemption 5 and the Foreseeable Harm Standard

The FOIA generally requires that all federal agency records be made available to the public, subject to certain specified exemptions. The Act provides, however, for nine categories of records that are exempt from mandatory disclosure. AO withheld the three documents under Exemption 5 of the FOIA, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by

law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Two civil discovery privileges that have been incorporated into Exemption 5, and which were cited by AO, are the attorney work-product privilege and the attorney-client privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Two documents, identified in the Determination Letter as Documents 74 and 91, were withheld under the attorney work-product privilege. A third document, identified in the Determination Letter as Document 92, was withheld under the attorney-client privilege. All three documents were related to a legal proceeding between Kaushal and SNL. The proceeding has been resolved.

The Determination Letter issued by AO explains how the withheld documents meet the criteria set out in Exemption 5. However, the Determination Letter does not discuss whether release of the withheld documents would cause a foreseeable harm to the to the interests protected by Exemption 5. As discussed below, we require a Determination Letter asserting Exemption 5 to include an articulation of foreseeable harm. If the Determination Letter fails to include an articulation of foreseeable harm, we have remanded the matter for a new determination. *Joyce Ecomomus*, 23 DOE ¶ 80,182 (1993); *Eugene Maples*, 23 DOE ¶ 80,164 (1993); *Oxy USA*, 24 DOE ¶ 80,101 (1994). Accordingly, we shall remand this matter to AO for a new determination.

The foreseeable harm standard was established by the "Memorandum for Heads of Departments and Agencies" (the Memorandum), issued by the Attorney General on October 4, 1993. The Memorandum states that "it shall be the policy of the U.S. Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." Thus, under the standard set out in the Memorandum, it is not enough to assert a legally correct application of an exemption. In addition, the agency must articulate a reasonably foreseeable harm to an interest protected by that exemption.

While the Memorandum states that it does not create any substantive or procedural rights enforceable at law, it nevertheless establishes an important practical requirement. Memorandum at 2; *Oxy USA*, *supra*. The Department of Justice is responsible for defending in judicial litigation an agency's assertion of a FOIA exemption. According to the Memorandum, the Department of Justice will provide the defense only if the agency has articulated a reasonably foreseeable harm. Without the Department of Justice's defense, the agency may be ordered by the court to release the documents, notwithstanding the applicability of a FOIA exemption. Consequently the DOE requires its offices to provide an articulation of foreseeable harm whenever they assert a FOIA exemption, and failure to provide such an articulation is a ground for remand.

B. Segregability

The fact that a document meets the criteria for withholding discussed above does not necessarily mean that it may be withheld in its entirety. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). *Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979).

AO states in the Determination Letter that "the factual material [in the withheld documents] is so inextricably intertwined with exempt material ... that the release would either disclose the privileged information or the nonexempt material would only comprise a small portion of the documents and pose an inordinate segregation burden." Based on our review of the documents, however, we find that AO should reconsider the issue of segregability. For example, Document 91 is a brief memorandum from an employee of SNL informing the Legal Department that Kaushal had filed a complaint against SNL, and requesting a review of the matter. The amount of material in this document that could arguably be withheld under the FOIA is small, and the document could be released with minor redactions.

III. Conclusion

On remand, AO must review the withheld documents, segregate and release all non-exempt portions of the documents, and issue a new determination that justifies any withholding. The new determination should take into account the foreseeable harm standard set forth in the Attorney General's Memorandum, as discussed above.

It Is Therefore Ordered That:

(1) The Appeal filed by Ashok K. Kaushal (Case No. VFA-0544) is hereby granted as set forth in paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 31, 2000

Case No. VFA-0545, 27 DOE ¶ 80,254

February 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David Rheingold

Date of Filing: January 4, 2000

Case Number: VFA-0545

On January 4, 2000, David Rheingold filed an Appeal from a determination issued to him on November 12, 1999, by the Office of Public Affairs (PA) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Rheingold challenges the adequacy of PA's search for documents responsive to his request.

I. Background

On November 12, 1999, Mr. Rheingold filed a request for information in which he sought a copy of the 1995 report by Carma International that evaluated press coverage for the Department of Energy. On November 12, 1999, PA issued a determination which stated that it conducted a search for the requested document. However, PA stated that it was unable to locate the document. See Determination Letter at 1.

On January 4, 2000, Mr. Rheingold filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Rheingold challenges the adequacy of the search conducted by PA. Mr. Rheingold asks that the OHA direct PA to conduct a new search for the requested document. See Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but

rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a

search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at PA to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Rheingold's request might exist. Upon receiving Mr. Rheingold's request for information, PA instituted a search of its internal files in its Press Office and its Resource Management Office, and also in the DOE's Procurement Office. Based on this search, PA was unable to locate the responsive document. Although PA acknowledged that it should have in its files an original copy of the report requested by Mr. Rheingold, it can only surmise that all copies of the report were inadvertently given out to the news media and an original copy was not maintained in its office. See Record of Telephone Conversation between Arlene Estep, PA, and Kimberly Jenkins-Chapman, OHA (January 11, 2000).

Given the facts presented to us, we find that PA conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Rheingold's request. Accordingly, Mr. Rheingold's Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by David Rheingold, OHA Case No. VFA-0470, on January 4, 2000, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 1, 2000

Case No. VFA-0546, 27 DOE ¶ 80,256

February 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: STAND, Inc.

Date of Filing: December 28, 1999

Case Number: VFA-0546

STAND, Inc. (Appellant) has filed an Appeal from a final determination issued by the Department of Energy's Oak Ridge Operations Office (Oak Ridge). In that determination, Oak Ridge released a number of documents in response to a Request for Information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, Oak Ridge also withheld some responsive information under Exemptions 4 and 6 of the FOIA. This Appeal, if granted, would require Oak Ridge to release the information it withheld under Exemption 4.

I. BACKGROUND

On January 22, 1999, the Appellant filed a Request for Information with Oak Ridge. On October 26, 1999, Oak Ridge issued a determination letter releasing responsive information to the Appellant. Oak Ridge, however, withheld some responsive information under FOIA Exemptions 4 and 6. The present Appeal was submitted on December 28, 1999, challenging Oak Ridge's withholdings under Exemption 4.(1) The withholdings that the Appellant contests concern two documents, one generated by a contractor, the other generated by Oak Ridge itself.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(4) (Exemption 4).

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in

question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g. Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial" as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4) (1994 & Supp. II 1996). Finally, the agency must determine whether the information is "privileged or confidential." (2)

Once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

In the present case, Oak Ridge withheld information from two documents under Exemption 4. The first document is entitled "Audit of Off-Site Treatment, Storage, Disposal, and Recycle (TSDR) Facility" (the WCS Report). This audit of Waste Control Specialists (WCS) was conducted by a DOE contractor, Bechtel Jacobs Company (Bechtel). Oak Ridge withheld from this document Bechtel's ratings and scores of WCS for (1) Financial Strength, (2) Title Transfer, (3) Management Systems, (4) Historical Use, (5) Operations, Design, and Equipment, (6) Compliance, (7) Public Relations, (8) Facility Siting, and (9) Overall Evaluation. In addition, the entire portion of the WCS Report entitled "Concerns" was withheld. Finally, Oak Ridge withheld portions of those sections of the WCS Report entitled "Parent Company and Facility" and "Waste Analysis and Laboratory."

The ratings and scores in the audit report clearly cannot be withheld under Exemption 4. Oak Ridge asserts that release of this information could cause WCS competitive harm. This information, however, was generated for the DOE by another firm, Bechtel, rather than by WCS, and there is no evidence that WCS has any sort of privilege or proprietary interest in it. The legislative history of the statute clearly indicates that Congress intended that the protection of Exemption 4 only be applied to that information "which would customarily not be released to the public by the person **from whom it was obtained**." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis supplied), *as cited at National Parks*, 498 F.2d at 766. Accordingly, we find that Oak Ridge improperly withheld the scores and ratings under Exemption 4.

Moreover, the determination letter fails to describe the withheld portion of the WCS Report entitled "Concerns." Nor does the determination letter describe the information withheld from the sections of the WCS Report entitled "Parent Company and Facility" and "Waste Analysis and Laboratory." The determination letter also fails to state why release of this information could reasonably be expected to result in competitive harm to its submitter. Without a more detailed justification of these withholdings, we cannot sustain Oak Ridge's actions on STAND's FOIA request.

Accordingly, we are remanding this portion of the Appeal to Oak Ridge. On remand, Oak Ridge must

either release the ratings and scores or issue a new determination letter with an appropriate justification for withholding the ratings and scores under one of the eight other FOIA exemptions. In addition, Oak Ridge must either release the other portions of the WCS Report it withheld under Exemption 4 or issue a new determination letter that both adequately describes the withheld information and provides an adequate justification for withholding it.

The second document from which Oak Ridge withheld information under Exemption 4 is the Audit Report resulting from the Oak Ridge Operations Office of Environmental Management's audit of WCS's Andrews, Texas Facility (the DOE Audit Report). The information that Oak Ridge withheld from this document appears to have been generated by the DOE. It is well settled that information generated by the federal government is not "obtained from a person" and is therefore excluded from Exemption 4's coverage. *See, e.g., Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980). To the extent that the withheld information was not obtained from a person, it fails to meet a statutory threshold for withholding under Exemption 4. It therefore cannot be withheld under Exemption 4. We recognize, however, that the DOE Audit Report may contain information that the Office of Environmental Management obtained from WCS as it was performing its audit. Such information may in fact be confidential, proprietary information and therefore eligible for protection from mandatory disclosure under Exemption 4. However, Oak Ridge has not segregated that type of information from other information in the DOE Audit Report that Oak Ridge itself generated. Accordingly, we are also remanding this portion of the Appeal to Oak Ridge. On remand, Oak Ridge should either release the information it withheld from the DOE Audit Report under Exemption 4 or issue a new determination letter that adequately justifies any withholdings from this document.

III. CONCLUSION

For the reasons set forth above, we are remanding the present Appeal to the Oak Ridge Operations Office. On remand, Oak Ridge shall either release the information it withheld under Exemption 4 or provide a new justification for withholding in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by STAND, Inc., Case No. VFA-0546, is hereby granted in part as set forth in Paragraph (2) below and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 3, 2000

(1)The Appeal does not contest any of Oak Ridge's withholdings under Exemption 6.

(2)In order to determine whether the information is "confidential," the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it

may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely either to: (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Case No. VFA-0547, 27 DOE ¶ 80,261

February 29, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alice L. Thomas

Date of Filing: January 27, 2000

Case Number: VFA-0547

On January 27, 2000, Alice L. Thomas filed an Appeal from a determination issued to her by the Freedom of Information Officer at the Department of Energy's (DOE) Western Area Power Administration (WAPA). The WAPA issued its determination in response to a request for information that Ms. Thomas submitted in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that documents held by the federal government be released to the public upon request. The Appeal, if granted, would require the WAPA to release certain documents to Ms. Thomas.

In her FOIA request, Ms. Thomas sought access to a 1996 job announcement for a position in the Salt Lake City Area Office of the WAPA, documentation supporting the hiring of a specified individual for another position, and information pertaining to any awards or special recognition given to that individual and two other WAPA employees.

In response to this request, the WAPA provided Ms. Thomas with documents pertaining to any awards or special recognition given to the three named employees. However, in its determination letter the WAPA informed Ms. Thomas that the job announcement and documentation for the hiring of the individual for the other position had been destroyed pursuant to WAPA's records retention policies.

In her Appeal, Ms. Thomas contests the WAPA's claim that these records no longer exist. She asserts that the documents in question are "unscheduled" records, and that according to the Western Records Management Manual, such records must be maintained in the agency's files until a disposition has been approved by the Archivist of the United States. She therefore contends that these records should still be in the WAPA's files.

In its response to the Appeal, the WAPA has cooperated with this office and enclosed pages 21 and 22 of its Merit Promotion Plan, dated July 5, 1988. Paragraph 6 states, in pertinent part, that a

"promotion case folder for each such position filled through competitive procedures must be maintained by the servicing personnel office for 2 years following the effective date of the personnel action . . . ." The WAPA then reiterated that, in accordance with this policy, the job announcement and the documentation supporting hiring for the other position were destroyed in 1998. Based on the record before us, we find no reason to question the veracity of the WAPA's response or to find that the destruction of the documents was improper. We will therefore deny Ms. Thomas' Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Alice L. Thomas on January 27, 2000 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 29, 2000

Case No. VFA-0548, 27 DOE ¶ 80,255

February 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: H & J Tool & Die Co.

Date of Filing: January 5, 2000

Case Numbers: VFA-0548

On January 5, 2000, the law firm of Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP (Forchelli) filed an Appeal on behalf of H&J Tool & Die Co. (H&J) with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Brookhaven Group (Brookhaven) issued to H&J on December 7, 1999. The determination concerned a request for information that H&J submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to H&J.

I. Background

On November 4, 1999, Forchelli filed a FOIA request with DOE's Chicago Operations Office seeking copies of: (1) all documents from January 1, 1998 to the date of the request concerning H&J and/or any of its employees; (2) correspondence between two named individuals regarding bid solicitations and H&J; (3) all Brookhaven bid solicitation documents and contract award documents relating to lamination work on a certain project; (4) all lists of vendors, subcontractors and prospective bidders for lamination work that Brookhaven National Laboratory (BNL) has created since January 1, 1998; and (5) all documents relating to problems between BNL and H&J from January 1, 1998 to the date of the request. Letter from Forchelli to FOIA Officer, DOE Chicago Operations Officer (November 4, 1999) (Request). The Chicago Operations Office transferred the request to Brookhaven, which is one of the DOE group offices under its direction. In a determination letter, the Brookhaven Group Manager responded that DOE did not possess or own responsive documents. Letter from George Malosh, Authorizing Official, to H&J (December 7, 1999) (Determination Letter). Rather, the records requested were "contractor-owned procurement related records" of Brookhaven Science Associates, LLC (BSA), the company that operates BNL for DOE. *Id.* H&J appealed this determination, asserting that the requested records should be considered agency records because BNL is "under DOE's control." Letter from H&J to OHA (January 5, 2000) (Appeal).

II. Analysis

Our threshold inquiry in this case is whether the material requested can be considered "agency records" and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf*. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). However, in some circumstances records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude

that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as BSA, are subject to the FOIA. *See, e.g., International Brotherhood of Electrical* Workers, 27 DOE ¶ 80,152 (1998); BMF *Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

A. BNL Is Not An Agency Under the FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552 (f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with DOE, BSA is the contractor responsible for maintaining and operating BNL. See Determination Letter. While DOE obtained BSA's services and exercises general control over the contract work, DOE does not supervise the day-to-day operations of BSA. *Id.* DOE's general oversight over BSA's contract work cannot be construed as "control" over BSA. We therefore conclude that BSA cannot be considered an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control At The Time Of Request

Although BNL is not an agency for the purpose of the FOIA, its records relevant to H&J's request could become "agency records" if DOE obtained them and they were within DOE's control at the time Forchelli made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, Brookhaven has stated that the information that H&J seeks was not in the agency's control at the time of the appellant's request. *See* Determination Letter. Based on these facts, the responsive documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

C. The Contract Provides That Employment-Related Records Are Contractor Property

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and the contractor provides that they are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any

records acquired or generated by the contractor in its performance of the contract shall be the property of the government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).” 10 C.F.R. § 1004.3(e)(1).

We next look to the contract between DOE and BSA to determine the status of the requested records. The contract provides that all records “acquired or generated” by the contractor in its performance of the contract shall be the property of DOE "[e]xcept as provided in paragraph b . . . . " Contract DE-AC02-98CH10886 (October 1, 1998), Article 94, Paragraph (a). *See also International Brotherhood of Electrical Workers*, 27 DOE ¶ 80,152 (1998). Paragraph (b) (3) of the DOE-BSA contract states that records relating to any procurement action by the contractor, except for records that are described as the property of the Government under 48 CFR 970-5204-9, are considered the property of the Contractor. Because the documents at issue are related to procurement activities of the contractor and do not fall within the previously-stated exception, the requested records are not the “property of DOE” and thus are not subject to release under DOE regulations.

It Is Therefore Ordered That:

(1) The Appeal filed on January 5, 2000 by H&J Tool & Die Co., OHA Case No. VFA-0548, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 3, 2000

Case No. VFA-0551, 27 DOE ¶ 80,258

February 23, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Janice R. McLemore

Date of Filing: January 13, 2000

Case Number: VFA-0551

On January 13, 2000, Janice R. McLemore completed the filing of an Appeal from a final determination issued by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE) on December 1, 1999. (1) In her Appeal, Ms. McLemore asserts that OR failed to provide her documents that were responsive to a request for information that she had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. BACKGROUND

In a request dated September 10, 1999, Ms. McLemore asked for copies of her father's medical records from the DOE's Oak Ridge nuclear facility. Additionally, she requested copies of any records pertaining to any accidents or incidents in which her father may have been involved. Her father was an employee at the Y-12 Plant at Oak Ridge. Ms. McLemore provided OR with her father's name, social security number, badge number and the dates he worked at the Y-12 Plant. On October 6, 1999, OR provided Ms. McLemore with a partial response to her request, in which she was sent a number of documents including medical and radiation exposure records. In its final determination regarding her request, OR provided Ms. McLemore with additional medical records obtained from the federal records facility in Atlanta, Georgia. OR reported that it could not locate any records pertaining to accidents or incidents in which her father had been involved.

Ms. McLemore appeals OR's final determination on the grounds that she does not believe that OR has provided her with all of her father's medical records. Specifically she points out that she has not been provided with all her father's "H-meter" and "Y-meter" film exposure badge records or his

"whole body count" radiation exposure records or urinalysis records. She requests that OR be directed to conduct another search for responsive records. (2)

II. ANALYSIS

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993); Native Americans

for a Clean Environment, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

We contacted the FOIA Officer at OR to inquire as to the nature of OR's search for responsive documents. See Memoranda of telephone conversations between Amy Rothrock, FOIA Officer, OR and Richard Cronin, Assistant Director, OHA (January 24, 2000). OR informed us that with regard to the portion of the request pertaining to Ms. McLemore's father's medical records, OR instituted searches of five systems of records that it determined were most likely to contain responsive information.(3) These five systems of records were searched using the information Ms. McLemore had provided. The system of records are described in the table below:

System of Record Name	Description of records contained in System
DOE-33	Personnel Medical Records
DOE-35	Personnel Radiation Exposure Records
DOE-71	Radiation Accident Registry
DOE-72	DOE Radiation Studies Registry
DOE-73	USDTPA Registry (4)

All responsive documents discovered in the searches of these systems of records were provided to Ms. McLemore.(5)

With regard to Ms. McLemore's request for records pertaining to accidents or incidents her father may have been involved in, OR conducted a search for responsive records in the Oak Ridge Records Holding Area which contains historical medical and personnel records from the beginning of the Manhattan Project at Oak Ridge. (6) In order that a more effective search could be conducted, OR examined the various administrative codes in Ms. McLemore's father's personnel file and determined the various buildings in the Y-12 Plant where her father may have worked. (7)OR then searched the Records Holding Area and found 100 boxes that contained documents concerning the buildings where Ms. McLemore's father may have worked during the time he was employed at the Y-12 Plant. All responsive documents from these boxes were subsequently provided to Ms. McLemore. OR does not know of any other location at Oak Ridge where responsive documents would be found.

Given the facts described above, we believe that OR's search was reasonably calculated to discover responsive documents. OR performed a search of the systems of records where responsive documents were most likely to exist. OR also conducted a search of the Records Holding Area for documents using the names of the buildings in which Ms. McLemore's father may have worked. Further, OR has no knowledge of other locations where responsive documents may exist. With regard to the lack of film badge information, OR has informed us that all badge readings are transcribed into paper records and then transcribed into an electronic database. Consequently, when a request for radiation exposure records is received, such as a request for film badge information, the electronic database is searched along with the duplicate microfiche records of the film badge readings. The film badges themselves are destroyed. (8) See Memorandum of telephone conversation between Linda Snapp, Radiation Controls/Privacy Act Officer, Y-12 Plant, Lockheed Martin Corporation and Richard Cronin, Assistant Director, OHA (February 14, 2000). OR also informed us that if Ms. McLemore's father had a "whole body count" procedure, the records of the procedure would have been located in the Records Holding Area or in DOE systems of records No. 35, 71, 72 or 73. OR informed us that "whole body count" radiation exposure data may have been broken down into exposure data for various body parts and systems for an individual. Some of the medical records provided Ms. McLemore contain such breakdowns. Further, some of the records provided to Ms. McLemore contain exposure data determined from a "void." "Void" refers to a

collected urine sample. OR has no indication that additional responsive records exist elsewhere. In sum, we find that OR conducted a search that was reasonably calculated to find responsive documents. Consequently, Ms. McLemore's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Janice R. McLemore on January 13, 2000, Case No. VFA-0551, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 23, 2000

(1)Ms. McLemore's initial submission did not contain a statement indicating on which grounds she sought to appeal the December 1, 1999 determination letter. See 10 C.F.R. § 1004.8(b). We contacted Ms. McLemore on January 13, 2000, and she informed us as to the grounds of her appeal. Consequently, we deem Ms. McLemore's appeal as filed on January 13, 2000.

(2)In her appeal, Ms. McLemore also sought to appeal OR's failure to respond to her subsequent request for documents relating to all accidents and incidents at Oak Ridge. In a conference call, OR and Ms. McLemore agreed to work together to try to narrow the scope of this request so that Ms. McLemore would be able to obtain documents in which she had a specific interest. See Record of conference call between Amy Rothrock, OR FOIA Officer, Janice McLemore, and Richard Cronin, Assistant Director, OHA (January 31, 2000). Ms. McLemore withdrew her appeal with regard to OR's failure to respond.

(3)A system of records is a group of records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying number, symbol or identifying particulars assigned to the individual. See 10 C.F.R. § 1008.2 (m).

(4)The records contained in this system of records pertain to individuals who received the drug diethylenetriaminepentaacetic acid (DTPA) for treatment of actual or suspected internal contamination with transuranic elements (elements, such as plutonium, with atomic numbers higher than 92, the atomic number for uranium).

(5)Some of the records identified in the searches had to be obtained from a federal record center in Atlanta, Georgia.

(6)The Manhattan Project was the name of the effort to develop the first atomic bomb for the United States during World War II.

(7)Based upon the administrative codes found in his records, OR determined that Ms. McLemore's father may have worked in the following buildings at the Y-12 plant: Buildings 9201-1 (Alpha-1 Machine Shop), 9201-5 (Alpha-5 Machine Shop), 9201-5E (Alpha-5 East Machine Shop); 9201-5W (Alpha-5 West Machine Shop), 9204-4 (Beta-4 Production Facility), 9212 (A-Wing and F- Wing Machine Shop), 9215 (Rolling Mill), 9766 (Machine Shop) and 9998 (H-2 Foundry).

(8)We were informed that a number of old films exists which can not be linked to particular individuals

and which can not be read for radiation exposure levels. Memorandum of telephone conversation between Linda Snapp, Radiation Controls/Privacy Act Officer, Y-12 Plant, Lockheed Martin Corporation and Richard Cronin, Assistant Director, OHA (February 14, 2000)

Case No. VFA0552, 27 DOE ¶ 80,257

February 17, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Margaret A. O'Neill

Date of Filing: January 18, 2000

Case Number: VFA-0552

On January 18, 2000, Margaret A. O'Neill filed an Appeal from a final determination that the Office of Headquarters and Executive Personnel Services (Personnel) of the Department of Energy (DOE) issued on December 15, 1999. That determination concerned a request for information submitted by Ms O'Neill pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Personnel would be required to conduct a further search for responsive documents.

Background

On August 18, 1999, Ms O'Neill submitted a FOIA request for

1. All records, including electronic mail [and] hand written notes, that pertain to the classification and review of all GS-0301-15 and GS 0343-15 position descriptions submitted by the Office of Counterintelligence for the Executive Assistant, Staff Director, and/or Executive Officer;
2. All materials prepared for use by management related to the review of comparable positions and;
3. All records of communication between management and staff related to the classification and review of particular positions and materials prepared for review of comparable positions.

Request Letter dated August 18, 1999, from Margaret A. O'Neill to FOIA Officer, FOI/Privacy Acts Division, DOE. On December 15, 1999, Personnel responded, releasing what it stated were all available records and documents. Determination Letter dated December 15, 1999, from Claudia A. Cross, Director, Office of Headquarters and Executive Personnel Services, DOE, to Margaret A. O'Neill. Personnel indicated that some of the records requested may no longer exist. Id.

On January 18, 2000, Ms O'Neill filed this Appeal. First, Ms O'Neill contends that records that no longer exist may possibly be retrieved if the records existed in electronic format.

Appeal Letter dated January 18, 2000, from Margaret A. O'Neill to Director, Office of Hearings and Appeals, DOE. Secondly, Ms O'Neill asks that the Office of Hearings and Appeals order Personnel to stop destroying all records responsive to her FOIA request.(1) Id. Finally, Ms O'Neill asks that a more thorough search be conducted. Id.

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985);*accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

In her Appeal, Ms O'Neill contends a further search for information responsive to her request should be conducted. She claims she has received, from another source, copies of electronic mail messages that were responsive to her request but were not released by Personnel. For this reason, Ms O'Neill believes that the search Personnel conducted was incomplete. In fact, Personnel has recently informed us that it has found additional responsive information. For that reason, we will remand the matter to Personnel to release the responsive information.

Personnel has not yet determined whether it is possible to search for information deleted from individuals' computers.(2) Ms O'Neill first requested on Appeal that she wanted all deleted electronic records to be searched. We believe this is a clarification of her original request, not a new request. Therefore, we will also remand the matter for a determination on this issue.

It Is Therefore Ordered That:

(1) The Appeal filed by Margaret A. O'Neill, on January 18, 2000, Case No. VFA-0552, is hereby granted as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Headquarters and Executive Personnel Services of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 17, 2000

(1) It has long been understood that the receipt of a FOIA request suspends the destruction of all documents responsive to that request. Therefore, such an order, were it possible, would be redundant.

(2)The availability of backup copies of deleted electronic mail messages varies within the DOE. It is dependent upon the procedures implemented by those who maintain each Local Area Network.

Case No. VFA-0554, 27 DOE ¶ 80,260

February 25, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Tri-Valley CAREs

Date of Filing:February 1, 2000

Case Number: VFA-0554

On February 1, 2000, Tri-Valley CAREs (Appellant) completed the filing of an Appeal from a determination issued by the Department of Energy's (DOE) Oakland Operations Office (Oakland). The Appellant challenges Oakland's determination that certain documents sought by it are not agency records and therefore are not subject to mandatory disclosure under the Freedom of Information Act (FOIA). 5 U.S.C. § 552; 10 C.F.R. Part 1004. This Appeal, if granted, would require Oakland to consider whether the requested documents could be released under the FOIA.

I. Background

On September 1, 1999, the Appellant filed a Request for Information seeking documents relating to the Inertial Confinement Fusion Program (the Program). In response to this Request, Oakland issued a determination on December 22, 1999.(1) In that determination, Oakland stated that it was not

releasing personal notes made by participants on a conference call related to the Program because it found that these records are not agency records, and therefore not subject to the FOIA.(2) In its Appeal, the Appellant claims that these records should be considered agency records under the Federal Records Management Act and the related General Records Schedule 32. See Letter from the Appellant to Director, OHA (January 27, 2000). The Appellant has also noted its belief that the notes contain substantive material that it needs. See Letter from Appellant to Director, OHA (February 16, 2000).

II. Analysis

We have considered Oakland's determination that the notes are not agency records and find, for the reasons explained below, that more facts are needed before it can be determined whether this analysis is correct. Under the FOIA, an "agency record" is a document which is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and it was used for an agency purpose. Kissinger v. Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Bureau of Nat'l Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (BNA); Ben Franklin, 20 DOE ¶ 80,110 at 80,526 (1990).(3)

In making the "agency records" determination, we look at the totality of circumstances surrounding the

creation, maintenance, and use of the document(s) in question. BNA, 742 F.2d at 1492-93. We contacted Oakland to inquire as to the use and nature of the notes, as well as Oakland's search for the notes. Approximately twenty people participated in a conference call regarding the Program. Oakland sent a request to each of the participants requesting the following: (1) various responsive documents and (2) a description of any notes of the call in the participant's possession. At least one participant sent a copy of his notes to Oakland and at least one sent a brief description but did not send the notes. See Record of Telephone Conversation between RoseAnn Pelzner and Dawn L. Goldstein (February 16, 2000). In the descriptions, Oakland learned that the notes were created for the participants' personal convenience. At the time of the Appellant's FOIA Request, none of these notes were maintained in any official DOE file. Oakland also noted that some participants were neither DOE contractors nor DOE employees. However, the participants had not specified in their descriptions whether they had shared their notes with others, such as those not participating, in order to inform them of what had been said during the conference call. Thus, it was unclear how these notes were handled or if they may have been dispersed. See Memoranda of Telephone Conversations between Andrea Keith, Office of General Counsel, Oakland, and Dawn L. Goldstein (February 9 and 14, 2000).

We are unable to make a final determination from these facts. We are remanding this case in order that Oakland may ascertain whether these notes were shown to, circulated to, or used by other individuals for any reason, including some business purpose, such as informing them what had taken place, decision-making or performing a task. Oakland should also determine how widely, if at all, the information was disseminated. Oakland may wish to consult the list of factors contained in Ethyl Corp. v. United States EPA, 25 F.3d 1241, 1247 n.3 (4th Cir. 1994). Oakland should then determine whether, under the totality of the circumstances, any of the notes have attained the status of agency records. Certainly, if these notes were used solely as memory aids or mere personal work aids by the notetakers individually, the notes would not be agency records. See Washington Post v. United States Dep't of State, 632 F. Supp. 607 (D.D.C. 1986).(4) Consequently, we will remand this matter to Oakland, which should promptly issue a new determination to the Appellant.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs on February 1, 2000, Case No. VFA-0554, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the DOE's Oakland Operations Office, which shall promptly issue a new determination in accordance with the guidance set forth in the above Decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 25, 2000

(1)Oakland stated in that determination that it was continuing to look for documents responsive to the Appellant's request. In a letter received by this Office on February 16, 2000, the Appellant noted the lack of a final response from Oakland to the remainder of its request. Section 1004.8(a) of the DOE Regulations states that the Office of Hearings and Appeals (OHA) has jurisdiction to consider Freedom of Information Act Appeals in the following circumstances:

> When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees. . . .
>
> 10 C.F.R. § 1004.8(a).

Since no appealable determination has been issued on the remainder of the Appellant's request, the circumstances for an administrative appeal on this issue do not exist. Under the circumstances, the Appellant does have the right to file a complaint with the appropriate federal district court. See 5 U.S.C. § 552(a)(4)(B), (6)(C). Accordingly, we will not consider this portion of the Appellant's appeal. We have, however, reminded Oakland of the need to respond promptly to this request. See Record of Telephone Conversation between RoseAnn Pelzner, FOIA Officer, Oakland, and Dawn L. Goldstein, Staff Attorney, OHA (February 16, 2000).

(2)Oakland withheld other information in that December 22, 1999 determination. The Appellant is not appealing those withholdings. See Letter from Appellant to the Director, Office of Hearings and Appeals (January 27, 2000).

(3)We note that the definition of agency records contained in the Federal Records Management Act, 44 U.S.C. 3301, and the related General Schedule 32 is instructive in a FOIA case but not dispositive. Forsham v. Harris, 445 U.S. 169, 183-84 (1980); BNA, 742 F.2d at 1493. This Office chooses to rely on the definition of agency records as developed in the FOIA context by federal courts as explained above. We further note that under the federal courts' definition of agency records, the substantive nature of the notes is also not dispositive. Nor does a requester's need for documents affect our FOIA analysis.

(4)If any of the notes were not mere memory aids or personal work aids, and were either created by or given to DOE contractors, Oakland should consider whether they fall within the provision of 10 C.F.R. § 1004.3, a regulation rendering some contractor-possessed documents subject to release. Moreover, even notes created by personnel not employed by DOE or a DOE-contractor could be subject to release, if these notes were then shared with and used by DOE personnel or DOE contractor personnel.

Case No. VFA-0555, 27 DOE ¶ 80,269

March 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Mary L. Michel

Date of Filing:January 28, 2000

Case Number: VFA-0555

Mary L. Michel filed this Appeal from a determination issued to her by the Oak Ridge Operations Office (ORO) of the Department of Energy (DOE). The determination responded to a request for information she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In her Appeal, Michel challenges the adequacy of ORO's search for documents responsive to her request.

I. Background

Michel submitted a request to ORO for copies of medical records of her late husband, John Michel. ORO responded by releasing John Michel's complete medical file, with some redactions to remove identifying information concerning other individuals.

Among the records ORO released was a document signed by John Michel and dated October 25, 1972. I will refer to this document as "the consent form." The consent form states, in part, that John Michel gave permission for his blood sample:

... to be used for purposes other than routine testing.... These uses ... might include such things as development of new tests, establishment of standards, accumulation of pooled reference serum, etc.... My name or any identifying data will not appear in any publication.... If tests are done that have clinical importance the results will be made part of my medical record.... If any of the results are thought to have prompt clinical significance I will be so informed.

Mary Michel appealed the adequacy of the search for responsive material conducted by ORO. She stated that she had "received all requested information except the results of the blood analysis agreed to in the [form] signed and dated by John W. Michel, 10-25- 72." The sole issue on appeal, then, is whether ORO should have discovered documents relating to a blood test associated with the consent form.

II. Analysis

The FOIA generally requires federal agencies to release material to the public upon request. Following an appropriate request, agencies must search their records for responsive documents. We have often stated that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where we believe the search conducted was inadequate. *E.g., Ashok K. Kaushal*, 27 DOE ¶ 80,189 (1999); *Hobart T. Bolin, Jr.*, 27 DOE ¶ 80,124 (1998).

In a case involving the adequacy of the agency's search, "the issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). To determine whether an agency's search was adequate, we therefore examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

Michel requested all medical records of John Michel, including special monitoring records and exposure records. In our review of Michel's Appeal, we ascertained that personnel at ORO searched the records of the site's medical department and located the medical file for John Michel that covered the full period of his employment at the site. These persons were not aware of any other place where John Michel's medical records could reasonably be found. In addition, we obtained information about the consent form from Judy Edwards, a laboratory technician with the ORO medical department. Edwards was working at the laboratory on October 25, 1972, when John Michel signed the consent form. She knew Mary Michel, and recalled that John Michel signed the consent form in order to give a blood sample to help calibrate a new blood test machine and to set standards for later tests. No individual blood test results were generated from this procedure. Thus, she believes there would be no responsive records specifically associated with John Michel's consent form dated October 25, 1972.

III. Conclusion

We believe that ORO conducted a search that was reasonably calculated to find the materials requested by Mary Michel. Moreover, based on Edwards' statement, we find no ground for believing that there are further records associated with the consent form. We will therefore deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Mary L. Michel, Case No. VFA-0555, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000

Case No. VFA-0556, 27 DOE ¶ 80,263

March 13, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Westinghouse Savannah River Company, LLC

Date of Filing: February 1, 2000

Case Number: VFA-0556

On February 1, 2000, Westinghouse Savannah River Company, LLC (WSRC) filed an appeal of a determination that the Department of Energy's (DOE's) Office of Inspector General (OIG) issued to it on December 21, 1999. That determination denied a request for information that WSRC filed on November 5, 1999, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that OIG release responsive documents, if they exist, that were withheld under FOIA Exemption 7(C), 5 U.S.C. § 552 (b)(7)(C).

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of an agency. 5 U.S.C. § 552(b). DOE regulations further provide that a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 5, 1999, WSRC requested that the OIG release a copy of an investigative file regarding a named individual. Letter from WSRC to FOIA Officer, OIG (November 5, 1999). The OIG responded that it could neither confirm nor deny the existence of records responsive to WSRC's request, and denied the request under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). Letter from Judith D. Gibson, OIG, to WSRC (December 21, 1999). An agency's statement in response to a FOIA request that it will neither confirm nor deny the existence of records is commonly called a "Glomar" response.(1)

WSRC subsequently appealed OIG's determination. Letter from WSRC to Director, Office of Hearings and Appeals (January 28, 2000) (Appeal). According to WSRC, the named individual in its request has waived his privacy rights by making allegations [of official misconduct] against WSRC and other defendants public through litigation. Id. If this Appeal were granted, OIG would be required to release the requested information, if it exists.

II. Analysis

This Decision and Order will focus on the propriety of OIG's determination of a privacy interest and OIG's use of the Glomar response in refusal to confirm or deny the existence of investigatory records concerning a third person. As detailed below, we will uphold both actions.

A. Exemption 7(C)

Exemption 7(C) of the FOIA, 5 U.S.C. § 552(b)(7)(C), allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold test for withholding information under Exemption 7(C) is whether the agency compiled such information as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). Amendments to the FOIA in 1986 extended the protection of Exemption 7 to all records compiled for "law enforcement purposes." See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987).

OIG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that OIG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995).

B. The Balancing Test Under Exemption 7(C)

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762 (1989) (Reporters Committee); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); Lesar v. Department of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980).

1. The privacy interest

An individual who files an official complaint alleging irregularities in DOE's operations has a privacy interest in being protected from possible retaliation. We have previously found that sources mentioned in OIG files have a strong privacy interest in remaining anonymous. See Blumberg, Seng, Ikeda & Albers, 25 DOE ¶ 80,124 at 80,563 (1995); James L. Schwab, 21 DOE ¶ 80,117 (1991). Indeed, the courts have recognized the possibility of harassment or intimidation of these sources, and have consistently found that privacy interests in the identities of individuals providing information to government investigators are greatly amplified. Safecard, 926 F.2d at 1197 (D.C. Cir. 1991), *cited in* Stoel Rives, LLP, 25 DOE ¶ 80,189 at 80,724 (1996). Therefore, unless that person has waived this privacy interest, he is entitled to protection from disclosure of his activities.

We find a cognizable privacy interest at stake in this case. WSRC argues that the named individual has waived his personal privacy by filing two lawsuits in which he relied on the findings of the OIG, thus choosing to make his allegations against WSRC and other defendants public through litigation. Appeal at 2. WSRC further argues that an invasion of the named individual's privacy by releasing the requested documents would not be unwarranted. Id. We do not accept as confirmation of an official proceeding WSRC's unsupported allegations that the named individual has filed two lawsuits based upon findings and actions made by the OIG. We have previously stated that we cannot accept unsubstantiated allegations as official confirmation that an enforcement file or proceeding exists. See Keci Corporation, 26 DOE ¶ 80,150 at 80,662 (1997) (Keci). Therefore, we find that the individual retains a personal privacy interest in the requested material.

2. The public interest in disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. We have held that the public interest in disclosure is measured not by the degree of the requester's interest in disclosure, but rather by "the right of the public to obtain the same information." The Die-Gem Co., Inc., 19 DOE ¶ 80,124 at 80,569 (1989) (quoting Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978)). The Supreme Court has held that information which does not directly reveal government operations or activities "falls outside the ambit of the public interest that the FOIA was enacted to serve." Reporters Committee, 489 U.S. at 775.

WSRC claims that there is an overriding public interest in the disclosure of the requested information. Appeal at 2. We agree that there is clearly a public interest in official misconduct. However, WSRC has neither explained the nature of the alleged misconduct nor provided any proof that allegations made by the named individual were part of an official proceeding. Courts have held that unsubstantiated allegations of official misconduct do not establish a public interest in disclosure. See McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (allegations that agency is not doing its job do not create a public interest sufficient to override privacy interest protected by Exemption 7(C)); Triestman v. Department of Justice, 878 F. Supp. 667 (S.D.N.Y. 1995) (no substantial public interest in disclosure of information concerning possible investigation of law enforcement agent). Therefore, we find that the public interest in disclosure of unsubstantiated allegations of official misconduct is negligible, and is outweighed by the individual's real and identifiable privacy interest.

C. Disclosure of the Existence of Records Would Reveal Exempt Information

In reviewing this Appeal, we contacted employees of OIG to discuss the Glomar response to WSRC's FOIA request. According to OIG, once it determined that WSRC was a third party requesting information about the named individual, it followed its policy of refusing to confirm or deny the existence of records in response to a FOIA request when six factors exist.(2) See Memorandum of Telephone Conversation between Jackie Becker, Attorney, OIG and Kimberly Jenkins-Chapman, OHA Staff Attorney (March 6, 2000). In this case, OIG determined that the six factors existed and on that basis issued a Glomar response to WSRC's FOIA request. In order to use a Glomar response with Exemption 7, there must be a cognizable privacy interest at stake and insufficient public interest in disclosure to outweigh that privacy interest. See William H. Payne, 26 DOE ¶ 80,144 (1996). A Glomar response is justified when the records sought, if they exist, would be exempt from disclosure under Exemption 7(C) of the FOIA, and the confirmation of the existence of such records would itself reveal exempt information. See Antonelli v. FBI, 721 F.2d 615 (7th Cir. 1983); William H. Payne, 26 DOE ¶ 80,144 (1996).

We find that OIG's Glomar response to WSRC was justified. Whether or not OIG enforcement records involving the named individual exist, refusal to confirm or deny the existence of these records is proper under Exemption 7(C). A Glomar response to such FOIA requests is necessary to protect the privacy rights of individuals whose identity may be revealed in an OIG investigation. By refusing to confirm or deny the existence of an enforcement file that mentions the named individual, OIG has properly protected that individual's privacy rights. Thus, we find that OIG was justified in providing a Glomar response to this request because the confirmation of the existence of such records would itself reveal exempt information. Accordingly, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Westinghouse Savannah River Company, LLC on February 1, 2000, OHA Case No. VFA-0556, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 13, 2000

(1)“Glomar” refers to the first instance in which a federal court upheld the adequacy of such a response. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents).

(2)When the following factors exist, OIG will issue a Glomar response: (1) the request is made by a third party; (2) the request is for information about a person identified by name; (3) the requested records, if they exist, would be contained in an enforcement file; (4) the named individual is not deceased; (5) the individual has not given the requester a waiver of his privacy right; and (6) there has been no official confirmation that an enforcement file or proceeding exists. See Keci, 26 DOE at 80,660 (quoting memorandum from Jackie Becker, OIG, to Linda Lazarus, OHA (November 27, 1996)).

Case No. VFA-0558, 27 DOE ¶ 80,270

April 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Center for Government Accountability

Date of Filing: March 6, 2000

Case Number: VFA-0558

The Center for Government Accountability (CGA) filed this Appeal on March 6, 2000 with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE Office of the Inspector General (OIG) issued to CGA on February 2, 2000. The determination concerned a request for information that CGA submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OIG would be required to release any responsive material.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 23, 1997, CGA requested copies of several categories of documents, including: (1) all documents that were withheld in FOIA request 94112804H; (2) all documents produced in the investigation of a complaint that CGA filed with OIG; and (3) all documents that pertain to the hiring of independent contractors by DOE and its prime contractors, including, but not limited to, Lockheed Martin. Letter from OIG to CGA (February 2, 2000) (Determination Letter). On February 2, 2000, the OIG provided some responsive material to CGA, but withheld two documents, Document 7 and Document 8, in their entirety under Exemption 5 of the FOIA. According to OIG, these documents

were part of the final investigative report package concerning CGA's complaint.(1) Document 7 is the draft indexed report of investigation and draft transmittal memorandum. Document 8 is the report reference sheet. Determination Letter at 1. In its determination, OIG justified withholding these documents by explaining that the withheld material is deliberative information. OIG further stated that the disclosure of Documents 7 and 8 was not in the public interest, because disclosure "would inhibit frank and open discussion . . . and would hinder the government's ability to reach sound and well reasoned resolutions." Determination Letter at 2.

CGA appeals this determination and contends that the documents are not truly deliberative because OIG did not rely on the contents of Documents 7 and 8 to produce the final report, Document 52. Letter from

CGA to Director, OHA (February 14, 2000). CGA also argues that the withheld draft report contains material of public interest, "especially because no public report was ever released." Appeal at 1.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*NLRB*). The "deliberative process" privilege falls under this exception, and this is the privilege that OIG relied upon in its determination. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*).

The deliberative process privilege shields from public disclosure records reflecting the predecisional, consultative process of an agency. *See Matthew Cherney, M.D.*, 27 DOE ¶ 80,187 (1999); *Los Alamos Study Group*, 27 DOE ¶ 80,177 (1999) (*LASG*); *Edwin S. Rothschild*, 27 DOE ¶ 80,150 (1998) (*Rothschild*). Predecisional materials are not exempt merely because they are prepared prior to a final action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). This privilege was developed primarily to promote frank and independent discussion among those responsible for making government decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) *(Mink)* (quoting *Kaiser Aluminum & Chem. Corp., v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *NLRB*, 421 U.S. at 151 (1975).

CGA contends that Exemption 5 does not apply to Documents 7 and 8 because they were not part of the deliberative process used to produce the final report of investigation, Document 52. CGA alleges that Document 52, the final report, is "diametrically opposite to what I was told was in the draft report by [OIG investigators] Sumner and Bautz, and further is not consistent with documentation released in this FOIA [request]." Electronic mail message from David Hackett, CGA to Valerie Vance Adeyeye, OHA (March 16, 2000). CGA also argues that draft reports are not deliberative because "deliberation is generally finished by the time a draft report is produced." Letter from CGA to OHA (February 14, 2000). According to CGA, draft reports only require minor changes prior to release in final form, and thus cannot be considered deliberative. *Id*. After a thorough review of Documents 7, 8, and 52, we do not agree. An agency may determine that a document is predecisional without identifying an agency final decision based on that document, provided that the agency establishes both the deliberative process involved and the role played by the withheld documents in the course of that process. *NLRB*, 421 U.S. at 151 n.18; *Coastal States*, 617 F.2d at 868.; *Hunt v. U.S. Marine Corp.*, 935 F. Supp. 46, 51 (D.D.C. 1996). Our review convinces us that Documents 7 and 8 were an integral part of the deliberative process that took place within OIG in order to arrive at findings on CGA's complaint. Therefore, we find that Documents 7 and 8 contain information that is exempt from disclosure under Exemption 5 of the FOIA.

CGA also argues that Documents 7 and 8 have information vital to the public interest because "they reflect findings that were later denied in the . . . final report." Electronic mail message from CGA to OHA (March 16, 2000). DOE regulations provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 522 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. However, OIG correctly determined that the release of Documents 7 and 8 would not be in the public interest since it found that releasing the documents would "inhibit frank and open discussion of matters and would hinder the government's ability to reach sound and well reasoned resolutions." Determination at 2.

The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering*

Inc., 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). Since the determination letter did not identify segregable, nonexempt factual material, we find OIG's determination to be insufficient in this regard. Our review finds that the documents contain some reasonably segregable factual information that may not be withheld under Exemption 5 unless inextricably intertwined with exempt material. Accordingly, we shall remand this matter to OIG. On remand, OIG must review the withheld documents and segregate and release all purely factual portions, or issue a new determination that justifies withholding the factual portions of the documents.

It Is Therefore Ordered That:

(1) The Appeal filed on March 6, 2000 by the Center for Government Accountability, OHA Case No. VFA-0558, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Inspector General, for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 3, 2000

(1)OIG did not release a copy of the final investigative report to CGA because CGA received that document in November 1996. Determination at 2; Electronic Mail Message from David Hackett, CGA to Valerie Vance Adeyeye, OHA Staff Attorney (March 16, 2000).

Case No. VFA-0559, 27 DOE ¶ 80,264

March 15, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: PowerMax Inc.

Date of Filing: February 15, 2000

Case Number: VFA-0559

On February 15, 2000, PowerMax Inc. (PowerMax) filed an Appeal from a final determination that the Nevada Field Office (NV) of the Department of Energy (DOE) issued on January 6, 2000. In its determination, NV informed PowerMax that records responsive to the request for information it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, were not agency records and thus were not subject to the FOIA. Consequently, NV did not provide a copy of the responsive documents to PowerMax. This Appeal, if granted, would require NV to release the information it withheld.

Background

This FOIA Appeal arises out of a contract dispute involving PowerMax and Pavel Enterprises, Inc. (PEI). Bechtel Nevada (BN) is the management and operating support contractor for the Washington Aerial Measurements Operations (WAMO) facility at Andrews Air Force Base in Camp Springs, Maryland.(1) BN employed PEI to be the general contractor at the WAMO project. PowerMax is a subcontractor to PEI at the WAMO project.

In a December 10, 1999 request for information (Request), PowerMax requested copies of 16 categories of documents relating to BN's communications concerning the WAMO project and other WAMO project and contract documents concerning BN and PEI. The 16 categories of documents are listed below:

1. Meeting minutes and notes from the time of the pre-construction meeting to the end of the WAMO project.
2. Requisitions submitted by PEI to Bechtel as well as any related correspondence, checks, wire transfer information and other related documentation relating to payments requisitioned by PEI or payments made

by Bechtel to PEI for services rendered under the WAMO facility

contract.(2)

3. Change orders and any settlement negotiation meeting minutes, notes, correspondence, and other documentation relating to any change orders proposed, contemplated or issued under the WAMO contract.

4. Schedules prepared by Bechtel or its contractors.

5. Information submitted by PEI which concerns subcontractors to be used on the project.

6. Correspondence, memoranda, faxes, and other documentation between Mr. Dwight Burch, Bechtel on-site field representative, and BN.

7. Correspondence, memoranda, faxes, and other documentation between Mr. Dwight Burch, Bechtel on-site field representative, and PEI.

8. Payment history of the WAMO project reflecting the payment made by Bechtel to PEI for the approved mechanical scheduled line items on a month to month basis from the project start-up through the date of this request, including copies of PEI's or Bechtel's actual monthly approved payment breakdowns.

9. PEI's initial job schedule submitted to Bechtel for approval, the approved schedule and any updated schedules.

10. A copy of PEI's performance and payment bond with BN for the WAMO project.

11. Correspondence, memoranda and other documentation between PEI and Bechtel concerning subcontractors that performed work on the WAMO project.

12. Correspondence or documentation addressing liquidated damages or other damages applicable to the WAMO project.

13. A copy of PEI's contract with BN.

14. Daily job reports, daily job information, field notes and similar documents from Mr. Dwight Burch of BN, the on-site representative.

15. Daily job reports, daily job information, field notes and similar documents submitted to BN from PEI.

16. Notices of delay from BN to PEI.

In its January 6, 2000 Determination Letter, NV stated that with regard to documents described in Request categories 1 through 9 and 11 through 16, all responsive documents to the Request are the property of BN. NV asserted that the DOE-BN contract provides that all procurement records are deemed by the contract to be the property of BN and not the DOE. Consequently, these records are not "agency records" and thus, not subject to the FOIA. With regard to Request category 10, BN released a copy of the Performance and Payment Bond to PowerMax. The Determination Letter states that while the Bond is a BN-owned document, BN has previously provided copies of that Bond to other parties.

PowerMax challenges NV's failure to provide responsive documents to its Request. In the Appeal, PowerMax asserts that PEI is in violation of the Federal Prompt Pay Act and that PEI is wrongfully "passing through" delay charges to PowerMax.

Analysis

As an initial matter, we do not agree with PowerMax's arguments regarding its need for the requested documents as justifying release of the documents under the FOIA. The FOIA applies to "records" that are maintained by "agencies" within the executive branch of government. 5 U.S.C. § 552(f). Consequently, the FOIA is applicable only where the requested documents may be considered an "agency record" or, pursuant to DOE regulation, is otherwise deemed to be the property of the DOE by contractual provision. Need is not relevant. Nevertheless, we have reviewed the facts of this case and find that NV was correct in its conclusion that the requested records would not be subject to release under the FOIA or DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as BN, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997) (LASG). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See LASG, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 180 & n. 11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, although BN is the management and operating support contractor for WAMO, the DOE does not supervise BN's day-to-day operations. Memorandum of telephone conversation between Michael Brown, Office of Public Affairs and Information, NV, and Richard Cronin, Assistant Director, OHA (March 14, 2000). We therefore conclude that BN is not an "agency" subject to the FOIA.

Although BN is not an agency for the purposes of the FOIA, its records relevant to PowerMax's request could become "agency records" if DOE obtained them and they were within the DOE's control at the time the Appellant made its FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). In this case, none of the responsive documents at issue was in the DOE's control or possession at the time of the Appellant's request. At the time of the Request, all responsive records were in the possession of BN. See Memorandum of telephone conversation between Michael Brown, Office of Public Affairs and Information, NV, and Richard Cronin, Assistant Director, OHA (February 17, 2000). Based on these facts, the documents do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145- 46.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2)." 10 C.F.R. § 1004.3(e)(1).

The relevant contract provisions in the DOE-BN contract are provided below:

I. 117. 970.5204-79 - ACCESS TO AND OWNERSHIP OF RECORDS (JUNE 1997)

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the process of the work, or in any event, as the contracting officer shall direct upon completion or termination of the contract.

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.

. . . .

(3) Records relating to any procurement action by the Contractor, except for records that under 48 C.F.R. (DEAR) 970.5204-9 Accounts, Records, and Inspection, are described as the property of the Government . . . . (3)

Contract No. DE-AC08-96PO11718, Modification A061.

The requested documents all pertain to BN's procurement of services and material for the WAMO project. Thus, the provisions of section I.117 quoted above indicate that such records would be contractor-owned records and not government records.

Because we find that the responsive documents are not agency records for the purposes of the FOIA and are not deemed to be DOE property by the DOE-BN contract, we find that the BN documents are not subject to release pursuant to the FOIA or DOE regulations. Consequently, PowerMax's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by PowerMax Inc., on February 15, 2000, Case No. VFA-0559, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. §552 (a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 15, 2000

(1)DOE is the agency that supervises the WAMO project.

(2) Bechtel is the parent corporation of BN.

(3)Section 970.5204-9 of the DEAR referenced in paragraph (b)(3) of the DOE-BN contract refers to government ownership of records relating to "financial and cost reports, books of account and supporting documents and other data evidencing costs allowable, revenues, and other applicable credits" pertaining to a contract. See DEAR Section 970.5204-9(d). None of the categories of requested documents relates to DOE-BN contract accounts.

Case No. VFA-0560, 27 DOE ¶ 80,265

March 16, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Robert A. Speir

Date of Filing:February 16, 2000

Case Number: VFA-0560

On February 16, 2000, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by Robert A. Speir appealing a determination by the Department of Energy's (DOE) Office of Inspector General (the IG). That determination was issued by the IG on February 2, 2000 in response to our remand of a request for information submitted by Speir in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the IG to release any responsive documents it is withholding.

I. Background

The request sought access to documents containing information about the following four items:

(1) Copies of all records given to any member of Congress or congressional committee related to Speir's receipt of a cash award from the Project on Government Oversight;

(2) All internal records related to DOE consideration of the requests by members of Congress for materials, documents and records related to Speir's receipt of a cash award from the Project on Government Oversight, and also records related to any DOE review regarding the appropriateness of the award;

(3) Records relating to Speir's receipt of a cash award from the Project on Government Oversight provided to the Department of Justice or any other element of the Executive Branch of the Federal Government; and

(4) Copies of records of any contact with members of the press as related to this award.

On November 4, 1999, the IG issued a determination letter withholding an unknown quantity of responsive documents in their entirety under FOIA Exemption 7(A). Speir appealed that determination, contending that the IG had improperly applied Exemption 7(A) in withholding information. *Robert A. Speir*, 27 DOE ¶ 80,251 (2000) (*Speir I*). In *Speir I*, we found that the IG failed to provide a sufficient justification of its withholdings under Exemption 7(A). Specifically we held: "The IG's determination letter does not provide any description of the documents it is withholding. As a result, we are unable to determine how release of the withheld information could reasonably be expected to interfere with the investigation." *Speir I* at 80,891. Accordingly, we remanded a portion of the Appeal to the IG, stating:

[T]he IG should release the withheld information, withhold it under an alternative FOIA exemption, or issue a new determination letter which includes a description of the withheld documents that is sufficient

to provide a reviewer with an opportunity to grasp how disclosure of the documents could reasonably be expected to interfere with an on-going investigation.

Speir I at 80,891. On February 2, 2000, the IG issued a new determination letter in response to our remand. This new determination letter provides a description of the information it is continuing to withhold under Exemption 7(A). On February 16, 2000, Speir filed the present appeal, contending that the description provided by the IG of the withheld information is still inadequate.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(7)(A) (1994 & Supp. II 1996). Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. " *Id.*

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *See F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982); *William Payne*, 26 DOE ¶ 80,144 (1996) (*Payne*). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority).

The IG is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). Accordingly, we have consistently found that the IG compiles information for law enforcement purposes within the meaning of Exemption 7. *Richard Levernier,* 26 DOE ¶ 80,182 (1997); *Keci Corporation*, 26 DOE ¶ 80,149 (1997). The courts have similarly found that the Inspector General's offices in other agencies exercise the requisite law enforcement functions to protect their investigatory files under Exemption 7. *E.g., Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Therefore, we find that the documents at issue in this case satisfy the threshold test for application of Exemption 7.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF,* 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. United States Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. United States Dep't of State*,

801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has provided a sufficient description of the withheld records. The determination letter identifies the withheld information as “Memoranda documenting intergovernmental meetings, special agent investigative notes, notes of financial analysis, memoranda of investigative activity, and investigator’s case processing material.” Determination Letter at 1.

The determination letter also provides a sufficient articulation of the harm that could reasonably be expected to occur if the withheld information was released. Specifically the determination letter notes that:

Release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. . . . [R]elease could tend to prematurely disclose enforcement efforts, or provide individuals involved in the investigation an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede an appropriate resolution of the investigation.

Determination Letter at 1-2. Since we agree with the reasoning set forth by the IG in its determination letter, we find that the IG has properly withheld the information under Exemption 7(A).

It Is Therefore Ordered That:

(1) The Appeal filed by Robert A. Speir on February 16, 2000, Case Number VFA-0560, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 16, 2000

Case No. VFA-0561, 27 DOE ¶ 80,268

March 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Leader Environmental, Inc.

Date of Filing: February 23, 2000

Case Number: VFA-0561

On February 23, 2000, Leader Environmental, Inc., (Leader) filed an Appeal from a determination the Department of Energy's Oak Ridge Operations Officer (DOE/OR) issued on January 11, 2000. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Appellant challenges the adequacy of DOE/OR's search for documents responsive to its request.

I. Background

On November 29, 1999, the Appellant requested from DOE/OR "[h]istorical records from Army Office of Research and Development (OSRD) and Contracts between Army OSRD and Westinghouse or related to work at Bloomingfield, New Jersey, including OEMSR519 and OEMSR814." Letter from Tom Tuori, Leader, to Amy Rothrock, DOE/OR (November 29, 1999). In a subsequent electronic mail message to DOE/OR, Leader elaborated that the "first group of contracts we are looking for were executed in 1941, 1942 and/or possibly early 1943, and were for experimental uranium processing work conducted . . . to support atomic bomb production activities that were eventually transferred from the OSRD to the Manhattan District Corps of Engineers (the ?Manhattan Project')." Electronic mail from Tom Tuori, Leader, to Amy Rothrock, DOE/OR (December 9, 1999). Leader also expressed interest in

material transfer documentation, bills of lading, receipts, invoices, etc. for the unprocessed uranium that was shipped to the Westinghouse Bloomfield, NJ plant; we suspect that the Army controlled the supply of uranium and was directly involved in the shipments of unprocessed uranium to Westinghouse. The shipments would have occurred during 1942 and early 1943.

Id. Finally, the Appellant provided the names of individuals it believed were involved in the transactions that were the subject of the documents it sought. Id.

In its January 11, 2000 determination, DOE/OR released certain documents it located that were responsive to Leader's request. Letter from Amy L. Rothrock, DOE/OR, to Tom Tuori, Leader (January 11, 2000). The present Appeal challenges the adequacy of DOE/OR's search for responsive documents. Letter from Thomas M. Tuori, Leader, to Director, Office of Hearing and Appeals (OHA) (February 17, 2000).

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search

for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, upon receiving the present Appeal, we contacted DOE/OR to inquire as to the search it conducted in response to Leader's request. DOE/OR informed us that historical contract documents such as those requested by Leader would be found in DOE/OR's Records Holding Task Group (RHTG) collection. Electronic mail from Linda Chapman, Office of Chief Counsel, DOE/OR, to Steven Goering, OHA (March 8, 2000). Staff in this group conducted a search of an RHTG database using the following keywords based on information supplied by Leader: "Westinghouse," "Bloomingfield," "OEMSR519," "OEMSR814," "Vannevar Bush," "J. W. Marden," "Harvey C. Rentschler," "R. C. Stuart," and "R. Newcombs." Electronic mail from Linda Chapman, Office of Chief Counsel, DOE/OR, to Steven Goering, OHA (March 3, 2000). This search revealed two documents entitled "Westinghouse Patent Clause" and three items of correspondence, copies of all of which were provided to the requester. Electronic mail from Linda Chapman, Office of Chief Counsel, DOE/OR, to Steven Goering, OHA (March 2, 2000).(1)

Based on the above descriptions, we conclude that DOE/OR's search was reasonably calculated to uncover the records sought by the Appellant. We have on numerous occasions found that a reasonable search of a computerized document tracking system meets the standard for adequacy set forth in the law. See, e.g., Barbara Schwarz, 27 DOE ¶ 80,245 at 80,874 (1999). Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Leader Environmental, Inc., Case Number VFA-0561, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000

(1) In processing the present Appeal, we noticed that DOE/OR had searched using the keyword "Bloomingfield," and we pointed out to DOE/OR that the plant in issue was located in Bloomfield, New Jersey. DOE/OR then performed a similar search of the RHTG database using the keyword "Bloomfield." Electronic mail from Linda Chapman, Office of Chief Counsel, DOE/OR, to Steven Goering, OHA (March 22, 2000). This search produced an additional potentially responsive document, which has been forwarded to the requester. DOE/OR also searched two card files and one electronic database cataloging "SF-135" forms, which are used to record the transmittal and receipt of records. These additional searches located no responsive documents. Id.

Case No. VFA-0562, 27 DOE ¶ 80,267

March 23, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Donald R. Patterson

Date of Filing: February 24, 2000

Case Number: VFA-0562

This Decision and Order concerns an Appeal that was filed by Donald R. Patterson from a determination issued to him by the Department of Energy's (DOE) Chicago Operations Office. In this determination, the Chicago Office denied Mr. Patterson's request for a waiver of fees with regard to a request that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Patterson asks that we grant his request for a fee waiver.

The FOIA requires that federal agencies generally release documents to the public upon request. The Act also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(I); see also 10 C.F.R. § 1004.9(a). However, the DOE is authorized to grant a full or partial waiver of applicable fees in certain circumstances.

I. Background

In his FOIA request, Mr. Patterson sought access to information relating to the investigation and resolution of allegations of reprisals taken against employees of the Argonne National Laboratory (Argonne) for reporting safety and health concerns; to modifications to the software program of Argonne's Advance Photon Source Access Control and Interlock System (APS); to an article which describes how to use the APS computer network and the Internet to search for jobs outside of Argonne; to an annual performance appraisal of Mr. Patterson for the period from June 1, 1995 through May 31, 1996; and to e-mail communications concerning daily meetings called by a named individual to check on the progress of APS technicians. Mr. Patterson further requested that all applicable fees arising from the processing of his request be waived. In support of this request, Mr. Patterson stated that release of this information would contribute to the public's understanding of government operations or activities. He said that the "disclosed information, if deemed to be appropriate, will be used as the basis for written and verbal communications with other members of the public" on the topics of how the government: (i) responds to allegations of retaliation against whistleblowers, (ii) controls modifications to safety equipment; (iii) implements its computer use policies; and (iv) oversees the work output of its contractor employees. January 16, 2000 Letter from Mr. Patterson to Linda Rohde, Chicago Operations Office, at 4. In a letter dated February 4, 2000,

the Chicago Office denied Mr. Patterson's fee waiver request based on its findings that "(1) any benefit to the general public is outweighed by a personal benefit to [Mr. Patterson]; and (2) [Mr. Patterson has] not described [his] expertise in the subject area to effectively convey the information; and the specific method which will be utilized by [Mr. Patterson] to disseminate the information to the general public."

In his Appeal, Mr. Patterson argues that he will not benefit personally from the requested information. Instead, he contends that he will present the information to his elected representatives in an attempt to convince them that the current whistleblower laws and DOE policies are ineffective. He adds that, if requested, he will "testify at congressional hearings to inform all of Congress and the general public" about his concerns. Appeal at 3.

II. Analysis

The DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). The burden of satisfying this two- prong test is on the requester. Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam). The DOE has implemented the statutory standard for fee waivers in its FOIA regulations. See 10 C.F.R. § 1004.9(a)(8). Those regulations set forth the following four factors that an agency must consider to determine whether the requester has met the first statutory fee waiver condition, i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities:

(A) the subject of the request: whether the subject of the requested records concerns "the operations or activities of the government";

(B) the informative value of the information to be disclosed: whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) the contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) the significance of the contribution to public understanding: whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). Finally, in addition to satisfying these four factors, the DOE must also find that disclosure of the requested information would not be primarily in the commercial interest of the requester. 10 C.F.R. § 1004.9(a)(8)(ii). In making this determination, the DOE must, in most

cases, consider whether the requester has a commercial interest that would be furthered by the requested disclosure, and, if so, whether that commercial interest outweighs the public interest in disclosure.

After reviewing the arguments raised by Mr. Patterson, we find that he has failed to demonstrate that release of the requested information is in the public interest because it would be likely to contribute significantly to public understanding of the activities of the government. Specifically, we find Factor (C), the contribution to an understanding by the general public of the subject likely to result from disclosure, to be dispositive of this matter. In previous cases, we have determined that in order to receive a waiver of fees, a requester must demonstrate both the intent, and the means, to disseminate the requested information to the general public. See, e.g., James L. Schwab, 22 DOE ¶ 80,133 (1992). The federal courts have held that in considering whether a requester satisfies this criterion, the relevant inquiry is whether he or she will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v. Department of Justice, 19 F.3d 807, 814 (2d Cir. 1994). The inability to disseminate information, by itself, is sufficient basis for denying a fee waiver request. Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988). See also Ruth Towle Murphy, 27 DOE ¶ 80,173 (1998) (Murphy).

In this case, Mr. Patterson has not demonstrated that he is capable of achieving the type of wide dissemination of information needed to qualify for a fee waiver. His statements that the information will

form the basis of communications with an unspecified number of "other members of the public," and with his elected representatives, do not suggest that he will be able to disseminate the information to a reasonably broad audience of interested persons. See, e.g., Crooker v. Department of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest to a small segment of the scientific community); Fazzini v. United States Department of Justice, No. 90 C 3303, slip op. at 12 (N.D. Ill. May 2, 1991) (requester cannot establish a public benefit merely by alleging that he has corresponded with members of the media and intends to share the requested information with them). See also Murphy (doctoral student who intends to include requested information in thesis has not demonstrated ability to disseminate to a reasonably broad academic audience); Tod N. Rockefeller, 27 DOE ¶ 80,167 (1998) (stated intention to share information with the general public insufficient to show ability to achieve meaningful dissemination). While it is possible that Mr. Patterson's elected representatives could convey information of the type he requested to a broader audience, there is no indication that they would be interested in doing so, and Mr. Patterson's prospects of presenting the requested data and other information at any type of congressional hearing are, at best, speculative.

Furthermore, Mr. Patterson has not indicated that he has the technical expertise needed to make the requested information understandable to a significant portion of the public. A portion of his request is for technical information concerning modifications to the APS software. Mr. Patterson has not described his qualifications in this area, and has therefore failed to demonstrate an ability to effectively convey this information to others. See, e.g., McClellan Ecological Seepage Situation v. Carlucci, 835 F. 2d 1282 (9th Cir. 1987).

For these reasons, we find that disclosure of the requested information to Mr. Patterson is unlikely to contribute significantly to public understanding of government operations or activities and is therefore not in the public interest. We conclude that the Chicago Office correctly denied his request for a fee waiver. (1)

It Is Therefore Ordered That:

(1) The Appeal filed by Donald R. Patterson in Case No. VFA-0562 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 23, 2000

(1)In finding that any benefit to the general public would be outweighed by a personal benefit to Mr. Patterson, it appears that the Chicago Office incorrectly applied the second requirement for a fee waiver. As previously stated, that requirement is that release of the information not be primarily in the commercial interest of the requester. However, because Mr. Patterson has not documented that release of the information is in the public interest, we need not address the issue of whether such a release would be primarily in his commercial interest.

Case No. VFA-0563, 27 DOE ¶ 80,271

April 5, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tri-Valley CAREs

Date of Filing: March 8, 2000

Case Number: VFA-0563

On March 8, 2000, Tri-Valley CAREs filed an Appeal from a final determination that the Oakland Operations Office (Oakland) of the Department of Energy (DOE) issued on February 3, 2000. In its determination, Oakland denied Tri-Valley CAREs' request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oakland to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are reflected in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Background

In a letter dated January 25, 2000, Tri-Valley CAREs submitted a FOIA request to Oakland for a copy of a report by Lawrence Livermore National Laboratory (LLNL) to DOE on rebaselining for the National Ignition Facility (NIF). Tri-Valley CAREs asserted that it was not a draft document. Further, it stated that it was signed by LLNL Associate Director George Miller and issued in November 1999. Request Letter dated January 25, 2000, from Sally Light, Nuclear Program Analyst, Tri-Valley CAREs, to Oakland. On February 3, 2000, Oakland denied the request, stating that the document was still a draft and, therefore, was being withheld under Exemption 5 of the FOIA. Determination Letter dated February 3, 2000, from Martin J. Domagala, Deputy Manager, FOIA Authorizing Official.

In its Appeal, Tri-Valley CAREs claims that the report is final and, therefore, not predecisional and deliberative. Appeal Letter dated March 2, 2000, from Marylia Kelley, Executive Director, Tri-Valley CAREs, to Director, Office of Hearings and Appeals (OHA),

DOE. Secondly, it argues that the report has been referred to as a "final" report and used by the Secretary of Energy Advisory Board (SEAB) NIF Task Force, which includes non-governmental members. *Id.* It claims the deliberative process privilege has been waived, if it existed at all. *Id.* Finally, Tri-Valley CAREs maintains that information that was not predecisional or deliberative should have been segregated and released. *Id.*

Analysis

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

We believe that the report Tri-Valley CAREs requested is a draft document. Although it was signed by George Miller, Associate Director of LLNL, it was not released to the public. It contained LLNL's recommendations to DOE for the rebaselining of the NIF. Tri-Valley CAREs argues that because the report was used by the SEAB, whose members consist of non-DOE employees, it has been released to the public. We disagree. Courts have determined that Exemption 5 protects from mandatory disclosure more than documents circulated strictly among agency personnel. *See Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971). Exemption 5 has been found to extend as well to communications between an agency and individuals whom the agency consults. *See, e.g., Lead Indus. Ass'n v. OSHA*, 610 F.2d 70,83 (2d Cir. 1979); *American Soc. Of Pensions Actuaries v. Pension Benefit Guaranty Corp.*, 3 GDS ¶ 83,182, at 83,845 (D.D.C. 1983).

Specifically, courts have found that an agency's limited release of a document to outsiders to serve a legitimate government purpose does not waive the document's confidentiality under Exemption 5. *See, e.g., Cooper v. Department of the Navy*, 558, F.2d 274, 278 (5th Cir. 1977); *modified on rehearing*, 594 F.2d 484, 485 (5th Cir. 1979), *cert. denied*, 444 U.S. 926 (1979); *Badhwar v. Department of the Air Force*, 629 F. Supp. 478 (D.D.C. 1986); *see also Coalition for Safe Power*, 16 DOE ¶ 80,127 (1987); *Idaho Statesman*, 7 DOE ¶ 80,102, at 80,504 (1981). The SEAB provides advice, information, and

recommendations to the Secretary of Energy on DOE's basic and applied research activities, economic and national security policy, educational issues, laboratory management, and on any other activities and operations of the DOE as the Secretary requests. In this instance, the Secretary consulted with the SEAB to formulate recommendations on the rebaselining of the NIF. Disclosure of the report to the members of the SEAB in order to utilize their expertise in the rebaselining of the NIF consequently is not a waiver.

However, Oakland's Determination Letter did not address the issues of whether the report contains any factual information that could be released. Accordingly, we will remand the case to Oakland. On remand, Oakland shall review the document and segregate and release all factual portions of the report, or issue a new determination that justifies their withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, on March 8, 2000, Case No. VFA-0563, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Oakland Operations Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 5, 2000

Case No. VFA-0564, 27 DOE ¶ 80,274

April 24, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: March 13, 2000

Case Number: VFA-0564

On March 13, 2000, Barbara Schwarz filed an Appeal from a determination issued to her on March 1, 2000, by the Office of Counterintelligence (OC) of the Department of Energy (DOE). That determination responded to a request for information she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Ms. Schwarz challenges the adequacy of OC's search for documents responsive to her request.

I. Background

Ms. Schwarz filed a request for information in which she sought information concerning German efforts (1) behind the nuclear weapons and other weapons of nations that are hostile to the United States; and (2) behind terrorists acts and wars against the United States or other countries that the United States wants to protect. On March 1, 2000, OC issued a determination which stated that it conducted a search of its files and found no documents responsive to the Appellant’s request. *See* Determination Letter. On March 13, 2000, Ms. Schwarz filed the present Appeal with the Office of Hearings and Appeals. In her Appeal, Ms. Schwarz challenges the adequacy of the search conducted by OC.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is

"dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at OC to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Schwarz' request might exist. Upon receiving Ms. Schwarz' request for information, OC instituted a search of its systems of records and files. Specifically, OC searched two of its system of records, DOE-81 "Counterintelligence Administrative and Analytical Records and Reports," and DOE-84 "Counterintelligence Investigative Records." Based on this search, OC indicated that it found no records responsive to Ms. Schwarz' request. OC has informed us that these two systems of records are the only two systems of records that would possibly contain responsive information. *See* March 27, 2000 Record of Telephone Conversation between Gary Chidester, OC and Kimberly Jenkins- Chapman, OHA. Given the facts presented to us, we find that OC conducted an adequate search which was reasonably calculated to discover documents responsive to Ms. Schwarz' request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, OHA Case No. VFA-0564, on March 13, 2000, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 24, 2000

Case No. VFA-0565, 27 DOE ¶ 80,272

April 13, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. ENG Services

Date of Filing: March 17, 2000

Case Number: VFA-0565

On March 17, 2000, R.E.V. ENG Services (the Appellant) filed an Appeal from a final determination that the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE) issued on March 2, 2000. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, documents were released to the Appellant. In its Appeal, the Appellant asserts that RFFO's search for records was inadequate. If granted, this Appeal would require RFFO to conduct a further search.

Background

In a letter dated November 1, 1999, the Appellant requested information pertaining to the visit of General Eugene E. Habiger, Director of Security and Emergency Operations, DOE, to RFFO.(1) He listed four specific items in his request, including:

1) Any and all unclassified documentation in the possession of the U.S. DOE which was specifically generated and/or gathered as a result of the visit and in order to present the status of safeguards and security at Rocky Flats to Gen. Habiger.

2) A listing (only) of the unclassified titles, dates and the office responsible for generating any and all classified documentation in the possession of the U.S. DOE which was generated, gathered and/or used as a reference material in the presentation of the status of safeguards and security at Rocky Flats to Gen. Habiger.

3) Any and all unclassified reports, notes, directions or instructions dealing in any way with the status of safeguards and security at Rocky Flats produced by the DOE or its contractors as a result of the above visit.

4) A listing (only) of the unclassified titles and dates for any and all classified reports, notes, directions or instructions dealing in any way with the status of safeguards and security at Rocky Flats produced by the DOE or its contractors as a result of the above visit.

Request Letter dated November 1, 1999, from David E. Ridenour, P.E., R.E.V. ENG Services, to Mary Hammack, FOIA/Privacy Act Officer, RFFO (Request Letter). On March 2, 2000, RFFO issued a determination releasing four documents to the Appellant. In addition, RFFO identified two classified documents that needed to be sent for review to DOE Office of Declassification.

On March 17, 2000, the Appellant filed this Appeal, alleging that RFFO's search for documents was too narrow. Appeal Letter dated March 9, 2000, from David E. Ridenour, P.E., R.E.V. ENG Services, to Office of Hearings and Appeals (OHA) (Appeal Letter). The Appeal contends "[t]he request covered information used to prepare for the visits, information presented during the visits, and information resulting from the visits" of General Habiger. *Id.* at 2. The Appellant believes that RFFO only looked at a portion of the information that was generated in preparation for the visits. Further, the Appellant believes that only DOE's contractor was searched for documents. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985);*accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

The Appellant is requesting anything connected to General Habiger's visits to RFFO that was generated either prior to, during, or after those visits. It is our understanding that virtually no documents were created prior to General Habiger's visit. Memorandum of Telephone Conversation dated March 30, 2000, between Mary Hammack, FOI/Privacy Act Officer, RFFO, and Janet R. H. Fishman, Attorney-Examiner, OHA, DOE. We contacted RFFO to determine what type of search was conducted. We were told that the Facilities Disposition office was contacted initially to determine if it had any information in its possession. Facilities Disposition indicated that Communications--Tours and Visits should be contacted as well as Kaiser Hill Company L.L.C. Security (Kaiser-Hill) and Wackenhut Services, L.L.C. (Wackenhut). Kaiser-Hill and Wackenhut responded that they had no relevant documents. We specifically asked about the documents the Appellant alleged in the Appeal Letter should have been created, *i.e.*, "Pope/Lavernier notes, findings, report or similar document providing the results of their weeks long investigation and the training documents, shift orders and post orders [Wackenhut] produced for the guard force to implement the use of hardened fighting positions." Appeal Letter at 1. RFFO indicated that it does not have any notes, findings, reports, or other documents from either Mr. Pope or Mr. Lavernier.(2) *See* Memorandum of Telephone Conversation dated April 4, 2000, between Mary Hammack, FOI/Privacy Act Officer, RFFO, and Janet R. H. Fishman, Attorney-Examiner, OHA, DOE. Further, Wackenhut did not create any training documents, shift orders, or post orders either prior to or during General Habiger's visit. As of the date of the Appellant's request, none of these documents had been created following General Habiger's visit. *Id.*

The Appellant asserts also that RFFO's response--namely, "no classified [documents] were produced by the DOE's contractors"-- shows that a whole category of information, *i.e.*, DOE generated documents, were omitted from the search. Appeal Letter at 1. This is incorrect. In fact, as stated in the determination letter, RFFO, Kaiser-Hill, and Wackenhut were all searched for responsive documents. Determination Letter dated March 2, 2000, from Mary Hammack, FOI/Privacy Act Officer, RFFO, to Mr. David E. Ridenour, P. E. RFFO admits that the sentence was improperly worded but was intended to reiterate that both the DOE contractors and DOE offices were searched for documents. Memorandum of Telephone Conversation dated April 4, 2000, between Mary Hammack, FOI/Privacy Act Officer, RFFO, and Janet R. H. Fishman, Attorney-Examiner, OHA, DOE. Six documents were found at RFFO, four of which were released to the Appellant and two that must be reviewed by the DOE Office of Declassification.

We are convinced that RFFO followed procedures which were reasonably calculated to uncover the material sought by the Appellant in its request. *See Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that the search did not uncover the documents that the Appellant believes may be in the possession of DOE does not mean that the search was inadequate. In the Appeal, the Appellant

alleges that General Habiger personally assured him that he would “leave no stone unturned.” Appeal Letter at 1. The Appellant is apparently convinced that General Habiger’s comment proves that more documents must exist. We are unpersuaded by this argument. RFFO searched the appropriate offices and found only the four documents it released to the Appellant and the two classified documents that must be reviewed by the DOE Office of Declassification. The Appellant has not directed us to any other office at RFFO that should be searched, but merely asserts that there must be more information. Mere speculation that an as yet discovered document may exist does not undermine the conclusion that the agency conducted a reasonable search for responsive documents.

Conclusion

RFFO conducted a search reasonably calculated to uncover the material sought by the Appellant in its request. RFFO searched both DOE and its contractors administrative records and four documents were released to the Appellant. Therefore, we will deny the Appellant’s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on March 17, 2000, by R.E.V. ENG Services, Case No. VFA-0565, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 13, 2000

(1)The Appellant sent an identical FOIA request to DOE Headquarters on August 13, 1999. DOE responded on September 23, 1999, transferring the request to RFFO.

(2)Both Mr. Pope and Mr. Lavernier are DOE employees who, according to the Appellant, conducted several weeks of review and observation at RFFO. Appeal Letter at 1.

Case No. VFA-0566, 27 DOE ¶ 80,275

April 24, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lisa R. Tunstall-German

Date of Filing: March 28, 2000

Case Number: VFA-0566

On March 28, 2000, the Office of Hearings and Appeals (OHA) received a Freedom of Information Act (FOIA) Appeal filed by Lisa A. Tunstall-German (the Appellant) appealing a determination by the Department of Energy's (DOE) Office of Headquarters and Executive Personnel Services (Personnel). Personnel issued that determination on September 30, 1999, in response to a request for information submitted by the Appellant in accordance with the provisions of the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Personnel to conduct a new search for responsive documents.

I. Background

The present case arises out of a personnel dispute. The Appellant was not selected for a Program Analyst position for which she had applied. Personnel apparently informed the Appellant that she was not selected for the Program Analyst position because she had declined the position. The Appellant claims that she never declined the position. On September 3, 1999, the Appellant filed a FOIA request with Personnel. The request sought "copies of all documentation that was submitted to reflect that [she] declined the position advertised in Vacancy Announcement Number:97-EE20- 0038, Program Analyst, GS-343-13." (1) On September 30, 1999, Personnel issued a Determination Letter to the Appellant in which it released one document that was responsive to her request, a selection certificate for the above-mentioned program analyst position. (2) The determination letter explained that the selection certificate was the only documentation available and further stated: "You will note that there is no requirement in the Merit Promotion Plan to retain information concerning *the reason for declination* by an applicant." (3) Determination Letter at 1 (emphasis supplied). On March 28, 2000, the Appellant filed the present appeal, contending that Personnel's search for responsive documents was not adequate. (4)

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Eugene Maples*, 23 DOE ¶ 80,106 (1993); *Native Americans*

for a Clean Environment, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

Personnel has apparently misinterpreted the Appellant's request. The Appellant was seeking any documents in Personnel's files that would show that she declined the position, while Personnel's Determination Letter indicates that it searched for information that would indicate the Appellant's reasons for declining the position.

Accordingly, we are remanding this request to Personnel. On remand, Personnel must conduct a search for any documents that would indicate that the Appellant declined the Program Analyst position. If Personnel locates any documents responsive to this request, it must issue a new determination letter either releasing or withholding them under an appropriately applied exemption. If Personnel's search fails to locate any documents that are responsive to the remanded request, it must issue a new Determination Letter describing the search and indicating that no responsive documents were located.

It Is Therefore Ordered That:

(1) The Appeal filed by Lisa R. Tunstall-German on March 28, 2000, Case Number VFA-0566, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) This matter is hereby remanded to the Department of Energy's (DOE) Office of Headquarters and Executive Personnel Services for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 24, 2000

(1) The Appellant's request contained several elements; her Appeal, however, focuses on only one of these elements.

(2) The DOE's FOIA regulations require that an appeal be filed within 30 calendar days after the appellant receives a determination letter. 10 C.F.R. § 1004.8(a). The Appellant has missed this deadline by almost six months. Under these circumstances, we could exercise our discretion to decline jurisdiction over this matter. However, we have decided to consider the present Appeal.

(3) The Determination Letter released several other documents which were responsive to elements of the Appellant's request that are not at issue in the present case.

(4) The present Appeal also challenges a personnel determination affecting the Appellant. However, this office does not have jurisdiction under the Freedom of Information Act to consider these matters.

Case No. VFA-0567, 27 DOE ¶ 80,273

April 21, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: March 27, 2000

Case Number: VFA-0567

On March 27, 2000, Barbara Schwarz filed an Appeal from a determination by the Department of Energy Headquarters Freedom of Information and Privacy Group (DOE/FOI). This determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA setting forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a request dated June 18, 1999, Ms. Schwarz requested from the DOE documents within the following categories:

1) As to that the Germans are behind the nuclear weapons and other weapons of nations that are hostile to the United States,

2) As to that the Germans are behind terror acts and wars against the United States or against other countries which the United States want to protect,

3) As to a civilian submarine in the Great Salt Lake, that protects it's [sic] residents from all kind of pollution and germs with the result that people stay young and have currently at least double the lifespan than people not living in this village,

4) As to L. Ron Hubbard and proposed energy programs and environmental programs and nuclear counterintelligence programs proposed by him,

5) As to Claude, Elizabeth, Phillip, Mark C., Harvey L., Edwin, Willard, Olivia Rathbun (de Rothschild) and proposed energy programs, environmental programs and nuclear counterintelligence programs proposed by them,

6) As to myself, Barbara Schwarz or misspelled version Schwartz,

7) As to if Mark C. Rathbun (de Rothschild)[,] members of his family, their attorneys or any Independent or Special Counsel inquired records pertaining to myself from the Dept. of Energy.

Letter from Barbara Schwarz to DOE (June 18, 1999).

On October 20, 1999, DOE/FOI sent a response to Ms. Schwarz. DOE/FOI first stated that it had informed Ms. Schwarz in a July 19, 1999 letter that items 1 and 2 of her request "did not describe the records you were requesting with sufficient specificity for the DOE to conduct a search for responsive documents. This response, therefore, responds to items 3, 4, 5, 6 and 7 of your request." Letter from Abel Lopez, Director, DOE/FOI (October 20, 1999). The response then informed Ms. Schwarz that the

files of five offices at Headquarters were searched for documents responsive to your request. These offices were the Office of Congressional and Intergovernmental Affairs, the Policy, Standards and Analysis Division in the Office of Safeguards and Security, the Office of Headquarters and Executive Personnel Services, the Office of Inspector General, and the Office of the Deputy General Counsel for Litigation.

Id. DOE/FOI reported that (1) the searches of the first three offices listed produced no documents responsive to items 3 through 7 of her request; (2) DOE/IG has already provided a separate response to Ms. Schwarz; and (3) the search of the Office of the Deputy General Counsel for Litigation located only one document, the July 19, 1999 letter to Ms. Schwarz referred to above regarding the lack of specificity of the first two items of her request. Id. That document was provided to Ms. Schwarz in its entirety along with DOE/FOI's October 20, 1999 response.

Ms. Schwarz filed an Appeal on November 2, 1999, contending that the DOE's search for documents responsive to her request was inadequate. She also took issue with the DOE/FOI's opinion that items 1 and 2 of her request did not sufficiently describe the records she was seeking. On December 2, 1999, we issued a decision on the Appeal, in which we remanded the matter to DOE/FOI to coordinate further searches of the Office of Safeguards and Security (OSS) and the Office of Headquarters and Executive Personnel Services for documents responsive to items 3 through 7 of her request, and to invite Ms. Schwarz to confer with knowledgeable DOE personnel in an attempt to clarify her description of the documents she was seeking in items 1 and 2 of her request.

On March 9, 2000, DOE/FOI issued a new determination to the Appellant. DOE/FOI stated that a further search by the OSS located 40 responsive documents, which DOE/FOI enclosed with its determination. Letter from Abel Lopez, Director, DOE/FOI, to Barbara Schwarz (March 9, 2000). DOE/FOI deleted information from five of the documents, citing Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Id. The additional search by the Office of Headquarters and Executive Personnel Services, however, located no responsive documents. Id. at 2. The determination by DOE/FOI also reported the results of searches for documents responsive to items 1 and 2 of the request, by the Office of International Affairs, the Office of Security and Emergency Operations, and the History Division of the Office of the Executive Secretariat. Of these searches, only that conducted by the History Division of the Office of the Executive Secretariat revealed a potentially responsive document, which was released to the Appellant in its entirety. Id. at 2-3. The present Appeal challenges DOE/FOI's withholding of information under Exemption 6 as well of the adequacy of searches reported in DOE/FOI's March 9 determination letter.(1)

II. Analysis

A. DOE/FOI's Withholding of Information Under FOIA Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of

State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

In its March 9 determination, DOE/FOI stated that it deleted from certain documents released to the Appellant the "names of individuals who held security clearances or who were subject to security investigations . . . ." Letter from Abel Lopez, Director, DOE/FOI, to Barbara Schwarz (March 9, 2000) at 1. From our review of the documents, it appears that certain information regarding two employees of Atomic Energy Commission (AEC, a predecessor agency to the DOE)(2) contractors was brought to the attention of AEC Personnel Security officials in 1968. This information concerned the two AEC contractor employees' connections to the Hubbard College of Scientology. Redacted from the documents released to the appellant are the names of the two persons, as well as other information that could identify them.

We have no doubt that these two individuals have a significant privacy interest in preventing the public release of their identities in this context, as the Supreme Court has recognized under Exemption 6 the privacy interests of the subjects of official inquiries. Department of Air Force v. Rose, 425 U.S. 352 (privacy interests of Air Force Academy cadets subject to honor and ethics inquiries); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979) ("A reasonable person would be very likely to find that disclosure of religious affiliations and activities would constitute an invasion of his or her privacy.").(3)

As for whether release of the information withheld would further the public interest by shedding light on the operations and activities of the Government, the Appellant argues,

Disclosure of [information withheld under] Exemption 6 would be very well in [the] public interest, because the time showed that L. Ron Hubbard and also some other scientologists were target[s] of libel and slander by a German oriented, German originated and German controlled Nazi-conspiracy, in which also U.S. officials participated.

Appeal at 2. We disagree. The information already released to the appellant clearly sheds light on the operation and activities of the Government in investigating AEC contractor employees with connections to Scientology organizations. However, the information withheld from those documents, the names of the individuals investigated and other information that could identify them, says little if anything about the activities of the Government. Weighing the significant privacy interests at stake on one hand, and the slight public interest on the other, we conclude that Exemption 6 was properly applied to the information withheld from Ms. Schwarz.

B. Adequacy of DOE's Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v.

Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982). In order to determine whether the search conducted by these offices was adequate under the FOIA, we contacted each office and requested information as to how it went about its search.

1. Search on Remand for Documents Responsive to Items 3 Through 7 of Ms. Schwarz's Request

As discussed above, in a December 2, 1999 decision on an earlier Appeal filed by Ms. Schwarz, we remanded the matter to DOE/FOI to coordinate further searches of the Office of Safeguards and Security (OSS) and the Office of Headquarters and Executive Personnel Services for documents responsive to items 3 through 7 of her request.

In response to our query, OSS provided the following information as to the search it conducted. First, the office determined that

any document responsive to Ms. Schwarz' request would be found in a search of our Central Personnel Clearance Index (CPCI); our clearance records on microfiche that cover all clearances or individuals considered for clearances, extending back to the . . . late 1940's; and this office's Information Management Center (IMC), which contains correspondence and records covering the information and subjects that Ms. Schwarz asked about.

. . . Please be advised that the CPCI records were searched electronically and the microfiche records were searched manually. The records in IMC were searched both electronically and manually.

Memorandum from Lynn Gebrowsky, Policy Standards and Analysis Division, OSS, to Steven Goering, OHA (April 13, 2000).

The Office of Headquarters and Executive Personnel Services searched its Senior Executive Performance Appraisal Records in the Executive and Technical Resource Division; Lending Library files and records in the Career Management Resource Center; Computer database, office files and old office records in the Employment and Classification Division; Medical records and files, performance, conduct, leave, and family-friendly records and requests (e.g., leave transfer) in the Employee and Labor Relations Division; and Correspondence files. In each of these areas, the Office conducted a manual search of office files, and an automated search of computer hard drives by all staff members in all existing software applications. The office also performed a name search of its computerized Corporate Human Resources Information System (CHRIS) and Department of Energy Information Database (DOEInfo). Electronic mail from Marilyn Greene, Office of Headquarters and Executive Personnel Services, to Steven Goering, OHA (April 19, 2000).

2. Search for Documents Responsive to Items 1 and 2 of Ms. Schwarz's Request

Ms. Schwarz also challenges the adequacy of searches for documents responsive to items 1 and 2 of the request, by the Office of International Affairs, the Office of Security and Emergency Operations, and the History Division of the Office of the Executive Secretariat. These three offices provided the following information regarding their respective searches.

The Office of Security and Emergency Operations conducted a visual file search of all its internal files as well as an electronic query of the SOCOTS correspondence tracking system. Electronic mail from Pat Daly, Office of Security and Emergency Operations, to Steven Goering, OHA (April 19, 2000). The Office of International Affairs coordinated a search of its entire organization by "consultation with IA managers on whether they would have any documents relating to any terrorist acts or threats to the U.S. from any nation within their respective offices including employees under their supervision." Electronic mail from Nicole Chesley, Office of International Affairs, to Steven Goering, OHA (April 14, 2000).

Finally, a historian in the History Division of the Office of the Executive Secretariat stated that she did not believe her division would have any documents responsive to the first two items of the Appellant's request, but nonetheless consulted an index that categorized by subject documents of the AEC Secretariat dating from 1958 through 1974. Memorandum of telephone conversation between Marie Hallion, Office of the Executive Secretariat, and Steven Goering, OHA (April 10, 2000).

Based on the above descriptions, we conclude that the searches conducted by all of the above offices were reasonably calculated to uncover the records sought by Ms. Schwarz. Though there was not one uniform search method used, each office clearly made a conscientious effort to locate all responsive documents it might have, either by notifying personnel of the request and asking them to provide responsive documents, or by searching indices, document tracking systems, and computer systems.(4)

In sum, because we find that DOE/FOI properly withheld information from the requester under Exemption 6, and that the DOE offices conducted adequate searches for documents responsive to Ms. Schwarz's request, the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, Case No. VFA-0567, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 21, 2000

(1) Ms. Schwarz also complains that DOE files contain mainly negative and untrue information about L. Ron Hubbard. However, the purpose of the FOIA is to provide access to documents the government has, not to ensure that the documents the government has are accurate or portray subjects in a positive light.

(2) The Appellant asks in her Appeal why the DOE has not conducted a search of the Atomic Energy Commission or the "Energy, Research and Development Office, . . ." Appeal at 2. The Energy Research and Development Administration (ERDA), like the AEC, is a predecessor agency to the DOE. As such, ERDA and the AEC no longer exist.

(3) Contrary to the argument of the Appellant, the death of L. Ron Hubbard has no relevance to whether the information was properly withheld under Exemption 6. Appeal at 2.

(4) Ms. Schwarz asserts in her Appeal that no DOE offices searched for documents responsive to items 3 through 7 of her request. Appeal at 1-2. This is not correct. As discussed in our December 2, 1999 decision on Ms. Schwarz's earlier Appeal, six DOE offices conducted searches in response to this portion of the appellant's request. Ms. Schwarz also specifically complains that the Office of International Affairs and the Office of Security and Emergency Operations only conducted searches for documents responsive to items 1 and 2 of her request. Appeal at 2. However, under the DOE FOIA regulations, the Freedom of Information Officer at any DOE location, in this case the Director of DOE/FOI at DOE Headquarters, has the authority to determine which office would have "responsibility for, custody of, or concern with the records requested." 10 C.F.R. § 1004.5(a). We can therefore safely assume that DOE/FOI forwarded the items of Ms. Schwarz's request to the offices it determined was most likely to have responsive documents. Further, we see no basis, and the appellant provides us none, to question the determination of DOE/FOI

that the Office of International Affairs and the Office of Security and Emergency Operations would not have documents responsive to items 3 through 7 of her request.

Case No. VFA-0570, 27 DOE ¶ 80,281

May 31, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David E. Ridenour

Date of Filing: April 10, 2000

Case Number: VFA-0570

This Decision and Order concerns an Appeal that David E. Ridenour filed from a determination issued to him by the Department of Energy's (DOE) Albuquerque Operations Office (AOO). In this determination, AOO informed Mr. Ridenour that no documents were located that were responsive to a request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require AOO to conduct a further search for responsive materials.

In his request, Mr. Ridenour sought access to all records relating to a report that he alleges AOO prepared about him in 1997. Such records were to include communications between AOO and other state and federal offices or private investigatory agencies about the report, documents concerning the cost of the investigation and distribution of the report, and documents concerning the propriety of conducting the investigation and the qualifications of the investigators, such as the mission statement of the Office assigned the work and the job description of David Fredrickson, the author of the report. In its response, AOO informed Mr. Ridenour that the investigator searched for responsive documents "but could not locate any. [Mr. Fredrickson] also stated ? The referenced report was prepared under the direction and auspices of the Office of Chief Counsel (OCC) [at] Rocky Flats Field Office (RFFO). The report and all background materials were turned over to that Office at the conclusion of the investigation. Therefore, the records, as well as the authority for release, remain with OCC, RFFO.'" Determination letter at 1. The letter also stated that the AOO's Office of Chief Counsel searched for responsive documents, but could not locate any, and that Mr. Ridenour's request was being transferred to RFFO, which would respond directly to him.

In his Appeal, Mr. Ridenour contests the adequacy of AOO's search for responsive documents. He argues that it is not credible that the AOO conducted an investigation and prepared a report, yet did not keep a copy of the report. Moreover, Mr. Ridenour contends that he should have been provided copies of the investigating office's mission statement and the job description of the named investigator. Finally, Mr. Ridenour argues that these and other responsive documents, such as telephone billing records, letters, and timekeeping and pay records exist, and he contends that AOO

should have searched its phone records, mail logs, e-mails, faxes and the word processing system backups and archive tapes for the period during which the report was generated.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995).

The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to evaluate the adequacy of the search, we contacted the AOO. We were informed that the investigation referred to by Mr. Ridenour was not an investigation of him by AOO, but was instead an inquiry by the Rocky Flats Field Office (RFFO) into its own internal operations, and that the inquiry was conducted entirely at RFFO using RFFO equipment and office space. See May 5, 2000 memorandum from Mr. Fredrickson to Carolyn Becknell, Acting FOI Officer; see also memorandum of May 16, 2000 telephone conversation between Terry Martin Apodaca, AOO, Mr. Fredrickson, and Robert Palmer, Staff Attorney, Office of Hearings and Appeals. Mr. Fredrickson further stated that although the report was drafted in Albuquerque, he worked on a laptop computer offsite in order to minimize distractions, that all hard copies were forwarded to RFFO, and the disks used “were not retained . . . after completion of the inquiry.” Id. With regard to Mr. Ridenour’s contention that he should have been provided with copies of the investigating office’s mission statement and Mr. Fredrickson’s job description, Ms. Apodaca stated that RFFO, and not AOO, was the investigating office and should be in possession of the mission statement, and that AOO erred in not providing a copy of Mr. Fredrickson’s job description to Mr. Ridenour. By letter dated May 18, 2000, AOO provided Mr. Ridenour with the job description.

Based on the foregoing, we find no reason to believe that additional responsive documents exist in AOO’s phone records, mail logs, e-mails, faxes, or the word processing system backups and archive tapes. We further conclude that AOO’s search for responsive documents was adequate, and that Mr. Ridenour’s Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by David Ridenour on April 10, 2000 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 31, 2000

Case No. VFA-0571, 27 DOE ¶ 80,283

June 14, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert H. Calhoun, Jr.

Date of Filing: April 27, 2000

Case Number: VFA-0571

Robert H. Calhoun, Jr. (Calhoun) filed this Appeal on April 27, 2000 with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE Albuquerque Operations Office (AO) issued to Calhoun on March 27, 2000. The determination concerned a request for information that Calhoun submitted pursuant to the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Parts 1004 and 1008. If the present Appeal were granted, AO would be required to release any responsive material.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. The Act also requires each agency to permit a requester to gain access to information pertaining to him which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, under the Privacy Act, agencies may provide that some systems of records are not subject to the Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(k).

I. Background

On October 28, 1999, Calhoun requested a copy of his DOE Personnel Security File (PSF). AO found 70 documents in Calhoun's PSF and withheld portions of five documents, specifically

Documents 11, 25, 26, 27, and 28. See Letter from AO to Calhoun (March 27, 2000) (Determination Letter). The Director of the Personnel Security Division of AO withheld portions of Documents 11, 25, 26, 27, and 28 pursuant to 5 U.S.C. § 552a(k)(5) (Exemption 5 of the Privacy Act) and 5 U.S.C. § 552(b)(7)(d) (Exemption 7(d) of the FOIA). According to the DOE, the information deleted from these documents was obtained by sources who were promised confidentiality in exchange for their information. Determination Letter at 2. Other withheld documents contained information that was generated by the Office of Personnel Management (OPM), and that material was referred to OPM for review and possible release. Id.

Calhoun appealed the Determination in a letter to OHA. He contends that the withheld documents should be released to him "in a paraphrased manner," i.e., without names, times and dates. Letter from Calhoun to OHA (April 17, 2000) (Appeal Letter).

II. Analysis

A. Privacy Act Exemption (k)(5) and FOIA Exemption 7(D)

In first party requests such as this one, information responsive to the request is provided to the requester unless there is an exemption in each statute authorizing withholding. Applicable here are Privacy Act Exemption (k)(5) and FOIA Exemption 7(D).

Exemption (k)(5) of the Privacy Act permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence . . ." 5 U.S.C. § 552a(k)(5). *See Roy Chavez*, 27 DOE ¶ 80,203 (1999). In creating Exemption (k)(5), Congress recognized the need to protect the sources of information to whom promises of confidentiality had been made. *See Chey Temple,* 25 DOE ¶ 80,194 (1996). AO stated that the sources were given confidentiality in this investigation. Determination Letter at 2. *See also Frank Isbill,* 27 DOE ¶ 80,215 (1999).

Exemption 7(D) of the FOIA provides that "records or information compiled for law enforcement purposes" may be withheld, "but only to the extent that the production of such documents "could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis . . . and, in the case of a record or information compiled by . . . an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D); 10 C.F.R. § 1004.10(b)(7)(iv). Exemption 7(D) is designed to protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and to encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential. *Ortiz v. Department of Health and Human Services*, 70 F.3d 729, 732 (2d. Cir. 1995). A source is confidential if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. *Id.*, citing *United States v. Landano*, 508 U.S. 165; 113 S. Ct. 2014, 2019 (1993). We find that AO gave the sources an express assurance of confidentiality. Determination Letter at 2.

Calhoun does not contest the applicability of either exemption. In fact, he states that he "can appreciate the concern for confidentiality." Appeal Letter. Rather, he suggests that the material be furnished to him without identifying names, times and dates. *Id.*

After a careful review of unredacted copies of the five withheld documents, we concur with AO's deletions from Documents 11, 25, 26, and 27. AO properly deleted information that could compromise the identity of confidential sources. However, we do not agree with AO's withholding of Document 28 in its entirety. According to AO, that action was necessary in order to shield from the requester the identity of the office that originated the document. Nonetheless, we find that the last page of Document 28 may contain releaseable information, i.e., information that would not, if released, reveal the identity of the confidential informant. Therefore, we find that DOE/AL should release the non-exempt information on the final page of Document 28, or issue a determination justifying any continued withholding of non-exempt information on this page.

B. Segregability

The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a

record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material); *Greenpeace*, 26 DOE ¶ 80,106 (1996), citing *Canyon Consultants*, 21 DOE ¶ 80,114 (1991) (release of non-exempt material not required if it would compromise the confidentiality of the withheld material). We conclude that, with the previously mentioned exception, AO did properly identify and release segregable, non-exempt material to the requester.

C. Public Interest

We find that release of the withheld material would not be in the public interest. Although DOE is committed to keeping the public informed about the agency, DOE is also concerned with preserving the privacy rights of confidential sources. By releasing the responsive documents with only those withholdings necessary to prevent identification of specific individuals (as AO has done in this case), DOE can provide maximum information while safeguarding individual rights and safety. *Richard Levernier*, 26 DOE ¶ 80,182 (1997).

It Is Therefore Ordered That:

(1) The Appeal filed on April 27, 2000 by Robert H. Calhoun, Jr., OHA Case No. VFA-0571, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 14, 2000

Case No. VFA-0572, 27 DOE ¶ 80,277

May 19, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Center for Public Integrity

Date of Filing: April 19, 2000

Case Number: VFA-0572

On April 19, 2000, the Center for Public Integrity (Appellant) filed an Appeal from a final determination issued on April 10, 2000 by the Department of Energy's Office of Fossil Energy (FE). In that determination, FE withheld several documents in response to a Request for Information filed by the Appellant on January 5, 2000 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require FE to release the withheld information.

I. BACKGROUND

This Appeal arises from the sale of NPR-1, commonly known as the Elk Hills Naval Petroleum Reserve, conducted by FE. On January 5, 2000, the Appellant filed a request for information with FE, seeking in pertinent part: "The names of all entities that placed bids on NPR-1, any portion thereof, and the amounts of all bids."

On April 10, 2000, FE issued a determination letter indicating that it was withholding the names of the unsuccessful bidders and the amounts of their bids under Exemption 4 of the FOIA. Determination Letter at 1. FE contended that release of the bid amounts and identities of the unsuccessful bidders would cause substantial competitive harm to the firms that submitted the unsuccessful bids and would impair FE's ability to obtain similar information in the future. The present Appeal challenges FE's withholdings under Exemption 4.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert, denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

The only exemption that FE expressly claimed in the present case is found at 5 U.S.C. § 552(b)(4) (Exemption 4). Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). “Like all FOIA exemptions, Exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute.” *Washington Post Co. v. United States HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

Where, as in this case, the agency determines that the information at issue is not a trade secret, but is instead “commercial or financial” and “obtained from a person,” it must then determine whether the information is "privileged or confidential." If the information is subject to a valid claim of legal privilege on the part of its submitter, it may properly be withheld under Exemption 4. In order to determine whether the information is "confidential" the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*Critical Mass*), *cert. denied*, 113 S. Ct. 1579 (1993). Information is considered to have been submitted involuntarily if, as in this case, any legal authority compels its submission, including informal mandates that call for the submission of the information as a cost of doing business with the government. *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997). Since the withheld information was involuntarily submitted, the agency must show that its disclosure is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained before withholding it under Exemption 4. *National Parks*, 498 F.2d 765 *at* 770; *Critical Mass*, 975 F.2d 871 at 879.

Once the DOE decides to withhold information, both the FOIA and the Department’s implementing regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to understand the basis for claiming the exemption and to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Kleppe*, 547 F.2d at 680 ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

In this case, FE does not contend that the withheld information contains “trade secrets.” Moreover, since it is clear that the withheld information is “commercial,” “was obtained from a person,” and is not “privileged,” the only issue in the present case is whether the withheld information is “confidential” in nature.

FE has set forth three reasons for withholding the bid amounts and identities of the unsuccessful bidders as confidential information protected by Exemption 4. First, FE contends that release of this information would cause substantial competitive harm to the unsuccessful bidders. Second, FE contends that release of

this information would impair the Government's ability to obtain future bids for assets it wishes to sell. Third, FE contends that releasing this information would be inconsistent with the mandate of legislation requiring that the sale of NPR-1 be conducted in a manner "consistent with commercial practices." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106 (110 Stat. 186).

Competitive Harm

We first consider FE's withholding of the documents under Exemption 4's "competitive harm" prong. The determination letter contends that:

Release of this information would likely cause substantial harm to the competitive position of the persons to whom it pertains. Since the oil and gas business is highly competitive, the knowledge that a company is bidding on an oil and gas producing property would reveal business strategy and would affect the amount of bids that will have to be offered on the next property. Also release of the specific dollar amount bid on the Elk Hills property could reveal the bidder's valuation methodology and analytical approach to formulating that bid and could provide insight into the company's growth strategies.

Determination Letter at 2.

The issue before us arises in an atypical context. It involves bid information submitted by entities seeking to *purchase* from a federal agency. In contrast, most of the FOIA cases involving bid information have involved entities that submitted bids in an effort to *sell* the government goods and services. However, this distinction does not affect the validity of relevant FOIA case law or its applicability here. It matters not that information was submitted in this case in order to buy from the government rather than to sell to it. What this body of case law requires us to focus on is the likelihood of competitive harm - i.e. whether a bidder's competitors could use the information provided to predict the submitter's future bids.

The information sought here is the total bid amounts. Our previous cases, as well as the courts, have viewed with skepticism claims that the release of total bid amounts would cause harm by allowing a bidders's competitors to predict its future bidding strategy. Accordingly, this office has consistently held that the total price of a contract, after the contract has been awarded, usually does not reveal details of the submitter's bidding strategy and thus cannot normally be withheld under Exemption 4. *See Baker, Donaldson, Bearman & Caldwell*, 27 DOE ¶ 80,164 (1998) (*Baker*) (citing *Covington & Burling*, 20 DOE ¶ 80,124 at 80,571 (1990)); *Morgan, Lewis & Bockius* 20 DOE ¶ 80,165 at 80,688 (1990) (*Morgan*). Nor does the mere fact that the contents of a document might be useful to competitors in future bids constitute sufficient ground to withhold the document. *Baker*, 27 DOE at 80,655 (citing *Morgan*, 20 DOE at 80,688). The courts clearly mandate that in order to receive protection under Exemption 4, the expected harm must be substantial in nature. *See, e.g., National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The courts have carefully scrutinized the withholding of aggregate pricing data, such as total bid amounts, under Exemption 4. In *Pacific Architects & Engineers v. United States Department of State*, 906 F.2d 1345 (9th Cir. 1990) (*Pacific Architects*), the Ninth Circuit found that aggregate pricing information was not confidential under Exemption 4 since it was made up of a number of fluctuating variables, and therefore would not allow competitors to calculate its bidding strategy. In *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (*Gulf*), the D.C. Circuit enunciated a standard for determining whether the disclosure of commercial information would likely cause substantial harm to a firm's competitive position. That court found that disclosure of information will result in substantial competitive harm if its release allows competitors to estimate, and thus undercut, the submitter's future bids. *Gulf*, 615 F.2d at 530. Courts have not upheld protection under Exemption 4's competitive harm prong when agencies have been unable to convincingly show that release of information would be of substantial assistance to competitors attempting to estimate and undercut the submitter's bids. *See, e.g., Pacific Architects; GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994); *Acumenics Research and Technology v. United States Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988).

While the law does not require FE to engage in a highly sophisticated economic analysis of the possible harm to the bidders that might result from disclosure, *see Public Citizen Health Research Group v. FDA* , 704 F.2d 1280 (D.C. Cir. 1983), in order to prevail, FE must meet its burden of showing substantial competitive harm to the bidders. FE has not met this burden.

In accordance with the DOE's FOIA regulations, FE solicited comments on the advisability of releasing the unsuccessful bids from each of the unsuccessful bidders. Six of the 14 unsuccessful bidders responded to FE's request for comments. Those six commenters each expressed concerns that release of the bid amounts and the identities of the bidders might allow their competitors to outbid them in future sales of petroleum producing properties. However, we are of the impression that release of the bid amounts and the identities of the bidders would not provide the bidders' competition with substantial insight into their bidding strategies. A bid amount appears to us to be dependent on several variables including the bidder's estimates of: the productive capacity of a unique petroleum producing property, future market conditions, applicability of future production technology and the particular bidder's expected future supply and demand for petroleum products. With so many variables involved, it is unlikely that much useful information about a bidder's future acquisition strategies can be gleaned from the release of the bid amounts.

We note that an unpublished decision by the United States District Court for the District of Columbia, *Raytheon Co. v. Department of the Navy*, No. 89-2481 (D.D.C. 1989) (*Raytheon*) contains some discussion and analysis which relate to the issues raised herein. In *Raytheon*, the court considered a request for the total cumulative amount that an unsuccessful bidder had bid for a government contract. The district court found that the total cumulative price could be properly withheld under Exemption 4, since its release could be expected to cause substantial harm to the unsuccessful bidder's competitive position.

The *Raytheon* court's ultimate holding that the unsuccessful bid amount could be withheld under Exemption 4's competitive harm standard is based upon evidence presented in a confidential affidavit that demonstrated factually how the contract price could be used by the bidder's competitors to derive data harmful to its competitive position. This evidentiary showing has not been made here. Finally, we note that the *Raytheon* case apparently involved only bid amounts and not the identity or identities of the bidders, so it has no bearing on the issues concerning the withholding of bidders' identities.

It may well be the case that FE, with its expertise in the oil and gas industry, may have knowledge or insight, that we lack, into how the withheld information might be used to estimate a submitter's future bids. However, the determination letter does not satisfactorily explain how knowledge that a particular firm placed a bid on all or part of NPR-1 or of the amount it bid would allow its competitors to estimate that firm's future bidding strategy. Accordingly, we are remanding this portion of the appeal to FE to issue a new determination letter in accordance with the instructions set forth below.

The Appellant contends that the potential for competitive harm to these bidders has been diminished by the passage of time. The Appellant notes that the bids were submitted over 30 months ago. During this time, the Appellant correctly contends, the oil and gas industry has undergone significant change. As courts have noted, the passage of time can, in some circumstances, mitigate the potential for harm that could have otherwise resulted from the release of commercial information. *See Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996); *Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990). Therefore, in weighing whether to withhold the information under Exemption 4's competitive harm prong, FE must consider the effect of the passage of time on the potential for competitive harm if the information were released, and provide an explanation of its reasoning in its new determination letter should it decide to withhold this information.

Impairment

We now turn to FE's contention that release of the unsuccessful bids would impair the government's ability to obtain similar information in the future. Essentially, FE is contending that release of unsuccessful

bids would impair the government's ability to receive bids in future sales of government-owned oil and gas properties.

The courts have denied protection under the impairment prong when the benefits associated with submission of particular information make it unlikely that the agency's ability to obtain similar submissions in the future will be impaired. *See, e.g., McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 15 (D.D.C. 1997) (finding that release of contract price information would not cause impairment since "[g]overnment contracting involves millions of dollars and it is unlikely that release of this information would cause [the agency] difficulty in obtaining future bids") (reverse FOIA suit) (appeal pending); *Badhwar v. United States Department of the Air Force*, 622 F. Supp. 1364, 1377 (D.D.C. 1985), *aff'd in part and rev'd on other grounds*, 829 F.2d 182 (D.C. Cir. 1987) (no impairment when submission mandatory if supplier wished to do business with the government); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"); *but see Orion Research v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (finding impairment for technical proposals submitted in connection with government contract because release "would induce potential bidders to submit proposals that do not include novel ideas"). These cases recognize that the benefits of doing business with the government can be considerable and are generally sufficient to ensure that firms will continue to submit bids even if these bids are made public. We find no reason suggesting that this logic does not apply to the facts of the present case. Accordingly, we are not persuaded by FE's contention that release of the withheld information would impair FE's ability to obtain bids on future sales of petroleum producing properties.

National Defense Authorization Act

FE further contends that releasing this information would be inconsistent with the mandate of § 3412(d) of the National Defense Authorization Act for Fiscal Year 1996. Section 3412(d) requires that DOE's sale of NPR-1 be conducted in a manner "consistent with commercial practices." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106 (110 Stat. 186). FE contends that since the commercial practice in the oil and gas industry is to keep bids for properties confidential, this statute requires that FE must not release the bids. FE's reliance on this statute is misplaced.

The FOIA allows the withholding of information under other statutes only if they meet the criteria set forth in Exemption 3. *See, e.g., Essential Information, Inc. v. USIA*, 134 F.3d 1165, 1168 (D.C. Cir. 1998). Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1994 & Supp. II 1996). The D.C. Circuit has expressly held that "a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure." *Reporters Comm. for Freedom of the Press v. United States Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.); *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987); *rev'd on other grounds*, 489 U.S. 749 (1989).

Section 3412(d) of the National Defense Authorization Act is clearly not a withholding statute under Exemption 3, since it does not specifically indicate that the agency must withhold particular information. We therefore find that the information sought cannot be withheld on that basis.

Duty to Segregate

We note also that FE withheld both the unsuccessful bid amounts and the unsuccessful bidders' identities. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, segregation and release of non-exempt material is not necessary when it is inextricably intertwined with the exempt material, such that release of the non- exempt material would compromise the confidentiality of the withheld material. *Lead Industries Association v. OSHA*, 610 F.2d 70, 83-86 (2d Cir.

1979). The duty to segregate and release non- exempt material requires FE to consider separately the identities of the unsuccessful bidders and the bid amounts. FE has not demonstrated, for example, how releasing the bid amounts without identifying the parties who submitted the bids could enable competitors to predict their competitors' future bidding strategies.

Accordingly, on remand, FE must conduct an additional review of any information it seeks to withhold from the Appellant in order to determine whether it contains information that can be segregated and released to the public.

Correspondence with the Office of the Vice President

At the same time that it requested the names of bidders and bid amounts, the Appellant also requested: "Any memoranda, correspondence, or other documents regarding any communication between the Office of the Vice President of the United States and DOE regarding the sale of NPR-1."

The Determination Letter indicated that FE's search for documents had not identified any documents that were responsive to this request. Determination Letter at 3. However, during the pendency of the present Appeal, FE submitted a number of documents to this office. Among these documents was a report on the sale of NPR-1 prepared by the DOE and addressed to Vice President Gore, albeit in his capacity as President of the United States Senate.

The DOE report delivered to the Vice President in his capacity as President of the Senate is a responsive document and should have been so identified. However, since FE has indicated that it has provided the Appellant with the document, its failure to identify it as responsive requires no corrective action.

III. CONCLUSION

We are remanding the present Appeal to FE. On remand, FE shall either release all or part of the withheld information or provide a new justification for any continued withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed by the Center for Public Integrity, Case No. VFA-0572, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Fossil Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 19, 2000

Case No. VFA-0573, 27 DOE ¶ 80,276

May 16, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David Ingwersen

Date of Filing: April 21, 2000

Case Number: VFA-0573

On April 21, 2000, David Ingwersen (the Appellant) filed an Appeal from a final determination that the Golden Field Office (GFO) of the Department of Energy (DOE) issued on March 30, 2000. That determination concerned a request for information the Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, no documents were released to the Appellant. In his Appeal, the Appellant asserts that GFO's search for records was inadequate. If granted, this Appeal would require GFO to conduct a further search.

Background

In a letter dated November 1, 1999, the Appellant requested information pertaining to "an invention submitted by Mr. A. Wallis Crane in 1977 to the Office of Energy Related Inventions for Evaluation." Request Letter dated February 13, 2000, from David Ingwersen to George P. Lewett, Chief, Office of Energy-Related Inventions, Department of Commerce (Commerce). On March 30, 2000, GFO issued a determination stating that a thorough search was conducted, including records from Commerce, which previously administered the Energy-Related Inventions Program. Determination Letter dated March 30, 2000, from Frank M. Stewart, Manager, GFO, DOE, to David Ingwersen (Determination Letter). The Energy-Related Inventions Program is now named the Inventions and Innovations Program and managed by the DOE through the GFO. GFO received the Program's files from Commerce approximately six months ago. Memorandum of Telephone Conversation dated May 2, 2000, between Janet R. H. Fishman, Attorney-Examiner, OHA, DOE, and Christopher Powers, GFO (May 2, 2000 Telephone Conversation Memorandum). The Determination Letter stated that the Inventions and Innovations Program's files contain material from the late 1970s. However, nothing referring to Mr. Crane was found. Determination Letter.

On April 21, 2000, the Appellant filed this Appeal, alleging that GFO's response is a "?sluff off' attempt, knowing that there is no penalty for such behavior." Appeal Letter received April 21, 2000, from David Ingwersen to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter). The Appellant includes, with the Appeal, a copy of a "1984" letter

from Commerce indicating that Mr. A. Wallis Crane submitted an invention in 1977.(1) *Id.* at Item 1. The Appellant believes that GFO has acted in bad faith and made an incomplete search. *Id.*

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

The Appellant is requesting “all information regarding an invention submitted by Mr. A. Wallis Crane in 1977.” Request Letter dated February 13, 2000, from David Ingwersen to George P. Lewett, Chief, Office of Energy-Related Inventions, Commerce. GFO’s FOIA Officer informed us that GFO searched both the hard files and the database containing the information which was transferred from Commerce to GFO regarding the Inventions and Innovations Program. In addition, the database containing the information regarding all GFO’s regular office files were searched. Telephone Conversation dated April 25, 2000, between Janet. R. H. Fishman, Attorney-Examiner, OHA, DOE, and Christopher Powers, FOIA Officer, GFO; Telephone Conversation dated May 11, 2000, between Janet. R. H. Fishman, Attorney-Examiner, OHA, DOE, and Christopher Powers, FOIA Officer, GFO. Also, GFO has checked the database(2) of its Inventions and Innovations Program files to verify its accuracy and found it to be correct. May 2, 2000 Telephone Conversation Memorandum. The files do contain some information that contains the date 1977, specifically applications for inventions. However, GFO is not sure whether the date indicates when the applications were submitted or when the inventions were invented. *Id.* In any event, no records responsive to the Appellants’ request were found. GFO has also informed us that it has not destroyed any records in the six months since they were received from Commerce. *Id.*

We are convinced that GFO followed procedures which were reasonably calculated to uncover the material the Appellant sought in his request. *See Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). The fact that the search did not uncover the documents that the Appellant believes may be in the possession of DOE does not mean that the search was inadequate. In the Appeal, the Appellant alleges that GFO did not see the information he was requesting on a computer screen and therefore claims it does not exist. Appeal Letter at 1. We have on numerous occasions found that a reasonable search of a computerized document tracking system, if that system covers all records that could possibly contain information responsive to the request, meets the standard for adequacy set forth in the law. *See, e.g., Barbara Schwarz*, 27 DOE ¶ 80,245 at 80,874 (1999). GFO has met this standard. Moreover, in this case, GFO went beyond checking the computer screen. GFO also confirmed that the database was accurate, checked its own files, and attempted to confirm with Commerce that GFO has all the records from the Program.(3) *Id.* Further, the “1984" letter from Commerce that the Appellant included with his Appeal merely confirms that the information he is requesting existed in 1984 at Commerce. The letter does not indicate that the requested information was still in existence when the Inventions and Innovations Program’s files were transferred to GFO some 15 years later.

Conclusion

GFO conducted a search reasonably calculated to uncover the material the Appellant sought in his request. GFO searched the database of the Inventions and Innovations Program and all of its archived files. Based on the above descriptions, we conclude that GFO’s search was reasonably calculated to uncover the records the Appellant sought. Therefore, we will deny the Appellant’s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on April 21, 2000, by David Ingwersen, Case No. VFA-0573, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 16, 2000

(1)We note that the letter the Appellant includes with his Appeal is a copy with the date and address blanked out. It is the Appellant's contention that this letter was written and/or received in 1984.

(2)It is our understanding that because both the database and the underlying files were received from Commerce, and GFO had no knowledge if the information was correct, it validated the accuracy of the database. This was accomplished by checking the database to see if it would respond correctly for information GFO knew that the files contained.

(3)GFO attempted to contact Commerce but determined that no one with any knowledge of the Energy-Related Inventions Program, as it was called at Commerce, remains with that Department. Memorandum of Telephone Message dated May 10, 2000, left by Christopher Powers, FOIA Officer, GFO.

Case No. VFA-0575, 27 DOE ¶ 80,279

May 26, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Edward A. Slavin, Jr.

Date of Filing:April 24, 2000

Case Number: VFA-0575

Edward A. Slavin, Jr., files this Appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.(1) Slavin's Appeal concerns a decision of the Department of Energy's Oak Ridge Operations Office (ORO) refusing to expedite the processing of his requests. As explained below, we will deny the Appeal.

Background

Between March 19 and March 31, 2000, Slavin filed six FOIA requests with ORO. He asked that each request be given expedited processing, under the provisions of 5 U.S.C. § 552(a)(6)(E). Rather than expediting Slavin's requests, ORO responded that they would be processed on a "documents first in, documents first out basis." Slavin then filed the present Appeal.

A highly condensed version of each request that Slavin filed is listed below, with the number assigned to it by ORO.

Request #00-233: various documents, including all documents bearing Slavin's name, and all documents relating to activities of various DOE officials, to the selection of and billing by various contractors, to the handling of whistleblower cases, and to affirmative action by legal contractors of ORO.

Request #00-239: documents relating to Millard Day, said by Slavin to be a party in a whistleblower case before the Department of Labor, including all documents bearing Day's

name, personnel files of persons involved in the case, and documents relating to legal preparation by DOE attorneys.

Request #00-245: documents relating to an accident at ORO's Y- 12 plant on December 8, 1998, particularly concerning individuals involved with the accident and disciplinary actions taken against them.

Request #00-249: all documents mentioning Linda Gass.

Request #00-250: all documents mentioning the Anderson County, Tennessee, executive.

Request #00-251: documents relating to hiring data and personnel records for attorneys at ORO, including all personnel, security, and health files and files concerning hiring of attorneys.

Analysis

Under the FOIA, an agency must respond to a request for information within twenty working days. 5 U.S.C. § 552(a)(6)(A)(i). As a general rule, agencies process FOIA requests on a "first-in, first-out" basis, according to the order in which they are received. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976). The FOIA also provides, however, for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

Granting one requester expedited processing gives him a preference over previous requesters, by moving his request “up the line” and delaying processing of other requests. *Exner v. FBI*, 542 F. 2d 1121 (1976). Therefore, the FOIA provides that expedited processing is to be provided only when the requester demonstrates “compelling need,” or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i).

“Compelling need,” as defined in the FOIA, arises in either of two situations. The first is when failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the Federal Government. 5 U.S.C. § 552(a)(6)(E)(v).

Slavin has failed to demonstrated a compelling need for expediting any of his six requests. In his submissions requesting the information, he implies that expediting his requests will save lives. He claims in each request that “due to the chilling effects of on-going anti-whistleblower harassment upon the workforce, employees are reluctant to engage in protected activity under environmental and occupational safety laws which can needlessly cause the loss of human lives in accidents and exposures.”

We are firmly committed to providing expedited processing of FOIA requests where there is a reasonable expectation that failure to do so would jeopardize the life or physical safety of an individual. Slavin, however, has provided us with no reason to believe that release of the documents he has requested will accomplish those goals. There is no discernible connection between any of the extensive set of documents requested by Slavin and any individual’s health or physical safety. We have only Slavin’s assertion that release of the documents will somehow prevent the “loss of human lives in accidents and exposures.” In the absence of some other urgency, however, a requester “cannot meet his burden by merely making a naked assertion ... in order to accelerate his FOIA processing." *Edmond v. U.S. Attorney*, 959 F. Supp. 1, 6 (D.D.C. 1997) (*Edmond*). Thus, we find that Slavin’s unsupported assertion is insufficient to establish a need for expedited processing.

Slavin also implies in his requests that he meets the second criterion for expedited processing – that he is a person primarily engaged in disseminating information, and has an urgency to inform the public about an activity of the Federal Government. He states that, among other accomplishments, he was the editor of a newspaper from 1981 to 1983 and was recommended for a Pulitzer Prize, and has published a book and seven articles in American Bar Association Publications. He further claims to have the “ability to inform the people of Anderson County and the world regarding Oak Ridge pollution.” Despite Slavin’s past occupations, however, he is currently an attorney and not primarily engaged in disseminating information. In connection with this FOIA request, he has a client who is employing him to perform services of a legal nature. Moreover, he has not shown that there is any urgency to inform the public about the contents of the documents he is requesting. We therefore find no basis in Slavin’s submissions for expediting the processing of his requests.(2)

Conclusion

Slavin has not shown the exceptional need or urgency that would warrant his being given preferential treatment by expediting the processing of his requests. Therefore, we find that ORO should respond to his requests in a manner consistent with applicable FOIA statutory and regulatory provisions. *Sangre de*

Cristo Animal Protection, Inc., 25 DOE ¶ 80,121 (1995).

It is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Edward A. Slavin, Jr. (Case No. VFA-0575) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(6)(E)(iii). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 26, 2000

(1) The Freedom of Information Act is implemented by the Department of Energy at 10 C.F.R. Part 1004.

(2) Slavin raised an additional ground for expedited processing in his Appeal. At the time the Appeal was filed, Slavin was the attorney of record for Linda Gass, a complainant in a whistleblower case before the Office of Hearings and Appeals (Case No. VWA-0028). Slavin stated that expedited processing was required because of the "the urgency of obtaining information in a timely manner," since "Gass's [whistleblower] hearing ... currently scheduled for one month from now – is being obstructed due to ... [DOE's] obstreperous delays..." While this FOIA Appeal was under consideration, Gass filed her whistleblower complaint with the Department of Labor, and her complaint with the Department of Energy was dismissed. Since there is no longer a need to expedite these documents for the DOE hearing, we will give no consideration to this argument for expediting.

Case No. VFA-0576, 27 DOE ¶ 80,278

May 26, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Eng. Services

Date of Filing: May 1, 2000

Case Number: VFA-0576

On May 1, 2000, R.E.V. Eng. Services (R.E.V.) filed with the Office of Hearings and Appeals (OHA) an Appeal from a determination by the Department of Energy's (DOE) Office of Inspector General (DOE/IG). That determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9).

R.E.V. requested from DOE/IG documents regarding "the (unsealed) False Claims Act case: ?United States of America, ex rel., David E. Ridenour, et al., v. Kaiser-Hill Company, L.L.C., et al.' Civil Action No. 97-WM-2191, filed October 08, 1997, in the United States District Court for the District of Colorado . . . ." Letter from David E. Ridenour, P.E., R.E.V., to DOE/IG (undated). In an April 11, 2000 response to R.E.V., DOE/IG stated that it had reviewed documents responsive to the request, including "case processing forms and printouts, memoranda of investigative activity, and internal memoranda," and that "responsive documents are being withheld in their entirety pursuant to subsection (b)(7)(a) of the [FOIA], or Exemption 7(A)." Letter from Herbert Richardson, Principal Deputy Inspector General, DOE/IG, to David Ridenour (April 11, 2000) at 1. DOE/IG explained that "[r]elease of the withheld material at this time could prematurely reveal evidence and interfere with enforcement proceedings" and that "it is not in the public interest to disclose certain material compiled as part of an ongoing law enforcement proceeding." Id.

II. Analysis

The only exemption at issue in the present case is found at 5 U.S.C. § 552(b)(7)(A) (1994 & Supp. II 1996). Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. " *Id.*

A. Whether the Documents Withheld Were Compiled for Law Enforcement Purposes

The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *See F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982); *William Payne*, 26 DOE ¶ 80,144 (1996) (*Payne*). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority).

DOE/IG is charged with investigating and correcting waste, fraud, or abuse in programs and operations administered or financed by the DOE. Inspector General Act of 1978, codified as amended at 5 U.S.C. App. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). Accordingly, we have consistently found that DOE/IG compiles information for law enforcement purposes within the meaning of Exemption 7. *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *Keci Corporation*, 26 DOE ¶ 80,149 (1997). The courts have similarly found that the Inspector General's offices in other agencies exercise the requisite law enforcement functions to protect their investigative files under Exemption 7. *E.g., Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). Because the documents at issue in the present case are part of a DOE/IG investigative file, we find that the documents were compiled for law enforcement purposes and therefore satisfy the threshold test for application of Exemption 7.

B. Whether a Law Enforcement Proceeding is Pending

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

The arguments of the Appellant go to both steps of this analysis. First, R.E.V. argues that the enforcement proceeding in question is not currently pending.

> The information requested pertains *only* to the investigation made of [my False Claims Act case] and the recommendation that resulted from that specific investigation. As the Government, [Department of Energy and Department of Justice], chose not to participate in the Qui Tam case, there can be no "ongoing enforcement proceeding" in that area.

Appeal at 1-2. However, we contacted DOE/IG after the filing of the present Appeal, and DOE/IG informed us that the investigations of the Justice and Energy Departments into this matter have not yet been closed. Memorandum of telephone conversation between Jacqueline Becker, DOE/IG, and Steven Goering, OHA (May 8, 2000). Having no evidence to the contrary other than the bare assertions of the Appellant, we will accept the representations of DOE/IG and conclude that the enforcement proceeding in question is currently pending.

C. Whether Release of the Documents Could Reasonably be Expected to Interfere with the Pending Enforcement Proceeding

The Appellant further contends that release of the documents withheld would not interfere with the enforcement proceeding in question. He asserts that "[a]fter three (3) years of public and private discussions, every individual or corporation possibly involved is well aware of their position. Efforts to ? fabricate defenses, destroy evidence, intimidate . . . witnesses or otherwise impede . . .' if indeed there were any, are long ago in place." Appeal at 2 (ellipses in original).

We do not agree with this contention. The Supreme Court has found that agencies are not required, in support of withholding of information under Exemption 7(A), to make a particularized, case-by- case showing of interference with their investigations. Rather, agencies may rely on a showing that, "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally ?interfere with enforcement proceedings.'" *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 236 (1978) (*Robbins*).

In making the "generic determinations" endorsed by the Court in *Robbins*, an agency has "a three- fold task," as articulated by the United States Court of Appeals for the District of Columbia in *Bevis v. United States Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). "First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90.

With regard to the first part of the task, the court in *Bevis* spoke of

categories that are sufficiently distinct to allow a court to grasp "how each . . . category of documents, if disclosed, would interfere with the investigation." The hallmark of an acceptable . . . category is thus that it is *functional*; it allows the court to trace a rational link between the nature of the document and the alleged likely interference.

Bevis, 801 F.2d at 1389 (quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (quoting *Campbell v. Department of Health and Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982)) (emphasis in original)). Applying this principle to the categories before it, the court in *Bevis* found that although some of the categories employed by the agency (the FBI),

allow the court to "trace a rational link [to] . . . the alleged likely interference," others do not. For example, certain of the categories selected by the FBI define the nature of the information contained in the included documents, e.g., "the identities of possible witnesses and informants," "reports on the location and viability of potential evidence," and "polygraph reports." Such categories satisfy the Crooker functionalism requirement because they allow the court to assess the FBI's representations of how release of the documents would result in interference to the Salvadoran proceedings.

On the other hand, other categories employed by the FBI give absolutely no indication of the substance of the information contained. For example, some categories are identified only as "teletypes," or "airtels," or "letters." These provide no basis for a judicial assessment of the FBI's assertions that release of the documents so categorized would interfere with enforcement proceedings. The FBI cannot carry its burden with such irrelevant classifications.

Id. at 1390.

Turning to the present case, we find that DOE/IG identified three categories into which fell the documents responsive to the Appellant's request, specifically "case processing forms and printouts, memoranda of investigative activity, and internal memoranda." Unlike the categories approved in *Bevis*, none of these categories "define the nature of the information contained in the included documents." For example, the category "case processing forms and printouts" could easily encompass documents that reveal nothing of substance relating to a particular investigation, similar to categories we have found in prior cases would "not seem to pose a threat of interference with the ongoing . . . investigations." *Anibal L. Taboas*, 25 DOE ¶ 80,207 at 80,774 (1996) (rejecting category designated "notices of acceptance or dismissal of complaints").

Further, given a standard definition of the word "memorandum," *e.g.*, "a written record or communication, as in a business office," Webster's II New Riverside University Dictionary 741 (1984), the categories "memoranda of investigative activity" and "internal memoranda" could include every document in an investigative file. When the "generic determinations" allowed under Exemption 7(A) employ categories

that are this broad, those categories run the risk of becoming the very "blanket exemptions" Congress sought to avoid in crafting Exemption 7. *Robbins*, 437 U.S. at 236 ("Amendment of Exemption 7 was designed to eliminate ?blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes . . . .").(1)

Thus, while it would not necessarily be fair to say that the categories named by DOE/IG give "no indication of the substance of the information contained," the categorization of these documents should be refined. This will allow our office, a court, and the public "to trace a rational link between the nature of the document and the alleged likely interference." *Bevis*, 801 F.2d at 1389, 1390. We will therefore remand this matter to DOE/IG so that it may issue a new determination to the Appellant, regrouping the documents it believes should be withheld into categories that are sufficiently distinct to allow one who is not privy to the actual contents of the documents to grasp how each category of documents, if disclosed, would interfere with the investigation.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. Eng. Services, Case No. VFA-0576, is granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Office of Inspector General for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 26, 2000

(1) To the extent that prior decisions of this office approved the use of such broad categories, those decisions are not consistent with the holdings in *Robbins* and its progeny, and they will no longer be viewed as controlling authority. *See Robert A. Speir*, 27 DOE ¶ 80,265 (2000) ("memoranda of investigative activity, and investigator's case processing material"); *Kristine Anne Horpedahl*, 27 DOE ¶ 80,202 (1999) ("investigative case file").

Case No. VFA-0577, 27 DOE ¶ 80,282

June 8, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mark A. Graf

Date of Filing: May 22, 2000

Case Number: VFA-0577

On May 22, 2000, Mark A. Graf filed an Appeal from a determination issued to him on April 17, 2000, by the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Graf challenges the adequacy of Rocky Flats' search for documents responsive to his request.

I. Background

On January 30, 2000, Mr. Graf filed a request for information in which he sought a copy of a November 13, 1996 Memorandum, "Abstract Report of Inspection on ?Alleged Tape Recordings of Conversations at the Rocky Flats Environmental Technology Site' and Other Management Issues" (S941S094). On April 17, 2000, Rocky Flats issued a determination which stated that it conducted a search for the requested document. However, Rocky Flats stated that it was unable to locate the document. See Determination Letter at 1.

On May 22, 2000, Mr. Graf filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Graf challenges the adequacy of the search conducted by Rocky Flats. Mr. Graf asks that the OHA direct Rocky Flats to conduct a new search for the requested document. See Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but

rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076

(D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Rocky Flats to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Graf's request might exist. Upon receiving Mr. Graf's request for information, Rocky Flats instituted a search of the offices that might possibly possess the requested document. Those offices included the Office of Chief Counsel and the Office of Facilities Disposition (the security office). Based on this search, Rocky Flats was unable to locate the responsive document. See Record of Telephone Conversation Between Mary Hammack, Rocky Flats, and Kimberly Jenkins-Chapman, OHA (May 30, 2000). In his Appeal, Mr. Graf states that he confirmed several facts regarding the requested document with the Headquarters FOIA office of the DOE. In light of the unsuccessful search conducted by Rocky Flats, Mr. Graf may wish to pursue his request directly with Headquarters FOIA office.

Given the facts presented to us, we find that Rocky Flats conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Graf's request. Accordingly, Mr. Graf's Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Mark A. Graf, OHA Case No. VFA-0577, on May 22, 2000, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 8, 2000

Case No. VFA-0581, 28 DOE ¶ 80,104

July 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: John Michael Unfred, P.C.

Date of Filing: June 22, 2000

Case Number: VFA-0581

On June 22, 2000, John Michael Unfred, P.C. (Unfred) completed filing this Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the Albuquerque Operations Office of the DOE (DOE/AL) issued to Unfred on April 18, 2000. The determination concerned a request for information that Unfred submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE/AL would be required to release any responsive material.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On January 16, 2000, Unfred requested copies of any Cooperative Research and Development Agreements (CRADAs) involving the technology described in U.S. Patent No. 5,858,457. Letter from DOE/AL to Unfred (April 18, 2000) (Determination Letter). Unfred requested: (1) any responsive CRADAs including any statements of work (SOW) and any appendices thereto; (2) any documents reflecting the negotiation of the responsive CRADA(s); (3) any documents reflecting the award, changes, modification or amendment of the CRADA(s); and (4) any documents of the contracting officer that reevaluate the quality of the technology. Letter from Unfred to Director, OHA (May 30, 2000) (Appeal).

DOE/AL determined that CRADA SC97/01489 between Sandia Corporation and Air Products and Chemicals, Inc. (APCI), a procurement document of Sandia National Laboratory, was responsive to the request. However, DOE regulations require that DOE contact the firm who submitted the requested information in order to give that firm the opportunity to identify proprietary, financial, or commercial information contained in the documents. Consequently, a representative of APCI reviewed the documents and identified all proprietary information. Letter from APCI to DOE/AL (February 25, 2000) (APCI Letter). On April 18, 2000, DOE/AL released the following three documents to Unfred, withholding all of the material that APCI had identified as proprietary: (1) CRADA 01489 Version 3/12/98, withholding Appendices A (SOW) and C (Background Intellectual Property); (2) CRADA 01489 Version 3/10/99, Amendment 1, withholding Appendices A (SOW) and C (Background Intellectual Property); and (3)

CRADA 01489 Version 2/23/98, withholding Appendix A (SOW). Determination Letter at 1. All redacted information was withheld under FOIA Exemption 4. *Id.* On June 22, 2000, Unfred filed this Appeal with OHA, contending that the response was "both untimely and inadequate." Appeal at 2. He further argued: (1) that DOE improperly relied upon the Trade Secrets Act in refusing to consider whether it is in the public interest to disclose non-exempt information; (2) that there is segregable information in the documents that DOE is obliged to release; (3) that DOE has made only conclusory assertions that competitive injury would result to APCI if the documents were released; and (4) that the documents were not fully identified to the requester. *Id.*

II. Analysis

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial or financial, obtained from a person and privileged or confidential." *National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. *Id*., at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). By contrast, information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879.

We have reviewed the redacted material and find that most of the deleted information was properly withheld under the *National Parks* test. (1) The documents contain specific details of the project that could cause substantial harm to APCI's commercial success in near term commercial opportunities. We agree with APCI's argument that public release of any proprietary information could enable a competitor to decrease its development time for the same product and diminish APCI's's chance to commercialize the technology developed under the CRADA. APCI Letter at 2-3. *See Judicial Watch, Inc. v. United States Dep't of Commerce*, 83 F. Supp. 2d 105 (D.D.C. 1999) (finding disclosure of proprietary information outlining the development of a venture would permit competitors to undercut development effort). As a result of our review, we find that release of most of the withheld information could cause substantial harm to APCI's competitive position. Therefore, we conclude that most of the information withheld (e.g., subject matter of the CRADA, scope of the product, costs, background intellectual property) is subject to withholding under FOIA Exemption 4. (2)

A. DOE/AL Determination Letter

Unfred argues that the determination letter was not timely, and did not adequately identify the responsive documents. We disagree. Although the FOIA requires an agency to inform the requester of its decision to grant or deny access to requested records within 20 working days, 5 U.S.C. § 552(a)(6)(A)(i), the federal courts have held that agencies may exceed the initial time limits in certain situations. *See, e.g., Zuckerman v. FBI*, No. 94-6315, slip op. at 8 (D.N.J. Dec. 6, 1995) (resource limitations); *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (agency need not adhere strictly to first-in, first-out processing so long as proceeding expeditiously and fairly). *See also Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996) (*Larson*) (no legal error in exceeding initial time limit). In this case, DOE regulations required DOE/AL to provide APCI with 10 working days to identify proprietary information. DOE/AL informed Unfred that APCI's review would cause processing to exceed the 20 day limit. Electronic mail message from Terry Apodaca, DOE/AL to Valerie Vance Adeyeye, OHA (July 24, 2000). Thus, we find that the Determination Letter was timely within the standards established by the federal

courts. *Larson,* 25 DOE at 80,763. Further, we find that DOE/AL adequately identified the responsive documents by CRADA number, version, and subject. Determination Letter at 1.

Unfred also argues that the determination stated "conclusory assertions." We do not agree. DOE/AL adequately explained its basis for finding Appendix A, the Statement of Work, to be exempt from withholding under Exemption 4. (3) In the Determination Letter, DOE/AL described the withheld information and further explained that release would be competitively harmful to APCI, "due to the highly competitive environment of supplying the next generation dielectrics for integrated circuits currently envisioned by the electronics industry." Determination Letter at 2. *See Public Citizen Health Research Group v. FDA*, 185 F.3d 898 (D.C. Cir. 1999) (*Public Citizen*) (finding competitive harm where disclosure of proprietary information would eliminate much of the time and effort otherwise required to market a product).

B. Public Interest Inquiry and Trade Secrets Act

As we have stated in previous cases, we do not make the typical inquiry into whether release of the material would be in the public interest in cases involving material determined to be exempt from mandatory disclosure under Exemption 4. *See FOIA Group, Inc*., 27 DOE ¶ 80,111 (1998); *Tactical Weapons Working Group, Inc*., 26 DOE ¶ 80,170 (1997). Courts have held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act. *Bartholdi Cable v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (when information shown to be protected by Exemption 4, government is generally "precluded from releasing" it due to Trade Secrets Act)*; CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (noting that Trade Secrets Act appears to cover practically any commercial or financial data collected by any federal employee from any source). We therefore reject Unfred's assertion that DOE/AL improperly refused to consider a public interest release of the withheld information.

C. Segregable Information

The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material). The determination letter did not identify any segregable, non-exempt factual material. However, our review finds that the March 12, 1998 and February 23, 1998 versions of the Statement of Work contain some factual information that may not be withheld under Exemption 4 unless inextricably intertwined with exempt material. *See, e.g., Center for Public Integrity*, 27 DOE ¶ 80,277 (2000) (non-exempt material is inextricably intertwined if its release would compromise the confidentiality of withheld material). In the section entitled "Background," the second sentence contains some segregable information. In the section entitled "Reasons for Cooperation," the first sentence of paragraph two, the first sentence of paragraph three, and the final sentence also contain some segregable information. Accordingly, we shall remand these two documents to DOE/AL. On remand, DOE/AL must review the aforementioned versions of the Statement of Work and segregate and release all purely factual portions, or provide a detailed explanation for withholding them.

It Is Therefore Ordered That:

(1) The Appeal filed on June 22, 2000 by John Michael Unfred, OHA Case No. VFA-0581, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Albuquerque Operations Office for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 28, 2000

(1)DOE/AL informed us during our review that the proprietary information was submitted involuntarily. Electronic Mail from Terry Apodaca, DOE/AL, to Valerie Vance Adeyeye, OHA (July 27, 2000).

(2)In addition, material that is "commercial or financial information that is privileged or confidential, under the meaning of [FOIA Exemption 4]" shall not be disclosed when obtained from a non-federal party participating in a CRADA under Chapter 63 of United States Code Title 15. 15 U.S.C.A. § 3710a(c)(7)(A).

(3)However, after reviewing the APCI letter, we note that the Determination Letter failed to include the basis of the claim of exemption for Appendix C, Background Intellectual Property. APCI Letter at 3.

Case No. VFA-0583, 28 DOE ¶ 80,106

August 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mark Donham

Date of Filing: July 6, 2000

Case Number: VFA-0583

On July 6, 2000, Mark Donham filed an Appeal from a final determination that the Oak Ridge Operations Office (Oak Ridge) of the Department of Energy (DOE) issued on May 5, 2000. In its determination, Oak Ridge denied Mr. Donham's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Oak Ridge to release the information it withheld.

Background

In an email dated April 11, 2000, Mr. Donham submitted a FOIA request to Oak Ridge for "a copy of the contracts between Steve Kay and the SSAB and Design Integration Group and the SSAB." Email Request dated April 11, 2000, from Mark Donham to John Sheppard, Paducah Site Office, DOE. SSAB is the Paducah Site Specific Advisory Board, a local board of the DOE Environmental Management Site Specific Advisory Board. Email from Amy Rothrock, Oak Ridge, to Janet R. H. Fishman, Attorney-Examiner, Office of Hearings and Appeals (OHA) dated July 17, 2000, at 2 (July 17, 2000). The SSAB is a federally chartered advisory board under the Federal Advisory Committee Act. The Design Integration Group (DIG) is a subcontractor to Bechtel Jacobs Company, LLC (BJC), the prime contractor at the Paducah Site Office. *Id.* Finally, Steve Kay, also a subcontractor to BJC, is employed as the facilitator for the Paducah SSAB. *Id.* On May 5, 2000, Oak Ridge denied Mr. Donham's request, stating that the contracts were not agency records and were in the possession of BJC. Determination Letter dated May 5, 2000, from Amy L. Rothrock, Authorizing Official, Oak Ridge, to Mark Donham.

In response, Mr. Donham filed this Appeal.(1) He argues that the SSAB is solely funded by the DOE and is federally chartered. Appeal Letter dated June 4, 2000, from Mark Donham to OHA, DOE. He believes that since the SSAB contracts he is requesting are solely funded by the DOE, he should be able to obtain copies of them. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th

Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

The information Mr. Donham requested is copies of the contracts between Steve Kay and the SSAB and between DIG and the SSAB. Request Email. Mr. Donham asserts that the SSAB is solely funded by the DOE, and he believes that, therefore, DOE should disclose copies of the contracts to him. Appeal Letter. Oak Ridge has informed us that the SSAB does not have procurement ability. Memorandum of Telephone Conversation dated July 19, 2000, between Janet R. H. Fishman, Attorney-Examiner, OHA, DOE, and John Sheppard, Paducah Site Office, Oak Ridge, DOE (July 19, 2000 Telephone Conversation). Procurement for the SSAB support requirements are handled by the prime contractor, BJC, after consultation with DOE and the SSAB. *Id.* Oak Ridge has searched for copies of the contracts and not found them. Indeed, Oak Ridge is certain that it does not possess the contracts. *Id.* Therefore, we must address whether procurement records between BJC and a sub-contractor are subject to the FOIA.

To make this determination, we must first assess whether any such records are "agency records" for purposes of the FOIA. We have frequently held that prime contractors such as BJC are not government agencies. *ChemData, Inc.*, 26 DOE ¶ 80,228 (1997) (outlining complete argument why the contractor's procurement records are not subject to the FOIA). We find that the analysis we applied to Rocky Flats in the *ChemData* case is equally applicable here. Therefore, its procurement records are not "agency records." *Id.* Next, we must determine whether the requested records are nevertheless subject to disclosure under section 1004.3(e) of our regulations. The DOE regulations state that

[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b).

10 C.F.R. 1004.3(e)(1).

We therefore next look to the contract between DOE and BJC to determine the status of the withheld records. According to the contract, all "records relating to any procurement action by [BJC]" are contractor-owned records. Contract No. DE-AC05-98OR22700, Section 1-100.970.5204-79(b)(3). Under the FOIA, the record is therefore a contractor record, not an agency record, and it is not subject to the FOIA. We shall completely deny Mr. Donham's appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Mark Donham, on July 6, 2000, Case No. VFA-0583, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 1, 2000

(1)Mr. Donham's Appeal was originally received on June 8, 2000 however, it did not contain a copy of the Determination Letter and was an incomplete filing. *See* 10 C.F.R. § 1004.8(b). Mr. Donham completed the filing on July 6, 2000.

Case No. VFA-0584, 28 DOE ¶ 80,102

July 18, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: June 19, 2000

Case Number: VFA-0584

On June 19, 2000, the Government Accountability Project (GAP) filed an Appeal from a determination issued by the Department of Energy Headquarters Freedom of Information and Privacy Group (DOE/FOI). This determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. § 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA setting forth the types of information agencies are not required to release. 5 U.S.C. § 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In an April 4, 2000 request, GAP requested from the DOE

Any and all records reflecting the request for payment or reimbursement of legal fees and/or costs associated with litigation in the case of Mark Graf v. Wackenhut Services Limited Liability Company, dated December 16, 1999, and encaptioned Case No. 1998-ERA-37 brought before the U.S. Department of Labor and recently adjudicated. This request is intended to include, but not be limited to - -

· Any and all records reflecting the payment and/or reimbursement of any monies paid by, or agreed to be paid by Department of Energy to the Wackenhut Services LLC company, a subcontractor at the Rocky Flats Environmental Technology Site (RFETS) and/or Kaiser-Hill, Inc., a DOE contractor at the RFETS site, related to or generated in connection with legal claims by Mr. Mark Graf, an employee of Wackenhut. This request is intended to include but not be limited to correspondence, memoranda, invoices, bills, and demands for payment, whether in written or electronic format.

Appeal at 1.

On May 24, 2000, DOE/FOI issued a determination to GAP, stating that at "DOE Headquarters, searches have been conducted by the Office of Safeguards and Security in the Office of Security Affairs and the Office of the Deputy General Counsel for Litigation. The searches by these offices did not locate any documents that are responsive to your request." Letter from Abel Lopez, Director, DOE/FOI, to Thomas

Carpenter, GAP (May 24, 2000). The determination letter went on to explain that the DOE's "Rocky Flats Field Office is conducting a search for responsive documents. Upon completion of the search and the review of any documents determined to be responsive to your request, that office will provide a final response to you." Id.

In its Appeal, GAP notes that on

May 23, 2000, the day before the response to me was dated, the General Counsel for the DOE, Ms. Mary Ann Sullivan, testified extensively [before the House Commerce Committee] on the matter of DOE's reimbursement of contractor litigation costs in whistleblower cases. The matter of whether DOE had reimbursed the contractor in the Mark Graf whistleblower case was specifically discussed at length by Ms. Sullivan.

Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). Nonetheless, "the standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

As an initial matter, we find that DOE/FOI's referral of the request to the Office of the Deputy General Counsel for Litigation and the Office of Safeguards and Security was "reasonably calculated to uncover the sought materials," since the documents requested concerned contractor litigation costs and the respondent in the case at issue, Wackenhut Services Limited Liability Company, provided security services as a subcontractor to the DOE. We thus turn to whether these two offices each conducted an adequate search, basing our determination upon the description of the searches the offices have provided to us. The Deputy General Counsel for Litigation informed us that when he performed the search, which was completed on or before April 26, 2000, he believed that any such records, if they existed, would be located at DOE's Rocky Flats Field Office (DOE/RF). See Electronic Mail from Marc Johnston, Deputy General Counsel for Litigation, to Steven Goering, OHA (June 23, 2000). He nonetheless consulted with members of his staff familiar with the Graf case, who confirmed that their office would not have responsive documents. Id. We also contacted the Office of Safeguards and Security (OSS), who explained that it, too, believes that "the most likely location of information responsive to the request" is DOE/RF, but that "if any documents responsive to Mr. Carpenter's request existed in this office . . . they would be located in the Field Operations Division, . . . [which] provides field assistance and policy implementation guidance to" DOE/RF. Memorandum from Lynn Gebrowsky, Office of Safeguards and Security, to Steven Goering, OHA (July 3, 2000). OSS therefore consulted its Desk Officer responsible for DOE/RF in the Field Operations Division, who confirmed that the Field Operations Division had no records responsive to the request. Memorandum of telephone conversation between Victor Hawkins, OSS, and Steven Goering, OHA (July 7, 2000). In addition, after our receipt of the present Appeal, OSS's Information Management Center performed a search of its computerized document tracking system for responsive documents, and found none. Id.

The appellant cites an abundance of news reports implying at the very least that, as of her testimony on May 23, 2000, the DOE General Counsel may have had documents that would have been responsive to GAP's request. Appeal at 2-3. However, the issue before us is not whether DOE Headquarters currently has responsive documents, or even whether it had such documents as of the date of DOE/FOI's May 24,

2000 response. Rather, the pertinent issue is the adequacy of the searches of the two DOE Headquarters offices. In this respect, the numerous reports cited by the Appellant do not help us to determine whether the DOE Headquarters offices searched would have likely had any responsive documents, because those searches were conducted well before the May 23, 2000 congressional hearing. See Freedom of Information Act Request Certification (April 26, 2000) (signed by Marc Johnston, Deputy General Counsel for Litigation); Memorandum from Winnie Lehman, Office of Safeguards and Security, to Abel Lopez, DOE/FOI (May 17, 2000).

Indeed, the reports cited by GAP indicate that the testimony of DOE Headquarters officials at the hearing relied upon information provided by DOE/RF, and that as late as May 18, 2000, DOE/RF officials informed Headquarters that there had been no reimbursement of contractor costs in the Mark Graf whistleblower case. Appeal at 3. Under these circumstances, it is quite possible that further information, and responsive documents, passed from Rocky Flats to Headquarters in the days leading up to the May 23 hearing. However, we certainly cannot expect searches conducted at Headquarters prior to that time to have uncovered such documents.

Based on the descriptions provided to us, we conclude that the searches of the Office of the Deputy General Counsel for Litigation and the Office of Safeguards and Security were reasonably calculated to uncover the records sought by GAP. Though there was not one uniform search method used, each office clearly made a thorough and conscientious effort to locate all responsive documents it might possess, either by notifying knowledgeable employees of the request and asking them to provide any responsive documents or by searching a computerized document tracking system, or both. For the reasons explained above, we will deny the present Appeal.(1)

It Is Therefore Ordered That:

(1) The Appeal filed by the Government Accountability Project, Case No. VFA-0584, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 18, 2000

(1) The Appellant is certainly free to file a new FOIA request to DOE Headquarters to obtain documents that DOE/RF may have sent to Headquarters since GAP’s April 4 request. We note, however, that the request has already been referred to DOE/RF for a separate response, and that any responsive documents that existed at DOE/RF at the time of GAP’s request should be subject to DOE/RF’s forthcoming determination.

Case No. VFA-0587, 28 DOE ¶ 80,113

September 21, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: July 13, 2000

Case Number: VFA-0587

On July 13, 2000, Government Accountability Project (GAP) filed an Appeal from two determination letters issued to it on May 18, 2000, and May 22, 2000, by the Department of Energy's Richland Operations Office (Richland). Those determinations were issued in response to a request for information that GAP submitted on March 17, 2000, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, GAP asserts that Richland failed to provide it with documents in its possession that are responsive to its request.

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest.

I. Background

On March 17, 2000, GAP filed a request for information in which it sought "any and all records generated in connection with *United States of America ex rel. David R. Carbaugh v. Westinghouse Hanford Company and Fluor Daniel Hanford, Inc.*, Civil Action No. SC-96-0171-WFN." *See* Letter from GAP to Director, Office of Hearings and Appeals (OHA) (June 21, 2000) (Appeal Letter). On March 30, 2000, GAP narrowed this request to invoices, billing statements, requests for payment and documents related to the above captioned litigation. On May 18, 2000, Richland issued a determination which stated that it identified several documents responsive to GAP's request. *See* Letter from Yvonne Sherman, FOIA Officer, Richland to GAP (May 18, 2000) (May 18 Determination Letter). However, Richland indicated that it was withholding certain portions of these documents pursuant to Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). *Id*. Richland also determined that a portion of one document was not responsive and redacted this information. In addition, on May 22, 2000, Richland issued a second determination which stated that since its May 18th determination, it had located two additional documents responsive to GAP's request. *See* Letter from Yvonne Sherman, FOIA Officer, Richland to GAP (May 22, 2000) (May 22 Determination Letter). Richland withheld these documents in their entirety pursuant to FOIA Exemption 4.

On July 13, 2000, GAP filed the present Appeal with the Office of Hearings and Appeals. In its Appeal, GAP challenges Richland's May 18 and May 22 determinations and asserts that: (1) DOE should produce an entire document without deeming portions of it as unresponsive unless it claims a privilege; (2) monthly statements of legal expenses incurred by Fluor Hanford, Inc. (FHI) were improperly withheld

under Exemption 4; (3) information regarding Westinghouse Hanford Company (WHC) legal expenses was relevant and should have been produced; and (4) two identified letters generated by WHC were improperly withheld under Exemption 4 and should have been produced.(1) Based on these assertions, GAP asks that the Office of Hearings and Appeals direct Richland to release the responsive documents requested.

II. Analysis

Adequacy of Richland's Withholding for Lack of Responsiveness

In its Appeal, GAP first contends that information was improperly withheld from a June 22, 1999 WHC Letter to Theodore Turpin. Appeal Letter at 2. In its May 18 Determination Letter, Richland indicated that it redacted information from the letter it provided to GAP because it deemed the information as not responsive to GAP's request. After reviewing this document, we have determined that the information redacted from the letter does not fall within the scope of GAP's request and thus is unresponsive. It is important to note that the document in question here addresses several different topics of which only one was responsive to GAP's request. Under these circumstances, it is reasonable to redact nonresponsive information. Accordingly, we will uphold Richland's determination to redact information from the letter that is nonresponsive to the Appellant's request.(2)

Adequacy of the Richland Exemption 4 Justification

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either: (1) trade secrets or (2) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

The courts recognize two distinct tests for determining whether information is "confidential" for purposes of this Exemption, depending on whether the government obtained it voluntarily or involuntarily. In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the government obtained the information. *Id*. at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). By contrast, information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879.

GAP's remaining arguments generally assert that Richland improperly withheld information pursuant to Exemption 4. Specifically, GAP disputes that the information withheld, including monthly statements of legal expenses incurred by FHI, information regarding WHC legal expenses, and two letters generated by WHC, was submitted voluntarily and therefore subject to the test set forth in *Critical Mass*. Richland has stated:

According to the Department of Energy's contract with Fluor Hanford, Inc., privileged and confidential legal documents prepared by or for contractors that are not reimbursed under the contract are the property of FHI and not subject to the provisions of the FOIA. RL [Richland] has not made a determination as to whether it will reimburse its contractors for this litigation. Therefore, until that decision is made, RL must protect the information as if the decision was not to reimburse the contractor.

We have also withheld monthly statements of costs incurred from the law firms. We have determined that

these documents were not required to be submitted to DOE as they were submitted voluntarily by FHI and would not be required to be submitted to DOE unless litigation costs were reimbursed. At this stage, the documents have been provided to DOE as a courtesy to assist us in our budget planning processes.

May 18 Determination Letter.

Richland also applied the above explanation to the other requested documents. It appears that Richland analyzed the confidentiality of the requested documents under the test set forth in *Critical Mass*, as if they had been submitted to the DOE voluntarily. However, it is unclear that the withheld documents were in fact voluntarily submitted. We contacted officials at the Richland office to ascertain the process by which the DOE reimburses litigation costs. Based on these discussions, it is apparent that the general method for contractors to receive reimbursement for their litigation costs is through submitting documents to the DOE. It is also apparent that this is the contractors' only method of obtaining payment and that they submit these documents for the purpose of receiving reimbursement from the DOE. We are therefore not convinced that these documents were voluntarily submitted to the DOE, but rather believe that they were involuntarily submitted, in order to receive reimbursement. Accordingly, we will remand the portion of GAP's Appeal related to Exemption 4 to Richland with a direction to analyze the documents under the standard set forth in *National Parks* and to issue a new determination with respect to the documents in question.(3)

It Is Therefore Ordered That:

(1) The Appeal filed by Government Accountability Project on July 13, 2000, is granted as specified in paragraph (2).

(2) This matter is remanded to the Department of Energy's Richland Operations Office for further processing in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 21, 2000

(1) In its Appeal, GAP says it is unclear whether Richland identified any documents regarding WHC's legal expenses. Richland has informed us that it did identify documents in that category and applied the same Exemption 4 analysis to these documents as it did to the FHI legal expenses in both its May 18 and May 22 Determination Letters.

(2) GAP may, however, elect to file a new FOIA request for the entire document.

(3) In addition, GAP requests that it be provided with a Vaughn index, i.e. an index identifying each responsive document, the exemption under which it is being withheld and an explanation of why that exemption is applicable. On previous occasions, we have stated that, although such an index may be required when an agency is in litigation with a FOIA requester, this degree of specificity is not required at the administrative stages of a FOIA request. See, e.g., Rockwell International, 21 DOE ¶ 80,105 at 80,527 (1991); Natural Resources Defense Council, 20 DOE ¶ 80,145 at 80,627 (1990). At the administrative levels, determinations need only provide a general description of the withheld material, and a statement of

the reason for withholding each document. Therefore, we reject GAP's request for a Vaughn index. However, in its new determination Richland should provide sufficient details to meet this second standard.

Case No. VFA-0588, 28 DOE ¶ 80,103

July 26, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Martin Becker

Date of Filing: June 27, 2000

Case Number: VFA-0588

On June 27, 2000, Martin Becker completed the filing of an Appeal from a determination issued to him in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Principal Deputy Inspector General (Authorizing Official) of the Office of the Inspector General of the DOE (OIG) issued that determination on May 23, 2000. This Appeal, if granted, would require that the DOE release information withheld pursuant to FOIA Exemptions 5, 6 and 7(C). 5 U.S.C. § 552(b)(5), (6), 7(C).

The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that the DOE shall nonetheless release to the public a document exempt from disclosure under the FOIA whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On November 10, 1999, Mr. Becker filed a request with the DOE for copies of any written information related to audits, investigations or inquiries the DOE prepared concerning the use of funds appropriated in line items 92-D-150 and 92-D-153 for use at the Savannah River Site. The Authorizing Official released several documents in their entirety, but redacted information from other documents or withheld documents in their entirety pursuant to Exemptions 5, 6 and 7(C).

II. Analysis

In his Appeal, Mr. Becker makes several arguments. First, he states that the DOE should release documents and portions of documents withheld pursuant to Exemption 5. Specifically, Mr. Becker argues that the DOE should release document 73 in its entirety and release the redacted information withheld from documents 84, 129 and 141. He argues that the DOE failed to provide him with a description of document 73 and did not segregate and release those portions of document 73 to which Exemption 5 does not apply. Second, Mr. Becker contends that the DOE should not have redacted names pursuant to Exemptions 6 and 7(C) from numerous documents. He states that the public interest in the release of the withheld names outweighs the privacy interest. Third, Mr. Becker requests that the DOE provide a description of documents numbered as 4, 5, 22-36, 40, 42-45, 48, 49, 53-60, 62-72, 79, 83, 86-97, 99-100, 104, 111, 114, 124, 131, 135, 143, 147- 149, 150-169, and 171-175. (1) Finally, Mr. Becker requests that

the DOE release copies of documents referred to in document 81, since he believes these documents are responsive to his FOIA request. (2)

A representative of the DOE IG's office has informed us that the office mistakenly withheld two responsive documents: document 73 and the "Executive Brief Complete" (referred to in document 81). The DOE IG's office is currently reviewing these documents and will either release them to Mr. Becker or provide an explanation for withholding. The DOE IG's office also provided information to us concerning the other documents referred to in document 81, which Mr. Becker claims are responsive to his FOIA request. Specifically, the DOE IG's office confirmed that one of these documents, referred to as "Agent Notes," was destroyed, pursuant to DOE IG's standard procedures, prior to Mr. Becker's FOIA request. The DOE IG's office also stated that another document referred to in document 81 by the title, "Criminal and Civil Referrals, Responses and Results Documented in Case File," is document 143. The DOE IG's office confirmed that it returned document 143 to the Department of Justice, where the document had originated, prior to Mr. Becker's FOIA request. See Record of July 20, 2000 Telephone Conversation between Linda Duvall, FOIA and Privacy Act Division, and Leonard M. Tao, OHA Staff Attorney. Accordingly, the remaining documents referred to in document 81 are not subject to Mr. Becker's FOIA request.

We have confirmed, as mentioned in the Authorizing Official's May 23, 2000 letter, that various DOE offices have not yet completed determinations concerning the releasability of responsive information. Id. Since final determinations have not been made on the documents of which Mr. Becker has requested descriptions, we will dismiss the portion of this appeal concerning documents 22-28, 30, 32-36, 40, 42-45, 48, 49, 53-60, 63- 67, 83, 86-97, 99-100, 104, 111, 114, 124, 131, 135, 147-149, 150-169, and 171-175 as not yet ripe for adjudication. See 10 C.F.R. § 1004.8(a).

A. Exemption 5

We will first consider Mr. Becker's Exemption 5 arguments concerning documents 84, 129 and 141. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified several privileges that fall under this definition. These privileges include the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. The ultimate purpose of the exemption is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. Sears, 421 U.S. at 151. See EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (Mink).

In order for Exemption 5 to shield a document, it must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The Authorizing Official, pursuant to Exemption 5, redacted information from documents 84, 129 and 141. We reviewed the redacted information and found that it contains preliminary estimates of time needed to conduct the investigation, contemplated investigative actions, and various editorial comments concerning the IG investigation. We find that the redacted information in these documents is both predecisional and deliberative pursuant to Exemption 5. Furthermore, these redactions do not contain any segregable factual information. Accordingly, we must deny the portion of Mr. Becker's appeal relating to these documents.

B. Exemption 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3; Stone v. FBI, 727 F. Supp. 662, 663-64 (D.D.C. 1990).

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard is entitled to protection. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, the OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995) (Ortiz), and cases cited therein. In the present case, the OIG documents were created pursuant to an investigation of alleged misconduct concerning the Westinghouse Savannah River Company. Consequently, the OIG documents at issue were created for a law enforcement purpose.

1. The Privacy Interest

We have carefully reviewed the redactions the Authorizing Official made in 33 documents pursuant to Exemptions 6 and 7(C). The Authorizing Official redacted from the documents the names of individuals who were contacted in the OIG's investigation. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY- TV) (withholding identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990). The Authorizing Official states that the individuals named in the responsive documents have a privacy interest in remaining "free from intrusions into their professional and private lives." We agree that there is a privacy interest that protects these individuals who provided information to government investigators.

2. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that “sheds light on an agency’s performance of its statutory duties.” Reporters Committee, 489 U.S. at 773. See Marlene Flor, 26 DOE ¶ 80,104 at 80,511 (1996) (Flor). The requester has the burden of establishing that disclosure would serve the public interest. Flor, 26 DOE at 80,511 (quoting Carter v. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987)). In his Appeal, Mr. Becker states that release of the withheld names could help his attempt to recover money on behalf of the United States. He argues that the people whose names have been withheld could provide testimony to support his qui tam action.

We find that Mr. Becker has not met his burden of demonstrating that disclosure of the withheld names would serve the public interest. Courts have held that unsubstantiated allegations of an agency’s misconduct are insufficient to establish a public interest in disclosure. In Spirko v. United States Postal Service, 147 F.3d 992 (D.C. Cir. 1998), the D.C. Circuit Court of Appeals found no public interest in names and information

pertaining to suspects and law enforcement officers absent any evidence of alleged misconduct by the agency. Moreover, the D.C. Circuit Court of Appeals found that “when . . . governmental misconduct is alleged as the justification for disclosure, the public interest is ?insubstantial’ unless the requester puts forward ?compelling evidence that the agency denying the FOIA request is engaged in illegal activity’ and shows that the information sought ?is necessary in order to confirm or refute that evidence.’” Davis v. United States Department of Justice,968 F.2d 1276, 1282 (D.C. Cir. 1992) (quoting Safecard at 1205-06). In his Appeal, Mr. Becker merely speculates that agency misconduct exists to form the basis of his qui tam action. Moreover, he can only speculate that the people whose names were withheld might provide supportive testimony in his litigation against the federal government. Such speculation is not enough for us to find that the release of these names would shed light on the agency’s performance of its statutory duties. Accordingly, we agree with the Authorizing Official and find that there is a minimal public interest in the disclosure of the material withheld pursuant to Exemption 6 and 7(C).

3. The Balancing Test

In determining whether documents may be withheld pursuant to either Exemption 6 or 7(C), courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. Reporters Committee, 489 U.S. at 762 (1989); Safecard. We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is no more than a minimal public interest in the release of the names of the investigative sources. Therefore, we find that the public interest in disclosure of the information withheld pursuant to Exemption 6 or 7(C) from documents

1, 8, 10- 11, 14, 16, 37-39, 41, 46, 52, 75, 77-78, 81-82, 85, 98, 103, 129-130, 132-134, 141-142, 144-146, 170, 176 and 204 is outweighed by the real and identifiable privacy interests of the named individuals.

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). The Authorizing Official withheld, for the most part, only names and identifying information. However, during our review of the redacted documents, we found information withheld in document 75 (a one page document) that is segregable and factual. Accordingly, we will remand this document to the OIG to either release additional factual information from document 75 or provide a detailed explanation for withholding. We affirm the Authorizing Official's findings concerning the remaining documents withheld pursuant to Exemption 6 or 7(C).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal Martin Becker completed filing on June 27, 2000 (Case Number VFA-0588) is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Principal Deputy Inspector General of the Office of the Inspector General of the Department of Energy to either release documents 73, 75, and the "Executive Brief Complete" (referred to in document 81) or provide a detailed explanation for withholding information.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 26, 2000

(1)Since the filing of Mr. Becker's appeal, Mr. Becker has informed us that he has received copies of documents 29, 31, 62, 79, 143 and descriptions of documents 4, 5, and 68-72. Since Mr. Becker requested descriptions of these documents and the DOE complied, we will not conduct a further review regarding these documents.

(2)Mr. Becker also states that the DOE failed to perform an adequate search in that the DOE did not provide him an allegedly responsive DOE IG report, ER-B-98-02. Mr. Becker is correct in so far as that document was not provided to him. However, we find that this is not evidence of an inadequate search. The DOE IG representative informed us that the Authorizing Official did not provide the audit report to Mr. Becker because the report did not refer to any of the line item information Mr. Becker requested. Thus, the Authorizing Official did not find that the report was responsive to Mr. Becker's request. See Record of July 20, 2000 Telephone Conversation between Linda Duvall, FOIA and Privacy Act Division, and Leonard M. Tao, OHA Staff Attorney.

Case No. VFA-0589, 28 DOE ¶ 80,107

August 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Donald R. Patterson

Date of Filing: June 23, 2000

Case Number: VFA-0589

On June 23, 2000, Donald R. Patterson (Patterson) filed an Appeal from a determination issued to him in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on May 23, 2000 by the Chicago Operations Office (DOE/CO). This Appeal, if granted, would require that DOE/CO release responsive documents and grant Patterson a fee waiver.

I. Background

On May 10, 2000, Patterson submitted a FOIA request to DOE/CO for a copy of "all government owned records relating to any alleged or actual incidents of reprisal against any [Argonne National Laboratory] ANL employees for 'whistleblowing.'" Letter from Patterson to Linda Rohde, FOI Officer, DOE/CO (May 10, 1000) (Request). Patterson further stated that he sought the information for personal use, and requested a fee waiver for the request. In the Request, Patterson addressed four factors that DOE/CO had previously advised him would be considered in granting a fee waiver. First, he explained that his request concerned the operations and activities of the government, since he sought information about DOE and a DOE contractor, ANL. Second, he wrote that the information would contribute to an understanding of how DOE investigates charges of whistleblowing and complaints of contractor retaliation against the whistleblower. Third, according to Patterson, the information would contribute to an understanding by the general public of the subject matter of the request. He states that he planned to present the information to elected representatives and testify at congressional hearings, if provided the opportunity. Request at 3. Finally, Patterson alleged that the disclosure was likely to contribute significantly to public understanding of government operations because "public understanding of the means that government takes to assure the safety of contractor employees is of utmost significance." *Id.* at 3. Patterson further stated that he would disseminate the information to the general public by submitting it to organizations dedicated to publicizing retaliation by DOE against DOE contractor employees. He stated that he intended to encourage the groups to post the documents on the Internet, and if they did not, he would create his own web site and post the documents there. *Id*. at 4-5.

On May 23, 2000, DOE/CO issued a determination letter, and denied Patterson's request for a fee waiver. DOE/CO indicated that it denied the request because Patterson did not demonstrate the capability of widely disseminating this information and because he failed to demonstrate any specialized knowledge that could enable him to effectively convey the information to others. Letter from DOE/CO to Patterson (May 23, 2000) (Determination). On May 30, 2000, Patterson wrote to DOE/CO requesting further explanations of its denial. DOE/CO sent Patterson an electronic mail message advising him to review the

determination letter, insisting that the determination letter adequately explained the reasons for denying his request. On June 23, 2000, Patterson filed this Appeal. Letter from Patterson to Director, OHA (June 23, 2000) (Appeal).

II. Analysis

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552 (a) (4)(A)(I); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in considering whether to waive fees. The two prongs can be summarized as the "public interest prong" and the "commercial interest" prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998) (*Murphy*). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government. 5 U.S.C. § 552 (a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. *Id.* The requester bears the burden of satisfying the two-prong test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997) (*Ott*).

In order to determine whether the requester meets the first prong (i.e., whether disclosure will contribute significantly to public understanding of government operations or activities) the DOE considers four factors:

> (A) The subject of the request: whether the subject of the requested records concerns the operations or activities of the government;
>
> (B) The informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of government operations or activities;
>
> (C)The contribution to an understanding by the general public of the subject likely to result from disclosure;
>
> (D) The significance of the contribution to public understanding: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. §1004.9(a) (8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997).

In denying Patterson's fee waiver request, the DOE/CO FOIA Officer opined that Patterson had not demonstrated a capability of widely disseminating this information, and that he had failed to demonstrate any specialized knowledge that would enable him to effectively convey this information to others. Determination at 1. Thus, DOE/CO concluded that Patterson failed to satisfy factor C, and based its determination on that conclusion. After reviewing Patterson's submission and the relevant case law, we find that DOE/CO properly denied Patterson's request for a fee waiver.

Factor C

This test requires us to consider whether the requested documents would contribute to the understanding of the subject by the public. *Ott*, 26 DOE at 80,780. To satisfy this factor, the requester must have the ability and intention to disseminate this information to the public. *Id.; see also STAND, Inc.*, 27 DOE ¶ 80,250 (1999) (*STAND*); *Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

Patterson states that he will use the disclosed information as "the basis for written and verbal communications with other members of the public on the topic of the government's response to allegations of retaliation against ?whistleblowers' . . . ." Request at 3. He plans to present the information to elected representatives, members of Congress (if provided the opportunity to testify at hearings), and public interest organizations, encouraging them to post the documents on their web sites. *Id*. at 4. Further, Patterson indicates that he would create his own website if the public interest organizations were not receptive to the information he offered. *Id*.

We find that Patterson has not provided sufficient evidence of his ability and intention to disseminate this information to the public. Courts have previously stated that passively making information available to anyone who might seek access to it does not meet the burden of demonstrating that the material will be disseminated to the public. *See Van Fripp v. Parks*, No. 97-0159, slip op. at 12 (D.D.C. Mar. 16, 2000) (emphasizing that placement in library amounts to a passive method of distribution that does not entitle requester to a fee waiver); *Klamath Water Users Protective Ass'n v. United States Dep't of the Interior*, No. 96-3077, slip op. at 47 (D.Or. June 19, 1997) (finding placement in library insufficient to merit a fee waiver). Merely placing the data in the public domain without analysis or explanation does not contribute to the public's understanding. *S.A. Ludsin & Co. v. SBA*, 1997 U.S. Dist. LEXIS 8617, at *16. Patterson's plan to post information on a website or submit that information to a public interest group is a passive method of placing the information in the public domain, compared to, for instance, distributing the material in a newsletter or journal. *See, e.g., STAND*, 27 DOE at 80,888. In addition, we have stated in a previous case involving the same requester that there is no indication that Patterson's elected representatives would be interested in conveying the information to a broad audience. *See Donald Patterson*, 27 DOE ¶ 80,267 (2000) (*Patterson*). Therefore, we find that Patterson has not satisfied the factor C test. The inability to disseminate information, by itself, is sufficient basis for denying a fee waiver request. *See Patterson*, 27 DOE at 80,927 (citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)). Accordingly, we shall deny this Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Donald Patterson on June 23, 2000, OHA Case Number VFA-0589, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 3, 2000

Case No. VFA-0591, 28 DOE ¶ 80,105

July 31, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Niagara Mohawk Power Corporation

Date of Filing: July 3, 2000

Case Number: VFA-0591

On July 3, 2000, Niagara Mohawk Power Corporation (NMPC) filed an Appeal from a determination the Energy Information Administration (EIA) of the Department of Energy (DOE) issued to it on June 1, 2000. In that determination, EIA released redacted versions of copies of Form EIA-867 submitted by certain firms.(1) NMPC had requested this information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

I. Background

In a March 3, 1995 request for information, NMPC sought copies of Form EIA-867 that certain firms had filed and any predecessor forms filed by those same firms for any year prior to 1995. Request Letter dated March 3, 1995, from William J. Mertens, Swidler & Berlin, Chartered, Attorney for NMPC, to Freedom of Information Act Officer, DOE. On May 19, 1995, after EIA had failed to issue a determination within the regulatory deadline, NMPC filed suit in the United States District Court for the District of Columbia, where summary judgment was granted to the DOE and the interveners. Appeal Letter dated June 30, 2000, from William J. Mertens, Esq., Asbill, Junkin, Moffitt & Boss, Chtd., Counsel for NMPC, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter). Following NMPC's appeal of the summary judgment order, the United States Court of Appeals for the District of Columbia Circuit granted the appeal and remanded the matter to the District Court for a determination on the merits. *Niagara Mohawk Power Corp. v. Department of Energy*, 169 F.3d. 16 (D.C. Cir. 1999). As a result of an mediation process at the District

Court, the parties agreed to stay the case until the completion of the administrative proceedings at DOE, specifically EIA's issuance of a determination letter on the NMPC FOIA request and any subsequent appeal to the OHA by NMPC. *Niagara Mohawk Power Corp. v. Department of Energy*, Dkt. No. 95CV00952 (D.D.C. February 23, 2000). On June 1, 2000, EIA issued the determination letter releasing the redacted copies of the Form EIA- 867 to NMPC. Determination Letter dated June 1, 2000, from John Geidl, Director, Office of Coal, Nuclear, Electric, and Alternate Fuels, EIA, DOE, to William J. Mertens, Esq. Asbill, Junkin, Moffitt & Boss, Chtd., Counsel for NMPC (Determination Letter). NMPC then filed this Appeal.

In the June 1, 2000 determination, EIA withheld portions of Form EIA-867 submitted by Ellicottville

Energy, Inc. (Laidlaw), General Mills, Inc. (General Mills), Oxbow Power of Tonawanda New York, Inc. (Oxbow), and Sithe Independence Station (Sithe) (collectively the submitters).(2) The four submitters involved in this Appeal all operate cogeneration plants. A cogeneration plant produces electricity for its own use and sells any extra electricity to customers, such as NMPC. In this case, the submitters are involved in manufacturing lumber and food products and in agriculture production. Sithe operates a cogeneration plant that supplies electricity and produces steam for a thermal host, *i.e.*, a company which purchases the steam to operate its business.

In its determination, EIA rejected NMPC's claim that the same or substantially similar information to that withheld is already in the public domain. Determination Letter at 1. EIA also determined that the withheld information is confidential because release of this information would cause competitive harm to the four submitters by revealing plant operational processes and costs of service and profit margins. The EIA states that releasing the information would put the submitters at a competitive disadvantage in contract renegotiations involving the sale of power to NMPC. Also, the EIA states that the submitters would be at a competitive disadvantage in their respective industries and as energy producers in direct competition with utilities such as NMPC. *Id.* at 2-3. In addition, EIA states that release of the information would have a chilling effect on its ability to obtain the information in the future. *Id.* at 3. Finally, EIA states that discretionary disclosure of this information would not be in the public interest. *Id.*

In its Appeal, NMPC argues that EIA's withholding of the information on the grounds that release of the information would negatively impact its ability to obtain the information in the future is "conclusory" and "failed to heed the express holding of the Court of Appeals." Appeal Letter at 3-4. Secondly, NMPC claims that the Court of Appeals found there is no actual competition between the submitters and NMPC. *Id.* at 4-5. Further, NMPC argues that even if actual competition exists, because the information is historical in nature, *i.e.*, from 1995 and earlier, substantial competitive injury to the submitters is unlikely. *Id.* at 5. NMPC also reasserts that the information has already been released in the Qualifying Facility Monitoring Report which the submitters are required to submit to NMPC under New York law. It asserts that the data in this report and in EIA Form-867 are identical or equivalent and DOE has already conceded that the information was substantially identical. *Id.* NMPC also argues that the Report is not confidential. *Id.* at 8.

II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) "commercial" or "financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) *(Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879. Because Form EIA-867 is a mandatory filing under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was "involuntarily" submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information

must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982). The specific information submitted on Form EIA-867 by Laidlaw, General Mills, Oxbow, and Sithe is their respective facility's generator rating in kilowatts, fuel information, thermal and generation information, and electric generator information. This information is commercial information. Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979). As we stated above, all of the submitters of the requested forms are either corporate entities or partnerships and, therefore, meet this requirement.

Finally, to qualify for Exemption 4 protection under *National Parks*, information must also be "confidential." Withheld information is "confidential" if it meets the test set out in *National Parks*. In this case, the withheld information would be considered "confidential" if release would either (a) cause substantial harm to the competitive position of submitters or (b) impair EIA's ability to obtain the necessary information in the future. In reviewing whether release would cause substantial competitive harm we analyze two elements: 1) the submitters must face actual competition and 2) disclosure would likely cause substantial competitive injury. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*).

The first question is whether the submitters face actual competition. We believe that the submitters have shown that they do face competition. However, they have employed different methods to demonstrate competition. Laidlaw has convinced us that release of the information would cause it competitive harm within its primary industry, the manufacturing of lumber and wood products. In contrast, the other submitters have shown that release of the information would cause competitive harm within their secondary industry, the sale of electric power, in which they are in direct competition with NMPC.

Laidlaw is a lumber company involved only secondarily in the electric industry. It is in direct competition with other entities engaged in the manufacturing of lumber and wood products other than furniture. Its competitors include Weyerhaeuser and Georgia Pacific. Finding that competition exists, we need to address whether the firm would face *substantial* competitive harm if the requested information were released. Laidlaw has provided sufficient information to show that release of the information would enable its competitors in the lumber industry to make accurate estimates of its energy consumption and, thereby, gain insight into its custom lumber drying operations. Letter dated March 17, 2000, from Craig M. Indyke, Esq., Read and Laniado, LLP, attorney for Laidlaw, to John Colligan, EIA. Release of the information would allow its competitors to discover its unique method of drying lumber and to replicate its methods. Laidlaw's competitors should not be permitted to gain the advantage of its experience at little effort or expense. To do so would tend to discourage companies from developing better processes and products. Therefore, we believe that Laidlaw would suffer substantial competitive harm within the lumber industry were the information on Form EIA-867 released to NMPC.

Both Sithe and Oxbow have argued that disclosure of the requested information would cause them competitive harm in electricity sales made in competition with NMPC and other suppliers. With the promulgation of Rule 888 and 889, the Federal Energy Regulatory Commission (FERC) opened access to electric transmission lines. Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg 21539 (1996); Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21737 (1996). The new structure of the wholesale market for power in New York State allows for market-based rates for sales of energy through a competitive bid-based market. Comment Letter at 2, dated March 21, 2000, from Curtis P. Lu, Latham & Watkins, Attorney for Sithe/Independence Power Partners, L.P. , to Robert Schnapp, Director, Electric Power Division, EIA, DOE (Sithe Comment Letter); Comment Letter at 1, dated March 7, 2000, from David W. Clark, Counsel, Oxbow, to Robert Schnapp, Director, Electric Power Division, EIA, DOE. According to Sithe, market participants in this highly competitive market can submit daily bids to the New

York Independent System Operator (NYISO) to sell energy at market-based prices. Sithe Comment Letter. Thus, success for market participants hinges on who can offer the most competitive prices. *Id.* at 4. Again, finding competition in this industry, we must ascertain whether release of the withheld information would cause substantial competitive harm.

Release of the requested information would allow NMPC and other competitors in the energy market to determine the submitters' costs of energy production and make an accurate estimate of their operating margins. With this information, a competitor of Sithe or Oxbow could accurately estimate their bids and thereby have a significant competitive advantage over each firm in future bids. *Id.* Neither Laidlaw nor General Mills made this specific argument. However, since the spot market in New York is open to any firm that generates electricity, we believe this argument is equally applicable to them.

We have also considered the following three arguments that NMPC has raised in its Appeal. NMPC's first argument concerns EIA's determination that disclosure of this information would put the four submitters at a competitive disadvantage when they renegotiate contracts with NMPC. EIA determined that disclosure of the requested information would reveal the submitters' costs of production and allow NMPC to calculate accurate estimates of their operating margins. EIA found this information would give NMPC an advantage in its contract renegotiations with the submitters since NMPC would have confidential information normally not known to an adversary in a negotiation. However, NMPC argues that the potential risk of competitive harm that might result was too remote in the occasional renegotiation of long-term contracts. As the court in *Niagara Mohawk* pointed out, *National Parks II* looked at the long-term nature of the contracts involved in that case--30, 20, and 5 years--and determined that there would not be substantial commercial harm in releasing the information. *National Parks II*, 547 F.2d at 681 n.28. Similarly, the contracts involved here are of long duration. We contacted all of the submitters and determined that their electricity purchase contracts with NMPC are 15 and 30 years in length.(3) We, therefore, do not agree with this aspect of EIA's determination.

We must also address NMPC's argument that release of the historical data requested in the case will not cause harm. Appeal Letter at 5. We disagree. The information contained in the copies of Form EIA-867 that the four submitters have filed is only approximately five years old and does not change significantly from year to year. Memorandum of meeting held July 11, 2000, between Janet R. H. Fishman, Attorney-Examiner, OHA, Richard A. Cronin, Assistant Director, OHA, and William M. Schwartz, Attorney, OHA, and John C. Geidl, Director, Office of Coal, Nuclear, Electric and Alternate Fuels, EIA, Robert M. Schnapp, Director, Electric Power Division, EIA, and John G. Colligan, EIA. Therefore, disclosing this five to eight year old information to NMPC would in essence be disclosing current information to NMPC.

Finally, NMPC argues that the requested information is already in the public domain, because the same information is collected periodically on the New York Public Service Commission (PSC) Qualifying Facility Monitoring Report (QFM). EIA determined that the information is not the same and further, that the QFM Report is not public information. We agree with EIA that the QFM Report is not public. Each Qualifying Facility–in this case, Laidlaw, General Mills, Oxbow, and Sithe-- sends a copy of the form to the relevant electric utility--in this case, NMPC. The Report is not filed with the PSC nor is it made public in any way. Simply because NMPC may have the ability to make the information public does not mean that the information is public. As Laidlaw stated in its comments, it is highly unlikely that one of its competitors would approach NMPC for a copy of the QFM Report, and even more unlikely that NMPC would provide it to the competitor. Comment Letter dated July 17, 2000, to Director, OHA, DOE, from Craig M. Indyke, Read and Laniado, LLP, Attorney for Laidlaw. Because we find that the QFM Report is not in the public domain, we find that confidentiality of the information in the report has not been waived. We need not address whether the information contained in it is the same as that on the requested EIA form.(4)

III. Conclusion

EIA determined that release of the requested information would put the submitters at a substantial competitive disadvantage. We agree. The submitters would be competitively harmed either in their primary industry or in direct competition with NMPC and others for the sale of electricity in the deregulated energy market in New York State. However, we do not agree with EIA that competitive harm may also occur in the renegotiation of contracts between the submitters and NMPC. Finally, despite NMPC's assertions, we have determined that the requested information, though at least five years old, reflects current data and that it is not already in the public domain. Therefore, we find that the information EIA withheld from NMPC is exempt from mandatory disclosure under Exemption 4. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See e.g., Vladeck, Waldmas, Elias & Engelhard, P.C.,* 27 DOE ¶ 80,230 at 80,835 (1999). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. Consequently, we uphold EIA's June 1 determination and shall deny the NMPC Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Niagara Mohawk Power Corporation, on July 3, 2000, Case No. VFA-0591, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 31, 2000

(1)NMPC originally requested copies of all the Forms EIA-867, titled "Annual Nonutility Power Producer Reports," submitted by any facility listing NMPC "as the electric utility which serves or will serve the facility, or as a utility to which the facility has delivered or will deliver electricity." Request Letter dated March 3, 1995, from William J. Mertens, Swidler & Berlin, Chartered, Attorney for NMPC, to Freedom of Information Act Officer, DOE. By the time of this Appeal, NMPC was requesting copies of the Form EIA-867 submitted by only four firms.

(2)We find these entities are either corporations or partnerships. At least two of these companies have had a name change since NMPC filed its original request. The names we have listed are those on Form EIA-867. Ellicottville Energy, Inc., was sold to Laidlaw Energy & Environmental, Inc. Sithe is referred to in many different ways in the various filings in this case. We will refer to it as Sithe.

(3)Sithe's contract, although of long duration, has a thirty day written notice of cancellation clause. Sithe Comment Letter at 2.

(4)Since we have found that the requested information can be withheld under the first prong of the *National Parks* test, whether its disclosure would cause competitive harm, we need not address the second prong of the *National Parks* test, whether release of the information will impair the government's ability to acquire similar information in the future.

Case Nos. VFA-0592 and VFA-0594, 28 DOE ¶ 80,108

August 8, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioners: Virginia Johnson

Terrence Willingham

Dates of Filing: July 5, 2000

July 19, 2000

Case Numbers: VFA-0592

VFA-0594

On July 5, 2000, Virginia Johnson filed an Appeal from a determination by the Department of Energy Headquarters Freedom of Information and Privacy Group (DOE/FOI). On July 19, 2000, Terrence Willingham filed an Appeal from a determination by DOE/FOI. These determinations responded to requests for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

The FOIA generally requires that documents held by the federal government be released to the public upon request. 5 U.S.C. ' 552(a)(6)(A). However, Congress has provided nine exemptions to the FOIA setting forth the types of information agencies are not required to release. 5 U.S.C. ' 552(a)(6)(B). Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. ' 1004.1.

I. Background

In a request dated May 18, 1999, Ms. Johnson requested “information from the [DOE]’s Automated Complaints Tracking System regarding complaints filed, processed, investigated, settled or adjudicated within the DOE,” including

- all final agency decision and/or settlements, including all awards of monies, promotions, backpay, payment of medical and/or legal expenses, and all compensatory damages
- all discrimination complaints filed by and settled in favor of DOE supervisors and DOE managers
- a copy of the complete Settlement Agreement entered into between Patricia Howse-Smith and the DOE.

Appeal at 1.

In a July 9, 1999 request, Mr. Willingham sought “copies of settlement agreements the Department of Energy entered into [from] 1992 to the present.” Letter from Terrence Willingham to Abel Lopez, DOE/FOI (July 9, 1999).

In response to the requests, DOE/FOI provided the following categories of documents to Ms. Johnson and Mr. Willingham,(1) deleting from the documents certain information under Exemption 6 of the FOIA, 5 U.S.C. ' 552(b)(6).

1. Legend of explanation of closures associated with each case. 1 page
2. Listing of cases through July 26, 1999. 62 pages (Information deleted under Exemption 6)
3. Listing of complaints settled by case number, date closed, back pay award and corrective action. 11 pages (Information deleted under Exemption 6)
4. Settlement agreements from 1992 to 1999. 268 pages (Information deleted under Exemption 6)

Letter from Abel Lopez, Director, DOE/FOI, to Virginia Johnson (June 2, 2000); Letter from Abel Lopez, Director, DOE/FOI, to Terrence Willingham (June 2, 2000).

In her Appeal of DOE/FOI’s response, Ms. Johnson raises a number of issues. First, she requests a detailed justification of the deletion of material from the documents under Exemption 6. Second, Ms. Johnson notes that “Enclosure 3 [an output of data from the complaints tracking system] contains a total of 231 listed settlement agreements,” and she was provided copies of only “70 settlement agreements from 1992 through 1999.” Third, she requests that she “be provided in writing an explanation of Enclosure 1, . . .” Finally, she states that she was never provided “all discrimination complaints filed by and settled in favor of DOE supervisors and DOE managers,” as she specifically requested. Johnson Appeal at 1-2. Mr. Willingham raises an issue similar to one brought forth by Ms. Johnson, complaining that “only about one third of [settlement agreements in cases listed as settled in the complaints tracking system] were provided to me.” Willingham Appeal at 1.

II. Analysis

A. DOE/FOI's Withholding of Information Under FOIA Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. ' 552(b)(6); 10 C.F.R. ' 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Fin. Management Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-70.

In its June 2 determinations, DOE/FOI explained,

> The names and other identifying information of individuals who have filed complaints with

> the Department have been withheld under Exemption 6. Disclosure of this information could subject the individuals to embarrassment, and unwanted communications and attention that would intrude into their personal lives. Moreover, disclosure of this information will not reveal any aspect about the operations and activities of the Government.

Letter from Abel Lopez, Director, DOE/FOI, to Virginia Johnson (June 2, 2000); Letter from Abel Lopez, Director, DOE/FOI, to Terrence Willingham (June 2, 2000).

We agree with the justification given by DOE/FOI for withholding identifying information from the documents it provided to the requesters. The federal courts have found a significant privacy interest in the names of federal employee parties to employment disputes. Rothman v. USDA, No. 94-8151, slip. Op. at 6 (C.D.Cal. June 17, 1996) (entire settlement agreement related to charge of employment discrimination that "could conceivably lead to embarrassment or friction with fellow employees or supervisors"); cf. Norwood v. Federal Aviation Admin., 993 F.2d 570 (6th Cir.) (identifying information from documents related to air traffic controllers strike).

As for whether release of the information withheld would further the public interest by shedding light on the operations and activities of the Government, we note that the information already released to the appellants clearly sheds light on the operation and activities of the Government as a respondent to discrimination complaints. However, the information withheld from those documents, the names of the individuals who filed complaints and other information that could identify them, says little if anything additional about the activities of the Government.

Ms. Johnson argues that releasing the location of the complainant within the DOE complex would be unlikely to identify the complainant. Memorandum of telephone conversation between Virginia Johnson and Steve Goering, OHA (July 26, 2000). However, if that information were in the hands of a fellow employee at the same DOE location, the employee very likely could use the information contained in the settlement agreement to identify the complainant. Moreover, the location of the complainant within the DOE complex adds no significant information regarding the activities of the Government, and thus does not appreciably further the public interest. Looking at the information withheld in this case, weighing the significant privacy interests of the complainants at stake on one hand and the slight public interest on the other, we conclude that DOE/FOI properly applied Exemption 6.

B. Adequacy of DOE's Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE & 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

We contacted the DOE's Office of Civil Rights within the Office of Economic Impact and Diversity (DOE/ED), which conducted the search for responsive documents. They informed us that settlement agreements that would have existed at the time of the requests at issue would have been found in the complaint files maintained by that office. Electronic mail from William Garrett, DOE/ED, to Steven Goering, (July 25, 2000). DOE/ED states that all settlement agreements kept in those files were provided to the requesters. Electronic mail from William Garrett, DOE/ED, to Steven Goering, (July 26, 2000). DOE/ED further explained,

> The fact that there may be 144 complaints for which no settlement agreements were provided may be attributable to several reasons: (1) the period of time involved, including a time before our record keeping was exact; (2) the fact that some of the complaints involved Field cases for which copies of settlement agreements may not have been provided [to DOE Headquarters]; and (3) the fact that some of the complaints may have been settled by [DOE's Office of General Counsel] for which copies of the settlement agreements were not provided.

Electronic mail from William Garrett, DOE/ED, to Steven Goering, (July 25, 2000).

This explanation by DOE/ED might well account for the fact that the office does not have copies of a number of settlement agreements, despite the fact that its own database lists the cases as settled. What remains unexplained, despite our offering DOE/ED ample opportunity to provide an explanation, is that some of the cases involved complaints filed *against DOE/ED* which were settled *as recently as the month prior to Ms. Johnson's request*. It is baffling that DOE/ED would not have a copy of a settlement agreement in such a case. More troubling is the fact the DOE/FOI informed us that DOE/ED told it, while the requests were in process, that DOE/ED would not provide certain settlement agreements to DOE/FOI for processing because of promises of confidentiality in cases involving DOE/ED employees.(2)

We therefore will remand this case to DOE/FOI for further processing. First, DOE/FOI should refer the matter back to DOE/ED, which must conduct a new search and provide to DOE/FOI unredacted copies of all settlement agreements in its possession, whether or not DOE/ED believes those agreements to be responsive to the Appellants' requests.(3) DOE/FOI can then independently determine which of the agreements provided are responsive to the requests, and release those agreements to the requesters, with information withheld as necessary under applicable FOIA exemptions. Second, if this new search does not account for all cases known to have been settled, DOE/FOI should refer the request to the DOE's Office of General Counsel and appropriate field offices to conduct searches for responsive documents.

C. Remaining Issues Raised on Appeal

Ms. Johnson raises two additional issues in her Appeal. First, she asks for "an explanation of Enclosure 1, the Complaints Tracking System closure legend . . ." Appeal at 1. We consider this outside the scope of the present Appeal, since the FOIA does not "require[] an agency to answer questions . . ." Matthew Cherney, M.D., 27 DOE ¶ 80,239 at 80,857 (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985)). Second, Ms. Johnson states that she was never provided "all discrimination complaints filed by and settled in favor of DOE supervisors and DOE managers," as she specifically requested. Appeal at 1-2. We note that this particular item of Ms. Johnson's request is confusing, at best, since a case is not typically "settled in favor" of one party. Rather a settlement represents a compromise by parties in lieu of a decision in favor of one of the parties. Thus, on remand, DOE/FOI should consult with Ms. Johnson to clarify this portion of her request.

For the reasons stated above, the present matter will be remanded to DOE/FOI for further proceedings in accordance with the instructions set forth in this Decision.

It Is Therefore Ordered That:

(1)The Appeals filed by Virginia Johnson, Case No. VFA-0592, and Terrence Willingham, Case No. VFA-0594, are granted as set forth in paragraph (2) below, and are in all other respects denied.

(2) This matter is hereby remanded to the Department of Energy Headquarters Freedom of Information and Privacy Group for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3)This is a final order of the Department of Energy from which any aggrieved party may seek judicial

review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 8, 2000

(1). Though Ms. Johnson and Mr. Willingham filed separate requests, DOE/FOI provided the same documents to each requester “as a matter of administrative convenience and discretion . . .” Letter from Abel Lopez, DOE/FOI, to Virginia Johnson (June 2, 2000).

(2). Any promise of confidentiality would be unlikely to override the FOIA. See Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1287 (D.C. Cir. 1983) (“agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality”); Robles v. Environmental Protection Agency, 484 F.2d 843, 846 (4th Cir.1973) ("While, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure."); Ackerly v. Ley, 420 F.2d 1336, 1340 n.3 (D.C. Cir. 1969) (“pledge[s] of confidentiality cannot, in and of themselves, override the Act.”). In any event, the existence of such promises would be a hollow justification for not providing documents, since many, if not most, of the settlement agreements that DOE/ED did provide to DOE/FOI, redacted copies of which were released to the requesters, also contained confidentiality clauses of one form or another.

(3). DOE/ED has informed us that many of the files that would contain settlement agreements have been archived. Electronic mail from William Garrett, DOE/ED, to Steven Goering, (July 25, 2000). On remand, DOE/ED shall either retrieve those files or refer the request for a search at the site where those files are now located.

Case No. VFA-0595, 28 DOE ¶ 80,118

October 19, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Oleta Longmire

Date of Filing: September 28, 2000

Case Number: VFA-0595

This Decision and Order concerns an Appeal that was filed by Oleta Longmire from a determination that the Freedom of Information Officer of the Department of Energy's (DOE) Richland Operations Office (ROO) issued to her. In this determination, ROO stated that it could not locate any documents that were responsive to the request for information that Ms. Longmire filed pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If we were to grant the Appeal, this matter would be remanded to ROO for a new search.

In her FOIA request, Ms. Longmire sought access to her deceased husband's medical records. In its determination, ROO stated that medical records at the site at which Mr. Longmire worked were maintained by the Hanford Environmental Health Foundation (HEHF), and that HEHF had thoroughly searched its records, by name and by social security number, without success. In her Appeal, Ms. Longmire challenges the adequacy of HEHF's search.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to obtain further information about the FOIA request and about the scope of the search, we contacted Ms. Longmire, ROO and HEHF. We were informed that HEHF had conducted computerized searches of all four databases in which responsive documents might have been located, and that no such documents were found. However, we learned that HEHF would not have records for individuals who were employed at Hanford prior to 1965. Ms. Longmire informed us that Mr. Longmire worked at Hanford during 1945 and 1946. (1) We then ascertained that E.I. Dupont de Nemours, Inc. (Dupont) operated the Hanford facility for the federal government during that period, and that if Mr. Longmire's Hanford records still existed, Dupont would have them. See memorandums of September 29, 2000 telephone conversations between Robert Palmer, OHA Staff Attorney, Angela Lowman, ROO, Cheryl Holland, HEHF, and Ms. Longmire.(2) For the foregoing reasons, we conclude that ROO's search for responsive documents was reasonably calculated to uncover the sought materials, and was therefore adequate. We will therefore deny

Ms. Longmire's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Oleta Longmire in Case No. VFA-0595 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 19, 2000

(1)At the time that it performed the search, ROO did not know the dates of Mr. Longmire's employment.

(2)We then informed Ms. Longmire that she could request the records by letter addressed to: E.I. Dupont de Nemours, Inc., Hall of Records, Wilmington, Delaware, 19898.

Case No. VFA-0597, 28 DOE ¶ 80,110

September 6, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Randall Brown

Date of Filing: July 28, 2000

Case Number: VFA-0597

Randall Brown (Brown) filed this Appeal on July 28, 2000, with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that the DOE Ohio Field Office (DOE/Ohio) issued to Brown on July 3, 2000. The determination concerned a request for information that Brown submitted pursuant to the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. If the present Appeal were granted, Ohio would be required to release any responsive material.

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. The Act also requires each agency to permit a requester to gain access to information pertaining to him that is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2 (m).

I. Background

According to Brown, he was a truck driver for a DOE sub-contractor during 1971 and 1972. Brown alleges that he was exposed to radiation during those years as a result of entering controlled areas at several DOE sites and transporting radioactive materials. Telephone Conversation between Brown and Valerie Vance Adeyeye, OHA (August 29, 2000). Brown currently suffers from kidney disease, and at the request of one of his doctors, is seeking information on the extent of his exposure to radiation. Letter from Brown to Senator Jim Bunning (November 26, 1999) (Request). In his Request, Brown had asked for all records relating to Brown located in DOE facilities in Paducah, Kentucky; Portsmouth, Ohio; Oak Ridge, Tennessee; Cincinnati, Ohio; and Erwin, Tennessee. The Senator forwarded the Request to the Environmental Protection Agency (EPA). The EPA informed Brown that it had some responsive material, but advised him that the DOE may have additional

material, and forwarded the Request to DOE headquarters. Letter from EPA to Brown (December 15, 1999). The FOIA/Privacy Act Division of DOE (DOE/HQ) determined that DOE's Oak Ridge Operations Office (DOE/OR) may have some responsive material, and it transferred the Request to the FOIA Officer at that location.

The DOE/OR FOIA Officer found no responsive material, and transferred the Request to the FOIA Officer at DOE/Ohio in a memo dated May 9, 2000. On July 3, 2000, DOE/Ohio sent Brown a determination letter stating that no responsive records could be located. On July 28, 2000, Brown filed this

Appeal.

II. Analysis

We have investigated the searches conducted by DOE/OR and DOE/Ohio in response to Brown's Request. DOE/OR contacted the following DOE locations for responsive material: the K-25 plant, the Y-12 plant, Oak Ridge National Laboratory, Paducah Gaseous Diffusion Plant, Portsmouth Gaseous Diffusion Plant, and plants in Weldon Springs and Newport News, Virginia. DOE/OR also searched medical, personnel, personnel security, and industrial hygiene records for information related to Brown. However, Brown worked for a sub-contractor, and, according to DOE/OR, sub- contractors, not DOE, maintain records on sub-contractor employees. Memorandum of Telephone Conversation between Linda Chapman, DOE/OR, and Valerie Vance Adeyeye, OHA (August 17, 2000). In addition, a dosimetry manager at the former K-25 plant stated that persons entering the controlled areas for a short period of time, such as truck drivers like Brown, were assigned Personnel Nuclear Accident Dosimeters (PNADs). Electronic Mail message from N. Kiely, Dosimetry Manager, East Tennessee Technological Park, to Linda Chapman, DOE/OR (April 24, 2000). However, the PNADs are not normally used to assess radiation dose to an individual, and are read only in the case of a "criticality." *Id.* Thus, while it is common for individuals to be issued PNADs, they are often excluded from radiation monitoring programs. *Id.*

DOE/Ohio informed us that they contacted the Fernald Environmental Management Project (Fernald), the DOE contractor at the Fernald Site. Fernald's Dosimetry Division searched its files against Brown's name and Social Security number, but no responsive records were located. Electronic mail message from Marian Schomaker, DOE/Ohio, to Valerie Vance Adeyeye, OHA (August 15, 2000). As a further search, Fernald also checked Security Vehicle logs from the time period that Brown referenced in his request (1971-72). There was an entry in the logs for two temporary badge numbers assigned to "R. Brown," an employee of a firm called Eck Miller. Fernald concluded that this was not the requester, assuming that Brown had worked for Union Carbide. Nonetheless, Fernald conducted a search using the two badge numbers, but found no related records. According to DOE/Ohio, these are the only locations where responsive records would be found. No other areas maintain dosimetry information. Electronic Mail Message from Marian Schomaker, DOE/Ohio, to Valerie Vance Adeyeye, OHA (August 15, 2000).

To further this investigation, we contacted Brown, who told us that he had indeed worked for Eck Miller in 1971-1972. Memorandum of Telephone Conversation between Brown and Valerie Vance Adeyeye, OHA (August 29, 2000). We informed DOE/Ohio that the requester was in fact the "R. Brown" listed in the log, and the Fernald Records Manager conducted another search of its archives using "R. Brown" and Brown's Social Security number. No responsive material was located other than the logs. Electronic Mail Message from DOE/Ohio to Valerie Vance Adeyeye (August 30, 2000). We have requested that DOE/Ohio send Brown a copy of the logs containing his name.

Based on the foregoing, we conclude that DOE/OR and DOE/Ohio have adequately searched all the systems of records under their control that might reasonably be expected to contain the material sought by Brown. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on July 28, 2000 by Randall Brown, OHA Case No. VFA-0597, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 6, 2000

Case No. VFA-0599, 28 DOE ¶ 80,123

November 2, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner:Martin Becker

Date of Filing: August 2, 2000

Case Number: VFA-0599

On August 2, 2000, Martin Becker filed a Motion for Reconsideration of a Decision and Order that the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) issued on July 26, 2000. Martin Becker, Case No. VFA-0588 (July 26, 2000). The Decision and Order considered Becker's Appeal of a determination the Principal Deputy Inspector General of the Office of the Inspector General of the DOE (IG) issued on May 23, 2000. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

On November 10, 1999, Mr. Becker filed a request with the DOE for copies of any written information related to audits, investigations or inquiries the DOE prepared concerning the use of funds appropriated in line items 92-D-150 and 92-D-153 for use at the Savannah River Site. The Authorizing Official released several documents in their entirety, but redacted information from other documents or withheld documents in their entirety pursuant to Exemptions 5, 6 and 7(C). Letter from Herbert Richardson, Principal Deputy Inspector General, to Martin Becker (May 23, 2000).

In considering Becker's Appeal, we upheld the IG's withholding of information under FOIA Exemption 5. We also affirmed the IG's findings (with the exception of one document that we remanded to the IG for further consideration) concerning the information withheld pursuant to Exemption 6 and 7(C), based upon our determination that the public interest in disclosure of the information was outweighed by real and identifiable privacy interests.

In requesting reconsideration of our decision, Becker argues that “the factual premise for OHA's determination of public interest . . . is incorrect. **I am not in litigation with the agency or the federal government**. The [decision] on page 5 states 'in his litigation against the federal government.'” Motion for Reconsideration at 1. Becker also contends that our decision did not adequately address one portion of his appeal, in which he referred to one of the documents he received, identified as Document 81, and contended that he had not been provided all other documents that were referenced in Document 81.

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. See 10 C.F.R. ' 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. See, e.g., Nathaniel Hendricks, 25 DOE & 80,173 (1996). We will exercise that discretion here to consider the issues raised by the Appellant.

II. Analysis

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. See William Payne, 26 DOE ¶ 80,144 (1996); F.B.I. v. Abramson, 456 U.S. 615, 622 (1982). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. See Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). See Burlin McKinney, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. Ripkis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991)*;* Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); FLRA v. Department of Treasury Financial Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). Reporters Committee, 489 U.S. at 762-770. See generally Ripkis, 746 F.2d at 3 (Exemption 6); Stone v. FBI, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., David Ridenour, 27 DOE ¶ 80,143 (1998); Richard Levernier, 26 DOE ¶ 80,182 (1997); K.D. Moseley, 22 DOE ¶ 80,124 (1992). Because all of the responsive documents that were withheld pursuant to Exemptions 6 and 7(C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

A. Privacy Interests

In identifying the relevant privacy interests in our July 2000 decision we stated,

Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) (Safecard); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (KTVY- TV) (withholding

identity necessary to avoid harassment of individual); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) (Cucarro); James L. Schwab, 21 DOE ¶ 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE ¶ 80,109 (1990).

Martin Becker, Case No. VFA-0588 (July 26, 2000) at 4. Mr. Becker argues that if the IG has withheld the names of federal employees, similar privacy interests would not be implicated by their release. Memorandum of telephone conversation between Martin Becker and Steven Goering, OHA (October 20, 2000). Indeed, some of the identities the IG withheld were those of law enforcement personnel of both the IG and the Department of Justice, though the IG's determination refers only to the withholding of the identities of "subjects, witnesses, sources of information, and other individuals . . . ." Letter from Herbert Richardson, Principal Deputy Inspector General, to Martin Becker at 2. Because the IG's determination does not explain why it withheld information identifying law enforcement personnel, or even specify that it did withhold such information, the determination is not adequate. An explanation of withholding under the FOIA must be "sufficient to allow the requester to understand the determination and if appropriate to formulate a meaningful appeal." See City of Federal Way, 27 DOE ¶ 80,191 at 80,725-26 (1999); Klickitat Energy Partners, 25 DOE ¶ 80,132 (1995); Arnold & Porter, 12 DOE ¶ 80,108 at 80,527 (1984); Exxon Co., USA, 5 DOE ¶ 80,178 at 80,813 (1980); Cities Service Co., 5 DOE ¶ 80,101 at 80,502 (1980). Therefore, we will remand this matter to the IG to either release the names of the federal employees or issue a new determination explaining its continued withholding of those names.(1)

B. Public Interest

Mr. Becker also takes issue with our July 2000 decision's analysis of the public interest, in which analysis we stated that

unsubstantiated allegations of an agency's misconduct are insufficient to establish a public interest in disclosure. In Spirko v. United States Postal Service, 147 F.3d 992 (D.C. Cir. 1998), the D.C. Circuit Court of Appeals found no public interest in names and information pertaining to suspects and law enforcement officers absent any evidence of alleged misconduct by the agency. Moreover, the D.C. Circuit Court of Appeals found that "when . . . governmental misconduct is alleged as the justification for disclosure, the public interest is 'insubstantial' unless the requester puts forward 'compelling evidence that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought 'is necessary in order to confirm or refute that evidence.'" Davis v. United States Department of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (quoting Safecard at 1205-06). In his Appeal, Mr. Becker merely speculates that agency misconduct exists to form the basis of his qui tam action. Moreover, he can only speculate that the people whose names were withheld might provide supportive testimony in his litigation against the federal government. Such speculation is not enough for us to find that the release of these names would shed light on the agency's performance of its statutory duties.

Martin Becker, Case No. VFA-0588 (July 26, 2000) at 5.

However, Mr. Becker's focus on our mischaracterization of his litigation as being "against the federal government" misses the point of the above analysis. Notwithstanding the identity of the defendant in his qui tam action, the finding relevant to our public interest analysis was that Mr. Becker "merely speculates" as to the existence of misconduct and "can only speculate that the people whose names were withheld might provide" testimony supporting his allegations of misconduct. The fact that the misconduct about which he speculates was allegedly on the part of a government contractor, rather than a government agency, or that he brings his qui tam action on behalf of the public, does not make those allegations, or his belief that the individuals whose privacy is at stake would support the allegations, any less speculative.(2)

To assure us that he is not merely speculating, the Appellant provides what he believes are the names of the individuals whose identities have been shielded by redactions, and argues that these individuals "will be able to help the Court [hearing the qui tam case] understand our contentions in a manner helpful to the U.S." Addendum to 8/2/00 Request for Reconsideration (August 14, 2000). However, to determine the

public interest in information requested under the FOIA, we must consider whether the release of the information would "shed[] light on an agency's performance of its statutory duties . . . ." Reporters Committee, 489 U.S. at 773. While the documents the IG already provided to Mr. Becker may in fact shed light on the activities of the IG, little if any additional light would be shed by revealing the individual indentities redacted from the documents. And though the Appellant may believe that knowing those identities could aid him in his qui tam action, and thereby indirectly further the public interest,

whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.

Id. at 771. We therefore agree with the IG that substantial privacy interests clearly outweigh the insignificant public interest in the identities of some of individuals withheld from the requester.

B. Whether the IG's Determination Identified All Responsive Documents

In his Appeal, Mr. Becker referred to one of the documents that the IG provided to him, identified as Document 81 and titled "Case Closure Checklist," and contended that this document referred to other documents that the IG had not provided to him. In our decision, we noted that the IG had inadvertently not provided to Mr. Becker one of the documents referred to in Document 81, an "Executive Brief." Although this document has since been provided to Mr. Becker, he asks for reconsideration because he does not believe our decision adequately addressed whether all documents referred to in Document 81 or attached to that document have been provided to him.

First, we note that Mr. Becker's original request sought "any reports, summaries or other written reflections of any audits, investigations or inquiries, prepared by the DOE IG, DOE CFO or any other authorized DOE component concerning use of funds appropriated in Line-Items 92-D-150 and 92-D-153 for use at the Savannah River Site." The fact that Mr. Becker may have now identified additional documents that are referenced in the documents the IG provided to him does not necessarily mean that these additional documents should have been identified by the IG or provided to Mr. Becker in response to his original request. For example, there may be documents referred to in Document 81 that fall outside the scope of Mr. Becker's original request, and Mr. Becker certainly may request those documents through a separate FOIA request. However, the relevant question for purposes of this decision is whether the IG conducted an adequate search for documents responsive to Mr. Becker's original request and identified to the Appellant each of the documents it located.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE & 80,152 (1995). Nonetheless, "the standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

We therefore have contacted the IG and obtained information from the individual responsible for conducting the search. She informed us that she first searched the IG's case tracking database, using as search terms the two line items specified in Mr. Becker's request. This search did not reveal any cases. The IG then contacted Mr. Becker to clarify what he was looking for, and was thereby able to identify two case files, Nos. I98SR009 and I96SR026 (corresponding to IG investigations of complaints filed by Mr. Becker). The entire contents of both of these files were considered responsive to Mr. Becker's request, and all documents in these files were identified to Mr. Becker in the IG's response to his request.

Subsequently, the IG provided to Mr. Becker printouts from the case tracking database itself, including the "Executive Brief" referred to in Document 81. The IG has confirmed that the case files and database records corresponding to the two case numbers would be the only locations of files responsive to Mr. Becker's request. Memorandum of telephone conversation between Jacqueline Becker and Linda Duvall, IG, and Steven Goering, OHA (September 6, 2000).

Based on the above description, we conclude that the IG's search was reasonably calculated to uncover the records sought by Mr. Becker. Indeed, the IG's initial search of its case tracking database would have been adequate. Barbara Schwarz, 27 DOE ¶ 80,245 at 80,874 (1999). And yet the IG went beyond this by consulting with the requester to identify the specific case files in which he was interested. The IG has also assured us that all documents contained in the case files and the tracking database have been identified to Mr. Becker, and we have no reason to believe otherwise.

In sum, we find that the IG conducted an adequate search for documents responsive to Mr. Becker's request and identified to him all documents that it located. We also find as we did in our earlier decision that the IG properly weighed the public and privacy interests at stake in deciding to withhold identifying information of private citizens under Exemption 7(C). However, we will remand this matter to the IG to issue a new determination to the requester releasing the information identifying federal employees or explaining its continued withholding of that information. In all other respects, the present Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Martin Becker on August 2, 2000, OHA Case No. VFA-0599, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 2, 2000

(1) In this regard, the Appellant contends that under Exemption 7(C) only the names of government employees who are "arresting officers" should be withheld. Memorandum of telephone conversation between Martin Becker and Steven Goering, OHA (October 20, 2000). However, the federal courts have generally held the identities of law enforcement personnel exempt from disclosure pursuant to Exemption 7(C), and these holdings have not been limited to the identities of arresting officers. See, e.g., Doherty v. United States Dep't of Justice, 779 F.2d 49, 52 (2d Cir. 1985) ("Identities of FBI agents, of FBI non-agent personnel, [and] of employees of the Immigration and Naturalization Service . . . are embraced by exemption (b)(7)(C).").

(2) Mr. Becker also reiterates an argument that he made in connection with his Appeal, stating that we should not base our finding regarding the public interest on whether the IG has found wrongdoing. Memorandum of telephone conversation between Martin Becker and Steven Goering, OHA (August 8, 2000); Facsimile transmission from Martin Becker to Bill Schwartz, OHA (July 14, 2000). We do not. Our

finding in our Appeal decision as to the lack of public interest was not based upon any finding of the IG, but rather on the speculative nature of Mr. Becker's allegations.

Case No. VFA-0600, 28 DOE ¶ 80,115

September 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Eng. Services

Dates of Filing: August 3, 2000

August 16, 2000

Case Numbers: VFA-0600

VFA-0604

This Decision and Order concerns two Appeals that David E. Ridenour d/b/a R.E.V. Eng. Services (R.E.V.) filed from determinations issued to him by the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE). RFFO issued these determinations in response to requests for information that R.E.V. filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeals, if granted, would require RFFO to release certain documents to R.E.V. Because they concern the same documents and raise the same issues, we will consider the two Appeals jointly.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under DOE regulations, a document which is exempted from disclosure under the FOIA shall nonetheless be released to the public unless the DOE determines that disclosure is contrary to federal law or the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 19, 2000, R.E.V. submitted a FOIA request to the DOE's Albuquerque Operations Office (AOO). In this request, R.E.V. sought access to a specific report and to documents pertaining to that report. The report was prepared by David Fredrickson, the Director of AOO's Personnel Security Division, at the request of RFFO's Office of Chief Counsel, and concerned internal RFFO operations. In its March 16, 2000 determination, AOO stated that it had conducted a search for responsive documents, but that none could be found. AOO further indicated that because it believed that RFFO possessed documents that were responsive to R.E.V.'s request, AOO would transfer the request to RFFO for further processing. R.E.V. appealed the adequacy of AOO's search for responsive documents, and the Office of Hearings and Appeals (OHA) found that search to be

adequate. David Ridenour, Case No. VFA-0570 (May 31, 2000). Subsequent to its initial search, and on its own initiative, AOO conducted another search. As a result of this search, Mr. Fredrickson located a copy of his final report, his cover memorandum, and the first page of the memorandum from Rocky Flats in which his assistance in this matter was requested. Believing RFFO to be the appropriate repository for

these documents, he sent them to that facility's Office of Chief Counsel. See May 5, 2000 memorandum from Mr. Fredrickson to Carolyn A. Becknell, Acting Freedom of Information Officer, AOO.

On July 14, 2000, RFFO issued two separate determinations to R.E.V. The first determination sets forth RFFO's response to AOO's referral of R.E.V.'s February 19 FOIA request. In this determination, RFFO withheld the report in its entirety pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). Specifically, RFFO states that the report was prepared in response to a Merit Systems Protection Board claim by Mr. Ridenour, and includes a discussion of the factual bases of that claim. Because the report was prepared by an individual working under the guidance of an attorney, and in contemplation of the MSPB claim, RFFO found the report to be attorney work- product, and therefore exempt from mandatory disclosure. RFFO further stated that it was unable to locate any documents relevant to "tasking, statement of work and/or contract" with respect to Mr. Fredrickson and the report. July 14 Determination Letter (RF00-016) at 2. (1)

RFFO issued the second determination letter (RF00-018) in response to a separate FOIA request filed by R.E.V. on March 26, 2000. In this request, R.E.V. sought access to "records relating to ?security investigations' on [Mr. Ridenour], internal or external to the agency." In its second determination, RFFO interpreted this request as being for records that were not previously provided to Mr. Ridenour in response to an earlier Privacy Act request, and stated that no additional responsive documents were found. RFFO specifically stated that the report did not concern a security investigation of Mr. Ridenour, and was therefore not responsive to this request. In addition, RFFO reiterated its finding that the report was exempt from mandatory release pursuant to Exemption 5. In its Appeals, R.E.V. contests RFFO's application of Exemption 5 in withholding the report. (2)

II. Analysis

A. RFFO's Application of Exemption 5

Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The United States Supreme Court has held that this exemption incorporates every civil discovery privilege which the government enjoys under statutory and case law. United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); FTC v. Grolier, 103 S.Ct. 2209 (1983) (Grolier). See also Peter T. Torell, 15 DOE ¶ 80,127 (1987) (Torell). One of these privileges is for attorney work-product. That privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." Coastal States Gas Corp. v. DOE, 617 F2d. 854, 864 (D.C. Cir. 1980). The privilege is applicable to material that was prepared by an attorney "in contemplation of litigation." See Hickman vs. Taylor, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege is also applicable to material prepared by a non- attorney under the supervision of an attorney, Durham v. United States Department of Justice, 829 F. Supp. 428, 432-33 (D.D.C. 1993), and to documents prepared in anticipation of administrative proceedings. Exxon Corp. v. Department of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983).

R.E.V. asserts that the report was not prepared in contemplation of litigation, but was instead a security report, that there is insufficient evidence to establish that Mr. Fredrickson, a non-attorney, was supervised by an attorney, that there are currently no pending administrative claims or lawsuits filed by R.E.V. against the DOE, and that the DOE has waived the privilege by failing to maintain confidentiality of the report. Finally, R.E.V. argues that even if RFFO properly applied Exemption 5 in withholding the report, we should release that document on public interest grounds.

We addressed and rejected most of R.E.V.'s arguments in Charlene Pazar, 27 DOE ¶ 80,104 (1998) (Pazar). In that case, we determined that the specific report sought here was properly withheld under the attorney work-product privilege incorporated into Exemption 5 of the FOIA. Specifically, we found that

the report was prepared in response to an administrative claim, i.e., a Merit Systems Protection Board complaint filed by Mr. Ridenour, that Mr. Fredrickson worked under the direct supervision of RFFO's Office of Chief Counsel, that the report has been kept in strict confidence by RFFO, and that release of the report was not in the public interest, despite the fact that the administrative claim for which it had been prepared had been dismissed.

R.E.V.'s arguments have not convinced us that Pazar was wrongly decided. However, two of these contentions are arguably new and deserve further discussion. R.E.V. claims that because RFFO did not have control over one copy of the report for a period of three years (the copy inadvertently retained and apparently misplaced by Mr. Fredrickson from May 1997 to May 2000), confidentiality has not been maintained, and the attorney work-product privilege is no longer applicable. We do not agree. The fact that an agency document may have been misplaced does not mean that the confidentiality of that document has been breached. Indeed, the federal courts have generally found that an exemption has been waived with respect to a given document only after an actual disclosure of that document to an individual outside of the agency has occurred. See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 488 (5th Cir. 1978); Powell v. United States, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984); Direct Response Consulting Serv. V. IRS, No.94-1156, 1995 WL 623282, at 5 (D.D.C. August 21, 1995). Here, no disclosure occurred. There is simply no support in the record for R.E.V.'s contention that "unauthorized individuals" had access to the report, R.E.V. Appeal at 3, or that the document's confidentiality was otherwise breached.

R.E.V. also points out that the Merit Systems Protection Board proceeding for which the report was prepared has been terminated. However, the purpose of the privilege, which is to protect the integrity of the adversarial process, remains applicable. In FTC v. Grolier Inc., 462 U.S. 19 (1983) (Grolier), the U.S. Supreme Court found that attorney work-product privilege survives the termination of the proceeding for which that work-product was produced. 462 U.S. at 28. For the forgoing reasons, we conclude that RFFO properly withheld the report under Exemption 5.

B. The Public Interest

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. R.E.V. argues that discretionary release of the report would be in the

public interest because it would foster debate as to whether the assignment of Mr. Fredrickson to the investigation of RFFO procedures was an appropriate use of DOE resources. Appeal at 3.

We find the public interest in the amount of resources expended by the assignment of one employee to perform a task of limited duration to be minimal, at best. On the other hand, we find that release of the report would result in foreseeable harm to the interests that the attorney work-product privilege was designed to protect. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5). As Justice Brennan stated in Grolier, "[i]t would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons . . . [H]e could gain insight

into the agency's general strategic and tactical approach to deciding . . . on what terms [lawsuits] may be settled." 462 U.S. 19 at 30 (Brennan, J., concurring). In view of RFFO's Office of Chief Counsel's belief that there is a substantial likelihood of further proceedings by Mr. Ridenour against the DOE, see memorandum of September 12, 2000 telephone conversation between Mr. Palmer and James Long, Office of Chief Counsel, RFFO, we do not believe that discretionary release of the report would be appropriate.

We will therefore deny R.E.V.'s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. Eng. Services on August 16, 2000 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 28, 2000

(1) RFFO has since informed us that it has located six responsive documents that were not identified in its July 14th determinations, including documents referred to in the May 5th Fredrickson memorandum, and that it will shortly issue another determination to R.E.V. concerning these documents. See memorandum of September 12, 2000 telephone conversation between Mary Hammack, RFFO, and Robert Palmer, OHA Staff Attorney.

(2) R.E.V. also alleges that AOO, RFFO and OHA engaged in a conspiracy to conceal the existence of responsive documents and to improperly deny it access to those documents. Because consideration of these charges is beyond our jurisdiction, we will not address R.E.V.'s conspiracy claim in this Decision, except to note that the allegations are false.

Case No. VFA-0601, 28 DOE ¶ 80, 109

September 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:R.E.V. ENG Services

Date of Filing:August 4, 2000

Case Number: VFA-0601

On August 4, 2000, R.E.V. ENG Services (R.E.V.) filed an Appeal from a determination the Director of the FOIA/Privacy Act Division (Director) of the Office of the Executive Secretariat at the Department of Energy (DOE) issued to the firm on July 14, 2000. In that determination, the Director denied an April 7, 2000 request for information that R.E.V. filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In R.E.V.'s request for information, the firm sought copies of documents related to any proposed or implemented changes in security procedures since General Eugene Habiger allegedly visited the Rocky Flats Environmental Technology Site in August and September 1999, including changes resulting from additional alleged recent visits from two other DOE employees: Mr. Pope and Mr. Lavernier. In his determination, the Director found no documents responsive to the request. In this Appeal, R.E.V. contends that the Director should have found responsive "trip reports recommending changes and RFFO [Rocky Flats Field Office] responses either implementing or contesting changes . . . likely to have resulted from the Lavernier/Pope visits." In accordance with R.E.V.'s Appeal, we have reviewed the adequacy of the search for responsive documents resulting from the alleged Lavernier/Pope visits.

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology

v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

We have investigated the DOE's search made in response to the R.E.V. request. In this investigation, we contacted representatives of the Director and the RFFO to ascertain the validity of R.E.V.'s contention that there must exist responsive information in the form of trip reports and RFFO responses recommending changes in security following the alleged Lavernier/Pope visits. Both the Director's representative and the RFFO FOIA Officer informed us that, at the time of the R.E.V. request, neither Mr. Pope nor Mr. Lavernier had visited the RFFO. See Record of August 28, 2000 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Brenda Washington, DOE FOIA/Privacy Act Office; and Record of August 29, 2000 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Mary Hammack, RFFO FOIA Officer. Thus, since the alleged visits had not occurred at the time of the request, the Director's representative and the RFFO FOIA Officer confirmed that neither office's search resulted in any responsive information.(1) Id. We find that the Director and the RFFO searched all of the DOE offices that would likely have responsive information. Since neither of these offices possess responsive information and we have no reason to believe that other DOE offices possess responsive information, we must deny R.E.V.'s appeal.

It Is Therefore Ordered That:

(1) The Appeal R.E.V. ENG Services filed on August 4, 2000, Case No. VFA-0601, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 1, 2000

(1)The RFFO informed us that, although no Lavernier/Pope visit occurred at the time of R.E.V.'s request, there may have been a subsequent Lavernier/Pope visit to the RFFO. However, the RFFO FOIA Officer stated that the RFFO does not have any responsive information from any Lavernier/Pope visit to the RFFO.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

September 25, 2000
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: XXXXXXX

Date of Filing: August 28, 2000

Case Number: VFA-0602

On August 28, 2000, XXXXXXX filed an Appeal from a final determination that the Ohio Field Office (Ohio) of the Department of Energy (DOE) issued on July 14, 2000. 1/ XXXXXXX submitted two requests for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. In its determination, Ohio informed XXXXXXX that it could not locate any documents pursuant to a search mandated by the Privacy Act. Ohio also informed XXXXXXX, however, that it located three documents pursuant to a search under the FOIA. Ohio determined that two of these three documents were not agency records and thus were not subject to release under the FOIA. Ohio released to XXXXXXX the other document after withholding portions under the FOIA. XXXXXXX challenges the search conducted for responsive documents and Ohio's withholding of information. This Appeal, if granted, would require Ohio to conduct another search for responsive documents and release the information it withheld.

Background

XXXXXXX filed two requests with DOE Headquarters in Washington, D.C., under the FOIA and the Privacy Act, in which she requested documents regarding the following categories of information:

> 1. Information regarding a May 2, 2000 meeting between XXXXXXX and Randy Tormey (Ohio Office of Chief Counsel), Nat Brown, Sandra Cramer (Office of Diversity) and Bob Folker (Deputy Manager) including all reports, letters, notes, meeting minutes, and management decisions pertaining to XXXXXXX generated by the above named offices;

1/ XXXXXXX's initial submission to us did not contain a copy of the determination letter she sought to appeal as required by 10 C.F.R. § 1004.8(a). She subsequently supplied us with the determination letter on August 28, 2000.

2. A copy of the investigation report issued by the Ohio Field Office Work Place Threat Assessment Team concerning XXXXXXXXXXX supervisory harassment complaint; and

3. All reports, letters, notes, meeting, minutes, and management decisions regarding a meeting between Bob Folker, Randy Tormey, and Sandra Cramer regarding a statement authored by XXXXXXX's physician.

On June 15, 2000, these requests were forwarded to Ohio for processing.

In its July 14, 2000 determination letter responding to both of XXXXXXX's requests, Ohio stated that it searched its systems of records subject to the Privacy Act and could find no documents that were responsive to her request. Pursuant to the FOIA, Ohio identified three documents possibly responsive to her requests. Two of these documents, a page of notes authored by Sandra Cramer regarding a May 16, 2000 meeting (Cramer Notes) and a two-page handwritten document written by Randy Tormey (Tormey Notes) concerning a May 2, 2000 meeting, were not provided to XXXXXXX since Ohio determined that the documents were not agency records under the FOIA and thus were not subject to release. The remaining document was a one-page document (Report) printed out from the Ohio Field Offices' Workplace Violence Threat Assessment Team Database (WPV Database). Ohio provided XXXXXXX with a redacted version of this document. Ohio stated that the withheld material consisted of unsworn statements, personal opinions and witness speculations that it asserted were subject to the deliberative process privilege and were thus withheld pursuant to Exemption 5 of the FOIA. Ohio also withheld names and other identifying information of individuals mentioned in the Report pursuant to Exemption 6. Ohio found that the privacy interest of the interest of the individuals mentioned in the Report outweighed the public interest in releases of the names.

XXXXXXX maintains that Ohio has failed to provide her all of the responsive documents in its possession. In support of her claim,XXXXXXX names several individuals who may have interviewed people in connection with her complaint.XXXXXXX also states that the Workplace Violence Threat Assessment Team (Team) completed an investigation in May 2000 relating to an Equal Employment Opportunity complaint she had filed and that the Team had a meeting on May 3, 2000.

Analysis

A. Adequacy of the Search

1. Search under the Privacy Act

The Privacy Act requires, inter alia, that each federal agency permit an individual to gain access to information pertaining to him or her contained in any system of records the agency maintains. 5 U.S.C. § 552a(d). The DOE regulations define a system of records as "a group of any records under DOE control from which some information can be retrieved by using the name of the individual or

by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m).

We contacted Ohio to inquire as to the search for records it conducted pursuant to the Privacy Act. Ohio informed us that it did not specifically search for records in any of its systems of records because none of them was likely to contain the very detailed type of records described in XXXXXXX's request. We subsequently reviewed a list of the system of records maintained at Ohio. We agree that none of the systems of records maintained at Ohio was likely to contain the requested records. Consequently, we find that Ohio's decision not to search any of its system of records under the Privacy Act was reasonable.

2. Search under the FOIA

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Eugene Maples, 23 DOE ¶ 80,106 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. NSA, 610 F.2d 824, 834 (D.C. Cir. 1979).

We spoke to several officials at Ohio to determine the extent of the search that was made for responsive documents. Upon receiving the two requests from XXXXXXX, the FOIA Officer, Marian Schomaker, immediately contacted each of the individuals referenced in the requests. Each of the individuals then conducted a search to locate responsive documents. See Memorandum of telephone conversation between Marian Schomaker, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Mr. Tormey and Ms. Cramer each located notes that were identified in Ohio's determination letter. Memorandum of telephone conversation between Randy Tormey, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000); Memorandum of telephone conversation between Sandra Cramer, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Ms. Schomaker then contacted Tim Marcus of the Ohio Workplace Violence Threat Assessment Team and asked him to search for responsive documents. Mr. Marcus searched the WPV Database and located one document which was subsequently provided to XXXXXXX in part. Mr. Marcus informed us that any notes taken by investigators on the Team are destroyed after he personally places the information into the MPV database. See Memorandum of telephone conversation between Tim Marcus, Workplace Violence Threat Assessment Team, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Ms.

Schomaker also had a search conducted for responsive documents in the office of the Deputy Manager. 2/

Given the above description of the search conducted for responsive documents, we find that Ohio conducted an adequate search for responsive documents. Ohio contacted each of the individuals XXXXXXX referenced in her requests and asked each to locate any responsive documents. 3/ Ohio then searched the Team records in order to locate any records regarding its investigation concerning XXXXXXX's complaint. While XXXXXXX references a May 2000 investigation by the Team in her appeal, we have been informed that the Team did not in fact conduct an investigation. See Memorandum of telephone conversation between Marian Schomaker, Ohio Field Office, and Richard Cronin, Assistant Director, OHA, (September 5, 2000); E-mail from Tim Marcus to Marian Schomaker (July 15, 2000) 4/ In sum, Ohio conducted a search reasonably calculated to locate documents responsive to XXXXXXX's requests.

B. Agency Records

We have considered Ohio's determination that the Tormey and Cramer Notes were not agency records and find it to be correct. Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and it was used for an agency purpose. Kissinger v. Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Bureau of Nat'l Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (BNA); J. Eileen Price, 25 DOE ¶ 80,114 (1995) (Price).

In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. See BNA 742 F.2d at 1492-93; Price. We contacted Ms. Cramer, who informed us that she created her notes regarding the May 16, 2000 meeting for her personal use so that she would remember details regarding the meeting. Her notes were not kept in any DOE record system but were kept in a personal file that she uses for her notes. She also informed us that her practice is to dispose of such notes after an

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2/ Mr. Folker, Deputy Manager at the time of the meetings, had left his position by the time of XXXXXXX's FOIA requests.

3/ In her appeal, XXXXXXX identified another individual who might have responsive documents. In light of the fact that this new information not available to Ohio when it processed her request, XXXXXXX should consult with Ohio to see if additional documents can be located.

4/ Ohio did not provide XXXXXXX a copy of Marcus' July 15, 2000 E-mail since it did not believe that it was responsive to her original request. Ohio has informed us that it will be sending XXXXXXX a copy of the E-mail in its entirety.

appropriate period of time. Memorandum of telephone conversation between Sandra Cramer, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). Mr. Tormey stated that he customarily takes notes at meetings he attends for his personal use. He never incorporated his notes of the May 2, 2000 meeting in any DOE record. Memorandum of telephone conversation between Randy Tormey, Ohio Field Office, and Richard Cronin, Assistant Director, OHA (September 5, 2000). From the facts surrounding the creation and use of the Cramer and Tormey Notes, it is apparent that they do not possess any of the attributes of an agency record. They were never maintained in an agency file nor used for any official agency purpose. See Price. Consequently, we find that Ohio correctly determined that the Cramer and Tormey Notes were not agency records under the FOIA.

C. Exemption 5

Ohio withheld portions of the fifth paragraph in the Event Summary Section of the Report pursuant to Exemption 5. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears) (footnote omitted). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). Only the "deliberative process" privilege is at issue here.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. Sears, 421 U.S. at 150. In order for Exemption 5 to shield a document, the document must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. EPA v. Mink, 410 U.S. 73, 87-91 (1973). An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

We have reviewed the withheld text and find that it was not properly withheld pursuant to Exemption 5. All of the material withheld pursuant to Exemption 5, except for a portion of one sentence, discussed below, appears to be factual and does not seem to be deliberative. Consequently, we will remand this matter to Ohio. On remand, Ohio should either release this material or issue another determination letter explaining why this material should be withheld. The material withheld from the sentence beginning "[H]is determination at the time . . . ." refers to the impressions and

opinion of an individual concerning a workplace incident. This material appears to be deliberative and predecisional and thus properly withheld pursuant to Exemption 5.

D. Exemption 6

Ohio deleted names and other identifying information from the Report pursuant to Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. See generally Ripskis, 746 F.2d at 3.

1. Privacy Interest

We find that the individuals whose names were withheld have a strong privacy interest in remaining anonymous. The Report references individual names concerning an investigation of an accusation that Ohio management appeared to tolerate an atmosphere that could result in workplace violence. Given the sensitive nature of the investigation and the potential for harassment, intimidation, or other personal intrusions, we find that significant privacy interests exists in the identities of individuals mentioned in the Report. See Cappabianca v. Commissioner, United States Customs Service, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnessess and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Accordingly, we find that the individuals whose identities were withheld have a significant privacy interest in maintaining their confidentiality. 5/

5/ It should be noted that scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted. Armstrong v. Executive Office of the President, 97 F.3d 575, 581 (D.C. Cir. 1996) (Armstrong). For example, civilian federal employees normally have no expectation of privacy concerning their names, titles and similar information. See 5 C.F.R. § 293.311. However, the name of a federal employee involved in a workplace situation of a sensitive nature might be withheld pursuant to Exemption 6. See Armstrong, 97 F.3d at 582 (dicta indicating that FBI might be entitled in certain factual contexts to use a categorical rule protecting the names of FBI agents pursuant to Exemption 6).

2. Public Interest in Disclosure

In Reporters Committee, the Supreme Court found that in FOIA contexts, the public interest in disclosure must be measured in terms of its relation to the FOIA's basic purpose. Reporters Committee, 489 U.S. at 772. The Court identified the basic purpose of the FOIA as "to open agency action to the light of public scrutiny." Id. (quoting Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)). Therefore, the Court held that official information that sheds light on an agency's performance of its statutory duties falls squarely within the FOIA's statutory purpose. Id. at 773. The Court further found that information about private citizens that is contained in government files but reveals little or nothing about an agency's own conduct does not further the basic purpose of the FOIA. Id. After examining the Report, it is not apparent that release of the individuals' names and identifying information would contribute to the public's understanding of the DOE's behavior or performance in carrying out its duties. Thus, in the present case, we conclude there is little or no public interest in the disclosure of the names and identifying information withheld in the documents at issue in the present case.

3. The Balancing Test

Because release of the individuals' names or other identifying information could reasonably be expected to subject them to harassment or intimidation or other personal intrusions, we find that significant privacy interests exist for these individuals. After weighing the significant privacy interests present in this case against little or no public interest, we find that release of information revealing the individuals' identities could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. Consequently, we find that the Ohio properly withheld the information redacted from the Report under Exemption 6.

E. Conclusion

In sum, we find that Ohio conducted an adequate search for documents pursuant to the FOIA and Privacy Act and properly withheld information in the Report pursuant to Exemption 6 of the FOIA. We also find that Ohio correctly determined that the Cramer and Tormey Notes were not agency records and not subject to release pursuant to the FOIA. However, we find that Ohio improperly withheld factual material in the Report pursuant to Exemption 5. Consequently, XXXXXXX's Appeal will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by XXXXXXX, on August 28, 2000, Case No. VFA-0602, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Ohio Field Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. §552 (a)(4)(B) and 5 U.S.C. § 552a(g)(1). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 25, 2000

Case No. VFA-0603, 28 DOE ¶ 80,112

September 14, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martin Becker

Date of Filing: August 10, 2000

Case Number: VFA-0603

On August 10, 2000, Martin Becker (Becker) filed an Appeal from a determination that the Office of the Inspector General (IG) of the Department of Energy (DOE) issued to him. In that determination, the IG released copies of some documents in their entirety, released some with redactions, and withheld one in its entirety. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In 1999, Becker submitted a FOIA request to DOE. The IG issued a response to the request, and Becker appealed the response on June 27, 2000. On July 26, 2000, OHA granted the appeal in part and remanded the request to the IG for further action. *See Martin Becker*, OHA Case No. VFA-0588 (July 26, 2000). As a result, the IG released additional documents, but continued to withhold some exempt information. One of the documents released was Document 207, which contained some material that was withheld under FOIA Exemptions 6 and 7(C). On August 10, 2000, Becker appealed the redactions in Document 207. Letter from Becker to OHA (August 10, 2000).

II. Analysis

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982) *(Abramson*). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), (d), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). *See Burlin McKinney*, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripkis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripkis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripkis*, 746 F.2d at 3 (Exemption 6); *Stone v. FBI*, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., David Ridenour*, 27 DOE ¶ 80,143 (1998); *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *K.D. Moseley*, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the responsive documents that were withheld pursuant to Exemptions 6 and 7(C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

1. Privacy Interest

In its determination, the IG stated that the withheld portions of Document 207 contained names and information that would tend to disclose the identity of certain individuals involved in the IG investigation of Becker's allegations. According to the IG, these individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 2. The IG further determined that the public interest in the identity of individuals whose names appear in investigative files does not outweigh the individuals' privacy interests. The IG segregated all releasable information from the withheld material. *Id.*

This office reviewed redacted and unredacted copies of Document 207. The IG withheld the names of three federal employees and one private citizen. All of the individuals were involved in some way with the IG's investigation.

Because of the possibility of harassment, intimidation, or other personal intrusions, the courts have

consistently recognized significant privacy interests in the identities of third parties mentioned or interviewed in the course of an investigation. *See Neely v. FBI*, 208 F.3d 461, 464 (4th. Cir. 2000) (withholding names of third parties mentioned or interviewed in course of investigation); *Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"); *Safecard Services, Inc., v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*). *See also Frank Isbill*, 27 DOE ¶ 80,215 (1999); *Blumberg, Seng, Ikeda & Albers*, 25 DOE ¶ 80,124 at 80,563 (1995); *James Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991). It is not necessary that harassment rise to the level of endangering physical safety before the protections of Exemption 7(C) can be invoked. *Miller v. Bell*, 661 F.2d 623 (7th Cir. 1981). Therefore, we find that the private citizen whose identity is being withheld in this case has a significant privacy interest in maintaining his or her confidentiality.

However, we find that, as a general matter, there simply is no privacy interest in material stating or describing a federal employee's official actions or duties "unless the work somehow reveals something personal or private about the individual . . . or there is some other special circumstance (for example, a reasonable, articulable belief that the person could be subject to harassment. . .)." *Mary Feild Jarvis*, 26 DOE ¶ 80,190 at 80,787 (1997) (quoting *The Cincinnati Enquirer*, 25 DOE ¶ 80,206 (1996) (*Enquirer*). *See also James E. Minter*, 27 DOE ¶ 80,140 at 80,595 (1998); *William H. Payne*, 25 DOE ¶ 80,190 (1996). We did not discern, nor did the IG offer, such a special circumstance. *William Hyde*, 18 DOE ¶ 80,102 at 80,509 (1988) (upholding the non-disclosure of document and identity of its author when the DOE field office described the requester's harassment of the author, a federal employee). As we have stated in the past, absent unusual circumstances usually directly related to the nature of the job, individuals do not have a privacy interest in the fact that the federal government employs them. *Enquirer*, 25 DOE at 70,769. Therefore, we will remand this matter to the IG to either release the names of the federal employees or issue a new determination explaining its continued withholding of those names.

2. Public Interest in Disclosure

Having established the existence of a privacy interest as regards the identity of the private citizen, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). The public interest is insubstantial in this type of case unless the requester puts forward compelling evidence that the agency denying the request is engaged in illegal conduct. *Safecard*, 926 F.2d at 1205-06. In his Appeal, Becker has not offered any compelling evidence of illegal conduct on the part of the agency. Therefore, we find that there is little or no public interest in the disclosure of the identity of the private citizen.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard*, 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Becker has not provided sufficient evidence to justify finding a substantial public interest in the disclosure of the withheld information. Therefore, we find that the public interest in disclosure of the identity of the private citizen is outweighed by the real and identifiable privacy interests of that individual.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Our review of Document 207(both redacted and redacted) found that, with the exception of the names of the federal employees, the IG did release all reasonably segregable, factual, non-exempt material (e.g., document titles, factual narrative).

It Is Therefore Ordered That:

(1) The Appeal filed by Martin Becker on August 10, 2000, OHA Case No. VFA-0603, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of the Inspector General to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 14, 2000

Case No. VFA-0605, 28 DOE ¶ 80,116

October 4, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. ENG Services

Date of Filing: September 6, 2000

Case Number: VFA-0605

On September 6, 2000, R.E.V. ENG Services filed an Appeal from a final determination that the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) issued on August 16, 2000. In its determination, Rocky Flats partially denied R.E.V. ENG Services' request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Rocky Flats to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated April 8, 2000, R.E.V. ENG Services submitted a FOIA request to Rocky Flats for documents pertaining to a FOIA request and the later appeal filed by Charlene Pazar on June 9, 1997, for the "Final Report that was prepared for the [Rocky Flats] Office of Chief Counsel by David Frederickson of the Albuquerque Field Office.(1) Request Letter dated April 8, 2000, from David Ridenour, P.E., R.E.V. ENG Services, to Mary Hammack, FOIA/Privacy Act Officer, Rocky Flats (Request Letter).

On August 16, 2000, Rocky Flats released eight documents, withholding only residential addresses and telephone numbers under Exemption 6 of the FOIA. Determination Letter dated August 16, 2000, from Barbara A. Mazurowski, Manager FOI Authorizing/Denying

Official (Determination Letter), at 3. Rocky Flats also partially denied the request. It withheld eight documents in their entirety under Exemption 5 of the FOIA. *Id.* at 2.

In its Appeal, R.E.V. ENG Services disputes the withholding of information under Exemption 5. First, R.E.V. ENG Services claims that "[t]he nature of [the document Rocky Flats identified as ?Note for Retained Copies'] is too unclear from the vague description given." Appeal Letter at 3 dated August 29, 2000, from David E. Ridenour, P.E., R.E.V. ENG Services, to George B. Breznay, Director, Office of Hearings and Appeals (OHA) (Appeal Letter). R.E.V. ENG Services also claims that no attempt has been made to reasonably segregate factual information from the note. *Id.* In regard to the other seven documents

withheld in their entirety under Exemption 5, R.E.V. ENG Services argues that Rocky Flats did not specify whether the documents were being withheld because they were deliberative or attorney-work product. *Id.* R.E.V. ENG Services continues that Rocky Flats must assert Exemption 5 for each document individually. It contends that a blanket denial is insufficient. *Id.* Further, R.E.V. ENG Services argues that Rocky Flats has not attempted to segregate factual information from these documents. *Id.* at 4. (R.E.V. ENG Services is not appealing the withholding of the residential addresses and telephone numbers made under Exemption 6.)

II. ANALYSIS

A. Deliberative Process Privilege or Attorney Work-Product

Rocky Flats has identified the "Note for Retained Copies" as attorney work-product. However, we could not ascertain from the Determination Letter whether the other seven documents were withheld because they were deliberative and pre-decisional, or attorney work-product, or both. From our discussions with Rocky Flats, we have determined that one of those seven documents, a memorandum from James D. Long Jr., to Mary Hammack, dated June 23, 1997 (Long Memorandum), was withheld as attorney work-product. Therefore, two documents must be reviewed on the basis that they were withheld as attorney work-product, the "Note for Retained Copies" and the Long Memorandum. The other six documents were withheld on the grounds that they were deliberative and pre- decisional.

B. Attorney Work-Product Documents

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The attorney work-product privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (*Coastal States)*. It protects documents prepared by an attorney in contemplation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). This privilege is also applicable to material prepared by a non-attorney who was supervised by an attorney. *Nishnic v. Department of Justice*, 671 F. Supp. 771, 772-73 (D.D.C. 1987). Finally, because factual work-product is not "routinely" or "normally" discoverable, it can also be protected under Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (*Weber*); *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (*Grolier*).

The first document we must review is the "Note for Retained Copies." The description of this document is nothing more than its title. The lack of a full description renders it difficult to determine its nature. A document must be described with enough specificity to allow the requester (1) to ascertain whether the claimed exemptions reasonably apply to the documents and (2) to formulate a meaningful appeal. *See Paul W. Fox*, 25 DOE ¶ 80,150, at 80,622 (1995), *citing James L. Schwab*, 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not, however, contain information that would compromise the privileged nature of the document. *Arnold & Porter*, 12 DOE at 80,527. A determination must also adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. *Id.*; *Paul W. Fox*, 25 DOE at 80,622. With the exception of providing the name of the "Note," none of the other descriptive items required by the *Arnold & Porter* decision were provided in the determination letter. More importantly, Rocky Flats failed to provide any explanation of how the attorney work-product privilege applies to the "Note." Rocky Flats has failed to include a specific description of the "Note" in its Determination Letter. Rocky Flats provided our Office with a copy of the "Note" and we have reviewed it.

Although we agree with Rocky Flats that it contains attorney work-product, we will remand the matter to Rocky Flats for a better description of this document and an explanation of how the privilege applies to the "Note."

Likewise, the Memorandum from James D. Long, Jr., to Mary Hammack, dated June 23, 1997, contains attorney work-product information. We believe this document is properly identified by its title. As we stated previously, the description need not contain information that would compromise the privileged nature of the document. But a determination must adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. *Arnold & Porter*, 12 DOE at 80,527; *Paul W. Fox*, 25 DOE ¶ 80,150 (1995). Again, Rocky Flats has failed to provide any explanation of how the attorney work-product privilege applies to this document. Therefore, we will also remand this document to Rocky Flats for similar considerations.

C. Deliberative Process and Predecisional Documents

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States*, 617 F.2d at 862. The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.,* generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Comms. v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

Rocky Flats withheld six documents because they contain information that is predecisional and part of the deliberative process. We have also been provided with copies of those documents. We have reviewed these documents and believe that they were properly withheld under Exemption 5. These documents demonstrate the normal frank and independent discussions that occur in making governmental decisions. However, we also believe that they contain factual information that could be segregated and released to the requester. For example, the first document listed in the Determination is a "Status Sheet, which contains documented conversations, telephone calls and electronic mail concerning" the FOIA Request. Determination Letter at 2. Some of the information contained in this document is nothing more than dates. This information could be segregated and released. Another line indicates that a telephone call was

received and from whom, information that could be segregated and released. Therefore, we will remand the withheld documents to Rocky Flats. On remand, Rocky Flats shall review the documents and segregate and release all factual portions of them or issue a new determination that justifies their withholding.

III. THE PUBLIC INTEREST

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. R.E.V. ENG Services argues that discretionary release would be in the public interest. Appeal Letter at 4.

Despite the fact that Rocky Flats need not segregate the factual material in a document that is protected by the attorney work-product privilege, we believe that Rocky Flats should release the factual information in both the "Note" and the Memorandum. The Attorney General has indicated that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) at 1, 2 (Reno Memorandum). The factual information can be released without foreseeable harm to the agency, even though it would not "normally" or "routinely" be discoverable in litigation. Portions of the "Note" are factual information that could easily be segregated and released to R.E.V. ENG Services without adversely harming the interest protected by the attorney work-product privilege. One such portion is a discussion of a statute and its requirements. Therefore, we will remand both the "Note" and the Memorandum to Rocky Flats to segregate and release the factual information or to provide justification sufficient to articulate a reasonably foreseeable harm in releasing any portion of either document. In regard to the documents withheld under the deliberative process privilege, since we are remanding this matter to Rocky Flats, we will not review those documents to determine whether the information should be released because it is in the public interest to do so. On remand, Rocky Flats should also review the documents to determine if it would be in the public interest to release any information that could be properly withheld.

IV. CONCLUSION

Rocky Flats properly withheld the documents under the Exemption 5 deliberative process and attorney work-product privileges, even though it did not identify which privilege it was using for each document. We have clarified that only the "Note for Retained Copies" and the Long Memorandum were withheld under the attorney work-product privilege. We are remanding this matter to Rocky Flats to provide a better description of these two documents and how the attorney work-product privilege applies to them. We are also remanding these two documents for Rocky Flats to segregate the factual information within them or issue a new determination that justifies their withholding. The other six documents were withheld under the deliberative process privilege. Again, Rocky Flats did not segregate the factual material from any of these documents. We will remand the matter for Rocky Flats to review the documents, and segregate and release all factual portions of them or issue a new determination that justifies their withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. ENG Services, on September 6, 2000, Case No. VFA-0605, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Rocky Flats Field Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 4, 2000

(1)"The report is the subject of two pending Appeals with the Office of Hearings and Appeals, Case Nos. VFA-0600 and VFA-0604. It will not be addressed in this Decision.

Case No. VFA-0607, 28 DOE ¶ 80,149

February 7, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Chuck Hansen

Date of Filing: September 11, 2000

Case Number: VFA-0607

Chuck Hansen filed an Appeal from a determination that the Department of Energy's Oakland Operations Office (Oakland) issued to him on August 31, 2000. In that determination, Oakland denied in part one of seven documents that Mr. Hansen requested in September 1990, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Oakland provided Mr. Hansen with a copy of Document Number COPJ 79-203, "LLL-Designed Weapons in the Stockpile– Problems/Reliability," dated May 14, 1979, from which information was withheld. Oakland withheld that information as the result of the Department of Energy's Office of Declassification reviewing the document and determining that it contained classified information. This Appeal, if granted, would require the Department of Energy (DOE) to release the information that it withheld from that document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In September 1990, Mr. Hansen submitted a request under the FOIA to Oakland, for seven specified documents. Oakland responded to the request by providing the first requested document in November 1999. In a second response to Mr. Hansen,

Oakland provided a redacted version of COPJ 79-203 from which information was deleted pursuant to a DOE determination that the withheld information warranted protection from disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the document described above. In his Appeal, Mr. Hansen contends that Oakland acted in an arbitrary and capricious manner when it withheld the information that it did, particularly because most, if not all, of that information has already been made public, and because the data at issue are 20 to 40 years old.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. See, e.g., National Security Archive, 26 DOE ¶ 80,118 (1996); Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs (SA) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of SA reviewed those portions of the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

In performing his review the Director of SA determined that the information Oakland withheld concerns nuclear weapons design and specific developmental problems and design corrections. These categories of information are still considered Restricted Data under current classification guidance. Under the Atomic Energy Act of 1954, this information is classified, and is therefore exempt from mandatory disclosure under Exemption 3. Nevertheless, in determining that a few sentences, headings and footnotes are not classified, the Director of SA has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations.

Based on the review performed by the Director of SA, we have determined that the Atomic Energy Act requires the continued withholding of much of those portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the document that the Director of SA has now determined to be properly classified must be withheld from disclosure. However, because some previously deleted information may now be released as a result of the Director of SA's review, a newly redacted version of the document reviewed in this Appeal will be provided to Mr. Hansen under separate cover. In this document, the Director has marked all deletions made by the DOE as "b(3)." Accordingly, Chuck Hansen’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Chuck Hansen on September 11, 2000, Case No. VFA-0607, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the document entitled “LLL-Designed Weapons in the Stockpile–Problems/Reliability,” Document Number COPJ 79-203, dated May 14, 1979, in which additional information is released, will be provided to Mr. Hansen.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 7, 2001

Case No. VFA-0611, 28 DOE ¶ 80,119

October 19, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Northwest Technical Resources, Inc.

Date of Filing: September 18, 2000

Case Number: VFA-0611

On September 18, 2000, Northwest Technical Resources, Inc. (NTR) filed an Appeal from a determination issued to it in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on August 17, 2000, by the Richland Operations Office (Richland). This Appeal, if granted, would require that Richland perform an additional search, release responsive documents, and grant NTR a fee waiver.

I. Background

On May 25, 2000, NTR submitted a FOIA request to Richland for copies of : (1) all documents, correspondence, and information related to Subcontract 0000X-MR-G0066 between NTR and Bechtel Hanford Inc. (Bechtel) and (2) all documents, correspondence, and information related to Subcontract 0000X-SC-G0131 between NTR and Bechtel. Letter from NTR to Richland (May 25, 2000) (Request). NTR narrowed the request on June 2, 2000, to exclude the actual contract. Letter from NTR to Richland (June 2, 2000). Richland conducted a search of its files and sent two interim responses and one final response to NTR. In the final response, Richland released responsive information, with some material withheld under Exemption 6, and other material deleted because it was "not responsive." Letter from Richland to NTR (August 17, 2000). Richland also charged NTR $358.51 for the search. (1)

On September18, 2000, NTR filed this Appeal. In the Appeal, the company stated that it did not receive all responsive material and that it should be granted a fee waiver. Letter from NTR to Director, Office of Hearings and Appeals (OHA) (September 18, 2000) (Appeal). NTR specifically asked for the release of three documents referring to Subcontract 0000X-SC-G0131 (the same three documents that NTR identified in its second request) and for the release of the information that was deleted from seven procurement documents.

II. Analysis

A. ADEQUACY OF SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't. of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Richland to ascertain the scope of the search, particularly in light of NTR's identification of specific documents that were not released to the company. Richland informed us that, after searching its files in response to NTR's second request, Richland had located some additional responsive material. See Memorandum of Telephone Conversation between Dorothy Riehle, Richland, and Valerie Vance Adeyeye, OHA (October 3, 2000). The additional material related to Subcontract 0000X-SC-G0131, the subject of this Appeal. Richland released that additional material to NTR on September 13, 2000, apparently as NTR was sending this Appeal to OHA. Letter from Richland to NTR (September 13, 2000). We therefore find that Richland has conducted an adequate search of records in its possession.

B. FEE WAIVER

NTR also appealed the assessment of fees associated with the request. Appeal at 2. According to NTR, its request seeks information that will provide "valuable insight" to the public regarding federal government activities related to contract negotiations. *Id.* For the following reasons, we find that Richland properly charged NTR for the search.

Although the FOIA generally requires that requesters pay fees for the processing of their requests, the statute does allow for a fee waiver under certain circumstances. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998) (describing the test for a fee waiver). However, NTR did not ask Richland to waive the fees associated with this request. In fact, NTR agreed to incur charges up to $100 and asked Richland to obtain NTR's approval of any charges in excess of that amount. Request at 1. Therefore, Richland was not required to make a determination on NTR's eligibility for a fee waiver. Because OHA's jurisdiction is limited to the contents of a final determination, 10 C.F.R. § 1004.8, this issue is not before us.

C. NON-RESPONSIVE INFORMATION

Richland redacted some information from the responsive documents, and identified the redacted data as "not responsive to [NTR's] request." Determination at 1. NTR then requested that Richland disclose the non-exempt portion of the non-responsive material. Appeal at 2. We reviewed this material and agree with Richland that it does not pertain to NTR's request for information about the Bechtel-NTR contracts. In fact, the redacted material deals with contracts between Bechtel and other private companies. Therefore, we find that the non-responsive material is not subject to disclosure under the FOIA. Accordingly, we shall deny this portion of the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Northwest Technical Resources, Inc. on September 18, 2000, OHA Case Number VFA-0611, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 19, 2000

(1)On the same day, NTR submitted a new request to Richland for three documents referring to Subcontract 0000X-SC-G0131. Letter from NTR to Richland (August 17, 2000). Richland conducted a new search, found more responsive material, and released that information to NTR on September 13, 2000. Letter from Richland to NTR (September 13, 2000).

Case No. VFA-0613, 28 DOE ¶ 80,120

October 19, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Doney, Crowley, Bloomquist & Uda, P.C.

Date of Filing:September 20, 2000

Case Number: VFA-0613

On September 20, 2000, Doney, Crowley, Bloomquist & Uda, P.C. filed an Appeal from a final determination the Bonneville Power Administration (BPA) issued on August 14, 2000. In that determination, BPA redacted information from two documents released in response to a request for information the appellant filed on June 28, 2000, under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the withheld information.

Background

In the appellant's request for information, the firm sought copies of documents from BPA related to any settlement agreements in the litigation known as *ALCOA Inc. and Vanalco, Inc. v. Bonneville Power Administration*. In his determination, the BPA FOIA Officer released eight documents, but redacted the agreed amounts of power BPA would supply to Alcoa from two of the documents pursuant to Exemption 4 of the FOIA.(1) In this Appeal, the appellant contends that the FOIA Officer improperly redacted the power amounts. In accordance with the Appeal, we have reviewed the FOIA Officer's decision to withhold these power amounts pursuant to Exemption 4.

Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. United States Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). "Like all FOIA exemptions, Exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute." *Washington Post Co. v. HHS*, 865 F.2d 320, 324 (D.C. Cir.

1989). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

Where, as in this case, the agency determines that the information at issue is not a trade secret, but is instead "commercial or financial" and "obtained from a person," it must then determine whether the information is "privileged or confidential." If the information is subject to a valid claim of legal privilege on the part of its submitter, it may properly be withheld under Exemption 4. In order to determine whether the information is "confidential" the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*Critical Mass*), *cert. denied*, 113 S. Ct. 1579 (1993). Information is considered to have been submitted involuntarily if, as in this case, any legal authority compels its submission, including informal mandates that call for the submission of the information as a cost of doing business with the government. *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997). Since the information withheld in this case was involuntarily submitted, the agency must show that its disclosure is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom it obtained the information before withholding it under Exemption 4. *National Parks*, 498 F.2d 765 at 770; *Critical Mass*, 975 F.2d 871 at 879.

Once the DOE decides to withhold information, both the FOIA and the Department's implementing regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to understand the basis for claiming the exemption and to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 906 (D.C. Cir. 1999); *Kleppe*, 547 F.2d at 680 ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

BPA has set forth its reasons for withholding the power amounts as confidential information protected by Exemption 4. Specifically, BPA contends that release of this information would cause substantial competitive harm to Alcoa. Furthermore, BPA states that the redacted information is of the type that is and has been customarily held in confidence by agencies and submitters. Thus, BPA contends that if the "strategic and confidential" information is released, Alcoa and other submitters will have a "distinct disincentive to contract with BPA" in the future.

In analyzing BPA's redaction of the power amounts to be supplied to Alcoa under Exemption 4's "competitive harm" prong, we find that BPA has not sufficiently described the substantial competitive harm that might result from disclosure of the information. BPA provided the general assertion that release of the power amounts "could cause substantial harm." We find that this sole statement is far too conclusory in nature.(2) The courts have required that a submitter provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive harm." *Lee v. FDIC*, 923 F. Supp. 451 at 455 (S.D.N.Y. 1996). Since BPA has not articulated

any details from the submitter that would shed light on the competitive harm that Alcoa might suffer if the redacted information were released, we must remand this matter back to BPA. Accordingly, we will require that BPA issue a new determination letter describing in sufficient detail the substantial competitive harm that would result if the power amounts were released.

We turn next to BPA's contention that release of the power amounts would impair the government's ability to obtain similar information in the future. Essentially, BPA is contending that release of the power amounts to be supplied to Alcoa would impair the government's ability to make future sales of its power. The courts have denied protection under the impairment prong when disclosure will not, in fact, diminish the flow of information to the agency, such as when the benefits associated with submission of information make it unlikely that the agency's ability to obtain future submissions will be impaired. *See, e.g., McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 15 (D.D.C. 1997) (finding that release of contract price information would not cause impairment since "[g]overnment contracting involves millions of dollars and it is unlikely that release of this information would cause [the agency] difficulty in obtaining future bids") (reverse FOIA suit) (appeal pending); *Badhwar v. United States Dep't of the Air Force*, 622 F. Supp. 1364, 1377 (D.D.C. 1985), *aff'd in part and rev'd on other grounds*, 829 F.2d 182 (D.C. Cir. 1987) (no impairment when submission mandatory if supplier wished to do business with the government); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"); *but see Orion Research v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (finding impairment for technical proposals submitted in connection with government contract because release "would induce potential bidders to submit proposals that do not include novel ideas"). These cases recognize that the benefits of doing business with the government can be considerable and are generally sufficient to ensure that firms will continue to do business with the government even if some submitted information is made public. Since the BPA has not explained in sufficient detail how its ability to negotiate future power sales would be impaired, we find that BPA has not satisfied the impairment prong of Exemption 4. Accordingly, we will require that BPA also address this impairment issue in sufficient detail in the determination letter.

It Is Therefore Ordered That:

(1) The Appeal filed by Doney, Crowley, Bloomquist & Uda, PC., Case No. VFA-0613, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 19, 2000

(1)The FOIA Officer also utilized Exemption 5 of the FOIA to withhold 21 documents generally described as "draft documents, personal observations and notes, recommendations, and comments." The appellant has not appealed this portion of the FOIA Officer's determination.

(2) We note that "the mere fact that the contents of a document might be useful to competitors in future contract bids does not constitute sufficient ground to withhold the document unless the document is

unique." *Baker, Donaldson, Bearman & Caldwell*, 27 DOE ¶ 80,164 (1998), citing *Morgan, Lewis & Bockius*, 20 DOE ¶ 80,165 at 80,688 (1990). The courts clearly mandate that in order to receive protection under Exemption 4, the expected harm must be substantial in nature. *See, e.g., National Parks*, 498 F.2d at 770.

Case No. VFA-0614, 28 DOE ¶ 80,117

October 17, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Doney, Crowley, Bloomquist & Uda, P.C.

Date of Filing: September 20, 2000

Case Number: VFA-0614

On September 20, 2000, Mr. R. Allan Payne of Doney, Crowley, Bloomquist & Uda, P.C., filed an Appeal from a determination issued to him on August 14, 2000, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Payne challenges the adequacy of BPA's search for documents responsive to his request.

I. Background

On June 28, 2000, Mr. Payne filed a request for information in which he sought "copies of documents which relate to, reference, form the basis of or evidence any study, process, analysis, report or survey conducted by or on behalf of the Bonneville Power Administration regarding the survivability of the Direct Service Industries." On August 14, 2000, BPA issued a determination which stated that it conducted a search for the requested information and identified six documents responsive to Mr. Payne's request. *See* Determination Letter.

On September 20, 2000, Mr. Payne filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Payne challenges the adequacy of the search conducted by BPA and states that he is aware that more documents exist that are responsive to his request. Mr. Payne asks that the OHA direct BPA to conduct a new search for the requested information. *See* Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Native Americans for a Clean Environment*, 23 DOE ¶ 80,106 (1993); *Marlene R. Flor*, 23 DOE ¶ 80,130

(1993). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of

reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at BPA to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Payne's request might exist. Upon receiving Mr. Payne's request for information, BPA instituted a search of its internal files. Based on this search, BPA located six responsive documents. *See* Determination Letter at 1. However, before the Appeal, Mr. Payne had a telephone conversation with BPA in which he fully explained his request. BPA conducted another search for responsive documents and located three additional documents. BPA has indicated that its search consisted of reviewing its program files and identifying individuals who would possibly have knowledge of the subject matter in question as the office has undergone several reorganizations. Those individuals were asked to conduct a search of their files. BPA further indicated that it possesses no other documents responsive to Mr. Payne's request. Given the facts presented to us, we find that BPA conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Payne's request. Accordingly, Mr. Payne's Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Doney, Crowley, Bloomquist & Uda, P.C., OHA Case No. VFA-0614, on September 20, 2000, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 17, 2000

Case No. VFA-0615, 28 DOE ¶ 89,129

December 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Center for Public Integrity

Date of Filing: September 21, 2000

Case Number: VFA-0615

On September 21, 2000, the Center for Public Integrity (Appellant) filed an Appeal from a final determination issued on August 4, 2000 by the Department of Energy's Office of Fossil Energy (FE). In that determination, FE continued to withhold several documents in response to a Request for Information filed by the Appellant on January 5, 2000, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require FE to release the withheld information.

I. BACKGROUND

This Appeal arises in connection with the sale of NPR-1, commonly known as the Elk Hills Naval Petroleum Reserve, conducted by FE. On January 5, 2000, the Appellant filed a request for information with FE, seeking in pertinent part: "The names of all entities that placed bids on NPR-1, any portion thereof, and the amounts of all bids."

On April 10, 2000, FE issued a determination letter indicating that it was withholding the names of the unsuccessful bidders and the amounts of their bids under Exemption 4 of the FOIA. April 10, 2000 Determination Letter at 1. FE contended that release of the bid amounts and identities of the unsuccessful bidders would cause substantial competitive harm to the firms that submitted the unsuccessful bids and would impair the government's ability to obtain similar information in the future. On April 17, 2000, the Appellant filed an appeal with this office, pursuant to 10 C.F.R. § 1004.8, challenging FE's withholdings under Exemption 4. On May 19, 2000, we issued a decision and order on the Appeal in which we found that FE had failed to adequately justify its withholdings under Exemption 4. *Center for Public Integrity*, 27 DOE ¶ 80,277 (2000) (*CPI*). Accordingly, in *CPI*, we granted the Appeal and remanded the determination to FE with instructions requiring that office to either release the information it had withheld under Exemption 4 or issue a new determination letter containing an adequate justification of its withholdings. *Id.* On August 4, 2000, FE issued a new determination letter, which continued to withhold the bid amounts and identities of the unsuccessful bidders under Exemption 4. The August 4 determination also withheld the same

information under Exemption 3. The present Appeal, which contends that FE continues to improperly withhold the bid amounts and identities of the unsuccessful bidders under Exemptions 3 and 4, was filed on September 21, 2000.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(b)(9); 10 C.F.R. § 1004.10(b)(1)- (b)(9). These nine exemptions must be narrowly – that is, precisely – construed. *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (citing provision now codified at 5 U.S.C. § 552(d)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). The only exemptions that FE claims in the present case are found at 5 U.S.C. § 552(b)(3) (Exemption 3) and 5 U.S.C. § 552(b)(4) (Exemption 4).

Exemption 3 allows the withholding of information under other statutes, but only if they meet specific criteria. *See, e.g., Essential Information, Inc. v. USIA*, 134 F.3d 1165, 1168 (D.C. Cir. 1998). Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1994 & Supp. II 1996). The D.C. Circuit has expressly held that "a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure." *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). An agency must also establish that the records in question fall within the withholding provision of the non-disclosure statute. *See A. Michael's Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983); *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 868 (D.C. Cir. 1981); *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).

In its August 4, 2000 determination letter, FE claims that section 303B(m) of the Federal Property and Administrative Services Act of 1949 (FPASA), as amended, that was added by section 821 of the National Defense Authorization Act for Fiscal Year 1997, specifically prohibits the release of the requested information under the FOIA. (1)

That section provides:

(b) CIVILIAN AGENCY ACQUISITIONS.--Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended by adding at the end the following new subsection:

"(m) PROHIBITION ON RELEASE OF CONTRACTOR PROPOSALS.--(1) Except as provided in paragraph (2), a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code.

"(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

"(3) In this subsection, the term 'proposal' means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.".

Pub. L. 104-201, § 821. (2)

FE's claim has considerable force. It is clear that this statute is a withholding statute under 5 U.S.C. § 552(b)(3)(A). It does more than set criteria permitting withholding. Instead it forbids agencies to disclose the materials it covers. Moreover the prohibition is structured broadly to impose its threshold prohibition on "any" described proposal, and then specifies a narrowly-described exemption from the statutory

prohibition. Finally there is no doubt from the statute's text that, in adopting it, Congress intended to affect disposition of FOIA requests because the operative prohibition is directed explicitly to "ma[king] available [the described information] to any person under section 552 of title 5, United States Code."

FE has argued convincingly that section 821 applies to the bids at issue in the present case. FE concluded that all the elements prescribed in this statute are met in the case of the NPR-1 bids. August 4, 2000 Determination Letter at 9. According to FE, the NPR-1 bids are "proposals" as that term is defined in the Act since each bid, in this context, was a "proposal" to enter into a contractual relationship with the government for the sale of a specific property. *Id*. Further, the bids were submitted "in response to the requirements of a solicitation for a competitive proposal," and those bids "were in the possession or control of the Department as the statute requires." *Id*. Finally, the unsuccessful bids for NPR-1 were not set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal. *Id*. at 10. The bidder's name as well as the bid amount formed part of each proposal as that term is used in the statute. *Id*. Therefore, FE maintains, the statute prohibits the public release of the unsuccessful bidders' names and bid amounts because this information was contained in each offeror's "proposal" submitted "in response to" a competitive "solicitation." *Id*.

The Appellant challenges FE's reliance on section 821 to withhold the NPR-1 bids under Exemption 3 on the ground that "the scope of that provision does not extend to sales of government property." September 21, 2000 Appeal at 3. The Appellant asserts that the statute must be read in the context of the statutory scheme of which it is a part, and notes that the first section of the FPASA subchapter containing this provision reads: "The purpose of this subchapter is to facilitate the procurement of property and services." *Id*. Further, the Appellant argues that sales of government property are governed generally by a separate section of the FPASA, codified at 40 U.S.C. § 484 (disposal of surplus property). Based on its assertion that the meaning of the statute, and therefore, its applicability to the NPR-1 bids, is controlled by the placement of section 821 in the FPASA rather than by the actual text of the provision, the Appellant maintains that section 821 "falls well short of the Exemption 3 standard that withheld information be *? specifically* exempted from disclosure by statute. . . .'" 5 U.S.C. § 552(b)(3) (emphasis added).

FE's August 4 determination carefully considered whether the application of section 821 to the NPR- 1 bids was precluded because they were generated by a sale of government property rather than a government procurement of goods or services. In support of its interpretation of the statute, FE cites several factors that "counsel against a construction . . . that would limit its application to the acquisition of goods and services by the Government." August 4, 2000 Determination Letter at 10. To begin with, there is the text of the provision itself. FE points out that "[n]owhere does [the text] describe its application as being directed to ?procurements' or ?acquisitions.'" *Id*. FE notes that the provision employs terms that define its reach, e.g., "proposal," "contract," "solicitation," and "competitive proposal," and acknowledges that this statutory usage suggests "prominent elements of the typical process by which the Government seeks goods or services from the commercial sector." *Id*. But nowhere does this text confine itself to procurement proposals. In fact, the text states, "the term 'proposal' means *any* proposal . . . submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." FPASA § 303B(m)(3), as added by section 821 (emphasis added). According to FE, the fact that no such linkage to the procurement process was specified in the broad definition of "any proposal" used in the Act means that Congress did not intend to limit its applicability to acquisitions. August 4, 2000 Determination Letter at 11. In support of this view, FE points out that elsewhere in the FPASA, where Congress sought to confine the term "proposal" to acquisitions, it did so explicitly, e.g., in 41 U.S.C. § 253(j)(1)(A), (j)(2)(A), and (j)(2)(B)(ii). Therefore, according to FE, Congress's use of the broad "any proposal" language of section 821 indicates that Congress legislated more broadly than just to govern acquisitions.

As FE correctly notes, the placement of this provision in the FPASA, which deals prominently with procurements, does not defeat its construction of the statute, since the FPASA also deals with government property sales. August 4, 2000 Determination Letter at 11. The particular legislative history which we have reviewed also contains no suggestion that section 821 was intended to be confined to contractor proposals made in acquisitions. In fact, as FE points out, the relevant portion of the House report states

that the legislation's objective was to relieve the "significant administrative burden on federal agencies receiving [FOIA] requests for release of contractor proposals . . ." to "allow federal agencies to dispense with the lengthy line-by-line reviews which are presently required. . . ." H.R. Rep. No. 104-563 at 327 (1996). Withholding the information sought here would be in harmony with that purpose.

The critical difference between the positions urged by FE and the Appellant in this case is their construction of section 821. FE focused on the text, which uses the broad language discussed above, including the term "any proposal." The Appellant does not contest FE's reading of the text, for it is clear that the plain meaning of the text would justify withholding the unsuccessful NPR-1 bids under Exemption 3. As noted above, the Appellant bases its narrow interpretation of the statute not on its text but on a comparison of the titles of the various sections of the FPASA, and the placement of the provision in a section dealing with procurement. These factors, rather than the language of the actual text of section 821, guide Appellant's position .

The Appellant's reliance on the title of the subchapter where the provision appears, rather than the plain meaning of the text, cannot be sustained. "[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase." Pennsylvania Department of Corrections v. Yesky, 524 U.S. 206, 212 (1998), quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529 (1947). "[Headings and titles] are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." Trainmen at 529; accord, United States v. Minker, 350 U.S. 179, 185 (1956). Nor does an inference, drawn from section 821's placement in the FPASA, that Congress had in mind only acquisition transactions create an ambiguity that would warrant resort to the statute's headings and titles to narrow its plain text. Even if that inference were correct, "that Congress did not envision" application of section 821 to sales transactions "is irrelevant" "in the context of an unambiguous statutory text. . . . [T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Pennsylvania Department of Corrections, 524 U.S. at 212, quoting Sedima, S.P.R. L. v. Imrex Co., 473 U.S. 479, 499 (1985) (internal quotations omitted).

In the present case there is no ambiguity, and we find that since Congress did not limit the applicability of the term "any proposal" in this provision to acquisitions, the language of section 821 clearly covers the competitive proposals containing the unsuccessful bids to purchase NPR-1 that DOE solicited pursuant to the National Defense Authorization Act for Fiscal Year 1996. Congress has spoken plainly to forbid their release. Therefore, we find that the records at issue were properly withheld under Exemption 3. Because our finding that the unsuccessful bids for NPR-1 may be withheld under Exemption 3 controls the disposition of the present Appeal, we will not also analyze the issues and arguments raised by the Appellant concerning Exemption 4.

III. CONCLUSION

We have found that FE is required to withhold unsuccessful bidders' identities and the amounts of their bids under section 821 and therefore may withhold this information under Exemption 3. Since this information should not be released under the FOIA, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by the Center for Public Integrity, Case No. VFA-0615, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 1, 2000

(1) Section 303B(m) is codified at 41 U.S.C. § 253b(m). For sake of clarity of provenance it is cited hereinafter as section “821” or the “Act.”

(2)Section 821 also added an identical restriction to 10 U.S.C. § 2305. These new restrictions nonetheless were placed in the Authorization Act’s subtitle dealing with “other matters” rather than its subtitle dealing specifically with “acquisition management.” Compare 110 Stat. 2603 with 110 Stat. 2609 (1996).

Case No. VFA-0617, 28 DOE ¶ 80,122

November 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Anter Corporation

Date of Filing: October 3, 2000

Case Number: VFA-0617

This Decision addresses a Freedom of Information Act (FOIA) appeal filed on October 3, 2000, by Anter Corporation (Anter), and is governed by the FOIA, 5 U.S.C. § 552, and the Department of Energy (DOE) implementing regulations, 10 C.F.R. Part 1004. For the reasons set forth below, Anter's appeal will be denied in part and remanded.

I. Background

With nine exemptions, the FOIA requires federal agencies to release documents to the public upon request. 5 U.S.C. § 552(a),(b); 10 C.F.R. § 1004.3,.10(b). Anter filed a FOIA request with the DOE Idaho Operations Office, seeking information relating to the decisional process in selecting an award for DOE Request for Proposal No. R00-18376, for which Anter had placed an unsuccessful bid. At issue in this appeal is a responsive document, dated June 2, 2000, entitled "Technical Evaluation of Proposals for The Laser Flash Thermal Diffusivity Instrument" (the responsive document). The first section of the document provides highlights of comments from named individuals who had experience with Anter's laser flash thermal diffusivity instrument (Anter's diffusivity instrument), and the second section summarizes and compares those comments. Citing Exemption 5 of the FOIA, the Idaho Operations Office FOIA Officer released the responsive document, but redacted the first section. In her determination, the FOIA Officer described the redacted material as "predecisional deliberative data, the release of which would likely ? stifle honest and frank communication within the agency.'" In its appeal, Anter seeks

release of the redacted information.

II. Analysis

Exemption 5 of the FOIA shields from disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 incorporates the executive "deliberative process" privilege, which permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process.

Coastal States, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. Renegotiation Board v. Grumman Aircraft Eng. Corp., 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, Coastal States, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker, National Wildlife Federation v. United States Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988).

Information protected by the deliberative process privilege may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," Coastal States, 617 F.2d at 854, but does not include factual information, unless the factual material is "inextricably intertwined" with exempt material, Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). In some circumstances, "disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted under [Exemption 5]." Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (Mead Data).

That a document is reportorial in nature is irrelevant to whether information within it may be withheld. "It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only ?report' what those recommendations and opinions are." Mead Data, 566 F.2d at 257 (documented summary of discussions among agency staff properly withheld, although document did not include affirmative recommendations or opinions).

Analysis of the responsive document in its entirety, with respect to the foregoing principles, reveals that the redacted information includes material that falls within the deliberative process privilege of Exemption 5, as well as material that is factual in nature and thus outside the privilege. The information shielded by the deliberative process privilege includes the opinions and subjective statements of the individuals whom the DOE consulted in evaluating Anter's diffusivity instrument. These statements are predecisional, because they were gathered as part of the process leading to the DOE's final award determination. The statements are also deliberative, because they address potential problems with, and available alternatives to, Anter's diffusivity instrument. See Coastal States, 617 F.2d at 867 (noting document is deliberative in nature if it weighs pros and cons of agency adoption of one viewpoint or another). See also Chemical Weapons Working Group, Inc., 26 DOE ¶ 80,170 (March 27, 1997) (finding technical evaluation of submitter's proposal within deliberative process privilege).

Because the statements themselves are protected under Exemption 5, the fact that the responsive document merely reports the statements, without affirmatively setting forth a recommendation, is immaterial. See Mead Data, 566 F.2d at 257 (finding reportorial document within Exemption 5). Disclosure of the statements would frustrate the purpose of Exemption 5, as individuals involved in evaluating bid proposals may resolve to "temper their candor with a concern for appearances to the detriment of the decision-making process." Coastal States, 617 F.2d at 866 (quoting and citing United States v. Nixon, 418 U.S. 683, 705 (1974)).

On the other hand, certain redacted statements appear purely factual in nature and, absent sufficient explanation supporting application of the deliberative process privilege, must be released. Because the FOIA Officer's determination does not make clear how the factual statements are "inextricably intertwined" with the exempt material discussed above, the FOIA Officer must reexamine the responsive document and either release the factual information, or provide a detailed explanation supporting application of Exemption 5.(1)

It Is Therefore Ordered That:

(1) The Appeal filed by Anter Corporation on October 3, 2000, Case No. VFA-0617, is hereby granted as set forth in paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Idaho Operations Office for further action in accordance with the directions set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 1, 2000

(1)In addition, the names of the individuals listed in the responsive document appear to be outside of the scope of Exemption 5, but may fall within the purview of another FOIA exemption.

Case No. VFA-0618, 28 DOE ¶ 80,121

October 31, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. ENG Services

Date of Filing: October 3, 2000

Case Number: VFA-0618

On October 3, 2000, R.E.V. ENG Services filed an Appeal from a final determination that the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) issued on September 21, 2000. That determination concerned a request for information submitted by R.E.V. ENG Services pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Albuquerque would be required to conduct a further search for responsive documents.

Background

On August 1, 2000, R.E.V. ENG Services submitted a FOIA request for all documents concerning a May 5, 2000 Memorandum from David Fredrickson, Director, Personnel Security Division, Albuquerque, to Carolyn A. Becknell, Acting FOI Officer, Office of Public

Affairs, Albuquerque, including telephone conversation records, letters, electronic mail messages, notes, and drafts. Request Letter dated August 1, 2000, from David E. Ridenour, P.E., R.E.V. ENG Services, to Terry Martin Apodaca, Albuquerque (Request Letter). The May 5, 2000 Memorandum was sent to Ms Becknell, indicating that Mr. Fredrickson had a copy of a report(1) he had prepared on behalf of the Rocky Flats Field Office (Rocky Flats) Chief Counsel's Office and that he had sent it to Rocky Flats. R.E.V. ENG Services alleges that background information exists regarding Mr. Fredrickson's decision to send the report to Rocky Flats. Therefore, in its August 1, 2000 Request, R.E.V. ENG Services also asked for any information regarding the decision to send to Rocky Flats the report referenced in the May 5, 2000 Memorandum. *Id.* On August 9, 2000, Albuquerque sent R.E.V. ENG Services a letter stating that "the *results* of [the] search for responsive documents have been referred to Ms. Mary Hammack [of Rocky

Flats] for her office's review as they are responsible for the final releasability determination." Determination Letter dated August 9, 2000, from Carolyn A. Becknell, Acting Freedom of Information Officer, Office of Public Affairs, Albuquerque, to David E. Ridenour (August 9, 2000 Determination Letter) (emphasis added).

After clarifying their respective roles concerning this request, Rocky Flats and Albuquerque agreed that Albuquerque was the appropriate office to respond to the August 1, 2000 Request. *See* Memorandum of Telephone Conversation held September 14, 2000, between Janet R. H. Fishman, Attorney-Examiner, OHA; William Schwartz, Staff Attorney, OHA; Terry Apodaca, Albuquerque; Mary Hammack, Rocky Flats; and James D. Long, Jr., Rocky Flats. Thereafter, on September 21, 2000, Albuquerque issued a

determination stating that no documents existed that were responsive to R.E.V. ENG Services' request. Determination Letter dated September 21, 2000, from Carolyn A. Becknell, Acting Freedom of Information Officer, Office of Public Affairs, Albuquerque, to David E. Ridenour (September 21, 2000 Determination Letter).

In response to the September 21, 2000 Determination Letter from Albuquerque, R.E.V. ENG Services filed this Appeal asking for a clarification of the apparent dichotomy between the August 9, 2000 Determination Letter, which seems to indicate that responsive information was sent to Rocky Flats, and the September 21, 2000 Determination Letter, which clearly indicates that Albuquerque has no relevant documentary information to release to the requester. Appeal Letter dated September 26, 2000, from David E. Ridenour, R.E.V. ENG Services, to Director, OHA, DOE (September 26, 2000 Appeal Letter). R.E.V. ENG Services requests any information that was sent to Rocky Flats. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We have contacted Albuquerque to determine what type of search was conducted. We now have the full story. Albuquerque contacted David Fredrickson's office to ascertain whether any documents were prepared in association with the May 5, 2000 Memorandum referenced in the request. Memorandum of Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and Terry Apodaca, Albuquerque (October 5, 2000). *Id.* We have been told that the May 5, 2000 Memorandum was sent to Rocky Flats by way of an interoffice envelope. *Id.* Therefore, no shipping form or label would have been generated. *Id.* According to the information we received, Mr. Fredrickson gave to his assistant verbal instructions for writing the May 5, 2000 Memorandum, so no notes were generated. *Id.* Mr. Fredrickson did not have any electronic mail or telephone contact or correspondence with Rocky Flats prior to his sending the documents referenced in the May 5, 2000 Memorandum. *Id.* Finally, Rocky Flats did not know the information referenced in the Memorandum existed at Albuquerque prior to its receipt from Mr. Fredrickson. Therefore, there were no instructions from Rocky Flats to Albuquerque regarding which office would be responsible for reviewing the documents for releasability. *Id.* Consequently, no documents ever existed at Albuquerque that were responsive to R.E.V. ENG Services' request, despite the implication from the August 9, 2000 Determination Letter that responsive documents had been sent to Rocky Flats.

Albuquerque's finely crafted August 9, 2000 Determination Letter indicating that "the *results* of [the] search for responsive documents" were referred to Rocky Flats was not intended to mislead the requester but rather to give no indication of whether any responsive documents had in fact been found at Albuquerque.(2) The only "result" referred to Rocky Flats by the August 9, 2000 Determination Letter was the fact that there were no responsive documents. *Id.* Based on the circumstances of this case and the search Albuquerque performed, we are convinced that Albuquerque followed procedures which were reasonably calculated to uncover the material sought by R.E.V. ENG Services in its request. Accordingly, the R.E.V. ENG Services Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. ENG Services, on October 3, 2000, Case No. VFA-0618, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the

district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 31, 2000

(1)The report itself has been the subject of a number of FOIA requests to both Albuquerque and Rocky Flats by R.E.V. ENG Services and others. In fact, the May 5, 2000 Memorandum was written in response to an earlier FOIA request that R.E.V. ENG Services filed with Albuquerque. Albuquerque responded to that request by stating that it had no responsive documents. However, after the determination, Mr. Fredrickson found a copy of the report and sent it to Rocky Flats. He then sent the May 5, 2000 Memorandum to Ms Becknell.

(2)Albuquerque chose this wording because, at the time the August 9, 2000 Determination was written, Albuquerque understood that all FOIA determinations regarding this material, even the existence or nonexistence of the material, were to be made by Rocky Flats, not Albuquerque. This misunderstanding as to which office was primarily responsible was corrected during the September 14, 2000 telephone conversation discussed above.

Case No. VFA-0619, 28 DOE ¶ 80,124

November 8, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Northwest Technical Resources, Inc.

Date of Filing: October 11, 2000

Case Numbers: VFA-0619

On October 11, 2000, Northwest Technical Resources, Inc. (NTR) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) in response to a determination that DOE's Richland Operations Office (DOE/RL) issued to NTR on September 13, 2000. The determination concerned a request for information that NTR submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of any existing responsive material to NTR.

I. Background

On August 17, 2000, NTR filed a FOIA request with DOE/RL seeking information related to the award of a technical services contract between NTR and Bechtel Hanford, Inc. (BHI); information regarding the award of a contract between Kelly Temporary Services, Inc. (Kelly) and BHI; information related to a DOE/RL report about the contract between NTR and BHI, and information that states that NTR's contract was supported by inadequate cost/price analysis. Letter from NTR to DOE/RL (August 17, 2000) (Request). DOE/RL released some information about the contract between NTR and BHI to NTR, but found no additional responsive information (some responsive information had been provided to NTR in response to an earlier request). Letter from DOE/RL to NTR (September 13, 2000). Further, DOE/RL informed NTR that the Kelly contract was between Kelly and Bechtel National, Inc., and was not an agency record. *Id.* NTR disagreed and filed this appeal, alleging that the Kelley-Bechtel National contract was in fact an agency record. Letter from NTR to OHA (October 11, 2000) (Appeal).

II. Analysis

Our threshold inquiry in this case is whether the material requested can be considered "agency records" and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf*. 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria can nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we

conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but

merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations, such as Bechtel National, Inc., are subject to the FOIA. *See, e.g., International Brotherhood of Electrical* Workers, 27 DOE ¶ 80,152 (1998); BMF *Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

A. Bechtel National Is Not An Agency Under the FOIA

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552 (f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the federal government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. V. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

We find that Bechtel National, Inc., parent company of BHI, cannot be considered an agency under FOIA because Bechtel National is not subject to substantial federal control. BHI, a subsidiary of Bechtel National, has a contractual relationship with DOE as the Environmental Restoration Contractor (ERC) at the Hanford site. *See* Contract DE-AC06-93RL12367. BHI previously entered into subcontracts with local vendors, such as NTR, for office support for the Environmental Restoration Program. However, Bechtel National now contracts with Kelly to provide office support to BHI for the ER program. (1) *See* Memorandum of Telephone Conversation between Dorothy Riehle, DOE/RL and Valerie Vance Adeyeye, OHA (October 19, 2000). There is no contractual relationship between Bechtel National and DOE in this case. We therefore conclude that Bechtel National cannot be considered an "agency" subject to the FOIA.

B. The Records Were Not Within DOE's Control At The Time Of Request

Although Bechtel National is not an agency for the purpose of the FOIA, its records relevant to NTR's request could become "agency records" if DOE obtained them and they were within DOE's control at the time NTR made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. However, DOE/RL has informed us that the information that NTR seeks was not in the agency's control at the time of the appellant's request. *See* Memorandum of Telephone Conversation Between Dorothy Riehle, DO/RL and Valerie Vance Adeyeye, OHA (November 3, 2000). Based on these facts, the responsive documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

C. There is No Contractual Relationship Between Bechtel National and DOE

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and the contractor provides that they are the

property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

As stated previously, there is no contractual relationship between Bechtel National and DOE. Therefore, we find that the requested records are not agency records and are not subject to release under DOE regulations.

It Is Therefore Ordered That:

(1) The Appeal filed on October 11, 2000 by Northwest Technical Resources, Inc. OHA Case No. VFA-0619, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552 (a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 8, 2000

(1)Section H-23 permits the ERC to "obtain direct support from affiliates to meet technical and staffing requirements . . . as approved by the Contracting Officer." See Contract DE-AC06- 93RL12367.

Case No. VFA-0620, 28 DOE ¶ 80,128

November 30, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Heart of America, Northwest

Date of Filing:October 27, 2000

Case Number: VFA-0620

Heart of America, Northwest ("Heart of America") filed this Appeal in response to a determination issued to it by the Department of Energy's Richland Operations Office (Richland). The determination concerns a request for records that Heart of America submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In its Appeal, Heart of America requests the release of additional material responsive to its request. As explained below, we will deny the Appeal.

BACKGROUND

In May 2000, Heart of America sent Richland a request for copies of certain records pertaining to a contract between British Nuclear Fuels, PLC, (BNFL) and the DOE's Office of River Protection (ORP).(1) The contract, denominated "TWRS Privatization Contract No. DE-AC06-RL13308," (the "contract"), dealt with waste treatment and immobilization services at the DOE's Hanford site.

In determination letters issued on June 23 and September 5, 2000, Richland responded by sending Heart of America copies of some requested records, and by stating that it did not have the other requested records. Heart of America then filed the present Appeal,

claiming that Richland had improperly withheld documents it had in its possession.(2)

Heart of America had organized its FOIA request into six items, with some of the items further broken down into categories of records. It has appealed Richland's response to three of its items. We will discuss each item separately below.

HEART OF AMERICA'S APPEAL

1. Item 1

In Item 1 of its request, Heart of America asked for various records "relating to costs projected to be incurred by ... BNFL for waste treatment services pursuant to [the contract] and elements of proposed fixed price for unit of treated waste...." Item 1 was subdivided into a number of categories. Category E of Item 1 requested "review of A-8/Fixed Unit prices, including disclosures of rate increases to Congress, the State of Washington, the Hanford Advisory Board, Heart of America Northwest or the public."

Richland replied by releasing responsive documents for most of the categories under Item 1. With regard to Category E, however, Richland stated that it had no responsive documents.

In its Appeal of this response, Heart of America argues that Richland "improperly claims that the documents they do have in their possession are not responsive because they were not generated by the agency and are consequently not agency records. This is an erroneous interpretation of the [FOIA] statute and an improper attempt to withhold a proper request under the act."

2. Item 3

Under Item 3 of its request, Heart of America asked for projected price and cost elements and potential increases in price from the original contract figures. Richland responded that "there was no documented information between BNFL ... and ... ORP that is responsive to this portion of your request. BNFL ... notified ORP's management verbally for the first time in early April 2000 that the price could exceed the contract target."

Heart of America appealed Richland's response to Item 3 by arguing that Richland "did not assert a specific FOIA exemption as a legal basis for refusing to disclose the requested information. Rather, [Richland] improperly claims that the documents they do have in their possession are not responsive because they were not generated by the agency and are consequently not agency records."

3. Item 6

Under Item 6 of its request, Heart of America asked for records dealing with subcontracts and allowable costs incurred by BNFL or related companies for public relations, lobbying, or public communications in support of the contract. Richland responded that "ORP has no responsive documents. This information was not a BNFL ... deliverable and therefore not an agency record or subject to the FOIA."

Heart of America appealed this response by claiming that the records requested under Item 6 "were all costs that BNFL, Inc., and its subcontractors were seeking reimbursement for and were in the possession of ... ORP. Consequently, they are agency records ... and must be made available."

ANALYSIS

Heart of America has assumed that Richland has the documents in question, but is withholding them on the ground that they are not "agency records." Richland, however, has stated only that it does not have the documents in question. Nevertheless, we will examine Heart of America's contention that the documents in question are agency records and that Richland should therefore have them.

The FOIA applies to "records" that are maintained by "agencies" within the executive branch of government. 5 U.S.C. § 552(f). Consequently, the FOIA is applicable only where the requested documents may be considered an "agency record."

The language of the FOIA does not define the term "agency records," but merely lists examples of the types of information agencies must make available to the public. 5 U.S.C. § 552(a). In interpreting the phrase "agency records," we have applied a two-step analysis for determining whether documents created by non-federal organizations, such as BNFL, are subject to the FOIA. *See, e.g., Los Alamos Study Group*, 26 DOE ¶ 80,212 (1997). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *Los Alamos Study Group*, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive

branch ... or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day- to-day supervision." *Forsham v. Harris*, 445 U.S. 169, 180 & n. 11 (1980) (citing *United States v. Orleans*, 425 U.S. 807 (1976)). In the present case, although BNFL was a contractor for ORP, the DOE did not conduct extensive, detailed, and day-to- day supervision of BNFL's operations.(3) We therefore conclude that BNFL is not an "agency" within the meaning of the FOIA.

Although BNFL is not an agency for the purposes of the FOIA, its records could become "agency records" if DOE obtained them and they were within the DOE's control at the time of the FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (*Tax Analysts*). In this case, none of the responsive documents at issue was in the DOE's control or possession at the time of the request.(4) Based on these facts, the documents do not qualify as "agency records" under the test set forth in *Tax Analysts*.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "when a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2)." 10 C.F.R. § 1004.3(e)(1).

The contract between BNFL and ORP does not contain a clause that explicitly provides for the ownership of various records. It provides only that certain specified "deliverables" become the property of the government. The documents requested by Heart of America are not included among the "deliverables," as stated in the determination letter, and therefore would be, if they exist, contractor-owned records and not government records.(5)

CONCLUSION

As noted above, Richland stated in its determination letter that it did not have certain documents requested by Heart of America. Nothing raised in Heart of America's Appeal causes us to question Richland's determination. However, Heart of America argues in its Appeal that Richland withheld these documents on the ground that they were not agency records. Based on our findings above, we conclude that these documents, if they exist, would not be agency records within the meaning of the FOIA, and would not be deemed DOE property by the contract. Consequently, we conclude that the documents are not subject to release pursuant to the FOIA or DOE regulations. We will accordingly deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Heart of America, Northwest, Case No. VFA- 0620, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. §552 (a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 30, 2000

(1) The Office of River Protection is an agency of the Department of Energy. It was established in 1998 to safely manage tank waste retrieval, treatment, and disposal at the DOE's Hanford site.

(2) Heart of America also expressed its disapproval that Richland responded by referring to internet addresses for certain documents rather than providing the documents themselves. However, after Heart of America filed this Appeal, Richland issued a new determination letter, releasing paper copies of the documents that were referred to by internet address in the first two determination letters. Thus, we need not consider Heart of America's objection to receiving internet addresses.

(3) Telephone statement of Dorothy Riehle, Office of Public Affairs and Information to Warren Gray of the Office of Hearings and Appeals, November 16, 2000.

(4) *Id*.

(5) *Id*.

Case No. VFA-0621, 28 DOE ¶ 80,127

November 29, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Norris Ramage

Date of Filing: October 16, 2000

Case Number: VFA-0621

On October 16, 2000, Norris Ramage filed an Appeal from a determination the Department of Energy's Oak Ridge Operations Office (DOE/OR) issued on September 29, 2000. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Mr. Ramage requested from DOE any records concerning his father, James Dennis Ramage, who was employed by a DOE subcontractor between 1950 and 1955 at the Department's Paducah (Kentucky) Gaseous Diffusion Plant, and any information regarding the subcontractor, F.H. McGraw. Letter from Norris Ramage to Amy Rothrock, DOE/OR (undated); Letter from Norris Ramage, to Paul Seligman, Deputy Assistant Secretary for Health Studies (undated). In response to this request, DOE/OR issued a determination releasing a radiation exposure record, "the only record located on Mr. Ramage . . . ." Letter from Amy L. Rothrock, DOE/OR, to Norris Ramage (September 29, 2000). DOE/OR also informed Mr. Ramage that, in "response to your request for information on the activities of F.H. McGraw, no records could be found." Id. Mr. Ramage challenges the adequacy of DOE/OR's search for documents responsive to his request.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485

(D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, upon receiving the present Appeal, we contacted DOE/OR to inquire as to the search it conducted in response to Mr. Ramage's request. DOE/OR informed us that it searched

the medical, personnel, radiation exposure (dosimetry) and similar files in the possession of the DOE, the current DOE contractor and the United States Enrichment Corporation (USEC), the company that leases the facility and retains custody of some records that they share with DOE for epidemiological and regulatory uses by government agencies.

Electronic mail from Amy Rothrock, DOE/OR, to Steven Goering, OHA (November 2, 2000). Specifically, DOE/OR stated that the following Privacy Act systems of records(1) were searched:

DOE-5 Personnel Records of Former Contractor Employees

DOE-33 Personnel Medical Records

DOE-35 Personnel Radiation Exposure Records

DOE-71 and DOE-72 Radiation Accident and Radiation Study Registries

Electronic mail from Amy Rothrock to Steven Goering (November 16, 2000). In addition, DOE/OR performed a search of its procurement records and of medical, exposure, and personnel files in its Records Holding Area, which contains historical medical and personnel records from the beginning of the Manhattan Project at Oak Ridge. Id.(2)

Based on the above descriptions, it appears clear to us that DOE/OR performed a search of locations where responsive documents were most likely to exist. We therefore conclude that DOE/OR's search was reasonably calculated to uncover the records Mr. Ramage sought. See Janice R. McLemore, 27 DOE ¶ 80,258 (2000) (DOE/OR search of pertinent Privacy Act systems of records and Records Holding Area constituted adequate search for medical records of requester's father). Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Norris Ramage, Case Number VFA- 0621, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 29, 2000

(1) A Privacy Act system of records is a group of records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particulars assigned to the individual. See 10 C.F.R. § 1008.2 (m).

(2) The Manhattan Project was the name of the effort to develop the first atomic bomb for the United States during World War II.

Case No. VFA-0622, 28 DOE ¶ 80,125

November 15, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Shapiro Fussell Wedge Smotherman

Martin & Price, LLP

Date of Filing: October 17, 2000

Case Number: VFA-0622

On October 17, 2000, Shapiro Fussell Wedge Smotherman Martin & Price (Shapiro) filed an Appeal from two determinations issued to the firm on September 11, 2000, and September 19, 2000, by the Golden Field Office (Golden) of the Department of Energy (DOE). Those determinations concerned a request for information that Shapiro submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Golden would be ordered to release the requested information or to issue new determinations.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Shapiro filed a FOIA request seeking "all documents relating, referring or pertaining to the Vermont Biomass Gasifier located in Burlington, Vermont." In both its September 11 and September 19, 2000 determination letters, Golden identified a number of documents responsive to Shapiro's request. However, Golden withheld portions of this information pursuant to Exemptions 4 and 5 of the FOIA. See September 11, 2000 and September 19, 2000 Determination Letters.

On October 17, 2000, Shapiro filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Shapiro challenges certain portions of Golden's determinations related to information Golden withheld under Exemption 4. Specifically, Shapiro asserts that it is uncertain, based on Golden's determination letters, how the withheld information would fall within Exemption 4. Shapiro asks that the OHA direct Golden to release the withheld information.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive

documents. After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search, and if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of the searches; (2) clearly indicate which information was withheld, and (3) specify any exemption under which information was withheld. Burlin McKinney, 25 DOE ¶ 80,205 at 80,797 (1996). It is well established that a FOIA determination must contain a reasonbly specific justification for withholding material pursuant to a FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. Id.

In the present case, Golden withheld responsive information under Exemption 4 of the FOIA. In its determination letters, Golden provided Shapiro with generic explanations regarding how Exemption 4 applies to the responsive information. Instead of providing specific justification for applying Exemption 4 to the material withheld in this case, Golden has merely restated the language of Exemption 4, without adequately explaining the reasons why Golden concluded that the responsive information is exempt from disclosure under the provisions of the FOIA. We find these explanations to be insufficiently informative and short of what is legally required. Furthermore, we note that there does not appear to have been any attempt to segregate and release any non-exempt information from exempt information in any of the withheld information.

Accordingly, we shall remand this matter to Golden either to release to Shapiro all of the information responsive to its request or to issue new determinations adequately supporting the withholding of the information. If new determinations are issued, Golden should include a statement of the reason for denial, a specific explanation of how the exemption applies to the information withheld and a statement why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1). Golden should further review each document for the possible segregation of non-exempt material. See 10 C.F.R. § 1004.7(b)(3).

It Is Therefore Ordered That:

(1) The Appeal filed by Shapiro Fussell Wedge Smotherman Martin & Price, LLP, OHA Case No. VFA-0622, on October 17, 2000, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the Golden Field Office of the Department of Energy, which shall either release the responsive information withheld in its September 11 and September 19, 2000 determinations or issue new determinations in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 15, 2000

Case No. VFA-0623, 28 DOE ¶ 80,126

November 17, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Barbara Schwarz

Date of Filing: October 20, 2000

Case Number: VFA-0623

Barbara Schwarz (Appellant) appeals from a determination of the FOI/Privacy Act Division of the Department of Energy (DOE) Headquarters (DOE/FOI) denying Appellant's request for fee waiver, which she filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the DOE implementing regulations, 10 C.F.R. Part 1004. The FOIA requires federal agencies to release documents to the public upon request, but provides that, absent a waiver, requesters must pay applicable processing fees. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. § 1004.9(a). This appeal, if granted, would waive the processing fees associated with Appellant's FOIA request.

I. Background

On July 19, 2000, Appellant filed a FOIA request with the DOE/FOI. Appellant requested records indicating that the German government secretly (1) motivated the Cuban government to foster hostile relations with the United States; (2) implanted a Communist form of government in Cuba or any other Communist state; (3) invented Communism; and (4) controlled or controls the countries of the former Soviet Union, Korea, Vietnam, Cuba or China. Pursuant to 10 C.F.R. 1004.4(e), the DOE/FOI issued a letter to Appellant on August 23, 2000, which sought either an assurance to pay the fees associated with processing her request, or a request for fee waiver. On September 9, 2000, Appellant filed a request for fee waiver (Waiver Request).(1) That request was denied, and it is that denial which is the subject of this appeal.

Appellant based her Waiver Request on three main premises. First, Appellant stated that she is indigent and cannot afford to pay applicable search fees. Waiver Request at 1. Second, Appellant maintained that she requests the records for "personal" reasons, to be used as evidence that she was

abducted from the United States by the German government. Id. Third, Appellant asserted that she requests the records for "educational reasons as to the secret German Nazi infiltration of the U.S. government and other countries." Waiver Request at 2. To that end, Appellant further asserted that she intends to distribute the information in the records to the public through use of the Internet. Id.

On October 5, 2000, the DOE/FOI denied Appellant's Waiver Request, and, on October 20, 2000, Appellant appealed the denial with the Office of Hearings and Appeals. In her appeal, Appellant maintains that she is entitled to a fee waiver on substantially the same bases she set forth in her Waiver Request, as cited above, and makes several statements in support of the truth of her assertion that the "United States government is secretly infiltrated by German Nazi conspiracy." Appeal letter at 1. Appellant further asserts

she is entitled to two hours of free search time and 100 copies of documents at no charge (the initial processing fees), and appeals from the DOE/FOI's alleged denial of the initial processing fees.

II. Applicable Legal Principles

The FOIA generally obligates requesters to pay processing fees, "except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge." 5 U.S.C. § 552(a)(4)(A)(ii), 10 C.F.R. § 1004.9(a), (b)(4). Either an assurance of willingness to pay fees assessed in accordance with Section 1004.9, or a request for fee waiver, must be included in a FOIA request. The FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the government (the public interest prong); and (2) is not primarily in the commercial interest of the requester (the commercial interest prong). 5 U.S.C. § 552(a)(4)(A)(iii).

In order to satisfy the public interest prong, the DOE requires that a requester show each of the following:

(A) The subject of the requested records concerns "the operations or activities of the government" (Factor A);

(B) Disclosure of the requested records is "likely to contribute" to an understanding of government operations or activities (Factor B);

(C) Disclosure of the requested records would contribute to an understanding of the subject by the general public (Factor C); and

(D) Disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

If a requester satisfies the four factors of the public interest prong, he must then satisfy the commercial interest prong by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Administrative appeals of fee waiver denials generally are reviewed de novo. See Tod N. Rockefeller, 27 DOE ¶ 80,167 (September 29, 1998).

In denying Appellant's Waiver Request, the Director of the DOE/FOI found that Appellant failed to satisfy each element of the public interest prong. We agree. After performing a de novo review of the merits of Appellant's fee Waiver Request, we find that disclosure is not in the public interest and, therefore, Appellant should not be granted a fee waiver.

III. Analysis

Factor A under the public interest prong requires that the requested records be sought for their informative value with respect to specifically identifiable government operations or activities. See Van Fripp v. Parks, No. 97-0159, slip op. at 10, (D.D.C. Mar. 16, 2000) (characterizing request as "fishing expedition that does not relate to defined operations or activities of the government") (Van Fripp); Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (finding requested list of agency attorneys and their bar affiliations "clearly does not concern idenifiable government activities or operations"). A request for access to records for their intrinsic informational content alone will not entitle one to a fee waiver. See Carney v. United States Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994) (stating subject matter of information sought relevant to consideration of fee waiver) (Carney).

In this case, records indicating that the German government secretly controls or controlled certain governments might have intrinsic informative value and be of general interest. However, Appellant has failed to show that such records have informative value with respect to a specifically identifiable operation or activity of the United States government. Appellant's Waiver Request and appeal letter are laden with denouncements of Nazi Germany and personal attestations as to the reality of discrete, worldwide German influence, but they do not address the issue relevant to a FOIA fee waiver determination, namely, whether the information Appellant seeks relates to or will shed light upon a particular aspect of government conduct. Because Appellant has failed to show that the requested records have informative value with respect to specifically identifiable government operations or activities, Appellant has failed to satisfy Factor A.

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. See Carney, 19 F.3d at 814. Because, as explained with regard to Factor A, there is no evidence linking the subject matter of Appellant's request to a specifically identifiable government operation or activity, disclosure of the requested information is not likely to contribute to or enhance public understanding of a specific government operation or activity. Thus, Appellant has failed to satisfy Factor B.

Factor C requires that the requested material contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Schrecker v. United States Dep't of Justice, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the ability and intention to disseminate the requested information to the public. See Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 & n.5 (D.C. Cir. 1988) (holding inability to disseminate information alone is sufficient basis for denying fee Waiver Request); Donald R. Patterson, 28 DOE ¶ 80,107 (2000) (denying fee waiver based on requester's failure to satisfy Factor C). Furthermore, passively making information available to anyone who might access it does not satisfy Factor C, because merely placing data in the public domain without analysis or explanation will not contribute to the public's understanding of the subject matter. See Van Fripp, slip op. at 11-12 (finding "it is plaintiff's burden to disseminate the requested information to the public and not, merely, to make it available"); Donald R. Patterson, supra (citing Van Fripp, supra).

Although Appellant asserts that she intends to distribute the requested information on the Internet, we have previously held that posting information on a website is a passive method of dissemination and insufficient for purposes of Factor C. See Donald R. Patterson, supra ("Patterson's plan to post information on a website . . . is a passive method of placing information in the public domain, compared to, for instance, distributing the material in a newsletter or journal."). Because Appellant has set forth no evidence that she will use a means of distribution other than the Internet, she has not demonstrated the ability and intention to disseminate the requested information to the public at large. Thus, Appellant has failed to satisfy Factor C.

Under Factor D, the last element of the public interest prong, disclosure must contribute "significantly" to public understanding of government operations or activities. Because, as explained with regard to Factor A, Appellant has not shown that the requested information relates to specifically identifiable government operations or activities, release of the requested information will not significantly contribute to public understanding of government operations or activities. Thus, Appellant has failed to satisfy Factor D.

The foregoing analysis reveals that Appellant has not satisfied the public interest prong, and on that basis alone, should not be granted a fee waiver. It is therefore unnecessary to proceed to analysis of the commercial interest prong.

In addition, to the extent Appellant claims entitlement to a fee waiver because she is indigent, and because she seeks the requested information for personal reasons, we note that neither basis is a proper consideration under the FOIA for purposes of making a fee waiver determination. See Ely v. United States

Postal Serv., 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents."); McClain v. United States Dep't of Justice, 13 F.3d 220, 220-21 (7th Cir. 1993) (finding fee waiver inappropriate where requester sought to serve private rather than public interest).

Finally, we need not address Appellant's assertion that the DOE/FOI denied her two free hours of search time and 100 copies free of charge (the initial processing fees). It appears that the October 5, 2000 determination from the DOE/FOI denied only Appellant's fee Waiver Request and not the initial processing fees provided for by 5 U.S.C. § 552(a)(4)(A)(ii), 10 C.F.R. § 1004.9(a), (b)(4) (quoted supra).

IV. Conclusion

Based on the foregoing, Appellant has failed to show that disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government. Therefore, her appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act appeal filed by Barbara Schwarz on October 20, 2000, OHA Case Number VFA-0623, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: November 17, 2000

(1)Appellant also appealed the DOE's August 23, 2000 fee letter. However, on September 28, 2000, the DOE Office of Hearings and Appeals dismissed Appellant's appeal for lack of jurisdiction.

Case No. VFA-0624, 28 DOE ¶ 80,130

December 4, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Judith A. Neal

Date of Filing:November 2, 2000

Case Number: VFA-0624

On November 2, 2000, Judith Neal filed an Appeal from a determination the FOIA Officer of the Oak Ridge Operations Office (FOIA Officer) of the Department of Energy (DOE) issued to her on August 10, 2000. In that determination, the FOIA Officer denied a request for information that Ms. Neal filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that a federal agency release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency either may or must withhold. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In Ms. Neal's request for information, she sought copies of documents pertaining to her mother, Carrie W. Smith, who worked at Oak Ridge during the Manhattan Project. The FOIA Officer's determination letter indicated that she found no documents responsive to the request. In this Appeal, Ms. Neal asks us to verify that the DOE conducted a search that included her mother's maiden name, Carrie W. Wilson, as well as her married name, Carrie W. Smith. In accordance with Ms. Neal's Appeal, we have reviewed the adequacy of the search for responsive documents.

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

We have investigated the DOE's search made in response to Ms. Neal's request. In this investigation, we contacted the FOIA Officer to answer Ms. Neal's question concerning the extent of the DOE's search. The

FOIA Officer informed us that she conducted a search using Ms. Neal's mother's social security number. She stated that a social security number search ensured that all records for Carrie Smith, Carrie Wilson, or any other names her mother might have used would be retrieved if they existed. Furthermore, the FOIA Officer informed us that all of the relevant DOE records from this time period were located in "the vault" and these records were organized by social security number. See Record of November 27, 2000 Telephone Conversation between Leonard M. Tao, OHA Staff Attorney, and Amy Rothrock, Oak Ridge Operations Office FOIA Officer. Thus, we find that the FOIA Officer's use of Ms. Neal's mother's social security number to search for responsive records was the most effective and comprehensive method possible and there is no need for a separate search using only Ms. Neal's mother's maiden name. Since the FOIA Officer conducted a search that was the most likely to reveal any responsive information and she confirmed that no responsive documents exist, we find the FOIA Officer's search to be adequate and must deny Ms. Neal's appeal.

It Is Therefore Ordered That:

(1) The Appeal Judith A. Neal filed on November 2, 2000, Case No. VFA-0624, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 4, 2000

Case No. VFA-0625, 28 DOE ¶ 80,132

December 8, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Linda G. Shown

Date of Filing: November 3, 2000

Case Number: VFA-0625

On November 3, 2000, Linda Shown, Esq. (Shown) filed an Appeal from a determination issued to her in response to a request for documents concerning Lester Mays that Shown submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on October 19, 2000, by the Oak Ridge Operations Office (Oak Ridge). This Appeal, if granted, would require that Oak Ridge perform an additional search.

I. Background

Lester Mays was employed by Tennessee Eastman (then the civilian contractor at the Oak Ridge site) from September 1944 to May 1945. Memorandum of Telephone Conversation between Amy Rothrock, Authorizing Official, Oak Ridge, and Valerie Vance Adeyeye, Office of Hearings and Appeals (OHA) Staff Attorney (November 28, 2000). Mr. Mays worked at what is now the Y-12 plant in Oak Ridge. *Id.* According to Shown, when Mr. Mays left Tennessee Eastman, he brought home a container filled with a thick white substance that he had scraped from machinery during his employment at the plant. Letter from Shown to Director, OHA (November 3, 2000) (Appeal). After Mays' death his widow called "someone in authority" to remove the substance from her home, and two "government workers" dressed in "full protective gear and with protective equipment" went to the residence and removed the container. *Id.* Mays' widow requested (but never received) either a report on the contents of the container or a receipt for the container. Appeal at 2.

On August 30, 2000, Shown filed a FOIA request with Oak Ridge on behalf of Lester Mays' son for "a copy of the complete file pertaining to his father . . . including but not limited to medical records, work related records, and any other information regarding Mr. Lester H. Mays." Letter from Shown to Oak Ridge (August 30, 2000). The request did not, however, mention the alleged removal of the substance from the home. Oak Ridge searched DOE historical files and found responsive personnel records that included some medical records. Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and Valerie Vance Adeyeye, OHA Staff Attorney (November 28, 2000). Oak Ridge released those records to Shown along with the determination on October 19, 2000. Letter from Oak Ridge to Shown (October 19, 2000). Shown then filed this Appeal, contending that

additional records pertaining to Lester Mays "must exist" because of the circumstances surrounding the removal of the mysterious substance from the Mays home in the 1960s. Appeal at 2. Mays' family believes that his death was caused by radiation exposure during his employment at Oak Ridge, and they allege that Oak Ridge should have responsive records in its possession relating to what they believe was

his radiation exposure. Id.

II. Analysis

A. ADEQUACY OF SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Oak Ridge to ascertain the scope of the search, particularly in light of Shown's description of the removal of the container. Oak Ridge informed us that they were not aware of the container incident that allegedly occurred in the 1960s. Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and Valerie Vance Adeyeye, DOE Staff Attorney (November 28, 2000). As a result, Oak Ridge had performed its search using Mr. Mays' Social Security number, and limited its search to DOE historical files. *Id.* If an accident occurred in the 1940s, the Health Physics Department would have generated a memo about the incident. *Id.* Oak Ridge also searched for any Health Physics files regarding Mr. Mays, and found no responsive material. *Id.* Oak Ridge did not search the Y-12 facility because the plant did not begin keeping detailed records on employees until the 1950s, over five years after Mr. Mays left Tennessee Eastman. *Id.* The Y-12 facility retained only a personnel card on each World War II-era employee, unless the individual was sick or involved in a hazardous material spill. *Id.* As for the allegation of radiation exposure, radiation exposure records were not initiated until the mid-1950s, after Mr. Mays had left the facility. *Id.* We therefore find that Oak Ridge conducted a search reasonably calculated to uncover the responsive material, i.e., records relating to a World War II-era employee. Accordingly, this Appeal should be denied. (1)

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Linda Shown on November 3, 2000, OHA Case Number VFA-0625, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 8, 2000

(1)Because the request did not contain any information about the alleged removal of the canister from the Mays residence, Oak Ridge was unaware of the incident. However, after we notified Oak Ridge of Shown's allegation, Oak Ridge agreed to initiate a search of Y-12 files for information relating to the 1960s incident. Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and Valerie Vance Adeyeye, OHA Staff Attorney (November 28, 2000). At Oak Ridge's request, Shown provided additional information about the incident to the FOIA office in order to facilitate the new search.

Letter from Shown to OHA (November 29, 2000). That search is ongoing.

Case No. VFA-0626, 28 DOE ¶ 80,131

December 4, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. ENG Services

Date of Filing: November 3, 2000

Case Number: VFA-0626

On November 3, 2000, R.E.V. ENG Services filed an Appeal from a final determination that the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) issued on October 4, 2000. In its determination, Rocky Flats denied R.E.V. ENG Services' request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require Rocky Flats to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that is required to be withheld or may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated August 1, 2000, R.E.V. ENG Services submitted a FOIA request to Rocky Flats for "information pertaining to the Rocky Flats Field Office tasking" for the "Final Report that was prepared for the [Rocky Flats] Office of Chief Counsel by David Fredrickson of the Albuquerque Field Office." Request Letter dated August 1, 2000, from David Ridenour, P.E., R.E.V. ENG Services, to Mary Hammack, FOIA/Privacy Act Officer, Rocky Flats. In an additional letter dated August 1, 2000, R.E.V. ENG Services submitted a FOIA request to Rocky Flats for documents delivered to Rocky Flats and referenced in a May 5, 2000 Memorandum from David M. Fredrickson, Director, Personnel Security Division, Albuquerque, to Carolyn A. Becknell, Acting FOIA/Privacy Act Officer, Albuquerque.(1) Second Request

Letter dated August 1, 2000, from David Ridenour, P.E., R.E.V. ENG Services, to Mary Hammack, FOIA/Privacy Act Officer, Rocky Flats.

On October 4, 2000, Rocky Flats denied both the August 1, 2000 requests, withholding six responsive documents,(2) claiming they were exempt from disclosure under Exemption 5. Rocky Flats claimed that the documents were attorney work-product. Determination Letter dated October 4, 2000, from Barbara A. Mazurowski, Manager, FOI Authorizing/Denying Official, Rocky Flats, to David E. Ridenour, P. E., R.E.V. ENG Services (Determination Letter).

In its Appeal, R.E.V. ENG Services disputes the withholding of information under Exemption 5. First, R.E.V. ENG Services asserts that claiming that the OF 41 Routing and Transmittal Form is attorney work-product strains the limits of credulity. Appeal Letter dated October 31, 2000, from David E. Ridenour, P.E., R.E.V. ENG Services, to George B. Breznay, Director, Office of Hearings and Appeals (OHA), DOE. The Appellant believes that Rocky Flats' justification in support of withholding the remainder of the documents rests on the assertion that he will be suing the government. R.E.V. ENG Services claims that no lawsuit is contemplated. *Id.*

II. ANALYSIS

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The attorney work-product privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). It protects documents prepared by an attorney in contemplation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). This privilege is also applicable to material prepared by a non-attorney who was supervised by an attorney. *Nishnic v. Department of Justice*, 671 F. Supp. 771, 772-73 (D.D.C. 1987). Finally, because factual work-product is not "routinely" or "normally" discoverable, it can also be protected under Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (*Grolier*). In order to claim the attorney work-product privilege, a lawsuit need not have already been filed. The privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Further, termination of litigation does not cancel the protection for attorney work-product material. *Grolier,* 462 U.S. at 28.

We have reviewed copies of all six documents withheld by Rocky Flats. As an initial matter, we agree with the Appellant that the "Routing and Transmittal Slip" does not contain any information that can be considered attorney work-product.(3) Other than the information listed in its description in the Determination Letter, it contains Mr. Fredrickson's room and telephone numbers. Further, it contains two sentences indicating what it is transmitting. None of this information can be construed to be attorney work-product. We believe it should be released in its entirety.

The other five documents are a letter and four memoranda. The second document we consider is a copy of a letter dated May 13, 1997, from Mell Roy, Chief Counsel, Rocky Flats, to Bruce Twining, Manager, Albuquerque. We believe that this document deals essentially with a personnel matter; however, it does contain some information that may be considered attorney work-product. The last four documents, all memoranda, contain similar, often identical, information. The first memorandum is from James D. Long, Jr., Attorney-Advisor, Rocky Flats, to Mr. Fredrickson, outlining what questions Mr. Fredrickson's inquiry should answer. The last three documents are cover memoranda from Mr. Fredrickson to Ms Roy, transmitting the report. These memoranda are essentially the same document with different dates. These three memoranda essentially replicate Mr. Long's memoranda.

A determination must adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984). In the present case, the Determination Letter provides only a statement that the documents are attorney work-product. This justification is the type of conclusory explanation that we have found to be invalid previously. *Arnold & Porter*, 12 DOE at 80,528. *Arnold & Porter* required that an explanation be set forth showing how the exemption applied to the specific document. That explanation must show that serious thought was given to the reasons justifying the withholding of each document. *Id.* at 80,529. In this case, with the exception of providing a blanket

statement that the documents are attorney work-product, Rocky Flats included no other justification. More importantly, Rocky Flats failed to specifically provide any explanation of how the attorney work-product privilege applies to these documents. Although we believe that portions of these documents may contain attorney work-product, we believe Rocky Flats is in the best position to make that initial assessment. We will remand the matter to Rocky Flats for a better description of the documents and an explanation of how the privilege applies to them.

III. THE PUBLIC INTEREST

In a typical case, the fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1.

Despite the fact that Rocky Flats need not segregate the factual material in a document that is protected by the attorney work-product privilege, we believe that Rocky Flats should release the factual information in these documents in furtherance of the public interest. The Attorney General has indicated that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) at 1, 2 (Reno Memorandum). The factual information can be released without foreseeable harm to the agency, even though it would not "normally" or "routinely" be discoverable in litigation. Portions of the documents are factual information that could easily be segregated and released to R.E.V. ENG Services without adversely harming the interest protected by the attorney work-product privilege. Therefore, we will remand the six documents to Rocky Flats with a direction to segregate and release the factual information or to provide justification sufficient to articulate a reasonably foreseeable harm in releasing any portion of the documents.

IV. CONCLUSION

We are remanding the Routing and Transmittal Slip to Rocky Flats for its release. We are also remanding the letter and four memoranda to Rocky Flats so that it may provide an adequate justification of how the attorney work-product privilege applies to these documents. Rocky Flats should review these six documents, and segregate and release all factual portions of them, or issue a new determination that justifies their withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. ENG Services, on November 3, 2000, Case No. VFA-0626, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Rocky Flats Field Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 4, 2000

(1)The Fredrickson Memorandum was written in response to an earlier FOIA request that R.E.V. ENG Services filed with Albuquerque. Albuquerque responded to that request by stating that it had no responsive documents. However, after the determination, Mr. Fredrickson found a copy of the report and sent it to Rocky Flats. He then sent the May 5, 2000 Memorandum to Ms Becknell.

(2)The determination letter refers to eight documents. Included within those eight documents are the original report, which has been the subject of two previous FOIA Appeals. *R.E.V. ENG Services*, 28 DOE ¶ 80,115 (2000); *Charlene Pazar*, 27 DOE ¶ 80,104 (1998). In these cases, we found that the report was attorney work-product. Therefore, we will not revisit the matter. Another document mentioned in the determination letter is a "note for retained copies." This was also the subject of a previous FOIA Appeal. *R.E.V. ENG Services*, 28 DOE ¶ 80,116 (2000). In that case, we remanded the matter to Rocky Flats for a new determination justifying the withholding of this document. Because that remand is still pending, we will not review that document again.

(3)We note that in the Determination Letter, this document is identified as containing the date "July 7, 1997." The date on the copy we received was "July 2, 1997." We believe this to be a typographical error in the Determination Letter.

Case No. VFA-0627, 28 DOE ¶ 80,133

December 11, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner:Martin Becker

Date of Filing:November 13, 2000

Case Number: VFA-0627

Martin Becker (Appellant) appeals from a determination of Department of Energy (DOE) Savannah River Operations Office (SROO) issued in response to his request for documents, which he filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the DOE implementing regulations, 10 C.F.R. Part 1004. In its determination, the DOE/SRO stated that the DOE neither owned nor possessed the documents responsive to Appellant's FOIA request, and, therefore, could not release them. For the reasons set forth below, this appeal is granted and remanded to the SROO for a new determination in accordance with this decision.

I. Procedural History

On September 22, 2000, Appellant filed a FOIA request with the SROO, seeking a copy of any lease entered into by Westinghouse Savannah River Company (WSRC) at Centennial Corporate Center in Aiken, South Carolina, since January 1, 1996 (the lease). WSRC is the management and operating (M&O) contractor at the DOE Savannah River Site and enters into various subcontracts, such as the lease, with third parties for the purpose of fulfilling its M&O contract with the DOE.

The SROO responded with a determination letter dated October 26, 2000. The determination letter stated:

The documents responsive to your request are neither owned nor possessed by [the DOE]. Specifically, DOE's [M&O contract with WSRC] provides:

The following records are considered property of the Contractor and are not Government documents: non-accounting records relating to any procurement action by the Contractor.

The records you have requested involve a WSRC subcontract and are thus procurement-related records of WSRC. DOE itself performed a search and we have no documents responsive to your request.

On November 13, 2000, Appellant filed this appeal from the SROO's determination. In his appeal letter, Appellant maintains that the lease is owned by the DOE, because it is "the only document that can actually verify for DOE in accord with [Department of Energy Acquisition Regulations] that the correct amounts are being (or have been) requested from DOE by Westinghouse for lease payments, and [a]s a result, in addition to statutory possession, DOE would have actual possession of the lease after a ?reasonable' search."

II. Applicable Legal Principles

Unless requested material falls within one of nine statutory exemptions, the FOIA generally requires a federal agency to release its records to the public upon request. 5 U.S.C. § 552(a); 10 C.F.R. § 1004.3. See also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).(1) The threshold inquiry in this case is whether the documents requested are "agency records" subject to the FOIA. As enumerated by the U.S. Supreme Court in United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989) (Tax Analysts), two requirements must be satisfied in order for materials to qualify as "agency records" (collectively, "the Tax Analysts test"). First, an agency must either create or obtain the materials. To that end, FOIA obligates an agency to provide access to only those documents which it in fact has created and obtained, not documents the agency merely could have created or obtained. Kissinger v. Reporters Com. for Freedom of the Press, 445 U.S. 136, 151-52 (1980) (Kissinger). The FOIA does not obligate an agency to create, retain, or compile documents as a matter of course, or procure records specifically in response to a FOIA request. Id. Second, the agency must be in control of the requested materials at the time the FOIA request is made. "By control we mean that the materials must have come into the agency's possession in the legitimate conduct of its official duties." Tax Analysts, 492 U.S. at 145.

Even if requested documents are not "agency records" under the Tax Analysts test, however, they nevertheless may be subject to disclosure under DOE regulations. 10 C.F.R. § 1004.3(e)(1) provides that "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)."

As will be discussed below, although the lease is not an "agency record" under the Tax Analysts test, the SROO has failed to provide an adequate explanation as to why the lease is not subject to disclosure under 10 C.F.R. § 1004.3(e)(1).

II. Analysis

A. The Lease is not an Agency Record Under the Tax Analysts Test

1. The Lease was not Created by a Government Agency

It is well settled that a private entity may be considered a government agency only where its structure and daily operations are subject to substantial federal control. See United States v. Orleans, 425 U.S. 807, 815 (1976). Although the DOE exercises general control over contractual work, it does not supervise the day-to-day operations of WSRC. Thus, the fact that WSRC participated in the creation of the lease does not render the document one created by a government agency.

2. The Lease was not in the SROO's Possession at the Time of

Appellant's FOIA Request

As indicated above, the FOIA obligates an agency to disclose only those documents which it in fact has created or obtained, not documents it merely could create or obtain. See Kissinger, 445 U.S. at 152. The relevant date for determining whether an agency has obtained documents is the date of the corresponding FOIA request. Id. The FOIA imposes no duty upon an agency to retain documents that have come into its possession or retrieve documents the agency once possessed. Id.

In this case, the SROO stated in its October 26, 2000 determination letter that it found no documents responsive to Appellant's September 22, 2000 FOIA request. In addition, in late November 2000, this office contacted officials from the Site Services Division (SSD) and Contracts Management Division

(CMD), who confirmed that their searches of their respective offices failed to uncover the lease. Telephone Conversations with Ron Jernigen, Tom Reynolds and Larry Snyder, Nov. 22, 2000; Telephone Conversation with Tom Reynolds, Nov. 27, 2000.

Appellant contends that because the lease is the "only" document that the SROO can use to verify reimbursement of allowable expenses in accordance with Department of Energy Acquisition Regulations [DEAR](2), the SROO should have obtained and filed a copy of the lease. Telephone Conversation with Martin Becker, Nov. 15, 2000. Furthermore, Appellant maintains, even if the SROO does not physically possess a copy of the lease, it has "statutory possession" and could have "actual possession of the lease after a ?reasonable' search.(3) Appeal Letter dated Nov. 13, 2000.

According to the Deputy Director of the CMD, however, the SROO verifies allowable expenses through use of a computerized database known as the Procurement Control System (PCS). Telephone Conversation with Tom Reynolds, Nov. 22 and 27, 2000. WSRC's Purchasing Department enters information from the lease into the PCS, which it then transfers to WSRC's Accounting Department. Id. The Purchasing Department, not the Accounting Department, maintains a copy of the lease. Telephone Conversation with Tom Reynolds, Nov. 27, 2000. The Accounting Department uses the PCS data to seek payment from the SROO. Id. See also Telephone Conversation with Tim Fischer of the SROO Office of Chief Counsel, Nov. 28, 2000.

The SSD and CMD officials concede that they had obtained a copy of the lease for approval purposes in 1996, when the lease was in development, but maintain that they did not have a copy within their possession and control at the time of Appellant's FOIA request. Telephone Conversations with Ron Jernigen, Tom Reynolds and Larry Snyder, Nov. 22, 2000; Telephone Conversation with Tom Reynolds, Nov. 27, 2000. The Deputy Director of the CMD further indicated that the approval copy of the lease initially may have been retained in CMD files, but because the files are purged every two years as a matter of course, the copy probably was discarded in 1998. Telephone Conversations with Tom Reynolds, Nov. 22 and 27, 2000.

Based on the foregoing, we find that the SROO did not have a copy of the lease on the date relevant to the Tax Analysts test, i.e., at the time of Appellant's FOIA request. The SROO has found it acceptable to rely upon the PCS, not solely the lease, in verifying allowable expenses. Regardless of whether the SROO has actual ownership of the lease under the DEAR, it has chosen not to exercise its authority to obtain a copy of the lease, and the FOIA does not require an agency to retrieve a responsive document merely because it can. See Kissinger, supra.

Because WSRC is not an "agency" for purposes of the FOIA, and the SROO has not obtained the responsive documents, we conclude that the lease is not an agency record under the Tax Analysts test.

B. The Lease May be Subject to Disclosure Under DOE Regulations

Although the lease is not an "agency record" under the Tax Analysts test, it may be subject to disclosure under DOE regulations. 10 C.F.R. § 1004.3(e)(1) states, "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)."

Section H.27(a) of the M&O contract states, "[except for records defined as contractor-owned,] all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government." As the SROO's determination letter indicates, Section H.27(b)(3) defines contractor-owned records as including, inter alia, "non-accounting records relating to any procurement action by the contractor."

As an initial matter, we find, and the SROO has not disputed, that the lease is a record acquired or

generated by WSRC in its performance of the M&O contract. WSRC generated and entered into the lease for the purpose of fulfilling its obligations under the M&O contract. On that basis alone, the lease could be subject to disclosure under 10 C.F.R. § 1004.3(e)(1).

The SROO contends, however, that the lease falls squarely within Section H.27(b)(3) as a "contractor-owned," "non-accounting record," and, as such, is specifically excepted from Section H.27(a). Therefore, according to the SROO, the lease is outside the purview of 10 C.F.R. § 1004.3(e)(1) and not subject to its disclosure provisions. Determination Letter, Oct. 26, 2000.

In support of the SROO's position, its Office of Chief Counsel (OCC) notes that it is WSRC's Purchasing Department that keeps the lease on file, while the Accounting Department utilizes PCS data. Telephone Conversations with Tim Fischer, Nov. 15 and 28, 2000. The OCC contends that because the Accounting Department processes allowable expenses, the lease would be subject to disclosure only if the Accounting Department maintained a copy of it. Id. If anything, argues OCC, it is the PCS data used by the Accounting Department, not the lease, which constitute an accounting record. Id.

We are not persuaded by SROO's argument. Although it may be true that, under the M&O contract, "non-accounting," "contractor-owned" records are not subject to disclosure, the SROO has failed to provide an adequate explanation in support of its position that the lease fits within that category. The distinction OCC attempts to make between WSRC's Accounting and Purchasing Departments is entirely its own creation and irrelevant for purposes of 10 C.F.R. § 1004.3(e)(1). Regardless of where the lease is kept within WSRC's organization, the lease provides direct support for the accounting information in the PCS that WSRC uses to seek payment of allowable expenses from the SROO.

Indeed, contrary to the SROO's assertion in its determination letter, the fact that the SROO does not have the lease in its physical possession is also irrelevant for purposes of the DOE regulations. 10 C.F.R. § 1004.3(e)(1), unlike the Tax Analysts test, does not require that a record be created or obtained by an agency in order for it to be subject to disclosure. Under the plain language of that regulation, records "in possession of the Government or contractor" and designated as property of the government shall be made available to the public, unless a FOIA exemption applies. The DOE regulations do not distinguish contractor-owned records from government-owned records-- and the M&O contract does not distinguish accounting records from non-accounting records-- depending upon where the records are kept.

Finally, we note that an argument can be made that the lease in fact is an accounting record. Section I.79(d) of the M&O contract provides that "all financial and cost reports, books of account and *supporting documents* . . . and other data evidencing costs allowable, [and] collections accruing to the Contractor in connection with the work under this contract . . . shall be the property of the Government . . . ." (emphasis added). WSRC's Purchasing Department enters information into the PCS directly from the lease. It is reasonable to conclude, and the OCC concedes, that the lease is a "supporting document" to WSRC's books of account and evidences costs allowable, i.e., lease payments. Telephone Conversation with Tim Fischer, Nov. 28, 2000.(4) It seems to stretch reasonable interpretation of the M&O contract too far to find that the lease supports WSRC's books of account under Section I.79(d) but is a "non-accounting"record under Section H.27(b)(3).

IV. Conclusion

Based on the foregoing, we find that the lease is a record acquired or generated by WSRC in its performance of the M&O contract, and as such, may be subject to disclosure under 10 C.F.R. § 1004.3(e)(1). Furthermore, the SROO has failed to set forth an adequate explanation as to why the lease is excepted from 10 C.F.R. § 1004.3(e)(1) as a "contractor-owned," "non-accounting" record. Therefore, this matter will be remanded to the SROO to issue a new determination. In its determination, the SROO must release any responsive documents, provide an adequate explanation as to why the documents are contractor-owned, or provide another adequate explanation for withholding them.

It Is Therefore Ordered That:

(1) The Freedom of Information Act appeal filed by Martin Becker on November 13, 2000, Case No. VFA-0627 is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Savannah River Operations Office to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: December 11, 2000

(1)"Records" includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business." Forsham v. Harris, 445 U.S. 169, 183 (1980). It is undisputed that the lease at issue in this case constitutes a "record" for purposes of the FOIA.

(2)Department of Energy Acquisition Regulations, 48 C.F.R. § 970.52 et seq., set forth uniform acquisition policies and model language to be incorporated in DOE management and operating contracts. Under the M&O contract, which incorporates DEAR language, WSRC may seek reimbursement of expenses incurred under subcontracts, such as the lease, entered into for the purpose of fulfilling M&O obligations.

(3)"We assume that by stating that the DOE has "statutory possession" of the lease, Appellant means to assert that the lease is property of the DOE under its M&O contract with WSRC, which incorporates DEAR language.

(4)OCC further argues, however, that Section I.79(d) should be construed as designating only *primary* supporting documents as property of the government. Otherwise, OCC contends, almost every record related to a subcontract "except negotiation notes" would be subject to disclosure. Telephone Conversation with Tim Fischer, Nov. 28, 2000. This is a burden- related argument and does not control here. We also note that this argument rests upon OCC's unsupported position that the lease does not provide direct support for WSRC's allowable expenses.

Case No. VFA-0629, 28 DOE ¶ 80,134

December 11, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Timothy C. Cronin

Date of Filing: November 14, 2000

Case Number: VFA-0629

On November 14, 2000, Timothy C. Cronin filed an Appeal from a determination the DOE's Bonneville Power Administration (BPA) issued on August 17, 2000. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Mr. Cronin requested from BPA

a copy of all documents, notes, e-mails or other writings or recordings which relate to, reference or evidence any **investigations, requests for waivers or grants of waivers of conflicts of interest** for any [BPA] employee or agent including, but not limited to BPA Administrator, Judith Johansen with respect to the power rate case known as WP-02 and the Record of Decision for the Power Subscription Strategy dated December 21, 1998.

Letter from Timothy C. Cronin to Freedom of Information Act Officer, BPA (July 5, 2000). After filing the request, the requester agreed with BPA to narrow the scope of the request to BPA employees who were "policy makers," including political appointees who worked on the WP-02 Rate Case and the Record of Decision for the Power Subscription Strategy dated December 21, 1998, rather than all BPA employees or agents. The requester defined "policy makers" as those employees with the responsibility to file financial disclosure forms. Electronic mail from Keshmira McVey, Attorney, BPA, to Steven Goering, OHA (November 30, 2000). In response to the request, BPA issued a determination stating that it was "unable to locate any agency records in response to your request." Letter from Gene Tollefson, Freedom of Information Officer, to Timothy Cronin (August 17, 2000). Mr. Cronin challenges the adequacy of DOE/OR's search for documents responsive to his request.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the

files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted BPA and found out the following regarding its search. The BPA Office of General Counsel searched its ethics files, in particular the file pertaining to the BPA Administrator. Second, all staff in BPA's General Counsel's office were informed of the request, and asked to produce any responsive documents. Finally, all policy-making BPA employees who worked on the WP-02 Rate Case and the Record of Decision for the Power Subscription Strategy dated December 21, 1998, were contacted to determine if they had knowledge of any responsive documents. This search process produced no responsive documents.(1) In addition, BPA's agency ethics officer was aware of no investigations into possible conflicts of interest with respect to the rate case referenced in the request. Electronic mail from Keshmira McVey, Attorney, BPA, to Steven Goering, OHA (November 30, 2000).

Based on the above descriptions, it appears clear to us that BPA performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that BPA's search was reasonably calculated to uncover the records Mr. Cronin sought. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Timothy C. Cronin, Case Number VFA-0629, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 11, 2000

(1) BPA did have documents that it did not consider responsive to the request, but that it thought might be of interest to the requester. BPA contacted the requester to find out whether he would like copies of these documents, and subsequently provided copies to the requester. Memorandum of telephone conversation between Keshmira McVey, Attorney, BPA, and Steven Goering, OHA (December 7, 2000).

Case No. VFA-0630, 28 DOE ¶ 80,135

January 4, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: John Michael Unfred, P.C.

Date of Filing: June 22, 2000

Case Number: VFA-0630

On July 28, 2000, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) granted in part a Freedom of Information Act appeal filed by John Michael Unfred, P.C. (Unfred) in response to a determination that the Albuquerque Operations Office of the DOE (DOE/AL) issued to Unfred on April 18, 2000. Unfred requested information relating to certain Cooperative Research and Development Agreements (CRADAs) between the DOE and a private company. DOE/AL contacted the company in order to give that firm an opportunity to identify proprietary information. The firm identified all of the Statements of Work contained in the CRADAs as proprietary, and DOE/AL withheld that material from Unfred. OHA remanded the matter to DOE/AL to identify and release any segregable, non-exempt information in the Statements of Work to Unfred. *John Michael Unfred, P.C.*, 28 DOE ¶ 80,104 (2000).

Subsequent to the issuance of the July 28, 2000 decision, it has been brought to our attention that DOE guidelines for drafting CRADAs indicate that proprietary information in a Statement of Work contained in a CRADA must be clearly marked as proprietary. The Statements of Work that were withheld from Unfred had no such markings. Thus, we find that the Statements of Work in the CRADAs under review cannot be considered proprietary and therefore are not exempt from disclosure pursuant to the FOIA on that basis. On remand, DOE/AL must release the Statements of Work in their entirety or provide a detailed explanation for continuing to withhold them on some other ground.

It Is Therefore Ordered That:

(1) The Decision and Order of July 28, 2000, OHA Case No. VFA-0581, is hereby amended as set forth above.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which

the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 4, 2001

Case No. VFA-0631, 28 DOE ¶ 80,145

February 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gilbert M. Arriola

Date of Filing: November 20, 2000

Case Number: VFA-0631

On November 20, 2000, Gilbert M. Arriola filed an Appeal from a determination issued to him on November 2, 2000 by the Director of Human Resources Management of the Department of Energy (HR). That determination concerned a request for information that Mr. Arriola submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the materials withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a request submitted to HR on January 12, 2000, Mr. Arriola requested the following documents:

(1) A copy of the Senior Executive Service Selection Certification for the position of Deputy Assistant Secretary for International Materials Protection and Emergency Cooperation, Announcement Number: ETR 99-ES-10-040.

(2) A copy of the complete application package submitted by the employee selected for the position including the dates MA received it.

(3) Copies of all documentation and notes, regarding the selection of the selected employee, taken prior to, during and subsequent to his selection; by all employees involved, in anyway, with the processing of his application, and by any boards or at any hearings or meetings.

(4) Copies of Standard Forms 50-B, “Notification of Personnel Action,” for the selected employee, since his/her employment, transfer, or detail with the Department of Energy.

(5) Copies of all documentation having to do with the transfer, detail or assignment of the selected employee to the Department of Energy and the identification of personnel responsible for making the decision to transfer, detail or assign the selected employee to the Office of Nonproliferation and National Security.

(6) The period of time the selected employee worked at the Department of Energy prior to his/her selection.

(7) Identification of the supervisor the selected employee reported to prior to his/her selection.

(8) Information on whether the selected employee was in any way identified as a replacement for Notra Trulock, the former Director, Office of Intelligence and the identification of who, in the Department of Energy, was involved in the matter.

(9) Copies of any Department of Energy statements or news releases announcing or responding to newspaper or other public comments, including comments made by Notra Trulock, on the selected employees identification as the person to replace him as the Director of the Office of Intelligence.

(10) The identity of the selecting official(s).

See Letter from Gilbert M. Arriola to Abel Lopez, Director of Freedom of Information Act and Privacy Group (January 12, 2000).

On November 2, 2000, HR issued a determination which identified documents responsive to Mr. Arriola's request. However, HR redacted information from these documents and withheld some of the materials pursuant to Exemption 5 and Exemption 6 of the FOIA. HR stated that the requested information is both "predecisional and deliberative" and falls clearly within the deliberative process privilege of Exemption 5. In addition, HR found that there is no public interest in the disclosure of an individual's personal information. However, there is a viable privacy interest that would be threatened by such disclosure and thus the information is withholdable under Exemption 6. See Determination Letter at 1-2.

On November 20, 2000, Mr. Arriola filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Arriola challenges HR's determination with respect to Items 3, 4, 5, and 9. He disagrees with the application of Exemptions 5 and 6 to Item 3 of his request and requests that OHA direct HR to release all of the requested information.

II. Analysis

A. Item 3 of Appellant's Request

In Item 3 of his request, Mr. Arriola requested "copies of all documentation and notes, regarding the selection of the selected employee, taken prior to, during and subsequent to his selection; by all employees involved, . . . , with the processing of his application, and by any boards or at any hearings or meetings." In its determination, HR released several responsive documents including the Executive Resources Board Subcommittee Case and Evaluation Summary Sheet, copies of E-mails and other memoranda regarding the selection process. However, it withheld the names of the panel members of the Executive Resources Board, responsible for rating the selected employee. Mr. Arriola asserts that Americans of Hispanic origin are severely underrepresented in DOE at the Senior Executive Service level. According to Mr. Arriola, disclosure of this information may reveal a discriminatory pattern and practice in the selection practice that has a direct impact on the underrepresentation of Hispanics. He therefore asserts that there is a public interest in knowing DOE's selection practices. After a thorough discussion with HR, we find that the names of the panel members were properly withheld under Exemptions 5. However, we also find that HR's determination letter with respect to Exemption 6 was insufficiently informative.

1. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency

in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding the requested information, HR relied upon the “deliberative process” privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. Id.

The material withheld by HR is a list of the names of panel members who sat on the Executive Resources Board. This Board is responsible for rendering an opinion of the best qualified candidates. These opinions are then forwarded to the selecting official, who then makes the final determination concerning the appointment. The selecting official, however, is not bound by these opinions. Thus, the Board’s examination of the candidates is predecisional and part of the deliberative process, i.e., it is advice to the selecting official on which candidate should be appointed to the position. We uphold HR’s decision to withhold the names of the panel members. Disclosure of the panel members’ names might discourage future participation in application evaluations. It is precisely this kind of information that the deliberative process privilege of Exemption 5 is designed to protect. See Robert E. Caddell, 20 DOE ¶ 80,164 at 80,683.

2. Exemption 6

Exemption 6 shields from disclosure “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d. Cir. 1991); Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); FLRA v. Department of Treasury Financial Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-770. See generally Ripskis, 746 F.2d at 3.

After reviewing HR’s determination letter with respect to Exemption 6, we have concluded that HR

provided a generic explanation of how Exemption 6 applies to the responsive information. We find this explanation to be insufficiently informative and short of what is legally required. It is well established that a FOIA determination must contain a reasonably specific justification for withholding material pursuant to a FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal. HR did not adequately explain the reasons why the names of the panel members are exempt from disclosure under the provisions of FOIA Exemption 6. Although we found that HR properly withheld the names of the panel members under Exemption 5, it would follow that there is no need to analyze Exemption 6 any further. However, HR applied Exemption 6 to withhold documents responsive to Item 4 of Mr. Arriola's request. Therefore, we shall remand this matter to HR to either release to Mr. Arriola all of the information responsive to his request (except for the names of the panel members) or to issue a new determination adequately supporting the withholding of the responsive information in the documents pursuant to Exemption 6. If a new determination is issued, HR should include a statement of the reason for denial, a specific explanation of how Exemption 6 applies to the documents withheld and a statement why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1).

B. Item 4 of Appellant's Request

In Item 4 of his request, Mr. Arriola requested "copies of Standard Forms 50-B, "Notification of Personnel Action", for the selected employee, since his/her employment, transfer, or detail with the Department of Energy." In response to this request, DOE provided Mr. Arriola with the SF-50 for the SES Career Appointment of Selectee and withheld certain personal information pursuant to Exemption 6. Mr. Arriola asserts that he was not provided with all of the Standard Forms 50-B for the selected employee.

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing Item 4 of Mr. Arriola's request, we contacted officials at HR to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Item 4 of Mr. Arriola's request might exist. HR informed us that it instituted a search of its files and located one document responsive to Mr. Arriola's request. It further informed us that it found no other documents responsive to Mr. Arriola's request. See January 16, 2001 Record of Telephone Conversation between Marilyn Greene, HR and Kimberly Jenkins-Chapman, OHA. Given the facts presented to us and the nature of the HR records, we find that HR conducted an adequate search which was reasonably calculated to discover documents responsive to Mr. Arriola's request.

C. Item 5 of Appellant's Request

In Item 5 of Mr. Arriola's request, he requested "copies of all documentation having to do with the transfer, detail, or assignment of the selected employee to the Department of Energy and the identification of personnel responsible for making the decision to transfer, detail, or assign the selected employee to the Office of Nonproliferation and National Security." HR provided Mr. Arriola with various responsive documents and information. In its determination letter, HR stated that the final copy of the "Reimbursable Interagency Agreement Between the U.S. Department of Energy and the Central Intelligence Agency" will be provided to Mr. Arriola when it becomes available. Mr. Arriola asserts that this response is "unacceptable" and argues that the "DOE is required to prepare reimbursable agreements for detailees at the time they are assigned to the DOE." See Appeal Letter at 2. After contacting officials at HR, we were informed that it is not in possession of the Interagency Agreement Mr. Arriola seeks. HR further informed

us that the Central Intelligence Agency never sent the agreement back to the DOE. It is now in the process of attempting to locate the agreement. Based on our discussions, we are satisfied that HR is acting in good faith, that the document is not currently in DOE's possession and that HR will provide Mr. Arriola with the interagency agreement when it becomes available.

D. Item 9 of Appellant's Request

Finally, Mr. Arriola appeals HR's response to Item 9 of his initial request in which he asks for "copies of any Department of Energy statements or news releases announcing or responding to newspaper or other public comments, including comments made by Notra Trulock, on the selected employee's identification as the person to replace him as the Director of the Office of Intelligence." In its determination letter, HR stated that no responsive documents or information was available in the Office of Human Resources, and it forwarded Mr. Arriola's request to the Office of Public Affairs for their direct response. Mr. Arriola asserts that he has yet to be contacted by the Office of Public Affairs. We contacted HR to ascertain the status of this portion of Mr. Arriola's request. That office informed us that they would check on the status of this request with the Office of Public Affairs and contact Mr. Arriola as soon as possible.

III. Conclusion

As discussed above, we have concluded that HR properly applied Exemption 5 to the names of the panel members. However, we found that HR's determination letter with respect to Exemption 6 was insufficiently informative. Therefore, we shall remand this matter to HR to either release to Mr. Arriola all of the information responsive to his request (except for the names of the panel members) or to issue a new determination adequately supporting the withholding of the documents pursuant to Exemption 6. We also find that HR acted properly with respect to the remainder of the request.

It Is Therefore Ordered That:

(1) The Appeal filed by Gilbert M. Arriola on November 20, 2000, Case Number VFA-0631, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Deparment of Energy, Office of Human Resource Management, which should issue a new determination with respect to the application of

Exemption 6 in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 1, 2001

Case No. VFA-0632, 28 DOE ¶ 80,138

January 19, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners:Neil Mock and Scott Lebow

Dates of Filings: December 4, 2000

December 14, 2000

Case Numbers: VFA-0632

VFA-0637

On December 4, and December 14, 2000, Neil Mock and Scott Lebow (the Appellants) filed Appeals from two final determinations that the Idaho Operations Office (DOE-ID) of the Department of Energy (DOE) issued on October 25 and December 1, 2000. Those determinations concerned requests for information the Appellants submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determinations, a number of documents were released to the Appellants in their entirety, other documents were released with portions redacted, and a number of documents were withheld in their entirety. In these Appeals, the Appellants are challenging DOE-ID's withholding and redaction of a limited number of the over 150 documents involved in the requests. In addition, the Appellants are challenging DOE-ID's determination that subcontractor personnel files are not agency records. If granted, this Appeal would require DOE-ID to produce the subject documents in their entirety.

I. Background

A brief background to the underlying facts will be useful in understanding the cases, which are being consolidated because of the similar subject matter for consideration in this determination. In August 1995, the Appellants filed claims with the DOE-ID Contractor Employee Protection Program pursuant to 10 C.F.R. Part 708, alleging that Lockheed Martin Idaho Technologies Company (Lockheed), the prime contractor at Idaho National Engineering and Environmental Laboratory (INEEL), and Coleman Research Company (Coleman), a subcontractor at INEEL, had retaliated against them for disclosing that Coleman and Lockheed had not complied with environmental statutes and the terms of their contracts with DOE. Once a complaint is filed under this program, the first step is to attempt to informally resolve the dispute. 10 C.F.R. § 708.7. DOE-ID requested that Lockheed and Coleman provide a response to the whistleblower complaints. Appeal Letter dated December 4, 2000, from Debra A. Hill, Osborn Maledon, Attorney for Appellants, to Director, Office of Hearings and Appeals (OHA), DOE (December 4, 2000 Appeal Letter).

In formulating their response, Coleman and Lockheed interviewed a number of employees. The attempt at informal resolution was unsuccessful, and the matter was referred to DOE Headquarters under the process outlined in the regulations. *See* 10 C.F.R. § 708.7(c). In two letters dated June 12, 2000,(1) the Appellants requested an extensive amount of information pursuant to the FOIA concerning their Employee Concerns

files and their whistleblower complaints. Request Letter dated June 12, 2000, from Debra A. Hill, Osborn Maledon, Attorney for Appellants, to Carl R. Robertson, Freedom of Information Officer, DOE-ID; Request Letter dated June 12, 2000, from Debra A. Hill, Osborn Maledon, Attorney for Appellants, to FOIA/Privacy Act Division, DOE Headquarters. Among the documents requested were the Appellants' personnel files at DOE-ID, Lockheed, and Coleman. *Id.* In order to provide the information to the Appellants more quickly, DOE-ID issued two determinations; the first determination dealt with a portion of the responsive information and the second determination dealt with the remainder of the responsive information, most of which was housed in DOE-ID archives. The October 25, 2000 Determination Letter released a number of documents but withheld others in their entirety relying on Exemptions 5 and 6 of the FOIA. Determination Letter dated October 25, 2000, from Nicole Brooks, FOI Officer, DOE-ID, to Debra A. Hill, Esq., Osborn Maledon, Attorney for Appellants (October 25, 2000 Determination Letter). The December 1, 2000 determination released a number of documents to the Appellants, but withheld their Coleman personnel files. Determination Letter dated December 1, 2000, from Nicole Brooks, FOI Officer, DOE-ID, to Debra A. Hill, Esq., Osborn Maledon, Attorney for the Appellants (December 1, 2000 Determination Letter). As an initial matter, DOE-ID noted that the personnel records were not in its possession. *Id.* Secondly, DOE-ID found that the documents are not agency records under the contract with Lockheed. *Id.*

On December 4 and 14, 2000, the Appellants filed these Appeals. Initially, in the December 4, 2000 Appeal, Case No. VFA-0632, the Appellants challenge DOE-ID's withholding of Documents 12-17, 28-30, 59, 82-111, and 113-116 under both Exemptions 5 and 6. December 4, 2000 Appeal Letter. The Appellants claim there is not sufficient information to determine whether the documents can be withheld under Exemption 5. *Id.* Further, the Appellants claim that the Exemption must be construed as narrowly as possible and that DOE-ID did not indicate that the documents contained opinions or deliberations by which DOE-ID formulated a decision. *Id.* at *2*. The Appellants also challenge the withholdings under Exemption 6, claiming that the only individuals with a privacy interest would be the Appellants. *Id.* at 3. Second, the Appellants challenge the withholding of Documents 19 and 21 under Exemption 5 (the attorney-client privilege).(2) *Id.* at 4, 5. The Appellants claim that since these documents were authored by a Coleman attorney and addressed to a Coleman employee, and vice versa, respectively, and in the possession of DOE, the attorney-client privilege has been waived. *Id.* Third, the Appellants challenge the redactions made to Documents 45, 46, and 48, claiming that one of the Appellants has already seen the unredacted documents and, in addition, the redactions are inconsistent. *Id.* at 5. Fourth, the Appellants challenge the withholding of Document 124 under Exemptions 5 and 6, claiming that DOE-ID has failed to provide sufficient information about the document to show that it is exempt from disclosure under the FOIA. *Id.*

Finally, in their December 14, 2000 Appeal, Case No. VFA-0637, the Appellants challenge DOE-ID's finding that the Coleman personnel files are not agency records. Appeal Letter dated December 14, 2000, from Debra A. Hill, Osborn Maledon, Attorney for Appellants, to Director, OHA, DOE.

II. Analysis

A. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

1. Deliberative Process

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of*

Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of the Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

DOE-ID has failed to provide a sufficient justification that the information contained in Documents 12-17, 28-30, 59, 82-111, 113-116, and 124 should be withheld under Exemption 5. These documents are primarily handwritten notes of interviews with personnel. October 25, 2000 Determination Letter. As an initial matter, we note that although these records were apparently generated by either Lockheed or Coleman, the documents could still be withheld under Exemption 5, if the documents became part of DOE-ID's deliberative process and were used or relied upon to formulate a DOE decision or policy. However, DOE-ID's determination is insufficient for us to concede that is the case here. DOE-ID must specifically address whether each of these documents was predecisional and deliberative. If a document meets this test, it may be withheld provided its release would stifle the communication within the agency or harm the agency's deliberative process. DOE-ID did not explain fully how Exemption 5 applies to these documents. In this connection, I note that after DOE-ID referred the whistleblower matter to DOE Headquarters, DOE Headquarters dismissed the Appellants' complaint because they had filed an action in Idaho District Court. Therefore, no final decision was issued in this matter that would have required DOE to rely upon or use these documents. However, the fact that no final determination was issued does not necessarily mean that the documents are not deliberative. If they demonstrate the normal give-and-take of an agency decision, they could be considered exempt under the FOIA. As an additional matter, DOE-ID did not segregate the factual information from these documents. Therefore, we will remand these documents for a new determination fully explaining how Exemption 5 applies to these documents. Even if DOE-ID finds that Exemption 5 applies, it must segregate the factual information from the documents.(3)

2. Attorney Work Product

The attorney work-product privilege serves to "provide working attorneys with a ?zone of privacy' within which to think, plan, weigh facts and evidence . . . , and prepare legal theories." *Coastal States*, 617 F.2d at 864. It protects documents prepared by an attorney in contemplation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). This privilege is also applicable to material

prepared by a non-attorney who was supervised by an attorney. *Nishnic v. Department of Justice*, 671 F. Supp. 771, 772- 73 (D.D.C. 1987). Finally, because factual work-product is not "routinely" or "normally" discoverable, it can also be protected under Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (*Weber*); *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (*Grolier*).

We agree with the Appellants that Documents 19 and 21 cannot be withheld under Exemption 5, because they are letters from a Coleman employee to a Coleman attorney and vice versa, respectively. However, we believe that these documents should be reviewed under Exemption 4 of the FOIA, which extends protection to documents that contain either (A) trade secrets or (B) information which is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

We find that Documents 19 and 21 are commercial within the meaning of Exemption 4. Commercial includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). In addition, the information was obtained from a person, as we consider corporations, such as Coleman, to be persons. Finally, the documents consist of information that is subject to the attorney-client privilege. Communication between a client, in this instance Coleman, and the client's attorney are privileged. The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Release of these documents could impair the government's ability to acquire these same types of documents in the future. The contractor could require an agreement in future contracts that this type of information would be contractor records as opposed to agency records, and refuse to allow DOE to see this type of information in the future. Because we are relying on the government impairment prong of *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993), we are not required to obtain the submitter's views as to the application of Exemption 4 to the documents. Although it relied on Exemption 5 for withholding Documents 19 and 21, DOE-ID properly withheld the documents, because they are exempt from disclosure under Exemption 4.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See also Frank E. Isbill*, 27 DOE ¶ 80,215 (1999); *Sowell, Todd, Lafitte and Watson LLC.*, 27 DOE ¶ 80,226 (1999) (*Sowell*).

DOE-ID applied Exemption 6 to Documents 12-17, 28-30, 59, 82-111, 113-116, and 124, to withhold the names of contractor employees in these handwritten notes. These notes were taken during interviews conducted by Coleman and Lockheed after the Appellants filed their retaliation complaint with DOE-ID.

Applying these standards to the facts of this case, we believe that the individuals named in the handwritten notes have a significant interest in maintaining the confidentiality of their opinions and comments. Whether guaranteed confidentiality or not, these individuals would not want their opinions disseminated to the general public. It is our belief they would expect such opinions to be kept confidential within the confines of the DOE and its contractors. Dissemination of their names would lead to less candor in any whistleblower proceedings in the future. Also, individuals would want to be spared the embarrassment of being named in a whistleblower action. *Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (witnesses and co-workers have substantial privacy interest in the nondisclosure of their participation in an investigation for Exemption 6 purposes). Therefore, we find that there is a significant privacy interest in the identities of contractor employees.

Next, release of this information would not further the public interest by shedding light on the operations of the federal government. Although the information might provide insight into the opinions of the Appellants' co-workers, the identity of those individuals who were interviewed would not further the public interest as it would not shed light on the operations of the federal government.

Because there is a significant privacy interest in maintaining the confidentiality of the withheld information, and because it does not shed light on the operations of government, release of the contractor's employees' names would constitute a clearly unwarranted invasion of personal privacy. DOE-ID correctly applied Exemption 6 in withholding this information.

DOE-ID also applied Exemption 6 to Documents 45, 46, and 48. The Appellants challenge the redaction of names in these documents on a number of grounds. As an initial matter, the Appellants assert that one of the Appellants has seen two of the documents previously, as part of his employment. Therefore, he knows the documents' content, including the names listed in them. The Appellants argue there is no privacy interest to be protected. However, we note that, according to the FOIA, once a document has been released to one requester pursuant to a FOIA request, the document must be released to subsequent requesters. Therefore, it is immaterial if the Appellant has already seen the documents. The identity of the requester is generally irrelevant when making a FOIA determination. Secondly, the Appellants believe that the redactions are inconsistent because not all names were redacted. However, names of non-supervisory or non-management contractor personnel may be redacted, as is the case with Documents 45 and 48, even when supervisors' names are released. It should be noted that scope of a privacy interest under Exemption 6 will always be dependent on the context in which it has been asserted. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996) (*Armstrong*). For example, civilian federal employees normally have no expectation of privacy concerning their names, titles, and similar information. *See* 5 C.F.R. § 293.311. However, the name of a federal employee involved in a workplace situation of a sensitive nature might be withheld pursuant to Exemption 6. *See Armstrong*, 97 F.3d at 582 (dicta indicating that FBI might be entitled in certain factual contexts to use a categorical rule protecting the names of FBI agents pursuant to Exemption 6). We agree with DOE-ID that a substantial privacy interest exists in the identities of private citizens due to the great potential that a commercial entity could misappropriate names for commercial purposes. The courts have also reached this conclusion. *See Sheet Metal Workers v. Department Of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. Department of Housing and Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identities of these contractor employees.

DOE-ID informs us that no names were redacted from Document 46. However, the copy of the document sent to us by the Appellants does appear to contain redactions. DOE-ID indicated that the original document was highlighted and when copied, the highlighted portions may appear to be redactions. In addition, in its list of documents, DOE-ID indicated that Document 46 contains redactions. On remand, we will order DOE-ID to provide the Appellants with the best available copy of that document, so that they can read those names that are highlighted on the original. We find, however, that DOE-ID properly

withheld the names of the non-supervisory or non-management contractor personnel listed on Documents 45 and 48.

C. Agency Records

The Appellants are appealing DOE-ID's determination that the Coleman personnel records are not "agency records." DOE-ID has stated that it does not possess the Coleman personnel records. It has contacted Coleman and asked for the records, but Coleman has declined. We will examine the Appellants' contention that the documents in question are agency records and that DOE-ID should therefore have them.

The FOIA applies to "records" that are maintained by "agencies" within the executive branch of government. 5 U.S.C. § 552(f). Consequently, the FOIA is applicable only where the requested documents may be considered an "agency record."

The language of the FOIA does not define the term "agency records," but merely lists examples of the types of information agencies must make available to the public. 5 U.S.C. § 552(a). In interpreting the phrase "agency records," we have applied a two-step analysis for determining whether documents created by non-federal organizations, such as Coleman, are subject to the FOIA. *See, e.g., Los Alamos Study Group*, 26 DOE ¶ 80,212 (1997). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *Los Alamos Study Group*, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch ... or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." *Forsham v. Harris*, 445 U.S. 169, 180 & n. 11 (1980) (citing *United States v. Orleans*, 425 U.S. 807 (1976)). In the present case, although Coleman was a contractor for Lockheed, the DOE did not conduct extensive, detailed, and day-to-day supervision of its operations. We therefore conclude that Coleman is not an "agency" within the meaning of the FOIA.

Although Coleman is not an agency for the purposes of the FOIA, its records could become "agency records" if DOE obtained them and they were within the DOE's possession or control at the time of the FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (*Tax Analysts*). As stated previously, none of the responsive documents at issue was in the DOE's control or possession at the time of the request. Based on these facts, the documents do not qualify as "agency records" under the test set forth in *Tax Analysts*.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "when a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

In 1999, Lockheed transferred management of INEEL to Bechtel BWXT Idaho, LLC (Bechtel). Under the terms of the transfer agreement, Lockheed was to transfer to Bechtel all documents acquired or generated pursuant to the performance of the Lockheed contracts, except records maintained by Lockheed(4) after September 30, 1999, including personnel files of employees transferring to Lockheed Contracts Close Out Offices. 1999 Idaho National Engineering and Environmental Laboratory Transfer Agreement dated September 14, 1999, at 5.B., at 3. This would appear to mean that Lockheed, and by reference Coleman, was required to turn over its personnel records to Bechtel. If that had occurred, the records would then be

available to DOE-ID. However, DOE-ID does not have the records and, under the FOIA, we cannot order that it produce documents that are not in its possession. There may be remedies at law to obtain such documents, but the FOIA is not one of them.

III. Conclusion

DOE-ID failed to provide sufficient justification for withholding the information contained in Documents 12-17, 28-30, 59, 82-111, 113-116, and 124, under Exemption 5. In addition, DOE-ID did not segregate the factual information from these documents. We will remand for a new determination fully justifying why these documents are exempt from disclosure under Exemption 5 and we will require that DOE-ID segregate the factual material. Although DOE-ID relied on Exemption 5 and the attorney-client privilege to withhold Documents 19 and 21, we believe these documents should be withheld under Exemption 4 and the attorney-client privilege. Therefore, we uphold DOE-ID's withholding of Documents 19 and 21. DOE-ID properly invoked Exemption 6 to withhold names and other personnel identifiers in Documents 12-17, 28-30, 45, 48, 59, 82-111, 113-116, and 124 and Documents 45 and 48. It should provide the Appellants with the best possible copy of Document 46, so that they can read the names highlighted in the original. Finally, DOE-ID cannot produce the Coleman personnel records because it does not have possession of them and did not have them at the time of the request. Based on the reasons stated above, we will remand the Appeal to DOE-ID to review Documents 12-17, 28-30, 59, 82-111, 113- 116, and 124. DOE-ID should segregate all factual information and issue a new determination fully justifying their withholding under Exemption 5. It must also produce its best copy of Document 46. The Appeal is denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed on December 4, 2000, by Neil Mock and Scott Lebow, Case No. VFA-0632, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Idaho Operations Office of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) The Appeal filed on December 14, 2000, by Neil Mock and Scott Lebow, Case No. VFA-0637, is hereby denied.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 19, 2001

(1)One letter was sent to the FOI Office at DOE-ID. The other letter was sent to FOIA/Privacy Act Division at DOE Headquarters. Since the requests were almost identical, the Appellants agreed that DOE-ID could handle the requests. Determination Letter dated October 25, 2000, from Nicole Brooks, FOI Officer, DOE-ID, to Debra A. Hill, Esq., Osborn Maledon, Attorney for Appellants (October 25, 2000 Determination Letter)

(2)The Appellants also challenge the withholding of Document 18. However, Document 18 will not be

considered in this Appeal as DOE-ID has determined that it should be released to the Appellants.

(3)We note that the handwritten notes that DOE-ID withheld are virtually illegible. In order to withhold any portions of the document under Exemption 5, DOE-ID must be able to read them well enough to determine which portions are segregable and releasable and which portions fall within the protection of Exemption 5.

(4)In this contract, Lockheed is referred to as LMITCO, a term which included its Teaming Partners and other Team Members. Although the Appellants argue that Coleman is not necessarily included in that definition, December 4, 2000 Appeal Letter at 2, DOE-ID states that the definition included Coleman. Memorandum from Nicole Brooks, FOI Officer, DOE-ID, to Janet R. H. Fishman, Attorney-Examiner, OHA, DOE, dated December 12, 2000. We believe that since DOE-ID is the most knowledgeable party about this, and we accept its assertion that Coleman was covered by the transfer agreement.

Case No. VFA-0634, 28 DOE ¶ 80,142

January 29, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Amigos Bravos

Date of Filing:December 6, 2000

Case Number: VFA-0634

On December 6, 2000, Amigos Bravos filed an Appeal from a determination the Freedom of Information Officer and the Freedom of Information Denying Official of the Albuquerque Operations Office (FOIA Officials) of the Department of Energy (DOE) issued to it on October 31, 2000. In that determination, the FOIA Officials denied a request for information that Amigos Bravos filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA generally requires that a federal agency release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency either may or must withhold. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In Amigos Bravos' request for information, the firm sought copies of documents regarding the participation of the DOE and/or Los Alamos National Laboratory (LANL) in the 1998 Triennial Review of the New Mexico Water Quality Standards. In the FOIA Officials' determination letter, they responded to the firm's request for numerous documents by releasing some documents, redacting others, and informing Amigos Bravos that they could not locate others. In this Appeal, Amigos Bravos asks us to order the release of documents the FOIA Officials determined were not agency records, order the release of information the FOIA Officials withheld pursuant to FOIA Exemption 6, and order a further search for other documents. In accordance with the Amigos Bravos Appeal, we have reviewed all of these requests.

Analysis

1. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a

search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

We have investigated the DOE's search made in response to the Amigos Bravos request for "all documents regarding LANL employees who participated in the 1998 Triennial Review." In their determination letter, the FOIA Officials stated that neither the DOE nor LANL had any responsive documents. Amigos Bravos contends that "numerous" LANL employees attended the public hearings over eleven days for the 1998 Triennial Review and that at least one of these attendees must have kept an accounting of items such as hours of attendance, communication costs, per diem amounts and travel expenses. A FOIA contact from the DOE's Los Alamos Area Office (FOIA contact) informed us that she reinvestigated whether any responsive documents exist. In her reinvestigation, she confirmed that the DOE does not have any attendance records, per diem reimbursement claims for travel expenses, or any other responsive documents. She stated that the hearings were held in Santa Fe, New Mexico, only 27 miles from LANL, and that LANL employees do not typically file for reimbursement of expenses for trips of this distance. *See* January 2, 2001 Record of Telephone Conversation between Leonard M. Tao, OHA Attorney, and Lisa Cummings, Los Alamos Area Office Attorney.

Amigos Bravos also requested all documents provided to or received from persons providing legal and consulting services. The FOIA Officials did not identify specific documents, but stated that responsive documents concerning this request "are publicly available at the LANL Reading Room in Los Alamos." Amigos Bravos informed us that it has reviewed the documents in the LANL Reading Room, but it asks us to require that the DOE clarify whether *all* responsive documents are in the LANL Reading Room. During our investigation, the FOIA contact stated to us that other responsive documents exist outside of the LANL Reading Room. *See* Memorandum of December 18, 2000 Telephone Conversation between Leonard M. Tao, OHA Attorney/Advisor, and Lisa Cummings, Los Alamos Area Office Attorney. Accordingly, we will remand this portion of the Amigos Bravos appeal and direct that the FOIA Officials identify responsive documents located outside of the LANL Reading Room and either release the responsive documents or provide a detailed explanation for withholding.

2. Exemption 6

The FOIA Officials withheld pursuant to Exemption 6 the names of two contractor employees and an employee's "z" number. The FOIA contact informed us that every LANL employee and many LANL visitors are assigned a "z" number upon entering the facility. Amigos Bravos contends that the DOE's redactions of these names and "z" number are unlawful because the disclosure of this information "would not constitute a clearly unwarranted invasion of personal privacy under Exemption 6." The firm states that release of the withheld information will reveal which LANL program is providing support to the New Mexico Municipal League, a private association of municipalities.

As an initial matter, the FOIA contact informed us that the FOIA Officials mistakenly redacted the employee's "z" number. *See* Memorandum of December 18, 2000 Telephone Conversation between Leonard M. Tao, OHA Attorney/Advisor, and Lisa Cummings, Los Alamos Area Office Attorney. Accordingly, we will remand this portion of the Amigos Bravos appeal and direct that the FOIA Officials release the redacted "z" number to Amigos Bravos. However, as described below, we find that the FOIA Officials properly withheld the names of contractor employees pursuant to Exemption 6.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *See*

Ripskis v. Department of Hous. and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy . *See generally Ripskis*, 746 F.2d at 3; *Stone v. FBI*, 727 F. Supp. 662, 663-64 (D.D.C. 1990).

A. The Privacy Interest

The FOIA Officials determined that there was a privacy interest in the identities of the contractor employees. We agree that a substantial privacy interest exists in the identities of private citizens due to the great potential that a commercial entity could misappropriate names for commercial purposes. The courts have also reached this conclusion. *See Sheet Metal Workers v. Department of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. Department of Housing and Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identities of these contractor employees.

B. The Public Interest

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). In its Appeal, Amigos Bravos states that release of the withheld information will reveal

which LANL program is providing support to the New Mexico Municipal League, a private association of municipalities.

We find that there is a minimal public interest in the release of the withheld information. Amigos Bravos has not demonstrated how the disclosure of specific names of non-federal employees will reveal anything of importance regarding the DOE or how it would serve the public interest. Moreover, Amigos Bravos has not shown how revealing the association of a LANL program to the New Mexico Municipal League alone will benefit the public interest at large. Also, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with the FOIA Officials and find that there is a minimal public interest in the disclosure of the names withheld pursuant to Exemption 6.

C. The Balancing Test

In determining whether documents may be withheld pursuant to Exemption 6 courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *SafeCard Services v. Securities and Exchange Comm'n*, 926 F.2d 1197 (D.C. Cir. 1991). We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names of the contractor employees. Therefore, we find that the public interest in disclosure of the names withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interests of the named individuals.

3. Agency Records

The FOIA Officials determined that various documents Amigos Bravos sought were not “agency records” and thus not subject to the FOIA, under the criteria set out by the federal courts. Cf. 5 U.S.C. § 552(f) (describing the scope of the term “agency” under the FOIA).(1) Once the FOIA Officials made this determination, the regulations required them to consider whether the records that did not meet these criteria were nonetheless subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1). Therefore, when the DOE deemed that the requested records failed to qualify as "agency records," they might still have been subject to release if the contract between the DOE and the LANL contractor provided that the documents in question are the property of the agency.

Most of the requested documents that the FOIA Officials deemed were not “agency records” concerned legal and consulting services that LANL either used or proposed using. In their determination letter, the FOIA Officials stated that these legal and consulting services documents are “legal records” that the contract between the DOE and LANL clearly defines as being the property of the contractor. However, in our discussions with the FOIA contact, she informed us that the DOE may have made a mistake in their classification of some of these requested documents. In fact, she stated that some of these legal and consulting services records may not in fact be “legal records.” *See* Memorandum of December 18, 2000 Telephone Conversation between Leonard M. Tao, OHA Attorney/Advisor, and Lisa Cummings, Los Alamos Area Office Attorney. Since the FOIA contact acknowledged that a mistake may have been made in the DOE’s determination that responsive documents were “legal records” and thus the property of the contractor, we must remand this matter for a more thorough review. Accordingly, we order that the DOE identify all documents responsive to the Amigos Bravos request for “legal and consulting services” records and either release responsive documents or provide a detailed explanation for withholding.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal that Amigos Bravos filed on December 6, 2000, Case No. VFA-0634, is hereby granted as set forth in paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act Officials of the Albuquerque Operations Office of the Department of Energy for further action in accordance with the directions set forth in this Decision.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 29, 2001

(1)The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C.

§ 552(a); *see e.g. BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987).

Case No. VFA-0635, 28 DOE ¶ 80,157

March 29, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Woolcott & Co.

Date of Filing: December 11, 2000

Case Number: VFA-0635

On December 11, 2000, H. Jay Spiegel & Associates (Spiegel), attorneys for Woolcott & Co. (Woolcott), filed an Appeal from a determination issued to Woolcott by the Department of Energy's Schenectady Naval Reactors Office (Schenectady). In that determination, Schenectady released some documents in their entirety, released some documents with redactions, and withheld some documents in their entirety. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On June 25, 1999, Woolcott submitted a FOIA request to DOE for copies of "any documents, research materials, submission, grant applications, or any other material related to U.S. Statutory Invention Registration No. H1115." Attachment 1 to Letter from the Office of Naval Reactors (DOE/NR) to Valerie Vance Adeyeye, Office of Hearings and Appeals (OHA) Staff Attorney (January 31, 2001). (1) DOE's Headquarters FOIA Division then transferred the request to

Schenectady. (2) Schenectady searched its files and released 279 pages of responsive material. *Id.* However, Schenectady withheld some material under FOIA Exemptions 3, 4 and 6. Letter from Schenectady to Woolcott (November 9, 2000) (Determination). On December 11, 2000, Spiegel filed an Appeal on behalf of Woolcott. Letter from Spiegel to Director, OHA (December 11, 2000) (Appeal). In the Appeal, Spiegel requested that Schenectady compare the responsive material with U. S. Statutory Invention Registration No. H1115, a public document, and release any responsive material found in its possession that was also found in the public document. *Id.*

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

In its determination, Schenectady stated that it withheld small portions of two documents under Exemption 6 in order to protect the privacy rights of the private citizens mentioned in those documents. Determination at 3-4. The agency redacted the home address and home phone number of a non-Federal employee from one document, and also redacted from a second document the names and home addresses of contractor personnel, along with the amounts of the cash awards given to these individuals. According to Schenectady, those individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination at 3. Schenectady further explained that because the requester knew the identity of one of the cash award recipients, disclosure of the amount of the award (all recipients received the same amount) could enable the requester to determine how much cash that individual had received. Attachment 10 to Letter from DOE/NR to Valerie Vance Adeyeye, OHA Staff Attorney (January 31, 2000) (Attachment 10).

This office reviewed unredacted copies of the two documents. We find that Schenectady properly withheld the names and addresses of the private citizens listed in the material, and also properly withheld the amount of the cash awards. This office has previously held that disclosure of the amount of a cash award to a requester who knows the identity of a recipient would constitute a "serious invasion of personal privacy." *See Jurgis Paliulionis*, 27 DOE ¶ 80,235 (1999) (*Paliulionis*).

2. Public Interest in Disclosure

Having established the existence of a privacy interest in the identity of a private citizen, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). Spiegel has not offered any evidence of a public interest in the disclosure of the withheld material. Therefore, we find that there is little or no public interest in the disclosure of the identity of the private citizens and of the amount of their cash awards.

3. The Balancing Test

In determining whether the disclosure of the responsive information would constitute a clearly unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U. S. at 762 (1989); *Safecard Services, Inc. v. Securities Exchange Commission,* 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Spiegel has not provided any evidence to justify finding a substantial public interest in the disclosure of the withheld information. Therefore, we find that the public interest in disclosure of the identities of the private citizens and their cash awards is outweighed by the real and identifiable privacy interests of those individuals. *See Paliulionis,* 27 DOE at 80,846.

B. Exemption 4

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (1) trade secrets or (2) information that is "commercial or financial, obtained from a person and privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). Information a submitter provides to an agency voluntarily is "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

We have reviewed the documents withheld under this exemption (a letter with three attached technical drawings) and find that the deleted information was properly withheld under the *Critical Mass* test. First, the information withheld was clearly commercial information. The withheld material referred to a new product that had been designed for commercial application. Second, the information was obtained from the manufacturer, a corporation. We have previously found that corporations are deemed "persons" for purposes of Exemption 4. *See Myers Bigel Sibley & Sajovec*, 27 DOE ¶ 80,225 (1999). Finally, we find that the information withheld was properly considered confidential for purposes of Exemption 4. The submitter provided the information voluntarily to Schenectady. Attachment 10 at 1. Material submitted voluntarily will be protected from disclosure by Exemption 4 if the material contains information that the submitter would not customarily release to the public. *See Vladeck, Waldman, Elias & Engelhard, P.C.* , 27 DOE ¶ 80,230 (1999).

After reviewing the withheld material, we find that the information that Foster-Miller, the manufacturer of the product, provided to Schenectady is not of the type that a company would customarily make available to the public. The documents in question contain specific details of a project that, if released, could cause substantial harm to Foster-Miller's commercial success. In fact, the technology under discussion is subject to three pending legal cases. Letter from Foster-Miller to Director, DOE/NR (September 26, 2000). None of the design drawings are available to the public. *Id.* Thus, in view of the competitive environment in which Foster-Miller operates, we agree with the company's argument that public release of any proprietary information could cause substantial harm to the company's competitive position. The information contained in the letter, when viewed in conjunction with the design drawings, has great commercial value to the company. Therefore, we conclude that the information withheld is properly subject to withholding under FOIA Exemption 4. (3)

C. Exemption 3

Exemption 3 of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute [other than the FOIA itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As articulated by the U.S. Supreme Court in *CIA v. Sims*, 471 U.S. 159, 167 (1985), application

of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. *Id. See also Kelly, Anderson & Associates, Inc.*, Case No. VFA-0638, 28 DOE ¶ 80,137 (2001). In its determination, Schenectady used the protection of two statutes, 10 U.S.C. § 130 and 22 U.S.C. § 2778, to withhold a technical drawing (in its entirety) and a portion of another document under Exemption 3.

1. The Technical Data Statute

The first statute used by Schenectady ("technical data" statute) prohibits disclosure of "any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside the United States without an approval, authorization, or license" granted under specified statutes. 10 U.S.C. § 130 (a). The term "technical data with military or space application" is defined as "any blueprints, drawings, . . . or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment." 10 U.S.C. § 130(c).

The "technical data" statute has been found to satisfy subpart (B) of the Exemption 3 criteria because it refers to sufficiently "particular types of matter to be withheld." *Chenkin v. Department of the Army*, No. 93-494, slip op. at 7 (M.D. Pa. Jan. 14, 1994); *affirmed*, 61 F.3d 894 (3d Cir. 1995) (*Chenkin*); *Colonial Trading Corp. v. Department of the Navy*, 735 F. Supp. 429, 431 (D.D.C. 1990). It therefore qualifies as a statute upon which a claim of withholding under Exemption 3 may be based. *See Keith E. Loomis*, 25 DOE ¶ 80,183 (1996) (*Loomis*).

2. The Arms Export Control Act

Schenectady also based its use of Exemption 3 on the Arms Export Control Act. Under this statute, the President is authorized to control the import or export of "defense articles and defense services" and is also "authorized to designate those items which shall be considered as defense articles and defense services." 22 U.S.C. §2778(a)(1). These items cannot be exported without special licensing. *Id.* at (a)(2), (a)(3), (b). Items designated as "defense articles and defense services" are found on the United States Munitions List ("the List"). *Id.*; 22 C.F.R. § 121.1. Among the restricted items on the List are "technical data and defense services," "naval nuclear propulsion plants" and facilities and "any machinery, device, component or equipment specifically developed, designed or modified for use in such plants or facilities." 22 C.F.R. § 121.1, Category VI (Vessels of War and Special Naval Equipment), Sections (e)-(g).

The United States Munitions List defines "technical data and defense services directly related to the defense articles" mentioned above as including information required for the design, development and manufacture of defense articles, including blueprints, drawings, plans, instructions and documentation. 22 C.F.R. § 121.1, Category VI, Section (g); 22 C.F.R. § 120.10(a)(1). Thus, we find that the Arms Export Control Act, through its reference to the United States Munitions List, also satisfies subpart (B) of the Exemption 3 criteria because it refers to sufficiently "particular types of matters to be withheld." *See Chenkin.*

3. Use of Exemption 3 Was Justified

Consistent with Executive Order 12344, 3 C.F.R. § 128 (1982), *reprinted in* 42 U.S.C. § 7158 (1995), and statutorily prescribed by the Department of Defense Authorization Act, P.L. 98-525, 98 Stat. 2492 (1984), the Director of DOE/NR has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving classified Naval Reactors information and Naval Nuclear Propulsion Information (NNPI). *See Loomis*, 25 DOE at 80,706 (1996). Upon referral of this Appeal from OHA, the Director of NR reviewed the responsive material and concluded that the withheld information is

Naval Nuclear Propulsion Information (NNPI). Determination at 2. The withheld information contains details of the design of steam generator equipment, which meets the definition for non-releasable sensitive military technical data. Attachment 10. The federal regulations treat NNPI as technical data with military application of the sort envisioned in 10 C.F.R. § 130. *See, e.g.*, 15 C.F.R. §§ 778.1, 778.5. The withheld material is also properly classified under Category VI, Sections (e)-(g) of the U.S. Munitions List. 22 C.F.R. § 121.1. Consequently, information accurately identified as NNPI is exempt from mandatory disclosure to the public under Exemption 3 of the FOIA. Determination at 1-2. (4)

DOE/NR has stated that this material was not disclosed to the general public in the public document mentioned by Spiegel (U.S. Statutory Invention Registration No. H1115). *Id.* DOE/NR indicated that because it would be unable to control further dissemination of the responsive material if it were released to any member of the public, such disclosure would be "tantamount to disclosure to foreign nationals." Attachment 10 at 2. We have no evidence that Woolcott has the license required by the Arms Export Control Act to export the responsive information. Disclosure to foreign nationals is also prohibited by the technical data statute, and requires continued protection from release. *Id.; see also Loomis*, 25 DOE at 80,706 (consideration of the public interest is not permitted where non- disclosure is required by statute).

However, after a second review of the withheld material, DOE/NR has agreed to release additional responsive material. Letter from DOE/NR to Valerie Vance Adeyeye, OHA Staff Attorney (March 23, 2001). DOE/NR recommends the release of the last three sentences in Section 9 of Attachment 8, and also portions of a redacted sentence in Section 10. A newly redacted version of Attachment 8, disclosing all releasable information, will be provided to the appellant under separate cover.

D. Segregable Information

The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material).

As regards the letter and drawings withheld under Exemption 4, the determination letter did not identify any segregable, non-exempt factual material. This office has reviewed the documents. The letter is very brief and presents most of the product information in the form of "bullets." Thus, we find that the small amount of segregable, non-exempt factual material in the letter is inextricably intertwined with the exempt information. Our review disclosed no segregable, non-exempt factual material in the drawings. Therefore, we find that Schenectady's withholding under Exemption 4 was correct. Finally, we find that Schenectady properly released all segregable, non-exempt factual material under Exemption 6.

It Is Therefore Ordered That:

(1) The Appeal filed by Woolcott & Co. on December 11, 2000, OHA Case No. VFA-0635, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 29, 2001

(1)U. S. Statutory Invention Registration No. H1115, filed with the U. S. Patent Office in July 1990, describes a robot arm apparatus provided for inspecting and/or maintaining the interior of a steam generator. The U.S. government has rights to the invention pursuant to a contract between DOE and General Electric Company. Exhibit 2 to Letter from Spiegel to Director, OHA (December 11, 2000).

(2)Schenectady reports to DOE/NR in Washington, D.C. DOE/NR has dual agency status–the Director of the Naval Nuclear Propulsion Program (within the Department of Defense) is also the DOE's Deputy Assistant Secretary for Naval Reactors. *See* Memorandum from Acting Director of Administration and Management, DOE to Director of Naval Nuclear Propulsion Program (June 9, 1993); Memorandum from Deputy Director for Naval Reactors to Assistant Secretary for Human Resources and Administration, DOE (Aug. 3, 1993).

(3) In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See Greenpeace USA*, 26 DOE ¶ 80,219 (1997).

(4)It is not clear whether DOE/NR acted as a Department of Defense entity or a DOE entity in withholding the information under 10 U.S.C. §130, the "technical data" statute. That statute refers to material in the possession or control of the Department of Defense. OHA does not have jurisdiction over appeals regarding information that is in the possession or control of another agency. Nonetheless, there is no such restriction on information under the Arms Export Control Act, which also satisfies the requirements of Exemption 3.

Case No. VFA-0636, 28 DOE ¶ 80,136

January 10, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Engineering Services

Date of Filing: December 11, 2000

Case Number: VFA-0636

On December 11, 2000, R.E.V. Engineering Services ("R.E.V. Eng. Services" or "the Firm") filed an Appeal from a partial determination issued on November 30, 2000, by the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this Appeal, the Firm contends that Rocky Flats has failed to acknowledge or respond to its FOIA request in a timely fashion and conducted an inadequate search for a non-classified document.(1)

I. BACKGROUND

By letter dated July 11, 2000, the Firm filed a FOIA request with Rocky Flats seeking a copy of a document that is commonly known as the "1999 SSSP." On November 30, 2000, the Rocky Flats FOIA/Privacy Act Officer wrote a letter that responded to the Firm's FOIA request by stating, in

relevant part, that:

. . . we have located the classified document known as the ?1999 SSSP' . . . No unclassified version of this document exists. The Departments of Energy's processes dictate two mandatory reviews of classified documents that are responsive to FOIA requests. They are time intensive and taking up to two years for our Washington, D.C. office to complete The withheld classified document has been determined to be responsive to your request, therefore the field local classification staff will review the document first. After this review is completed, the document will be sent to the Document Declassification Division, Office of Security and Emergency Operations, Washington, D.C. for the final determination review . . .

On December 11, 2000, the Firm filed an Appeal in which it alleges that Rocky Flats had (1) failed to acknowledge or respond to its FOIA request within the time required by law, and (2) failed to conduct an adequate search for an unclassified, electronic version of the 1999 SSSP. In support of its argument that the search performed was inadequate, the Firm states that the electronic version of the 1999 SSSP was marked for classification at the time that it was prepared, and that the electronic document could provide a completely unclassified record with little effort.

II. ANALYSIS

A. Failure to Process a FOIA Request in a Timely Fashion

The portion of the Firm's Appeal that is based on the failure to process a FOIA request within the time specified by law must be dismissed because OHA does not have the jurisdiction to decide this issue. Section 1004.8(a) of the DOE regulations grants OHA jurisdiction to consider FOIA appeals only in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees.

10 C.F.R. § 1004.8(a). Section 1004.8(a) has been construed to confer jurisdiction on OHA only when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when the requester has not received an initial determination from an Authorizing Official, or when an appeal is based on the agency's failure to process a FOIA within the time specified by law. John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (no administrative remedy for agency's non-compliance with a timeliness requirement).(2) Accordingly, the portion of the Appeal that deals with the agency's failure to process a FOIA request within the time specified by law must be dismissed.

B. Reasonableness of the Search for Unclassified Records

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted the Rocky Flats FOIA/Privacy Act Officer to ascertain the extent of the search that had been performed for the unclassified document. Based on information received from the Classification Officer for the DOE Rocky Flats Field Office, the FOIA/Privacy Act Officer informed us that no electronic or paper unclassified version of the "1999 SSSP" document exists. See E-Mail Message from Mary Hammack to Linda Lazarus (January 4, 2001). Although the FOIA/ Privacy Act Officer indicated that the electronic version of the classified document had been "portion marked," she also stated that there was no evidence that the interrelationships of the various paragraphs to each other had been reviewed for classified information. The FOIA/Privacy Act Officer further informed us that no part of a classified document may be released before the DOE declassification process has been completed. Id.

Given the facts presented to us, we find that Rocky Flats conducted an adequate search which was reasonably calculated to discover an unclassified version of the 1999 SSSP. Therefore, we must deny this part of the Firm's Appeal.

It Is Therefore Ordered That:

(1) As set forth above, the Appeal filed by R.E.V. Engineering Services on December 11, 2000, is dismissed in part and denied in part.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 10, 2001

(1)In its Appeal, the Firm also requested that we order Rocky Flats to waive all charges that relate to this FOIA request because of the significant public interest in the subject, or in the alternative, refrain from charging fees for the time that the agency will spend reviewing these records. We dismiss both these issues on procedural grounds. First, we are without jurisdiction to determine whether all charges should be waived because the Firm never asked Rocky Flats for such a waiver, and, under 10 C.F.R. §1004.8(a), our jurisdiction is limited to issues that have already been determined. See Memorandum of Telephone Conversation between David Ridenour, R.E.V. Eng. Services and Linda Lazarus, OHA Staff Attorney (December 12, 2000). Second, the part of the Appeal that involves the propriety of the proposed charges for the agency review of documents will be dismissed as moot because the Rocky Flats FOIA Officer has indicated that a new determination will be issued on the calculation of fees. See Memorandum of Telephone Conversation between Mary Hammack, FOIA/Privacy Act Officer and Linda Lazarus (January 4, 2001).

(2)Because it did not receive a timely response to its FOIA request, the Firm is considered to have exhausted its administrative remedies. 10 C.F.R. § 1004.5(d)(4); 5 U.S.C. § 552(a)(6)(c). Accordingly, under the FOIA, the Firm may seek the release of the requested documents in federal district court. 5 U.S.C. § 552(a)(4)(B). However, the agency's failure to comply with the ten day time limit does not result in a waiver of any FOIA exemptions. See Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988) ; James E. Davis, 11 DOE ¶ 80,151 at 80,689 (1983).

Case No. VFA-0638, 28 DOE ¶ 80,137

January 17, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner:Kelly, Anderson & Associates, Inc.

Date of Filing:December 19, 2000

Case Number: VFA-0638

This decision addresses a Freedom of Information Act (FOIA) appeal filed by Kelly, Anderson & Associates, Inc. (Kelly) pursuant to 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. For the reasons set forth below, Kelly's appeal will be granted and remanded for a new determination in accordance with this decision.

I. Background

With nine exemptions, the FOIA requires federal agencies to release documents to the public upon request. 5 U.S.C. § 552(a), (b); 10 C.F.R. § 1004.3, .10(b). On September 13, 2000, Kelly filed a FOIA request with the FOIA/Privacy Act Division of the DOE Headquarters, seeking a copy of the winning proposal (the winning proposal) that resulted in contract DE-AT01-00AD00165 (the resultant contract). In response, a Procurement Analyst for Headquarters' Procurement Services, Corporate Services Division (the Analyst) withheld the requested document and issued a determination letter to Kelly on November 17, 2000, which stated:

The costs proposals are withheld in their entirety. They are authorized to be withheld pursuant to Exemption 3 of the FOIA, as authorized by the National Defense Authorization Act of 1997 (NDAA), Pub. L. No. 104-201, 821, 110 Stat. 2422, 2609 (1997). The NDAA contains a section prohibiting making a proposal in the possession or control of an executive agency available to any person under the [FOIA].

On December 19, 2000, Kelly appealed the Analyst's determination. In its appeal letter, Kelly states:

By "winning proposal," [we] meant to convey our request for the Technical and Management Sections of the winning proposal, not the Cost Section, which we understand is proprietary to the selected company. Therefore, it would be fully

acceptable to [Kelly] if the document provided included deletions of all such proprietary information.

II. Applicable Legal Principles

Exemption 3 of the FOIA allows agencies to withhold information that is

specifically exempted from disclosure by statute [other than the FOIA itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the

issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). As articulated by the U.S. Supreme Court in CIA v. Sims, 471 U.S. 159, 167 (1985) (Sims), application of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and, if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. Id.

III. Analysis

Applying the foregoing legal principles, the initial question in this case is whether the NDAA provides a statutory exemption to disclosure within the meaning of Exemption 3. We have previously held that it does. See, e.g., Chemical Weapons Working Group, Inc., 26 DOE ¶ 80,170 (1997) (Chemical Weapons); Patricia McCracken, 26 DOE ¶ 80,227 (1997). Section 821(b)(1) of the NDAA, "Prohibition On Release of Contractor Proposals, Civilian Agency Acquisitions," (Section 821(b)(1)) provides that "a proposal in the possession or control of an executive agency *may not be made available* to any person under [the FOIA]," unless such proposal is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal. (emphasis added).(1) The plain language of Section 821(b)(1) allows no discretion in withholding contractor proposals that are not set forth or incorporated by reference in a contract. The section therefore satisfies Subpart A of Exemption 3. See Chemical Weapons, supra.

We must next determine whether the subject information, i.e., the winning proposal, withheld by the Analyst is a "proposal" for purposes of Section 821(b)(1). We find that it is. Section 821(b)(3) of the NDAA defines "proposal" to mean "any proposal including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal." The winning proposal was submitted by a contractor in response to solicitation DE-RQ01- 00AD77777, which sought competitive proposals.

Our finding that the Sims test is satisfied, however, does not end our inquiry in this case. Section 821(b)(1) further requires us to ask whether the winning proposal is set forth or incorporated by reference in the resultant contract. If so, by its own terms, Section 821(b)(1)'s shield is lifted. Examination of the resultant contract reveals that the proposal is incorporated by reference therein. The resultant contract provides that "[a]ll work will be in accordance with the attached statement of work and performed pursuant to [the winning] technical and price proposal of [a certain date] . . . ." Contract DE-AT01-00AD00165. This direct incorporation by reference places the winning proposal outside the protection of Section 821(b)(1) and, thus, also outside the protection of Exemption 3.

Although Exemption 3 is inapplicable to this case, it appears that the requested proposal may be protected under another FOIA exemption, such as Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

IV. Conclusion

Based upon the foregoing analysis, the winning proposal is not protected from disclosure under Exemption 3 but may be protected under another FOIA exemption. This matter is therefore remanded to the Supervisory Procurement Analyst (SPA) for a new determination. In its determination, the SPA must either release the requested documents or provide another reason for withholding them.

It Is Therefore Ordered That:

(1) The appeal filed by Kelly, Anderson & Associates, Inc. on December 19, 2000, Case Number VFA-0638, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the FOIA/Privacy Act Division of the Department of Energy Headquarters to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 17, 2001

(1)Section 821(b)(1) of the NDAA may be found at 41 U.S.C. § 253(b)(m).

Case No. VFA-0639, 28 DOE ¶ 80,139

January 22, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kathie Light

Date of Filing: December 21, 2000

Case Number: VFA-0639

On December 21, 2000, Kathie Light (Light) filed an Appeal from a determination that the Richland Operations Office (Richland) of the Department of Energy (DOE) issued to her. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, Richland released some responsive information to Light. This Appeal, if granted, would require the DOE to release the remainder of the responsive information as well as to conduct a more thorough search for responsive documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a request dated September 11, 2000, Light wrote Richland and requested copies of all documents and electronic communications concerning herself generated by eight named individuals as well as two unions (Item 1), the American Federation of Government Employees- Local 788 (AFGE) and the National Federation of Federal Employees - Local 181 (NFFE), dated from January 1, 2000 to September 11, 2000. (1) Additionally, Light requested documents relating to applicants for a job announcement (No. Richland-00-MP-44) (2) including applications, qualification analysis worksheets for eligible applicants and ranking panel score sheets (Item 2). Lastly, with regard to the job announcement, Light asked for all documents or electronic communications from five named individuals (Item 3).

In its November 6, 2000 Determination Letter, Richland provided Light with copies of documents responsive to Item 1 and 3. With regard to documents generated by AFGE and NFFE that might be responsive to Item 1, Richland stated that since those records were not agency records, they were not subject to the FOIA. Further, documents generated by three of the named individuals in their capacities as union officials that could be responsive to Items 1 and 3 would thus also not be subject to the provisions of the FOIA. Richland also stated that it had contacted Richland's Office of Site Services (OSS) and had been informed that any electronic messages responsive to Item 1 would be no longer be in existence. OSS informed Richland that it maintained backup tapes of messages only for the previous 28 days; thus messages older than 28 days would have been erased when the tapes were recycled.

With regard to Item 2, Richland released redacted copies of the Qualification Analysis Worksheets for each eligible candidate and the rating sheets. In these documents Richland withheld the applicants' names, scores, names of individuals on the selection panel and "any other personal information" pursuant to Exemption 6 of the FOIA. Richland also withheld in their entirety, pursuant to Exemption 6, the application materials each applicant submitted along with the written responses to the ranking criteria that each applicant submitted (application materials). Richland determined that, after considering the privacy interests of the individuals referenced in the withheld material and the public interest in the release of the withheld material, that release of the withheld information would constitute a clearly unwarranted invasion of privacy.

In her submission, Light asserts several grounds for appeal. First, Light argues that any documents created or possessed by AFGE and NFFE and their officials are agency records and subject to the FOIA, since the documents were generated on government-owned equipment and that there was no explicit agreement authorizing union use of government-owned equipment until April 16, 2000. Thus, any documents generated on government owned equipment prior to April 16, 2000 should be considered agency records. Second, she challenges withholding in their entirety all the application materials pursuant to Exemption 6. Lastly, she asserts that an inadequate search was conducted for responsive documents. In particular, she states that Richland failed to contact OSS in a timely enough fashion to prevent the destruction of electronic documents and that there should exist documents from three of the named officials who were involved in a Richland management decision to remove labor relations from Light's job responsibilities.

II. Analysis

A. Agency Records

Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and it was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of Nat'l Affairs, Inc. v. Department of Justice*, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*); *J. Eileen Price*, 25 DOE ¶ 80,114 (1995) (*Price*). In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. *See BNA*, 742 F.2d at 1492-93; *Price*.

With regard to the potentially responsive documents in possession of the two unions, AFGE and NFFE, and their officials, Richland has stated that none of these documents were created by Richland nor has Richland exercised control over these documents. In this regard, Richland has been informed that any potentially responsive documents that are in the possession of the unions or their officials, other than the ones already provided to Richland, are used exclusively for union operations. See Memorandum of telephone conversation between Dorothy Riehle, Richland, and Richard Cronin, Assistant Director, OHA (January 5, 2001). Consequently, we find that the responsive documents in possession of AFGE and NFFE and their officials, that are used for exclusively union operations, are not agency records and are not subject to the FOIA.

Our conclusion is not changed by Light's assertion that until April 16, 2000, neither union had a valid agreement with DOE to use DOE equipment to create documents and that use of DOE equipment prior to April 16, 2000, makes any such document created before that date an agency document. In *Gallant v. NLRB*, the United States Court of Appeals held that documents may not be considered agency documents solely because they were created by an individual on agency time on agency equipment. *Gallant v. NLRB*, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (*Gallant*). In examining existing case law, the court in *Gallant* held that while use of agency resources by an agency employee in the creation of a document is a factor in determining whether a document is an agency record, it is not as significant as other factors such as the purpose for which the document was created, the actual use of the document, and the extent to which the

author or other agency employees acting in the scope of their employment relied on the document to carry out agency business. *Id.* at 172. Thus, the fact that agency resources were used to create a document is insufficient alone to render a document an agency record. *Id.* As described earlier, the union documents at issue in this case were used exclusively for union purposes and have not been in the control of Richland. Consequently, responsive documents possessed by the unions and their officials and used exclusively for union operations are not agency records.

B. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripkis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripkis*, 746 F.2d at 3.

1. Privacy Interest

Richland determined that there was a privacy interest in the identity of the unsuccessful job applicants. According to Richland, each applicant made a "personal choice" to apply for the vacant position, and Richland invoked the FOIA to protect that choice from public disclosure. Determination Letter at 2.

Courts have similarly found that the disclosure of the identities of unsuccessful federal job applicants constitutes a clearly unwarranted invasion of personal privacy For instance, *Core v. U.S. Postal Service*, 730 F.2d 946 (4th Cir. 1984), presents a fact pattern similar to this case. (3) Core was an unsuccessful applicant for a vacancy at the U.S. Postal Service ("the Service"). He argued that the Service had violated hiring regulations, and then requested information about the other unsuccessful job applicants. (4) The Service invoked Exemption 6 and withheld responsive information about the unsuccessful applicants, determining that harm could arise from such a disclosure. The Court upheld the withholding and found that "disclosure may embarrass or harm applicants who failed to get a job." *Core*, 730 F.2d at 949. The court reasoned that present or prospective employers or coworkers could learn that others were deemed better qualified for a competitive appointment. *Id. See also Barvick v. Cisneros*, 961 F. Supp. 1015, 1021 (D. Kan. 1996) (*Barvick*) (upholding agency's nondisclosure of identifying information on the unsuccessful applicants because it could lead to embarrassment or adversely affect their future employment or promotion prospects). Therefore, we find that there is a substantial privacy interest in the identities of unsuccessful federal job applicants.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of

information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). In her Appeal, Light does not specifically identify a public interest that would be served by release of the application materials but asserts that there may have been irregularities in the process of selecting applicants for the "best qualified" list for the job announcement, especially since she believes that other, less qualified individuals were put on the list.

We find that there is a minimal public interest in the release of the withheld information. Light has not demonstrated how the disclosure of information about each job applicant is necessary for the public to evaluate Richland's hiring practices. Simply alleging that an agency has engaged in violations of hiring regulations does not justify releasing personal information. *See Barvick*, 941 F. Supp. at 1022 (quoting *Hopkins v. Department of Housing and Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991) (invocation of a legitimate public interest cannot itself justify the release of personal information)). This is especially true in this case where Richland hired no one pursuant to the job announcement. Thus, release of the withheld information would tell us little about Richland's hiring practices. Therefore, we agree with Richland and find that there is a minimal public interest in the disclosure of the responsive material.

3. The Balancing Test

We have concluded above that there is a substantial privacy interest at stake in this case. Moreover, we found that there is only a minimal public interest in the release of the names of the unsuccessful applicants. Therefore, we find that the release of the application materials would constitute a clearly unwarranted invasion of personal privacy. Consequently, we believe Richland properly withheld the information pursuant to Exemption 6.

C. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Eugene Maples*, 23 DOE ¶ 80,106 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 834 (D.C. Cir. 1979).

We contacted Richland to determine the extent of the search that had been conducted for responsive documents. *See* Memorandum of telephone conversation between Dorothy Riehle, Richland, and Richard Cronin, Assistant Director, OHA (January 2, 2001); Memorandum of telephone conversation between Dorothy Riehle, Richland, and Richard Cronin, Assistant Director, OHA (January 11, 2001). Richland informed us that upon receipt of the request it contacted each of the named individuals and asked each to conduct a search. Richland also undertook a search at its office of Human Resources. Richland then contacted the Office of Site Services (OSS) to determine the existence of responsive electronic messages. Richland was informed that any electronic messages responsive to the request would have been deleted 28 days after their creation. Given the facts presented to us, we believe that Richland conducted an adequate search for documents responsive to Light's request.

Light's arguments to the contrary are unavailing. Light asserts that Richland's delay in contacting OSS resulted in the destruction of potentially responsive electronic documents. Upon receipt of Light's FOIA Request, a Richland official immediately contacted OSS and was informed that all messages older than 28 days old were destroyed. Because this official had been informed that Richland's Human Resources office had already provided her with all documents that might be on the OSS computer (other than union messages), she did not ask OSS to conduct a search until October 3, 2000. Memorandum of telephone conversation between Dorothy Riehle, Richland, and Richard Cronin, Assistant Director, OHA (January 11, 2001). Given the evidence before us, we do not believe that Richland was acting in bad faith in conducting the search. While Light finds it inconceivable that there is no documentation regarding the decision to remove one of her job responsibilities, the central issue to be resolved is not whether there might exist any other documents possibly responsive to the request, or whether such documents should exist, but rather whether the *search* for documents was *adequate*. *See Weisburg v. Department of Justice,* 745 F.2d 1476, 1485 (D.C. Cir 1984); *Citizens Commission on Human Rights v. FDA,* 45 F.3d 1325 (9th Cir. 1995). Even if Light is correct that additional documents exist, the FOIA only requires that Richland conduct a reasonable search for documents. As described above, we find that Richland's search was reasonably calculated to discover responsive documents and thus is sufficient under the FOIA.

D. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). We have reviewed a sample of the application materials and find that there is no segregable material that can be provided to Light. The very small amount of segregable material contained in the application materials is inextricably intertwined with the protectable identifying information in the applications materials. Consequently, we find that Richland properly withheld the application materials in their entirety.

III. Conclusion

In sum, we find that Richland conducted an adequate search for documents responsive to Light's FOIA Appeal. Further, any responsive union documents used exclusively for union purposes are not agency records for the purposes of the FOIA. Lastly, Richland properly withheld in their entirety the application materials for job announcement No. Richland-00-MP-44. Thus, Light's appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Kathie Light on December 21, 2000, OHA Case No. VFA-0639, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 22, 2001

(1)Several of the named individuals were union officials of AFGE or NFFE. Light later modified her request and requested, with regard to union officials named in her request, documents dated from January 1, 2000 through April 15, 2000.

(2)This job announcement was subsequently cancelled.

(3)Because Richland canceled the vacancy announcement, all the applicants for the job announcement were unsuccessful.

(4)Core also requested, and received, information about the successful applicants. *Core*, 730 F.2d at 947.

Case No. VFA-0640, 28 DOE ¶ 80,141

January 25, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Wiley, Rein & Fielding

Date of Filing:December 26, 2000

Case Number:VFA-0640

On December 26, 2000, Wiley, Rein & Fielding filed an Appeal from a determination the Manager of the Ohio Field Office of the Department of Energy (DOE) issued to it on November 22, 2000. In that determination, the Manager stated that she could not locate records responsive to a Freedom of Information Act (FOIA) request that Wiley, Rein & Fielding filed on November 3, 2000. The FOIA requires that a federal agency generally release documents to the public upon request. *See* 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

In its November 3, 2000 request for information, Wiley, Rein & Fielding sought copies of certified payroll records of any subcontractors to Fluor Fernald at the Fernald Environmental Management Project site for the years 1998 and 1999. In her determination, the Manager stated that no agency records exist regarding these certified payroll records. Wiley, Rein & Fielding contends that the DOE must have responsive records.

Analysis

In the Manager's response to the Wiley, Rein & Fielding request, she determined that the payroll records were not DOE "agency records" because the records were the property of the contractor and not in the possession or control of the DOE at the time of the request. Wiley, Rein & Fielding states that Department of Labor regulations require government contractors to submit to the government the weekly payroll records for their employees and subcontractor employees. *See* 29 C.F.R. § 5.5(a)(3)(ii)(A). Furthermore, the firm states that the Federal Acquisition Regulation also requires government contractors involved in construction services that exceed $2,000 in value to submit employee payroll information to the government. *See* 48 C.F.R. § 52.222-8. Wiley, Rein & Fielding contends that, in light of these regulations, there must exist payroll "agency records" responsive to its request.

Our threshold inquiry in this case is whether the requested payroll records are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf.* 5 U.S.C. § 552(f) (describing the scope of the term "agency" under the FOIA). Second, records that do not meet these criteria may nonetheless be subject to release under the DOE regulations. 10 C.F.R. § 1004.3(e); *see* 59 Fed. Reg. 63,884 (December 12, 1994). For the reasons set forth below, we conclude that the records in question are not "agency records" and that they are also not subject to release under the DOE regulations.

The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. §

552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations are subject to the FOIA. *See, e.g., BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether we should regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Fluor Fernald is the contractor responsible for maintaining and operating the Fernald Environmental Management Project. While the DOE obtained Fluor Fernald's services and exercises general control over the contract work, it does not supervise the contractor's day-to-day operations. *See* Contract No. DE-AC24-01OH20115. We therefore conclude that Fluor Fernald is not an "agency" subject to the FOIA.

Although Fluor Fernald is not an agency for the purposes of the FOIA, its records relevant to the Wiley, Rein & Fielding request could become "agency records" if the DOE obtained them and they were within the DOE's control at the time the firm made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In this case, while the contract between the DOE and Fluor Fernald requires that the contractor submit on a weekly basis the payroll records to the DOE Contracting Officer, we have determined that the records the firm seeks were not in the agency's control at the time of the firm's request. Although it is unclear if the DOE's Contracting Officer reviewed these particular payroll records, the Manager's representative informed us that, regardless, these records would have been returned to the contractor.(1) *See* January 18, 2001 Record of Telephone Conversation between Renee Holland, DOE Ohio Field Office, and Leonard M. Tao, OHA Staff Attorney. Since the Manager's representative confirmed that the payroll records were not in the DOE's control at the time of the firm's request, these documents clearly do not qualify as "agency records" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46; *see also Forsham*, 445 U.S. at 185-86.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2)." 10 C.F.R. § 1004.3(e)(1).

We therefore next look to the contract between the DOE and Fluor Fernald to determine the status of the

requested records. That contract generally states,

Except as is provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government . . .

Contract No. DE-AC24-01OH20115, Section H.20 (a). Paragraph (b)(4) of the "Contractor's Own Records" section of the contract states that the excluded category of contractor's records includes "Records and files pertaining to wages, salaries, benefits and benefit administration." Furthermore, paragraph (b)(7) of this section states that "All records relating to any procurement action by the contractor" are considered contractor records. Since the subcontractor payroll records Wiley, Rein & Fielding requests are documents the contract states are contractor records, we find that the records sought by the firm are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations. Accordingly, we must deny the Wiley, Rein & Fielding Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal that Wiley, Rein & Fielding filed on December 26, 2000, Case No. VFA-0640, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 25, 2001

(1)The contract between the DOE and Fluor Fernald does not require that the DOE keep the payroll records after the Contracting Officer has completed his review. *See* Contract No. DE- AC24-01OH20115.

Case No. VFA-0641, 28 DOE ¶ 80,140

January 24, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Barbara Schwarz

Date of Filing: December 22, 2000

Case Number: VFA-0641

Barbara Schwarz filed this Appeal from a determination issued by the Department of Energy (DOE) Headquarters Freedom of Information and Privacy Act Division (FOI/PA). This determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Schwarz sent a letter to the Office of Hearings and Appeals, dated March 22, 2000, that contained both an appeal of an earlier FOIA determination, and a request for additional material under the FOIA. We issued a Decision and Order with respect to the appeal portion of the letter, designated Case No. VFA-0567, in *Barbara Schwarz*, 27 DOE ¶ 80,273 (2000).

The request portion of Schwarz's letter was forwarded to the FOI/PA for processing pursuant to the FOIA. In a Determination Letter dated December 4, 2000, FOI/PA stated that it was providing Schwarz with documents responsive to some of her requests, and informed her that no responsive documents were located for her other requests. Schwarz then filed this appeal, challenging the adequacy of the search for responsive documents, a lack of response to a request for a fee waiver, and a failure to provide a "search declaration."

II. Analysis

A. Adequacy of Search

Schwarz claims that the search for responsive records was inadequate because she was not provided with two categories of

records. The first category consists of records pertaining to a civil suit in the Federal District Court for the District of Columbia, Case No. 00-1610-HHK, which Schwarz says she filed against the Department of Energy. The second category consists of records that Schwarz describes as pertaining to "a town or village with name Chattanooga in Utah (Note: not Tennessee)."

Neither the civil case nor the town of Chattanooga, Utah, are mentioned in Schwarz's request letter. Furthermore, no reasonable interpretation of Schwarz's request letter would suggest that records pertaining to the civil case or to Chattanooga, Utah would be responsive to her request. An appellant may not use the

appeal process to expand the scope of a FOIA request. *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991). We will therefore deny this portion of Schwarz's appeal.

B. Request for a Fee Waiver

The DOE FOIA regulations state that the DOE will provide up to two hours of search time and up to 100 pages of duplication without cost, and may charge fees for processing FOIA responses that exceed those limits. In addition, the regulations provide for certain circumstances in which the DOE may waive the fees. 10 C.F.R. § 1004.9.

Schwarz was not charged any fees in connection with her FOIA request. Nevertheless, she claims in her appeal that FOI/PA "ignored" her request for a waiver of fee. As we have explained before to Schwarz, a request for a "fee waiver" is moot if no fees have been charged. *Barbara Schwarz*, 27 DOE ¶ 80,245 (1999). We will therefore dismiss this portion of Schwarz's appeal as moot.

C. Request for a search declaration

Woven throughout Schwarz's appeal are requests for a detailed description of how the search was conducted. She asserts that

the determination ... is very unspecific.... I was not explained the records system.... I received absolutely no search document.... I always had requested a search certification or declaration by Dept. of Energy employees as to the result of their searches. With letter of December [4, 2000, the FOI/PA] Office mailed me first time a certification as to a search.... However, the certificate is not under oath, as requested and the no records determination is not true, and no evidence as to the search was attached... I insist on the search declaration.

As we have explained to Schwarz before, neither the FOIA nor the relevant DOE regulations requires the agency to supply a "search certificate" or a detailed description of the search that was conducted. *Barbara Schwarz, supra.* Furthermore, we believe that requiring a "search declaration" at the administrative stage of review is unnecessary and unproductive. We will therefore deny this portion of the appeal.

III. Conclusion

We find that, on appeal, Schwarz has requested records that were not within the scope of her original request. Consequently, we find no reason to remand her original request for a further search. In addition, we find no basis to grant Schwarz's request for a "search declaration," and we find her request for a fee waiver to be moot. We will therefore deny this Appeal in part and dismiss it in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, Case No. VFA-0641, is hereby dismissed with respect to the fee waiver issues it raises, and denied in all other respects.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 24, 2001

Case No. VFA-0642, 28 DOE ¶ 80,146

February 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R. E. V. Eng. Services

Date of Filing: December 26, 2000

Case Number: VFA-0642

On December 26, 2000, David Ridenour (Ridenour) of R. E. V. Eng. Services (REV) filed an Appeal from a determination issued to him in response to a request for documents that REV submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on December 13, 2000, by the Rocky Flats Field Office (RFFO). This Appeal, if granted, would require that RFFO perform an additional search.

I. Background

In a previous case, Ridenour had submitted a request for information under the FOIA to the RFFO. *See R.E.V. Eng. Services*, OHA Case Nos. VFA-0600/0604, 28 DOE ¶ 80,115 (2000). The OHA attorney responsible for processing that case had telephone conversations with an attorney at RFFO in order to adjudicate that appeal related to the request. *Id.* In a memorandum memorializing one of those conversations, the OHA attorney referred to a "belief" in the Office of Chief Counsel (OCC) that "there is a substantial likelihood of further proceedings by Mr. Ridenour against the DOE." 28 DOE ¶ 80,115. OHA used this information to support its decision to uphold the RFFO's nondisclosure of a document under one of the FOIA exemptions. *Id.*

On October 10, 2000, Ridenour submitted another FOIA request to RFFO for "information pertaining to RFFO's Office of Chief Counsel's ?belief that there is a substantial likelihood of futher proceedings by Mr. Ridenour against the DOE.' " Letter from Ridenour to RFFO (October 16, 2000) (Request). Ridenour referenced the telephone memorandum previously mentioned. On December 13, 2000, the RFFO FOIA/Privacy Act Officer issued a determination letter stating that no responsive records were located. Letter from RFFO to Ridenour (December 13, 2000) (Determination Letter). On December 26, 2000, Ridenour filed this Appeal. Letter from Ridenour to Director, OHA (December 26, 2000). He argued that because OHA considered the OCC's anticipation of future litigation important enough to memorialize and use in its decision making, the OCC must have documentation of that belief in its files. Appeal at 1-2.

II. Analysis

A. ADEQUACY OF SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't*

of State, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted RFFO to ascertain the scope of the search. The FOIA/Privacy Act Officer informed us that the original request was sent to the OCC on October 23, 2000 for a search of its files. The OCC searched its files and stated that "there are no records of which this office is aware that pertain to RFFO's Office of Chief Counsels' belief that there is a substantial likelihood of further proceedings by Mr. Ridenour against the DOE." Letter from James Long, Attorney, OCC to Mary Hammack, FOIA/Privacy Act Officer (October 23, 2000); Electronic Mail Message from James Long to Valerie Vance Adeyeye, OHA Staff Attorney (January 25, 2001). The OHA attorney who adjudicated Case No. VSO-0600/0604 informed us that Ridenour had received a copy of the telephone memorandum that memorialized the pertinent conversation between OHA and OCC. Memorandum of Conversation between Robert Palmer and Valerie Vance Adeyeye, OHA Staff Attorneys (January 11, 2001). We therefore find that the agency conducted a search reasonably calculated to uncover the responsive material.

Moreover, we find no evidence that the statement that Ridenour touts as OCC policy amounts to more than verbal conjecture by an OCC staff member that an individual who has filed several federal and administrative cases recently (including nine FOIA appeals in the past ten months) is likely to engage in future litigation. *See R.E.V. Eng. Services*, Case No. VFA-0636, 28 DOE ¶ 80,137 (2001); Case No. VFA-0626, 28 DOE ¶ 80,131 (2000); Case No. VFA-0618, 28 DOE ¶ 80,121 (2000); Case No. VFA-0605, 28 DOE ¶ 80,116 (2000); Case No. VFA-0601, 28 DOE ¶ 80,109 (2000); Case Nos. VFA-0600/0604, 28 DOE ¶ 80,115 (2000); Case No. VFA-0576, 27 DOE ¶ 80,278 (2000); Case No. VFA-0565, 28 DOE ¶ 80,272 (2000). Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by R.E.V. Eng. Services December 26, 2000, OHA Case Number VFA-0642, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 1, 2001

Case No. VFA-0643, 28 DOE ¶ 80,148

February 6, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Thomas J. Balamut

Date of Filing: December 28, 2000

Case Number: VFA-0643

On December 28, 2000, Thomas J. Balamut (Balamut) filed an Appeal from a determination that the Chicago Operations Office (CH) of the Department of Energy (DOE) issued to him. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, CH released some responsive information to Balamut. This Appeal, if granted, would require the DOE to release the responsive information it withheld from him.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 10, 2000, Balamut filed a FOIA request with CH seeking a list of individual dollar amounts and a brief description of each cash award given to employees in the Chicago Operations Office, Argonne Group for Fiscal Year (FY) 1999 and FY 2000. In a determination letter, CH indicated that it located the documents responsive to Balamut's request. CH released most of the responsive information. However, it withheld the individual names of award recipients associated with individual dollar amounts for the Argonne Group employees under Exemption 6. In his Appeal, Balamut challenges the application of Exemption 6 to the withheld information.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6);

10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

CH determined that there was a privacy interest in the individual names of the award recipients associated with individual dollar amounts given to Argonne Group employees. According to CH, individual award recipients have "a significant privacy interest in protecting from disclosure the amount of his or her award." CH further stated that "disclosing an individual's award would not serve a significant public interest because it would not directly reveal the operations or activities of the government." *See* Determination Letter at 1.

We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc*., 15 DOE ¶ 80,115 at 80,537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc*., 16 DOE ¶ 80,102 at 80,504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,120 at 80,569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80, 104 at 80,519 (1985). The same type of privacy interest is involved in this case. If a document listing the individual names of award recipients associated with individual dollar amounts were disclosed to the requester, the awards could obviously be directly linked to the employees who received them. Release of this material would reveal considerable personal financial information about each Argonne Group employee given an incentive award and would certainly constitute a serious invasion of personal privacy. In addition, courts have similarly found that even releasing favorable information about an employee, such as details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy among co-workers." *See Ripskis* , 746 F.2d at 3. These considerations govern our determination. We therefore find a significant privacy interest in the individual names of the award recipients.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). In his Appeal, Balamut states that " incentives to improve performance work only when individuals can measure their performance and resulting awards against some standard, which is the performance and resulting awards of others. They can then determine that the system is equitable. If this information is not open and public then the system is not a true incentive system, but rather a system of patronage, and results in a disincentive to employee's performance." *See* Appeal Letter at 1.

We agree with Balamut's assertion that there is a public interest in the release of the withheld information.

However, alleging that recognition of incentive awards should properly be made public does not by itself justify releasing personal information. *See Hopkins v. Department of Housing and Urban Dev*., 929 F.2d 81, 88 (2d Cir. 1991) (invocation of a legitimate public interest cannot itself justify the release of personal information)). Therefore, we must balance both the privacy and public interests in this case.

3. The Balancing Test

In determining whether the disclosure of the names of individual award recipients could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989).

We have concluded above that there is a substantial privacy interest at stake in this case. In addition, we find that although there is a public interest in the release of the names of the award recipients, we agree with CH that the public interest in disclosure of the withheld material is outweighed by the real and identifiable privacy interests of the Argonne Group employees.

C. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b). We find that CH properly segregated and released all responsive information by withholding only the names of individual award recipients associated with the dollar amounts of the awards given.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas Balamut on December 28, 2000, OHA Case No. VFA-0643, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 6, 2001

Case No. VFA-0644, 28 DOE ¶ 80,144

January 31, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Kenneth P. Brooks

Date of Filing: January 2, 2001

Case Number: VFA-0644

This Decision and Order concerns an Appeal that was filed by Kenneth P. Brooks from a determination issued to him by the Freedom of Information Officer of the Department of Energy's (DOE) Albuquerque Operations Office (AOO). In this determination, AOO provided to Mr. Brooks four documents that he requested pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Brooks challenges the adequacy of the search for responsive documents.

In his FOIA request, Mr. Brooks sought access to all documents relating to him as a previous DOE employee or as an employee of a DOE contractor, including a 1989 letter from a named DOE attorney to Mr. Brooks' attorney, all "1990s correspondence" written to or by Martin Marietta or Lockheed Martin or their attorneys, and all documents relating to his security clearance or background investigations. In its response, AOO described the search for responsive documents that was performed. AOO stated that Mr. Brooks' request was referred to the Offices of Chief Counsel (OCC) and Equal Opportunity (OEO), the Employee Concerns Program (ECP), the Personnel Security Division (PSD), and the Headquarters Office of the Executive Secretariat, Freedom of Information and Privacy Acts Division.

In the determination, AOO said that OCC located four documents that are responsive to Mr. Brooks' request. However, OCC "stated that ?we could not locate the 1989 letter [from the named DOE attorney to Mr. Brooks' attorney]. Last year [OCC] did destroy some documents that were in our safe that we believe were related to Brooks' case. They were destroyed per our records management guidance DOE 1324.2A, Schedule 7, 9, e.'" AOO determination at 2.

The determination further indicated that OEO and ECP searched their files for responsive documents, and were unable to locate any. ECP searched their inactive and active Employee Concerns, Potential Whistleblowers and Whistleblowers files dating from 1992 to the present. Id.

PSD searched for Mr. Brooks' Personnel Security File, and found it to be located at the Oak Ridge Operations Office. The determination stated that Mr. Brooks' request was therefore referred to Oak Ridge and to the Headquarters FOI and Privacy Acts Division, and that these offices would respond directly to Mr. Brooks. Id. (1)

In his Appeal, Mr. Brooks alleges that the documents he seeks would have been located in the same files as the documents that were provided to him, and that AOO is withholding responsive documents in an attempt "to cover up their illegal actions." Appeal at 2. Mr. Brooks provided no evidence to support this allegation.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

Based on the description set forth in AOO's determination, we find that the search for responsive documents in this case was reasonably calculated to uncover the requested information, and it was therefore adequate. However, in view of Mr. Brooks' allegation that additional documents should have been located in the files in which the four OCC documents were found, we contacted that Office. We were informed that its reading file, in which copies of outgoing correspondence were kept, and its local storage area were searched. No responsive documents were located in the reading file, and no responsive material other than the four identified documents was found in the local storage area. See memorandum of January 25, 2001 telephone conversation between Robert Palmer, OHA Staff Attorney, and Margaret Sanchez, OCC. We conclude that the search for responsive documents was adequate despite Mr. Brooks' unsupported allegation of a cover up. We will therefore deny Mr. Brooks' Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Kenneth P. Brooks in Case No. VFA-0644 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 31, 2001

(1)In the determination, AOO also stated that Mr. Brooks withdrew the portions of his request that involved searching the DOE archives in Atlanta, Georgia for records concerning the Pinellas Plant. In his Appeal, Mr. Brooks argues that this withdrawal was conditioned upon the production of the information that he seeks from the other DOE facilities that were searched. He contends that since he has not received this information, the "Pinellas" portion of his request should not be considered as withdrawn. In the alternative, he attempts to submit a new request for the Pinellas files as a part of his Appeal. As an initial matter, it is possible that Mr. Brooks will receive some or all of the documents that he seeks from the Oak Ridge Operations Office or from the Headquarters FOI and Privacy Acts Division. In any event, the DOE regulations do not allow for the filing of a new FOIA request as part of a FOIA Appeal. See generally 10 C.F.R. § 1004.4, 1004.8. Therefore, if Mr. Brooks does not receive the information that he requested from these offices, he should file a new request for the Pinellas files.

Case No. VFA-0645, 28 DOE ¶ 80,143

January 29, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Frank M. Laiza

Date of Filing: January 2, 2001

Case Number: VFA-0645

On January 2, 2001, Frank M. Laiza filed an Appeal from a final determination that the Richland Operations Office (DOE/RL) of the Department of Energy (DOE) issued on December 5, 2000. In its determination, DOE/RL informed Mr. Laiza that it located no agency records responsive to the request for information he submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

Mr. Laiza is employed by a DOE contractor at the Department's Hanford Site near Richland, Washington. In 1994, 1997, and 2000, Mr. Laiza filed employee concerns with his employer. On November 16, 2000, Mr. Laiza requested from DOE/RL copies of the concerns he filed in 1994 and 1997, "and all supporting documentation that was filed with them . . . ." Electronic Mail from Frank Laiza to Dorothy C. Riehle, DOE/RL (November 16, 2000). In its December 5, 2000 response to Mr. Laiza's request, DOE/RL stated that it "conducted a thorough search of [DOE/RL] Office of Special Concerns (SCO) and no documents were located." DOE/RL also informed Mr. Laiza that records of employee concerns filed with his employer were property of the employer under the contract between DOE and the employer. Letter from Marla Marvin, Director, Office of Intergovernmental, Public and Institutional Affairs, DOE/RL, to Frank Laiza (December 5, 2001). In his Appeal, Mr. Laiza contends that DOE/RL's statement that it could locate no responsive documents contradicted what he was told in a July 11, 2000 conversation with a DOE/RL employee.(1) Mr. Laiza states he was told that "every employee concern written since the beginning of the employee concerns program, whether filed with DOE-RL or the contractor was on record at DOE-RL and could be obtained with a FOIA request." Appeal at 1.

II. Analysis

A. Whether DOE/RL Conducted an Adequate Search for Responsive Documents

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v.

Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted DOE/RL and obtained the following information relevant to the search at issue in this case. The Office of Special Concerns (SCO) at DOE/RL tracks all employee concerns filed with DOE contractors at the Hanford site. This is done by means of periodic reporting to SCO by the contractors, telling SCO the case number assigned to the concern and the name of the contractor employee responsible for handling the concern. This does not mean that, as Mr. Laiza understood it, “every employee concern written since the beginning of the employee concerns program, whether filed with DOE-RL or the contractor was on record at DOE-RL and could be obtained with a FOIA request.” Appeal at 1. In general, an employee concern and supporting documentation is maintained by the DOE contractor with which it was filed, unless the concern becomes the basis for a complaint filed with DOE/RL’s SCO. Thus, in response to Mr. Laiza’s request, DOE/RL searched SCO, which had in its possession only one employee concern filed by Mr. Laiza. He filed that concern with his employer in 2000, and it subsequently became the subject of a complaint he filed with SCO. SCO informed us that the two previous concerns Mr. Laiza filed with his employer were not filed with SCO, and therefore SCO had no documents responsive to Mr. Laiza’s request.(2) Under these circumstances, we find that DOE/RL’s search was “reasonably calculated to uncover” the materials Mr. Laiza is seeking.

B. Whether Responsive Documents in the Possession of DOE Contractors are Subject to Release

To the extent that the records Mr. Laiza has requested are not in the possession of DOE/RL but are in the possession of DOE contractors, we find for the reasons below that those documents are not subject to release under the FOIA or DOE regulations. The FOIA is applicable only where the requested documents may be considered an “agency record” or, pursuant to DOE regulation, is otherwise deemed to be the property of the DOE by contractual provision.

The statutory language of the FOIA does not define "agency records," but merely lists examples of the types of information agencies must make available to the public. See 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as WHC and FHI, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997) (LASG). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." See LASG, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 180 & n.11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, the entities that would be in possession of the employee concerns at issue are Westinghouse Hanford Corporation (WHC) (with respect to the 1994 concern) and Fluor Hanford, Inc. (FHI) (with respect to the 1997 concern). Although these two companies were contracted by the DOE to operate the Hanford site, the DOE did not supervise either contractor’s day-to-day operations. Memorandum of telephone conversation between Dorothy C. Riehle, DOE/RL, and Steven Goering, OHA (January 17, 2001). We therefore conclude that WHC and FHI are not "agencies" subject to the FOIA.

Although WHC and FHI are not agencies for the purposes of the FOIA, their records responsive to Mr. Laiza’s request could become "agency records" if DOE obtained them and they were within the DOE's control at the time Mr. Laiza made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). However, as discussed above, none of the responsive documents at

issue was in the DOE's control or possession at the time of the Appellant's request. Based on these facts, the documents do not qualify as "agency records" under the test set forth by the federal courts. See Tax Analysts, 492 U.S. at 145-46.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under" the FOIA. 10 C.F.R. § 1004.3(e)(1).

The relevant provisions in the WHC contract are as follows:

H-8 OWNERSHIP OF RECORDS

(a) Government records.

Except as provided in paragraph (b) of this clause, all records acquired or generated by the Contractor in its performance of this contract shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting officer may from time to time direct during the process of the work, or in any event, as the Contracting officer shall direct upon completion or termination of the contract.

(b) Contractor records.

The following records are considered the property of the Contractor and are not within the scope of paragraph (a) above.

. . . .

(2) Employee Assistance Program and Employee Concerns Program records and files maintained on individual employees; . . .

Contract No. DE-AC06-87RL10930.

DOE’s contract with FHI contains similar language providing that “[e]mployment-related records such as . . . employee concern program records” are “considered property of the Contractor . . . .” Contract No. DE-AC06-96RL13200 at H-34. Because the contracts in this case do not provide that employee concern records are property of the Government, such records are not subject to release under DOE regulations.

In sum, because we find that DOE/RL conducted an adequate search of records that would be subject to release under the FOIA or DOE regulation, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Frank M. Laiza on January 2, 2001, Case No. VFA-0645, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. §552 (a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 29, 2001

(1)Mr. Laiza also states that DOE/RL did not comply with the FOIA because it did not respond to his request within twenty working days as the Act requires. 5 U.S.C. § 552(a)(6)(A)(i). Whether DOE/RL responded within the time set forth in the FOIA statute and regulations is not an issue within our jurisdiction, 10 C.F.R. § 1004.8, and that issue is in any event now moot because DOE/RL has issued its response.

(2)SCO has not maintained the periodic reports from the contractors that would have contained the case numbers and name of the contractor employee responsible for addressing Mr. Laiza's 1994 and 1997 employee concerns.

Case No. VFA-0646, 28 DOE ¶ 80,147

February 2, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner:Barbara Schwarz

Date of Filing:January 8, 2001

Case Number: VFA-0646

This decision addresses the combined appeals of Barbara Schwarz (Appellant) from two Freedom of Information Act (FOIA) determinations issued to her by the FOI/Privacy Act Division of the Department of Energy (DOE) Headquarters (DOE/FOI). The determinations denied Appellant's requests for fee waivers, which she had filed in connection with two separate FOIA requests, regarding related subject matter. Appellant's respective appeals from those determinations were received by this office on January 8, 2001 and assigned the same case number, VFA-0646. For the reasons set forth below, the appeals will be denied.

I. Background

Appellant filed a FOIA request, dated November 19, 2000, with the DOE/FOI for "records pertaining to inquiries/subpoenas of Mark C. Rathbun's (De Rothschild) or his family's attorney or an Independent or Special Counsel or Congress for any records, e.g., FOIA/PA or litigation records on me, Barbara Schwarz or misspelled version Schwartz." In the request for information, Appellant also requested a waiver of associated copying and processing fees (Waiver Request One). Waiver Request One is apparently based upon Appellant's assertions therein that (1) she is indigent and cannot afford to pay the required fees, (2) she needs the requested documents to find and free Mr. Rathbun, who Appellant believes has been wrongfully imprisoned by a "German Nazi conspiracy," and (3) the requested documents "will be of high interest for the American public and will shed light as to how a German infiltrated government works."

By letter dated November 20, 2000 (Waiver Request Two), Appellant requested a waiver of the fees associated with her October 10, 2000 FOIA request for any records pertaining to former President Dwight D. Eisenhower.(1) Appellant filed two supplements to Waiver Request Two, dated December 16, 2000 and December 18, 2000, respectively. In Waiver Request Two, as supplemented,

Appellant asserts that she is entitled to a fee waiver because (1) she is indigent and cannot afford to pay the required fees, (2) she needs the requested documents in order to prove that she was kidnapped from America as a child and taken to Germany by a "German Nazi conspiracy," (3) she intends to make the records available to Congress and the public via the Internet, and (4) it is "important for the American public," and would greatly contribute to the public's understanding of how the government works, to know that the U.S. Government is "secretly infiltrated by a German Secret Service."

Evidently, Appellant's supplements to Waiver Request Two and the DOE/FOI's determinations denying original Waiver Requests One and Two crossed in the mail.(2) In separate letters, each dated December

12, 2000, the DOE/FOI denied Appellant's respective requests for fee waivers, finding that neither request satisfied the requirements for granting a fee waiver, found at 10 C.F.R. § 1004.9(a)(8). Appellant's appeal from the denial as to Waiver Request One shall be referred to as Appeal One, and her appeal from the denial as to Waiver Request Two shall be referred to as Appeal Two.

Appeals One and Two set forth essentially the same assertions as Waiver Requests One and Two, respectively. In Appeal One, Appellant further contends that she has "absolutely no commercial interest [in the requested documents]. I have a private interest in those records and very much so a historical and educational interest of which the American public should profit." She also argues that, regardless of the fee waiver, she is entitled to, but was denied, two "free" hours of search time and 100 "free" copies of records. In Appeal Two, Appellant contends that the DOE/FOI "violated the 20 working days response time to respond to [her October 10, 2000] FOIA request and request for fee waiver," and again argues that she is entitled to, but was denied, free search time and copies.

II. Applicable Legal Principles

The FOIA generally requires federal agencies to release documents to the public upon request, but provides that, absent a fee waiver, requesters must pay applicable processing fees. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. § 1004.9(a). Either an assurance of willingness to pay fees assessed in accordance with Section 1004.9, or a request for fee waiver, must be included in a FOIA request. The FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the government (the public interest prong); and (2) is not primarily in the commercial interest of the requester (the commercial interest prong). 5 U.S.C. § 552(a)(4)(A)(iii).

In order to satisfy the public interest prong, the DOE requires that a requester show each of the following:

(A) The subject of the requested records concerns "the operations or activities of the government" (Factor A);

(B) Disclosure of the requested records is "likely to contribute" to an understanding of government operations or activities (Factor B);

(C) Disclosure of the requested records would contribute to an understanding of the subject by the general public (Factor C); and

(D) Disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

If a requester satisfies the four factors of the public interest prong, he must then satisfy the commercial interest prong by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Administrative appeals of fee waiver denials generally are reviewed de novo. See Tod N. Rockefeller, 27 DOE ¶ 80,167 (September 29, 1998).

In denying Appellant's Waiver Requests One and Two, the DOE/FOI found that Appellant failed to satisfy each element of the public interest prong. We agree. After performing a de novo review of the merits of both waiver requests, we find that disclosure of the information Appellant seeks is not in the public interest and, therefore, Appellant should not be granted a fee waiver.

III. Analysis

Factor A under the public interest prong requires that the requested records be sought for their informative value with respect to specifically identifiable government operations or activities. See Van Fripp v. Parks, No. 97-0159, slip op. at 10 (D.D.C. Mar. 16, 2000) (characterizing request as "fishing expedition that does not relate to defined operations or activities of the government") (Van Fripp); Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (finding requested list of agency attorneys and their bar affiliations "clearly does not concern identifiable government activities or operations"). A request for access to records for their intrinsic informational content alone will not entitle one to a fee waiver. See Carney v. United States Dep't of Justice, 19 F.3d 807, 814 (2d Cir. 1994) (stating subject matter of information sought relevant to consideration of fee waiver) (Carney).

Records pertaining to Mark Rathbun (De Rothschild) and former President Dwight D. Eisenhower

might have intrinsic informative value and be of general interest. However, Appellant has failed to show that such records have informative value with respect to a specifically identifiable operation or activity of the United States government. Appeals One and Two are laden with Appellant's denouncements of Nazi Germany and personal attestations as to the truth of her suspicions, but they do not address the issue relevant to a FOIA fee waiver determination, namely, whether the information Appellant seeks relates to or will shed light upon a particular aspect of government conduct. Because Appellant has failed to show that the requested records have informative value with respect to specifically identifiable government operations or activities, Appellant has failed to satisfy Factor A.

Under Factor B, disclosure of the requested information must be likely to contribute to the public's understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. See Carney, 19 F.3d at 814. Because, as explained with regard to Factor A, there is no evidence linking the subject matter of Waiver Requests One and Two to specifically identifiable government operations or activities, disclosure of the requested information is not likely to contribute to or enhance public understanding of a specific government operation or activity. Thus, Appellant has failed to satisfy Factor B.

Factor C requires that the requested material contribute to the general public's understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Schrecker v. United States Dep't of Justice, 970 F. Supp. 49, 50 (D.D.C. 1997). Thus, the requester must have the ability and intention to disseminate the requested information to the public. See Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 & n.5 (D.C. Cir. 1988) (holding inability to disseminate information alone is sufficient basis for denying fee Waiver Request); Donald R. Patterson, 28 DOE ¶ 80,107 (2000) (denying fee waiver based on requester's failure to satisfy Factor C). Furthermore, passively making information available to anyone who might access it does not satisfy Factor C, because merely placing data in the public domain without analysis or explanation will not contribute to the public's understanding of the subject matter. See Van Fripp, slip op. at 11-12 (finding "it is plaintiff's burden to disseminate the requested information to the public and not, merely, to make it available"); Donald R. Patterson, supra (citing Van Fripp, supra).

Although Appellant asserts that she intends to distribute the requested information on the Internet, we have previously held that posting information on a website is a passive method of dissemination and insufficient for purposes of Factor C. See Barbara Schwarz, 27 DOE _____, Case No. VFA- 0623) (Oct. 20, 2000) (citing Donald R. Patterson, supra ("[P]lan to post information on a website . . . is a passive method of placing information in the public domain, compared to, for instance, distributing the material in a newsletter or journal.")). Because Appellant has set forth no evidence that she will use a means of distribution other than the Internet, she has not demonstrated the ability and intention to disseminate the requested information to the public at large. Thus, Appellant has failed to satisfy Factor C.

Under Factor D, the last element of the public interest prong, disclosure must contribute "significantly" to public understanding of government operations or activities. Because, as explained with regard to Factor A, Appellant has not shown that the requested information relates to specifically identifiable government

operations or activities, release of the requested information will not significantly contribute to public understanding of government operations or activities. Thus, Appellant has failed to satisfy Factor D.

The foregoing analysis reveals that Appellant has not satisfied the public interest prong, and on that basis alone, should not be granted a fee waiver with regard to Requests One and Two. It is therefore unnecessary to proceed to analysis of the commercial interest prong.

In addition, to the extent Appellant claims entitlement to a fee waiver because she is indigent, and because she seeks the requested information for personal reasons, we note that neither basis is a proper consideration under the FOIA for purposes of making a fee waiver determination. See Ely v. United States Postal Serv., 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents."); McClain v. United States Dep't of Justice, 13 F.3d 220, 220-21 (7th Cir. 1993) (finding fee waiver inappropriate where requester sought to serve private rather than public interest).

We also note that we have no jurisdiction to consider Appellant's assertion that the DOE/FOI failed to respond within the statutory time limits to her October 10, 2000 request for information. See 10 C.F.R. § 1004.8(a). In any case, the DOE/FOI's December 12, 2000 determination, and Appellant's appeal therefrom, renders her assertion moot.

Finally, we need not address Appellant's assertion that the DOE/FOI denied her two free hours of search time and 100 copies free of charge (the initial processing fees). It appears that the determinations dated December 12, 2000, from the DOE/FOI denied only Appellant's fee waiver requests, and not the initial processing fees provided for by 5 U.S.C. § 552(a)(4)(A)(ii), 10 C.F.R. § 1004.9(a), (b)(4) (quoted supra).

IV. Conclusion

Based on the foregoing, Appellant has failed to show that disclosure of the requested information in Waiver Requests One and Two is likely to contribute significantly to public understanding of the operations or activities of the government. Therefore, Appeals One and Two will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act appeals filed by Barbara Schwarz on January 8, 2001, and assigned OHA Case Number VFA-0646, are hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: February 2, 2001

(1)The November 20, 2000 request was essentially a remailing of her October 10, 2000 request for information, which included a request for fee waiver.

(2)Because the supplements essentially reiterate the arguments set forth in Waiver Request One, however, the supplements likely would not have changed the DOE/FOI's decision to deny Appellant's request for a fee waiver. In addition, we note that Appellant apparently remailed the supplements to the DOE/FOI on

December 26, 2000.

Case No. VFA-0648, 28 DOE ¶ 80,150

February 9, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dianne D. Taylor

Date of Filing: January 24, 2001

Case Number: VFA-0648

On January 24, 2001, Dianne D. Taylor (the Appellant) filed an Appeal from a final determination that the Savannah River Operations Office (Savannah River) of the Department of Energy (DOE) issued on December 21, 2000. That determination concerned a request for information the Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The determination indicated that no responsive documents were identified as a result of the search conducted in response to the Appellant's request. In her Appeal, the Appellant asserts that Savannah River's search for records was inadequate. If granted, this Appeal would require Savannah River to conduct a further search.

Background

On December 5, 2000, the Appellant requested a copy of the personnel security file for her father, Ernest Gerric Duncan, Jr., as well as his radiation exposure, medical, and personnel records. Request Letter dated December 5, 2000, from Dianne D. Taylor to Pauline Conner, FOI/Privacy Act Officer, Savannah River (Request Letter). On December 21, 2000, Savannah River issued a determination stating that a thorough search was conducted, including contractor-owned records. Determination Letter dated December 21, 2000, from David G. Darugh, Authorizing Official, Savannah River, to Dianne Taylor. Savannah River found no documents responsive to the request. *Id.* On January 24, 2001, the Appellant filed this Appeal, challenging Savannah River's search as inadequate. Appeal Letter finalized January 24, 2001, from Dianne D. Taylor to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter).

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler,*

Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the

government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

The Appellant is requesting a copy of Mr. Duncan's personnel security file and his radiation exposure, medical, and personnel records. Request Letter. Savannah River's FOIA Officer informed us that the Savannah River Personnel Security Department searched its computer database for Mr. Duncan's name and social security number. No responsive records were found. The contractor on site, Westinghouse Savannah River Company (WSRC), also conducted a search of the medical and legal departments' computer databases, paper files and indexes of old records that had been sent to storage, using both Mr. Duncan's name and social security number. Electronic Mail Message sent January 30, 2001, from Pauline Conner, FOI/Privacy Act Officer, Savannah River, to Janet R. H. Fishman, Attorney- Examiner, OHA; Memorandum of Telephone Conversation, January 25, 2000, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Pauline Conner, FOI/Privacy Act Officer, Savannah River (January 25, 2000 Telephone Memorandum). No responsive records were located. WSRC's radiation department searched its year-by-year computerized exposure listing, "lektriever" database,(1) and microfiche and microfilm. No responsive records were located. *Id.* Finally, WSRC's personnel department searched its old indexes of records. No responsive records were located. *Id.* None of these departments destroys records. *Id.*

When asked if records for other employees from the early 1950s had ever been located, the FOI/Privacy Act Officer stated that records for 20-year employees had been found. January 25, 2000 Telephone Memorandum. However, she indicated that Mr. Duncan worked at Savannah River for only a year or two. *Id.* During the time the Appellant claimed her father worked at Savannah River, the site was just being built. *Id.* Further, during the time he worked there, the Federal Bureau of Investigation (FBI) did the personnel security investigations, not Savannah River. She indicated that possibly the FBI could have responsive records on him. *Id.* In any event, no records responsive to the Appellant's request were found at Savannah River or its contractor, WSRC.(2)

We are convinced that Savannah River followed procedures which were reasonably calculated to uncover the material the Appellant sought in her request. *See Miller*, 779 F.2d at 1384-85. The fact that the search did not uncover documents that the Appellant believes may be in the possession of DOE does not mean that the search was inadequate. Savannah River searched both its records and those of the contractor, using Mr. Duncan's name and social security number. Both computer and hand searches were conducted. No responsive records were located. We cannot identify, nor has the Appellant, another office at either Savannah River or Westinghouse that would have responsive records. Therefore, we will deny the Appellant's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on January 24, 2001, by Dianne D. Taylor, Case No. VFA-0648, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 9, 2001

(1)"Lektriever" is the brand name of a mechanical, revolving shelf file where the Westinghouse radiation department's paper files and microfiche records are stored. The database keeps a listing of every name in

the records system along with comments about whether the file is paper or microfiche, the social security number, termination date, and address. Electronic Mail Message dated February 6, 2001, from Pauline Conner, FOI/Privacy Act Officer, Savannah River, to Janet R. H. Fishman, Attorney-Examiner, OHA.

(2)In a letter dated January 5, 2001, from Ms. Taylor to Savannah River, she mentioned that her father worked for Union Carbide. Letter dated January 5, 2001, from Dianne D. Taylor to David G. Darugh, Savannah River. On January 12, 2001, Mr. Darugh responded that because Union Carbide was the prime contractor at the Oak Ridge Operations Office and not at Savannah River, Ms Taylor should contact Oak Ridge to determine if it had information on her father. Letter dated January 12, 2001, from David G. Darugh, Authorizing Official, Savannah River, to Dianne D. Taylor. It is possible that the FBI or the Oak Ridge Operations Office may have Mr. Duncan's personnel security file.

Case No. VFA-0649, 28 DOE ¶ 80,153

March 15, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martin Becker

Date of Filing: February 7, 2001

Case Number: VFA-0649

On February 7, 2001, Martin Becker filed an Appeal from a final determination that the Savannah River Operations Office (DOE/SR) of the Department of Energy (DOE) issued on January 12, 2001. In its determination, DOE/SR informed Mr. Becker that it had no documents responsive to the request for information he submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

I. Background

On September 22, 2000, Mr. Becker filed a FOIA request with the DOE/SR, seeking a copy of any lease entered into by Westinghouse Savannah River Company (WSRC) (including any subsidiaries or affiliates thereof) at Centennial Corporate Center in Aiken, South Carolina, since January 1, 1996. WSRC is the management and operating (M&O) contractor at the DOE Savannah River Site.

DOE/SR responded with a determination letter dated October 26, 2000. The determination letter stated,

The documents responsive to your request are neither owned nor possessed by [the DOE]. Specifically, DOE's [M&O contract with WSRC] provides:

The following records are considered property of the Contractor and are not Government documents: non-accounting records relating to any procurement action by the Contractor.

The records you have requested involve a WSRC subcontract and are thus procurement-related records of WSRC. DOE itself performed a search and we have no documents responsive to your request.

On November 13, 2000, Mr. Becker filed an Appeal from DOE/SR's determination. We issued a decision on that Appeal on December 11, 2000, in which we found that DOE/SR had failed to set forth an adequate explanation as to why the lease in question was contractor-owned. Thus, we remanded the matter to DOE/SR to issue a new determination and either release any responsive documents, provide the adequate explanation that was lacking from its first determination, or provide another adequate explanation for withholding them.

DOE/SR issued a new determination on December 21, 2000, in which DOE/SR's Authorizing Official stated,

In my original final determination dated October 26, 2000, I stated that the lease agreement was considered

contractor-records. However, an oversight was made and I should have also stated that we have no documents responsive to your request. Therefore, the explanation for not releasing the documents you requested is that they do not exist. WSRC did not enter into any new leases, renewals or extensions at the Centennial Corporate Center since January 1, 1996. . . . As such, we do not have and never did have documents responsive to your request.

Letter from David G. Darugh, DOE/SR, to Martin Becker (December 21, 2000). In a subsequent letter to Mr. Becker, DOE/SR stated, "Any lease currently in place at the Centennial Corporate Center involves private interests not associated with our M&O contract between WSRC and [DOE]." Letter from David G. Darugh, DOE/SR, to Martin Becker (January 12, 2001).

On February 7, 2001, Mr. Becker filed the present appeal, arguing that the "requested lease does not involve ?private interests not associated' with the M&O contract issued to WSRC." Appeal at 1. Mr. Becker cites a document submitted with his appeal as evidence that

1. The tenant of the Centennial Corporate Center in Aiken, South Carolina, is Westinghouse Safety Management Solutions (WSMS).
2. WSMS is a wholly-owned subsidiary of WSRC.
3. WSMS is a WSRC subcontractor.
4. WSMS bills WSRC for reimbursement of costs incurred, including the cost of rental space, through an Inter-Work Requisition (IWR).

Appeal at 2 (footnotes omitted). Based on the above facts, Mr. Becker argues that federal regulations require "WSRC to maintain a copy of the lease between WSMS and Centennial Partners, and these lease documents are property of the Government." Id.

II. Analysis

Unless requested material falls within one of nine statutory exemptions, the FOIA generally requires a federal agency to release its records to the public upon request. 5 U.S.C. § 552(a); 10 C.F.R. § 1004.3. See also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). In our December 11, 2000 decision, we found that because "WSRC is not an ?agency' for purposes of the FOIA, and [DOE/SR] has not obtained the responsive documents, . . . the lease is not an agency record" subject to the FOIA. However, we also found that the lease may be subject to disclosure under DOE regulations. Specifically, 10 C.F.R. § 1004.3(e)(1) states, "[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)."

A. Whether WSRC Possesses Records Subject to Release Under DOE Regulations

WSRC's M&O contract with the DOE contains a provision entitled "Access to and Ownership of Records," a standard clause which DOE regulations require be inserted in all M&O contracts. 48 C.F.R. 970.5204.3. Section I.88 of the contract states, "Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government . . . ." CONTRACT NO. DE-AC09-96SR18500, MODIFICATION NO. M068 at 102. Thus, 10 C.F.R. § 1004.3(e)(1) requires that DOE make available to the public records that are in the possession of WSRC that are "property of the Government" under this clause.

However, as noted above, WSRC has stated that it has no document responsive to Mr. Becker's request. The company explained that in response to the request, the

Facilities Management Group and the Procurement Group were contacted regarding leasing activities of WSRC for space in the Centennial buildings. Both groups responded there were no new leases, extensions,

or renewals after 1/1/96 on space at Centennial Corporate Center. The initial lease was for the period 10/17/91 to 10/17/96, and WSRC did not exercise its 5-year renewal option. The Procurement Department was not involved with any negotiations on behalf of WSMS for its space leased in Centennial.

Electronic Mail from Adrian Smith, WSRC, to Steven Goering, OHA (February 26, 2001). Mr. Becker contends that, because WSRC incurred costs in reimbursing WSMS for a portion of the payments WSMS made pursuant to the lease, WSRC is required by regulation to keep a copy of the lease between WSMS and Centennial Partners. We have reviewed the regulation cited by Mr. Becker,(1) which we discuss in greater detail below, and find that while it does impose certain record- keeping requirements on WSRC, the lease in question is not necessarily among the documents that the regulation requires WSRC to maintain. More importantly, the regulation directly relevant to this case, 10 C.F.R. § 1004.3(e)(1), requires DOE to make available records that are actually "in the possession" of WSRC, not records that the appellant argues ought to be in WSRC's possession. We find that WSRC has provided us with a reasoned explanation for its conclusion that it does not have a copy of the lease between WSMS and Centennial Partners.

B. Whether WSMS Possesses Records Subject to Release Under DOE Regulations

We also asked WSMS whether any of its contracts with the DOE (or subcontracts thereto) contain the "Access to and Ownership of Records" clause, which DOE regulations also require be inserted in certain subcontracts. 48 C.F.R. § 970.5204-3(g). WSMS's General Counsel responded, "Time limitations prevent me from providing you with an exact tally of which of our contracts contain [this clause]. A few of our many contracts would meet the threshold for its passdown." Electronic Mail from Matt Alan, General Counsel, WSMS, to Steven Goering, OHA (February 22, 2001). Thus, to the extent WSMS acquires or generates records in the performance of any of its contracts containing the clause, those records are generally property of the Government, which 10 C.F.R. § 1004.3(e)(1) requires DOE make available to the public, subject to certain exceptions set forth in subsection (b) of the ownership of records clause.

In this case, the relevant exception is contained in subsection (b)(3), which classifies as property of the contractor "[r]ecords relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, are described as the property of the government; . . ." 48 C.F.R. 970.5204.3(b)(3). WSMS contends that the lease by which it procured office space "was executed independent of performance under any one or more DOE contracts" and in any event is a record relating to a procurement action by the contractor, and therefore is property of WSMS. Electronic Mail from Matt Alan, General Counsel, WSMS, to Steven Goering, OHA (February 22, 2001).

WSMS is clearly correct that a record acquired or generated independent of performance under a contract containing the ownership of records clause could not have been acquired or generated in the performance of that contract, and therefore could not be property of the Government under that clause. However, the information provided by WSMS does not address whether *additional copies* of the lease were acquired or generated in WSMS's performance of a contract containing the relevant clause. WSMS contends that when applying the ownership of records clause to any copy of the lease, only the circumstances of the original acquisition or generation of the document, in this case the execution of the lease, are relevant. Electronic Mail from Matt Alan, General Counsel, WSMS, to Steven Goering, OHA (February 28, 2001). WSMS reasons that to the extent the lease was originally acquired or generated "independent of performance under any one or more DOE contracts," the lease *and all copies thereof* fall outside of the scope of the ownership of records clause. Thus, WSMS did not provide any information on what other copies of the lease are in its possession and under what circumstances those copies were generated.

We disagree with WSMS's interpretation of the ownership of records clause. To illustrate how a copy of the lease in question would in fact become property of the Government, we turn to the example of a copy of the lease generated in compliance with 48 C.F.R. § 970.5232-3, "Accounts, Records, and Inspection," which we mentioned above and now quote in pertinent part:

970.5232-3 Accounts, records, and inspection.

As prescribed in 48 CFR 970.3270(a)(2), insert the following clause:

Accounts, Records, and Inspection (DEC 2000)

(a) Accounts. The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs incurred; collections accruing to the contractor in connection with the work under this contract, other applicable credits, negotiated fixed amounts, and fee accruals under this contract; and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

. . . .

(d) Disposition of records. Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as otherwise provided in this contract, including provisions of Clause__, Access to and ownership of records, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

. . . .

(g) Subcontracts. The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (h) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

48 C.F.R. § 970.5232-3. Any of WSMS's contracts that contains the above clause requires WSMS to "maintain a separate and distinct set of accounts, records, documents, and other evidence" as described in paragraph (a) of the clause. If, pursuant to paragraph (a), WSMS generated a copy of the lease and maintains that copy as part of a separate and distinct set of records, that copy is a record distinct from the original copy of the lease, and that distinct record clearly was generated by WSMS in its performance of any contract containing the ownership of records clause.

Moreover, as discussed above, the ownership of records clause specifically brings within its scope records relating to any procurement action that are acquired or generated in the performance of a contract containing the clause, if those records are of the type described in 48 C.F.R. § 970.5232- 3(d), i.e., "all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract . . . ." Certainly a copy of the lease generated pursuant to paragraph (a) of the "Accounts, Records, and Inspection" clause would fall within the scope of paragraph (d) of the same clause, and as such would be property of the government under the ownership of records clause.

The WSMS General Counsel offers a different interpretation, arguing that

a subcontractor's HQ lease may fall under the ?supporting documents' language [of paragraph (d) of the "Account, Records, and Inspections" clause]. I say ?may' because there is nothing requiring DOE or WSRC to request the lease. . . .

Consistent with our earlier discussions, DOE owns such documents solely to the extent the record is in DOE's possession.

Electronic Mail from Matt Alan, General Counsel, WSMS, to Steven Goering, OHA (March 6, 2001).

However, we see nothing in paragraph (d) of the "Account, Records, and Inspections" clause indicating that ownership of a record by the Government is dependent upon the Government having possession of the record. Indeed, the paragraph specifically refers to records that are "in the possession of the contractor . . . ." Similarly, the DOE FOIA regulation that provides access to records that are property of the Government states that it applies to "records that are in the possession of the Government *or the contractor*. . . ." 10 C.F.R. § 1004.3(e)(1) (emphasis added).

IV. Conclusion

We find, as explained above, that WSRC has provided a reasonable explanation for its conclusion that it does not have a copy of the lease requested by Mr. Becker. WSMS, on the other hand, has at least one copy of the lease, but claims that any and all copies of the lease are property of WSMS. The above analysis shows, by way of the example of a copy created under the "Account, Records, and Inspections" clause, that a copy of the lease certainly can be property of the Government under the ownership of records clause, and therefore subject to the DOE FOIA regulations.

Based on the foregoing, we find that any copy of the lease requested by Mr. Becker that is in the possession of WSMS and that was generated in compliance with 48 C.F.R. § 970.5232-3, "Accounts, Records, and Inspection," is a record that is property of the Government subject to disclosure under 10 C.F.R. § 1004.3(e)(1). We will therefore remand this matter to DOE/SR, which shall, in compliance with 10 C.F.R. § 1004.3(e)(1), obtain a copy of any such record from WSMS and provide it to Mr. Becker, unless the record or reasonably segregable portions of it are exempt from public disclosure under 5 U.S.C. § 552(b). If WSMS generated no copy of the lease in compliance with 48 C.F.R. § 970.5232-3, DOE/SR shall request that WSMS identify, using our interpretation of the relevant contract clauses as set forth in this opinion, any copy of the lease that was in any other way acquired or generated by WSMS in its performance of a contract containing the relevant ownership of records clause. DOE/SR shall obtain a copy of any such record from WSMS if it finds, in accord with our analysis contained in this opinion, that the record is property of the Government. 10 C.F.R. § 1004.3(e)(1) ("DOE will make available to the public such records that are in the possession of the Government or the contractor"). DOE/SR shall provide a copy of the record to Mr. Becker, unless the record or reasonably segregable portions of it are exempt from public disclosure under 5 U.S.C. § 552(b).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Martin Becker on February 7, 2001, Case No. VFA-0649 is hereby granted as specified in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the Savannah River Operations Office to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: March 15, 2001

(1)The section cited by Mr. Becker, 48 C.F.R. § 970.5204-9, was removed from the regulations in December 2000, but a substantially similar section was added at 48 C.F.R. § 970.5232-3. 65 Fed. Reg. 80994, 81074 (December 22, 2000).

Case No. VFA-0650, 28 DOE ¶ 80,152

March 2, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Radioactive Waste Management Associates

Date of Filing:February 12, 2001

Case Number: VFA-0650

Radioactive Waste Management Associates (RWMA) filed this Appeal in response to a determination issued to it by the Department of Energy's Ohio Field Office (OH). The determination deals with a request that RWMA submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In its Appeal, RWMA requests the release of material responsive to the request. As explained below, we will remand RWMA's request for further processing.

I. Background

RWMA's FOIA request sought the release of records relating to "the handling, reprocessing, and storage of uranium recovered at the NFS-West Valley reprocessing plant and stored at ... Fernald, Ohio." OH located one responsive document, a two-volume draft report titled "Ohio Field Office Recycled Uranium Project Report, May 15, 2000, DOE-OH-00-0001" (the draft report). However, OH withheld the draft report in its entirety, claiming it was exempt from mandatory release pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). RWMA then filed the present Appeal with the Office of Hearings and Appeals.

II. Analysis

The FOIA generally requires that all federal agency records be made available to the public, subject to certain specified exemptions. The Act provides, however, for nine categories of records that are exempt from mandatory disclosure. OH withheld the draft report

under Exemption 5 of the FOIA, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). This provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It

is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id*. Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. Department of Health and Human Services*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The fact that a document meets the criteria for withholding discussed above does not necessarily mean that it may be withheld in its entirety. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979).

OH states in the Determination Letter that “because of the way the findings are presented in this draft report, it would be virtually impossible to segregate out any nonexempt material.” Based on our review of a sample of the draft report, however, we find that OH should reconsider the issue of segregability. For example, the draft report contains a table of contents, a list of tables, a list of figures, and introductory matter that do not appear to qualify for withholding under Exemption 5.

III. Conclusion

On remand, OH must review the withheld document, segregate and release all nonexempt portions of the documents, and issue a new determination that justifies any withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by Radioactive Waste Management Associates (Case No. VFA-0650) is hereby granted as set forth in paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Ohio Field Office for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:March 2, 2001

Case No. VFA-0651, 28 DOE ¶ 80,154

March 23, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert J. Ylimaki

Date of Filing: February 16, 2001

Case Number: VFA-0651

This Decision concerns an Appeal filed by Robert J. Ylimaki from a determination that the Chicago Operations Office issued to him on January 24, 2001. In that determination, Chicago denied in part a request for information that Mr. Ylimaki filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his FOIA request, Mr. Ylimaki sought access to the dollar amounts of Special Act or Service Awards given to grade GS-15 employees at the Chicago Office, broken down by division. He also requested the salaries of specific Chicago Office employees and the amounts of any performance awards or bonuses given to these employees during fiscal year 1999. In its response, the Chicago Office withheld the division-by-division breakdown under Exemption 6 of the FOIA. 5 U.S.C. § 552(b)(6). Exemption 6 protects from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Id. In support of its determination, the Chicago Office stated that since the number of GS- 15 employees per division is so small, disclosure of the withheld information would "allow with minimal analysis and the process of elimination, the identification of individual special act awards

by employee." The Chicago Office added that an individual "has a significant privacy interest in protecting from disclosure the amount of his or her award, since releasing the amount would allow direct comparison between employee awards and almost certainly incite jealousy in those employees receiving lower awards." Determination at 1. However, the Chicago Office released a list of the GS- 15 bonuses broken down by major groups, and the salaries of specific employees. The amounts of these employees' bonuses were also withheld under Exemption 6.

In his Appeal, Mr. Ylimaki contends that federal regulations require that the requested information be released. He cites 5 C.F.R. § 293.311(a), an Office of Personnel Management regulation, which states, in

pertinent part, that the "following information . . . about most present and former Federal employees, is available to the public: . . . (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)." With regard to the Chicago Office's application of Exemption 6, he contends that the privacy interests of the employees involved is minimal at best, and that there is a substantial public interest in releasing evidence of what he claims are abuses in the awarding of bonuses at the Chicago Office. He therefore requests that we instruct the Chicago Office to release the withheld material.

II. Analysis

Contrary to Mr. Ylimaki's position, 5 C.F.R. § 293.311 does not necessarily require the release of the information that he seeks. Paragraph (b) of that regulation provides that the information described in paragraph (a) need not be released if it

(1) Is selected in such a way that would reveal more about the employee on whom information is sought than the six enumerated items [in paragraph (a)], the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

(2) Would otherwise be protected from mandatory disclosure under an exemption of the FOIA.

5 C.F.R. § 293.311(b). In its determination, the Chicago Office did not contend that the release of the requested information would reveal more about the employee on whom information is sought than the items enumerated in paragraph (a); instead, it took the position that one of those items, i.e., performance awards or bonuses, is itself exempt from mandatory release under the FOIA. We must therefore evaluate the Chicago Office's application of Exemption 6.

The purpose of that Exemption is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991); FLRA v. Department of Treasury Financial Management Service, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee, 489 U.S. at 762-770. See also Frank E. Isbill, 27 DOE ¶ 80,215 (1999); Sowell, Todd, Lafitte and Watson LLC., 27 DOE ¶ 80,226 (1999) (Sowell). In keeping with the rule that exemptions to the FOIA be construed narrowly, see EPA vs. Mink, 410 U.S. 73 (1973), the "clearly unwarranted" language of Exemption 6 weights the scales in favor of disclosure. Ripskis, 746 F.2d at 3.

Applying these standards to the facts of this case, we believe that a significant privacy interest is at stake. We find that the GS-15 employees in the Chicago Office have a significant interest in maintaining the confidentiality of their bonuses. As set forth in the determination, disclosure of these amounts would almost certainly lead to comparisons between bonuses given to employees, and could engender jealousy among those who received lesser amounts, or who received no awards, and promote discord in the workplace. See, e.g., Thomas J. Balamut, 28 DOE ¶ _____, Case No. VFA- 0643 (February 6, 2001); Jurgis Paliulionis, 27 DOE ¶ 80,235 (1999). Next, we find that release of the requested information would further the public interest by helping to reveal how the federal government compensates its employees. Since we have found that there are competing privacy and public interests in the information in question,

we must now balance these interests to determine whether the information should be disclosed. For the reasons that follow, we conclude that the GS-15 employees' privacy interests outweigh the public interest in disclosure, and that the Chicago Office properly withheld the material in question.

At the outset, we recognize that federal employees are public servants, and that the public has a significant interest in knowing how its employees are paid. This interest is reflected in the fact that the DOE and other federal agencies generally make available to the public the salaries of their employees. See, e.g., 5 C.F.R. § 293.311. In fact, such information is so readily available that we have previously stated that it must be released under the FOIA because federal employees have no reasonable expectation of privacy in this area. The Valley Times, 27 DOE ¶ 80,247 (1999). The fact that bonuses and performance awards are a part of their recipients' compensation and are specifically referred to in the regulation under which federal salaries are generally released indicates that the public interest in this information is significant.

However, the Chicago Office has demonstrated that there is a substantial possibility that harassment of the GS-15 employees would result from the release of this type of information. Specifically, the Chicago Office has cited specific instances of inappropriate behavior by some of its employees. See letter from Chicago Office to Office of Hearings and Appeals, March 15, 2001, at 2; memorandum of March 13, 2001 telephone conversation between Linda Rhode, Chicago Office, and Robert Palmer, Office of Hearings and Appeals. Such harassment would disrupt the functioning of the Chicago Office and would adversely affect its ability to perform the responsibilities with which it is charged. We have previously found the potential for harassment of employees to be a sufficient justification for withholding information under Exemption 6. See, e.g., William Hyde, 18 DOE ¶ 80,102 (1988). Because the potential for harassment in this case outweighs the public interest in disclosure, we will deny Mr. Ylimaki's Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Robert J. Ylimaki, Case No. VFA-0651, on February 16, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 23, 2001

Case No. VFA-0652, 28 DOE ¶ 80,155

March 27, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner:David A. Mitchell

Date of Filing:February 20, 2001

Case Number: VFA-0652

This decision addresses the Freedom of Information Act (FOIA) appeal filed by David Mitchell (appellant) pursuant to 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. For the reasons set forth below, the appeal will be granted in part and remanded for a new determination in accordance with this decision.

I. Background

The appellant(1) filed a FOIA request dated October 26, 2000 with the DOE Office of Civilian Radioactive Waste Management (OCRWM) in Yucca Mountain, Nevada, seeking records relating to:

OCRWM Management's investigation of the charge of harassment and intimidation made by Bill Belke, Site NRC, against Bob Clark, Acting Director of OCRWM's Office of Quality Assurance . . . including a November 23, 1999 report filed with the OCRWM Concerns Program.

By letter dated October 27, 2000, the appellant amended his FOIA request to seek additional records relating to:

Concerns raised by [the appellant] in late summer/early fall 1999 to the [DOE OCRWM] Concerns Program, regarding Quality Assurance and Work Environment Issues, relating to his employment with MACTEC, Inc. and work performed at the Sandia National Laboratory and Yucca Mountain Project [including] those concerns

that were referred by OCRWM to the DOE Inspector General and DOE Security [and] the U.S. Nuclear Regulatory Commission.

By letter dated December 20, 2000 to the appellant's attorney, the OCRWM FOIA Office (OCRWM/FOI) partially denied the appellant's FOIA request, stating the following:

[D]ocuments consisting of 1,303 pages in which all third party names, residential addresses, employee numbers and/or social security numbers, employee signatures, their listed witness names and third party performance appraisals contained within have been redacted pursuant to 5 U.S.C. 552(b)(6) [("Exemption 6") of the FOIA], because release of this information would constitute a clearly unwarranted invasion of personal privacy [that] far outweighs any possible public interest to be served by release of this information.

Also pursuant to Exemption 6, the OCRWM/FOI withheld in their entirety 7 resumes consisting of 66 pages, stating that exempt information is "so intermingled [with nonexempt information] that no substantive portions could be segregated for release as nonexempt." In addition, pursuant to 10 C.F.R. § 1004.9, the OCRWM/FOI responded, "you are categorized as a commercial requester." The OCRWM/FOI further stated that although the appellant had originally stated a willingness to pay an amount of not more than $100, "when this office informed your firm of the actual cost, an e-mail confirmation was received from [your assistant], stating your firm's willingness to pay the amount of $951.20." (2)

The appellant, who has filed a reprisal complaint against a DOE contractor and submitted his FOIA requests "for the purpose of obtaining information regarding the government investigation [into his] allegations," appealed from the OCRWM/FOI's determination on February 20, 2001. In his appeal, he asserts the following:

(A) The OCRWM/FOI was "overzealous" in redacting certain documents under Exemption 6, since many of the redacted documents had been supplied in unredacted form to the appellant through case discovery, "created as a result of concerns raised by the appellant to the DOE," or previously exchanged between the DOE and the appellant himself. The Appellant further asserts that "information obtained by the DOE in investigating . . . concerns [including documents relevant to the DOE's Interim Final Report] should not be withheld from the person who raised those concerns."

(B) The OCRWM/FOI erroneously categorized the appellant as a "commercial requester" for purposes of charging processing fees associated with this FOIA requests.

(C) The appellant is entitled to either a fee waiver or a reduction in fees in proportion to the amount of time "inappropriately spent reviewing and redacting information from documents previously produced by or to" the appellant.

(D) The OCRWM erred in charging the appellant $951.20 for processing his FOIA request, since the appellant had stated a willingness to pay not more than $100 and the OCRWM denied him the opportunity to narrow his FOIA requests after he learned of the actual cost. The appellant maintains that because he needed the requested documents for an upcoming trial, he was effectively forced to accept the charge and subsequently dispute it through this administrative appeal.

We address each of the appellant's assertions in kind below.

II. Analysis

A. Whether Exemption 6 Protects the Redacted and Withheld Information

With nine exemptions, the FOIA requires federal agencies to release documents to the public upon request. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(6); 10 C.F.R. § 1004.10(b)(6). "Similar files" include all documents which contain information that applies to a particular individual. Department of State v. Washington Post, 456 U.S. 595, 599 (1982). If documents are of the type described in Exemption 6, then an agency must undertake a three step analysis, as enumerated by the Supreme Court in Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 495-96 (1994) (FLRA), in determining whether Exemption 6's protection applies. First, an agency must determine whether a significant privacy interest would be invaded by disclosure of the record. If no privacy interest is identified, the record may not be withheld under Exemption 6. See also Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. Finally, the agency must weigh the identified privacy interests against the public interest in order to

determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. With these principles in mind, we shall now review the contested documents.

1. Documents Relating to Appellant's Reprisal Allegations

The first set of documents relate to the appellant's allegations of reprisal against a DOE contractor and consist of a schedule and transcripts of interviews of contractor employees; pages from two DOE Interim Final Reports of investigations (and addendums thereto) into the appellant's allegations; an Issue Analysis Plan prepared by the OCRWM Employee Concerns Program (EC) manager; various Deficiency Reports and Quality Assurance Checklists prepared by contractor employees; and various handwritten and typed memoranda, letters, and emails (many authored by or addressed to the appellant) regarding the EC's investigation into the appellant's allegations. We have reviewed unredacted copies of the documents and, as discussed below, we find that in every instance the OCRWM/FOI properly and meticulously applied Exemption 6 in withholding only third party names, residential addresses, employee or social security numbers, and employee signatures (collectively, "the redacted information").(3)

As a threshold matter, we find that the redacted information constitutes a "similar file," because it applies to particular individuals.(4) Having so found, we must next determine whether disclosure of the information would constitute an invasion of privacy and how severe an invasion it would be. Reporters Committee, 489 U.S. at 763, defines privacy as encompassing "the individual's control of information concerning his or her person," which "includes the prosaic . . . as well as the intimate and potentially embarrassing," Painting and Drywall Work Preservation Fund v. HUD, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (PDWPF).

In this case, the redacted information includes not merely names, but also intimate information, such as addresses and employee and social security numbers. We therefore find that there is a privacy interest in the redacted information. Furthermore, because the purpose for which a FOIA requester seeks information is immaterial, if we were to find that the appellant is entitled to receive the information sought, that same information would have to be provided, for example, to creditors, salesmen, and commercial organizations. PDWPF, 936 F.2d at 1303. See also, Reporters Committee, 498 U.S. at 771 (Congress clearly intended the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]"). We therefore find that the privacy interest in the redacted information is significant.(5)

On the other hand, the public interest in disclosure of the redacted information is virtually nonexistent and consequently does not override the significant privacy interests involved. Although appellant claims a unique entitlement to disclosure of the redacted information because it relates to allegations and concerns raised by him, the relevant inquiry in determining whether there is a public interest in disclosure is the extent to which disclosure would serve the "core purpose of the FOIA,"

i.e., to "contribute significantly to public understanding of the operations or activities of government." FLRA, 510 U.S. at 1012. Put another way, proper emphasis is upon the public's right "to be informed about what their government is up to," not the specific interest of a person seeking disclosure in a particular case. Reporters Committee, 489 U.S. at 772. See also, Professional Review Organization v. Department of HHS, 607 F. Supp. 423, 427 (D.D.C. 1985). "[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made." Reporters Committee, 498 U.S. at 772. The redacted information in the memos consists of the names of contractor employees. The names deal with the alleged failure of a contractor to comply with relevant laws. In this case, the names do not cast light on what the DOE "is up to," and there is no obvious public interest in its disclosure. See PDWPF, 936 F.2d at 1303 (information potentially revealing contractor's failure to pay prevailing wages on HUD-assisted projects does not shed light on HUD activity). In addition, the fact that a small portion of the redacted information is contained in DOE Interim Final Reports regarding the appellant's allegations does not change the fact that the information regards the activities of private, non-federal employees and has no apparent bearing upon government activities.

Furthermore, that the redacted information may be contained in discoverable documents is irrelevant for purposes of the FOIA and Exemption 6. “Regardless of the requested information’s usefulness in a separate proceeding, the FOIA does not supplant discovery or enlarge discovery rights. Being a private litigant neither diminishes nor enhances the merits of a FOIA request.” Barvick v. Cisneros, 941 F. Supp. 1015, 1020 (D. Kan. 1996) (Barvick) (citing National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). In the same vein, also immaterial is the fact that the redacted information is contained in documents originally created by or sent to the appellant himself, as the identity of the requesting party generally has no bearing on the merits of his FOIA request. See Reporters Committee, 489 U.S. at 771.

Based upon the foregoing, we find that the OCRWM/FOI properly applied Exemption 6 to the redacted information.

2. The Resumes

The second set of disputed documents consists of 7 resumes of contractor employees (collectively, “the resumes”), which the OCRWM/FOI wholly withheld under Exemption 6, based upon its determination that exempt information in the resumes is “so intermingled that no substantive portions could be segregated for release as non-exempt.” We agree that the resumes must be completely withheld, but do so based upon the determination that Exemption 6 protects all information in the resumes, i.e., there is no non-exempt information to segregate.

Our review of unredacted copies of the resumes reveals that they are inherently personal in nature, i.e., pertain to particular individuals, and therefore invocation of Exemption 6 analysis is proper. We further find that the resumes trigger a privacy interest, as they contain the names of private individuals, and their addresses, telephone numbers, education and employment histories. As discussed above, an individual has a significant privacy interest in his name and contact information. Furthermore, each non-federal employee represented by one of the resumes has at least a small privacy interest in the history set forth therein. Even a nominal privacy interest is sufficient to justify withholding the resumes in this case, because there is no public interest involved. As with the redacted information, the resumes regard private contractor employees and, as such, disclosure will not contribute significantly to public understanding of government operations or activities. The resumes therefore may be withheld in their entirety.

B. Whether The Appellant is a Commercial Use Requester

The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"--and places requesters into three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

The appellant asserts that the OCRWM/FOI erroneously categorized him as a “commercial use requester.” We agree. In defending its categorization of the appellant, the OCRWM/FOI explained that it looked to the attorney who had filed the FOIA requests on behalf the appellant. OHA telephone conversation with the OCRWM/FOI Officer, Feb. 29, 2001. The OCRWM/FOI asserted that because the attorney directly filed the FOIA requests, presumably for a fee to be paid by her client (i.e., the appellant), the attorney was properly charged the commercial use rate. For the purpose of assessing processing fees, however, when one party files a FOIA request on behalf of another, agencies must look to the party for whom the request is made. See Government Accountability Project (GAP), 25 DOE ¶ 80,203 (1996) (analyzing whether client seeking documents, not organization that actually filed request, is “commercial use requester”); OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18. Thus, in determining whether the commercial rate applies to this case, we must look through the attorney to the appellant.

In doing so, we find that the appellant is not a commercial use requester. A "commercial use" is defined as "one that furthers a commercial, trade or profit interest as those are commonly understood." 10 C.F.R. § 1004.2(c). In this case, the appellant seeks to use the requested information in proceedings stemming from his complaint of reprisal against a DOE contractor. Information helpful to a retaliation claim may further a requester's interest in compensation or retribution, but not an interest in commerce, trade, or profit. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987). Therefore, the appellant is not a commercial use requester for purposes of FOIA. See GAP, supra.

C. Whether Appellant is Entitled to a Fee Waiver or Reduction of Fees

The appellant asserts that he is entitled to a fee waiver or reduction of fees for "time inappropriately spent reviewing and redacting information previously produced by or to [the appellant].(6) We disagree.

In asserting that he is entitled to a waiver or reduction of fees, appellant fails to recognize the distinction between documents produced through the FOIA and documents produced through case discovery. As discussed above, the identity of a requester generally has no bearing upon the merits of his FOIA request; even the fact that the requester has unredacted copies of documents in his possession has no bearing upon whether those same documents must be produced to him in redacted form under the FOIA. See Reporters Committee, 489 U.S. at 772. Because we have found that the responsive documents were properly redacted in this case, it may be appropriate to charge redaction fees, if the appellant, once placed in the proper request category, is subject to such fees.

D. Whether Charging Appellant Processing Fees in Excess of $100 Was Proper

Appellant asserts that because he submitted a written statement to the OCRWM/FOI that he would pay processing fees up to $100 and requested advance notice if the fees would exceed that amount, the OCRWM/FOI should not have charged him $951.20, or any amount in excess of $100. Although we do not have jurisdiction to simply reduce FOIA processing fees, we contacted the Director of the DOE FOI/Privacy Act Division (the FOIA Director) regarding this matter. The Director indicated that it would have been proper for the OCRWM/FOI to obtain the appellant's authorization for the greater amount prior to incurring the $951.20 cost, allow the appellant to narrow his FOIA request, incur production costs only up to $100, or choose to produce all of the responsive documents to him at a charge of no more than $100. OHA telephone conversation with the Director, Mar. 15, 2001. Although resolution of the fee dispute remains with the appellant and the OCRWM/FOI, we note that our finding that the OCRWM/FOI improperly categorized appellant as a commercial requester may effect a reduction in fees charged.

III. Conclusion

Based upon the foregoing analysis, we find that the redacted information and the withheld resumes are properly protected from disclosure under Exemption 6. We further find that the appellant is not a commercial use requester for purposes of assessing processing fees, but that he is not entitled to or reduction in fees, except to the extent that his improper categorization may have affected the fees charged to him. This matter is therefore remanded to the DOE Office of Civilian Radioactive Waste Management for a new determination as to how the appellant must be categorized under 5 U.S.C. § 552(a)(4)(a)(ii) and 10 C.F.R. § 1004.9(b), for the purpose of assessing processing fees.

It Is Therefore Ordered That:

(1) The appeal filed by David Mitchell on February 20, 2001, Case Number VFA-0652, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the FOIA/Privacy Act Division of the Department of Energy Office

of Civilian Radioactive Waste Management to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 27, 2001

(1)All documents filed by the appellant in this matter were actually filed on his behalf by his attorney.

(2)As discussed below, the appellant consented to pay $951.20 with the intent of subsequently appealing the fee.

(3)Although the OCRWM/FOI indicated that it also withheld third party witness names and performance appraisals, no such information was redacted from the contested documents sent to this office for review by the appellant. Most of the redacted information therein is contractor employee names.

(4)Because the type of privacy and public interests associated with the redacted information is essentially the same, it is unnecessary to perform a separate analysis of each piece of redacted information. We therefore will conduct an Exemption 6 analysis for the redacted information in its entirety.

(5)We note that because we find that there is no identifiable public interest in disclosure (discussed infra), even a nominal privacy interest would weigh against disclosure.

(6)”We note that appellant has not asserted that he is entitled to a waiver of or reduction in fees under the FOIA’s fee waiver provisions. 5 U.S.C. § 552(a)(4)(a)(iii).

Case No. VFA-0653, 28 DOE ¶ 80,166

April 24, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:H & J Tool & Die Company, Incorporated

Date of Filing:March 12, 2001

Case Number: VFA-0653

H & J Tool & Die Company, Incorporated ("the Firm") has appealed two determinations issued by the Department of Energy (DOE) under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. On March 12, 2001, the Firm appealed a determination issued on January 19, 2001, by the Office of the Inspector General ("OIG") on the grounds that the OIG had failed to follow proper procedures and had improperly withheld certain information.(1) On April 4, 2001, the Firm appealed a related determination that was issued by the FOIA and Privacy Act Division of the Office of the Executive Secretariat (FOIA Office) on November 29, 2000, on the grounds that DOE had failed to conduct an adequate search for documents that were responsive to its FOIA request.

I. BACKGROUND

By letter dated November 16, 2000, the Firm sent a letter to the FOIA Office seeking documents regarding a complaint that had been filed with the OIG as well as all other documents relating to the Firm. On November 29, 2000, the FOIA Office sent the Firm a letter which indicated that the request for documents relating to the OIG complaint had been assigned to the OIG to conduct a search for responsive documents and provide a direct reply to the Firm. In this letter, the FOIA Office did not mention that the Firm had also requested documents about the Firm, nor did it indicate that any other DOE office had been asked to search for responsive documents.

By letter dated January 19, 2001, the OIG responded to the portion of the Firm's FOIA request that sought documents regarding a specific OIG complaint by indicating that:

1. The OIG had located responsive documents;
2. The OIG was releasing four of these documents in their entirety;
3. The OIG did not provide two documents to the Firm because it believed that the Firm already had these documents; and
4. The OIG released one document (a copy of a completed OIG complaint form) to the Firm with names and other information withheld pursuant to Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6) and § 552(b)(7)(C).

The Firm appealed the determination of the OIG to OHA on the grounds that the OIG failed to provide two documents because it believed that the Firm already had these documents and wrongfully withheld information from a document under Exemptions 6 and 7(C) of the FOIA.(2) The Firm also explained that it was challenging the adequacy of the search conducted by the FOIA Office for all documents that

contained information about the Firm. See Memorandum of Telephone Conversation between Joseph A. Hauger, Jr., President, H & J Tool & Die Company, and Linda Lazarus, Staff Attorney, OHA (April 4, 2001).

II. ANALYSIS

A. Adequacy of the Search

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted the FOIA Office and ascertained that, except for the referral to the OIG to search for records pertaining to a specific complaint, DOE had not yet searched for documents that contain information about the Firm. For this reason, the FOIA Office has requested that this matter be remanded to it so that such a search may be conducted. See Memorandum of Telephone Conversation between Sheila Jeter, FOIA and Privacy Act Specialist, and Linda Lazarus (April 6, 2001). As this request is reasonable, this matter will be remanded to the FOIA Office to conduct a new search for records that contain information about the Firm.

B. Exemptions 6 and 7(C)

The Firm also challenges the fact that the OIG had redacted material from a copy of a completed OIG complaint form involving a DOE contractor pursuant to Exemptions 6 and 7 (C) of the FOIA. 5 U.S.C. § 552(b)(6), (7)(C). Before providing this document to the Firm, the OIG had redacted the names and other information that could identify certain contractor employees. See Memorandum of Telephone Conversation between Caroline Nielsen, OIG, and Linda Lazarus (April 23, 2001). These redactions are proper.

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must

undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. See Ripskis v. Department of Housing and Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. See Reporters Committee for Freedom of the Press v. Department of Justice, 489 U.S. 749 (1989) (Reporters Committee). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). See generally Ripskis, 746 F.2d at 3; Stone v. FBI, 727 F. Supp. 662, 663-64 (D.D.C. 1990) .

We have previously considered cases in which both Exemption 6 and 7(C) were invoked, and we stated that in such cases, provided the Exemption 7 threshold requiring a valid law enforcement purpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. See, e.g., K.D. Moseley, 22 DOE ¶ 80,124 (1992). Since, as discussed below, all of the documents involved here were compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard may be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement that they constitute a clearly unwarranted invasion of personal privacy.

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. FBI v. Abramson, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). By law, the OIG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The OIG is therefore a classic example of an organization with a clear law enforcement mandate. Ortiz v. Department of Health and Human Services, 70 F.3d 729, 732-33 (2d Cir. 1995). In the present case, the OIG documents were created during an investigation of possible irregularities in the procurement process and during the processing of a FOIA request. Consequently, the OIG documents at issue were created for a law enforcement purpose.

We find that there is a privacy interest here. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. Safecard Services, Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991); Cucarro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985). We have followed the courts' lead. James L. Schwab, 21 DOE 80,117 at 80,556 (1991); Lloyd R. Makey, 20 DOE 80,129 (1990). Therefore, we find that release of the individuals' identities or information that could identify these individuals would result in significant invasions of privacy.

In Reporters Committee, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within the public interest as that term is used in the FOIA. Id. We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals's identities or information that could identify these individuals.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing the individuals' identities would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that information that would reveal the identities of the individuals were properly withheld under Exemptions 6 and 7(C). While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals. By releasing the responsive document with only those

redactions necessary to prevent identification of specific individuals, which is what has been done here, the agency can provide as much information as possible while safeguarding individual privacy rights.

C. Documents in the Firm's Possession

The OIG did not provide the Firm with copies of two document based on the belief that the Firm already had copies of these documents in its possession. Although the Firm has these documents, the FOIA only permits the government to withhold documents when information is exempt from disclosure under the statute. Accordingly, we will remand this matter to the OIG with instructions to either provide these documents or issue a new determination that sets forth a justification for withholding these documents.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by H & J Tool & Die Company, Incorporated, on March 12, and April 4, 2001 (Case Number VFA-0653) is hereby granted as set forth in paragraphs (2) and (3) below, and denied in all other respects.

(2) This matter is hereby remanded to the FOIA and Privacy Act Division of the Office of the Executive Secretariat for further action in accordance with this decision.

(3) This matter is hereby remanded to the Office of the Inspector General for further action in accordance with this decision.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 24, 2001

(1)On February 26, 2001, the Office of Hearings and Appeals (OHA) received an Appeal from the Firm. By letter dated February 28, 2001, OHA informed the Firm that its Appeal would not be considered as properly filed until OHA received a copy of the determination letter that was the subject of the Appeal. On March 12, 2001, OHA received a copy of this determination letter from the Firm.

(2)The Firm also appealed because the OIG had failed to make a determination about the releasability of a document which had originated in the Chicago Operations Office (Chicago). Instead of issuing a determination, the OIG had returned this document to Chicago and requested that Chicago send a determination directly to the Firm. Chicago is in the process of making a determination concerning the releasability of this document. See Memorandum of Telephone Conversation between Linda Rohde, FOIA and Privacy Act Officer, and Linda Lazarus (April 23, 2001). Although we will not consider this aspect of the Firm's Appeal at this time, the Firm will have the opportunity to appeal Chicago's determination after it has been issued.

Case No. VFA-0654, 28 DOE ¶ 80,156

March 28, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R. E. V. Eng. Services

Date of Filing: March 1, 2001

Case Number: VFA-0654

On March 1, 2001, David Ridenour (Ridenour) of R. E. V. Eng. Services (REV) filed an Appeal from a determination issued to him in response to a request for documents that REV submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on February 20, 2001, by the DOE's Rocky Flats Field Office (RFFO). This Appeal, if granted, would require that RFFO release additional responsive information to REV or provide a detailed explanation of its reasons for withholding such material.

I. Background

In a previous case, Ridenour had appealed RFFO's determination withholding certain information under the FOIA. *See R.E.V. Eng. Services*, 28 DOE ¶ 80,116 (2000). In that decision, the Office of Hearings and Appeals (OHA) granted the Appeal and remanded the matter to RFFO to perform another review of the documents responsive to Ridenour's request. *Id.* After a further review, RFFO released two documents in their entirety but continued to withhold portions of five documents. Letter from RFFO to Ridenour (February 20, 2001) (Determination). According to RFFO, those documents were exempt from disclosure under Exemption 5 of the FOIA.

In this Appeal, Ridenour contends that RFFO did not properly establish the applicability of Exemption 5 to any of the redacted documents. Letter from Ridenour to Director, OHA (March 1, 2001) (Appeal). He further alleges that RFFO did not specify the role played by each withheld document in the deliberative process, thus making it impossible for him to understand the basis for the withholding. Appeal at 1. Ridenour asks that OHA remand this issue to RFFO with direction to release the withheld documents in their entirety or to provide a clear and understandable document-by-document reason for withholding the material. Appeal at 2.

II. Analysis

The Deliberative Process Privilege

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974) (*Sears*). It is intended to promote frank and independent discussion among those responsible for making governmental decisions.

EPA v. Mink, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

This office has previously reviewed the five documents in question, and we stated at that time that portions of those documents were properly withheld under Exemption 5. *See R.E.V. Eng Services***,** 28 DOE ¶ 80,116 (2000) (*R.E.V. Eng*). We also found that the documents contained some factual information. However, the issue currently under appeal is whether RFFO has provided the necessary information for Ridenour to understand RFFO's basis for withholding material under Exemption 5. We find that it has not.

A document must be described with enough specificity to allow the requester (1) to ascertain whether the claimed exemptions reasonably apply to the documents and (2) to formulate a meaningful appeal. *See R.E.V. Eng.*, 28 DOE at 80,543; *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1005), *citing James L. Schwab*, 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter*, 12 DOE at 80,527.

We find that RFFO has adequately described the withheld documents. The following two descriptions are representative of the descriptions of the six documents:

1) Status Sheet, which contains documented conversations, telephone calls and electronic mail concerning Ms. Charlene Pazar's FOIA Request No. RF97-038.

2) Electronic message, dated 10/27/97, from Mary Hammack to Jeremy Karpatkin, Communications and Economic Development, RFFO, subject: FOIA request in OCC for Concurrence.

Determination at 2. RFFO has adequately identified the subject matter, date, author and recipient of the documents.

However, a determination must also adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. *Arnold & Porter*, 12 DOE at 80,527; *Paul W. Fox*, 25 DOE at 80,622. The determination in this case contains no explanations of how the deliberative process privilege applies to each document. RFFO wrote in the determination:

The deleted portions of the . . . five documents contain deliberative information which is exempt from mandatory disclosure under the provisions of the FOIA. Portions of the five documents contain[ing] frank and independent discussion and/or recommendatory in nature are, therefore, deliberative process documents. The deliberative process privilege of Exemption 5 protects from disclosure materials that reflect the personal opinions, analyses, or recommendations of those individuals involved. The factors that are weighed to determine whether documents are protected by the deliberative process privilege include: (1) whether the documents are "deliberative" (i.e., whether it reflects the give-and-take of a consultative process); (2) whether the documents are so candid or personal in nature that public disclosure would stifle honest and frank communication in the future; and (3) whether the documents are recommendatory of what will become a final document.

The DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall be released, regardless of their exempt status, unless the DOE determines that disclosure is contrary to public interest. For the reasons described above, I have determined that release of those portions of the five documents is not in the public interest.

Determination at 2.

The paragraphs quoted above do not explain how Exemption 5 applies to the specific documents withheld from Ridenour. Rather, RFFO has merely restated the applicable law without explaining how that law applies to the withheld information. *See Animal Legal Defense Fund v. Department of Air Force*, 44 F. Supp. 2d 295 (D.D.C. 1999) (stating that the need to describe each withheld document under Exemption 5 is particularly acute because the deliberative process privilege depends on the document and its role in the administrative process); *Senate of the Commonwealth of Puerto Rico v. Department of Justice*, 823 F.2d 574, 585-86 (D.C. Cir. 1987). (1)

We find that RFFO has not provided the necessary information for the requester to understand RFFO's basis for withholding material under Exemption 5. Accordingly, this Appeal is granted. We remand this matter to RFFO to provide an explanation of how the deliberative process privilege applies to each of the five withheld documents. This explanation should set forth the deliberative process involved and the role that the withheld material played in that process.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by R.E.V. Eng. Services December 26, 2000, OHA Case Number VFA-0642, is hereby granted as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Rocky Flats Field Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2001

(1)RFFO also makes a conclusory assertion that release of the material is not in the public interest. Determination at 2. Even though this statement is also inadequate, we note that the requester has not presented any evidence that release of the withheld information is in the public interest.

Case No. VFA-0655, 28 DOE ¶ 80,160

April 11, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nevada Nuclear Waste Task Force, Inc.

Date of Filing: March 12, 2001

Case Number: VFA-0655

On March 12, 2001, Nevada Nuclear Waste Task Force, Inc. (Nevada) filed an Appeal from a determination issued to it on February 5, 2001, by the Office of Civilian Radioactive Waste Management (OCR) of the Department of Energy. That determination concerned a request for information that Nevada submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OCR would be ordered to release the requested information.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On December 18, 2000, Nevada filed a FOIA request seeking a copy of all comments received from reviewers of the Site Recommendation Consideration Report Overview. See Appeal Letter at 1. In its February 5, 2001 determination letter, OCR stated that it withheld the requested comments in their entirety pursuant to Exemption 5 of the FOIA. The Determination Letter further stated that the documents requested involve communications that are predecisional and are part of a deliberative process "in that they involve recommendations and opinions on policy matters relating to the consideration of the Yucca Mountain site under the Nuclear Waste Policy Act." See Determination Letter at 1. The Determination Letter also concluded that releasing the requested comments would likely stifle honest and frank communication within the agency. Id. at 1.

On March 12, 2001, Nevada filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Nevada asserts that OCR's application of Exemption 5 to the requested comments was too broad. See Appeal Letter at 1. Specifically, it argues that OCR should have only withheld information that is specifically deliberative in nature and released "all other information

. . . that is not specifically deliberative, such as background information, facts, figures, sender and receiver information, dates, times and other information." Nevada further asserts that release of this information is in the public interest. Id. For these reasons, Nevada requests that the OHA direct OCR to release the

requested information.

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) (Sears). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). In withholding the reviewers' comments, Nevada relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. Sears, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. EPA v. Mink, 410 U.S. 73, 87 (1973) (quoting Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Cl. Ct. 1958)) (Mink). The ultimate purpose of the exemption is to protect the quality of agency decisions. Sears, 421 U.S. at 151.

In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. Coastal States, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. Id. Even then, however, the exemption only covers the subjective, deliberative portion of the document. Mink, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The records at issue are reviewers' comments to a draft of an overview of a Site Recommendation Consideration Report. The reviewers were DOE and contractor employees who were responsible for rendering comments on the substance, style and tone of the draft Report. (1) Given the facts presented to us, we find that the requested comments are intra-agency, pre-decisional and part of the deliberative process. It is well settled that draft documents, by their very nature, are pre-decisional and deliberative. This category of documents has been afforded Exemption 5 protection because draft documents typically reflect "tentative views which might be altered or rejected upon further deliberation by the authors or by their superiors." Coastal States, 617 F.2d at 866; Committee to Bridge the Gap, 20 DOE ¶ 80,127 (1990). Consequently, we have determined that Exemption 5 was properly applied to the information at issue. In addition, after a thorough review of the comments at issue, we find that the factual material requested by Nevada in its Appeal is inextricably intertwined with the exempt material, and thus properly withheld.

III. Public Interest Determination

The DOE regulations provide that the DOE shall release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Notwithstanding our finding that OCR properly applied Exemption 5 to the reviewers' comments in this case, we must consider whether the public interest nevertheless requires disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has reviewed its administration of the FOIA and adopted a "foreseeable harm" standard for defending FOIA exemptions. See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (stating that the Department of Justice will defend the

assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption).

In the present case, the requested information consists of reviewers' comments made by DOE and contractor officials which were submitted in response to a draft of an overview of a report. The release of this information would in our opinion have a chilling effect on the willingness of OCR officials to make recommendations or voice opinions regarding highly sensitive and controversial issues. Employees and managers would be less likely to communicate their recommendations on this and similar issues if they knew or suspected that an agency would release their opinions to the public. OCR officials have stated that, and we agree, the release of the requested information would result in a foreseeable harm in that the candor of future agency deliberations would be substantially diminished. Consequently, we find that this harm satisfies the reasonably foreseeable harm standard that the Attorney General articulated and that the release of the material contained in the requested information and protected pursuant to Exemption 5 would not be in the public interest. See Dennis Kirson, 26 DOE ¶ 80,225(1997).

It Is Therefore Ordered That:

(1) The Appeal filed by Nevada Nuclear Task Force, Inc., on March 12, 2001, Case Number VFA- 0655, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 11, 2001

(1)It is well settled that many documents generated outside of agencies are withholdable under the deliberative process privilege. In order to determine whether documents generated outside of agencies are part of the deliberative process, the courts have employed a functional test. Under this functional approach, opinions and recommendations generated by outside consultants are considered part of the deliberative process if they were created pursuant to agency initiative in order to assist the agency in its decision making. See Nuclear Control Institute, 27 DOE ¶ 80,128 at 80,565 (1998) (citing Formaldehyde Institute. V. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989)). In this case, contractor officials have been made part of the deliberative process.

Case No. VFA-0656, 28 DOE ¶ 80,158

April 10, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:CTG Media & PBN News

Date of Filing: March 13, 2001

Case Number: VFA-0656

Gary Scurka of CTG Media & PBN News filed an Appeal from a determination of the Department of Energy's (DOE) Freedom of Information Act and Privacy Act Division (FOIA/PA). The determination responded to a request for information that Scurka filed under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Scurka requested records from the DOE involving (1) "The Peacemaker," an action film released in 1997; (2) Dream Works, the company that produced "The Peacemaker;" and (3) Jessica Stern, a former official with the National Security Council, and meetings Stern allegedly had with a DOE official.

In its response to Scurka's request, FOIA/PA stated that a search was conducted by several offices of the DOE, and that no responsive records were found.(1) Scurka then filed the present Appeal,

challenging the adequacy of FOIA/PA's search for responsive records.

II. Analysis

In evaluating a search for responsive records, "the issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). An adequate search under the FOIA is one that is reasonable, not exhaustive. As one court noted, "the standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). We will remand a case for further processing when it is evident that the search conducted was not reasonably calculated to uncover the sought materials. *See, e.g., Butler, Vines and Babb*, 25 DOE ¶ 80,152 (1995).

In order to assess the adequacy of the search in this case, we contacted the staff of FOIA/PA. In the course of our assessment, we learned that responsive records might exist in the Office of Public Affairs, the Office of Intelligence, and the Office of Nonproliferation and National Security.(2)

Accordingly, we will remand this matter to FOIA/PA to conduct a further search for responsive documents

in the custody of the Office of Public Affairs, the Office of Intelligence, and the Office of Nonproliferation and National Security. On remand, FOIA/PA shall ensure that there is a thorough and adequate search for all records responsive to Scurka's request. After a search of these offices has been conducted, FOIA/PA will issue a new determination stating the results of that search.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by CTG Media & PBN News, Case Number VFA-0656, is hereby granted in part as specified in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Freedom of Information Act and Privacy Act Division to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 2001

(1)FOIA/PA did not provide a final determination on two items in Scurka's request. Because the DOE has not yet issued a determination regarding these two items of Scurka's request, they are not before us on appeal at this time. One item, dealing with special atomic demolition munitions, was referred by FOIA/PA to the DOE's Albuquerque Operations Office. The second item is Scurka's request for records about an individual named Phillip Petersen. FOIA/PA, in its determination letter dated February 26, 2001, asked Scurka to provide additional identifying information about Petersen. Scurka did not provide the additional information until April 9, 2001, and sent it to the OHA rather than to FOIA/PA. The OHA has forwarded the additional information to FOIA/PA for processing.

(2)The Office of Public Affairs was not included in the original search for responsive documents. The Office of Intelligence and the Office of Nonproliferation and National Security were included, and both offices reported that they found no responsive documents. It appears, however, that the searches in these offices were limited in scope; the Office of Intelligence, for example, reported that it found no records relating to the "The Peacemaker," but did not mention other items in Scurka's request.

Case No. VFA-0658, 28 DOE ¶ 80,159

April 10, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: The Wenatchee World

Date of Filing: March 13, 2001

Case Number: VFA-0658

On March 13, 2001, The Wenatchee World (The World), a newspaper located in Wenatchee, Washington, filed an Appeal from a determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued to it on February 27, 2001. In that determination, BPA denied in part a request for information that The World filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, The World sought access to contracts by which BPA sold power to, and purchased power from, Alcoa, Inc. (Alcoa). BPA identified four documents as being responsive to this request, and released three of those documents in their entirety. The fourth document, Confirmation Agreement, Contract No. 01PB-23944, was released with price information withheld pursuant to Exemptions 4 and 5 of the FOIA. 5 U.S.C. § 552(b)(4), (b)(5). This Agreement concerned the purchase of power by BPA from Alcoa. In its Appeal, The World contests BPA's application of these Exemptions.

II. Analysis

A. Exemption 4

Exemption 4 shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (National Parks). In National Parks, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government involuntarily is "confidential" for purposes of Exemption

4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (Critical Mass). By contrast, information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." Critical Mass, 975 F.2d at 879. We have generally considered information submitted as a prerequisite to doing business with the government as having been involuntarily submitted. See, e.g., Glen M. Jameson, 25 DOE ¶ 80,191 (1996); Hanford Education Action League, 23 DOE ¶ 80,143 (1993). We will therefore employ the National Parks test in determining whether BPA properly applied Exemption 4.

It is undisputed that the withheld information is "commercial" in nature, and that it was submitted by a "person," as that term is used in Exemption 4. There is no claim that the price information is privileged in nature; therefore, unless it is "confidential," the information may not be withheld under this Exemption. In its determination, BPA contends that the price information is confidential because its release would likely cause substantial harm to Alcoa's competitive position.

In its Appeal, The World contests this conclusion. It argues that information of this sort has been released to the public by BPA and other aluminum manufacturers, thereby undermining any claim of competitive harm. In support of this argument, The World cites news articles from the Associated Press (AP) and an internet website entitled "The Daily News Online." The AP article contains pricing information concerning the sale of electricity by BPA to Kaiser Aluminum Corp. (Kaiser), and the resale of that electricity to BPA. The Daily News article contains similar information about BPA's dealings with Longview Aluminum LLC (Longview).

After reviewing The World's submission and BPA's response, we find that BPA properly applied Exemption 4 in withholding the pricing information. (1) Although some pricing information regarding these other BPA transactions has previously been made public, we find that there are substantial differences between these sales and BPA's dealings with Alcoa, and that the potential for competitive harm from the release of the Alcoa price information is significantly greater. BPA's contract with Kaiser permitted the firm to resell the electricity it purchased from BPA on the open market. See Associated Press Article; Memoranda of April 3-4, 2001 Telephone Conversations between Mark Miller, BPA, and Robert Palmer, OHA Staff Attorney. Therefore, the price of that electricity when it was resold to BPA was set by market forces, and did not necessarily reflect Kaiser's fixed costs. However, under Alcoa's contract, the firm could only resell the energy to BPA. Consequently, the resale price was significantly lower, and much more reflective of overhead and fixed costs that remain even when the firm's production facilities are shut down. Id. BPA's contract with Longview, like its agreement with Alcoa, limited the resale rights of the purchaser. Id. However, the Longview deal was much bigger and more complicated, and contained requirements that were not set forth in the Alcoa deal. For example, Longview was required to take its "load," or purchases of electricity from BPA, down to zero for the remainder of the year, to support certain federal legislation, and to pay its laid-off employees 100 percent of the salary and benefits. Id. Therefore, the revenue realized by Longview from its resale to BPA reflected not only a recovery of fixed costs, but also compensation for these additional services. For these reasons the release of the Alcoa pricing information would reveal substantially more about that company's overhead and other fixed costs than was revealed by the information cited in The World's Appeal. Alcoa's competitors could use this information to gain an advantage in pricing and competitive bidding situations. We conclude that BPA properly applied Exemption 4 in withholding the information in question. See, e.g., The FOIA Group, 27 DOE ¶ 80,111 (1998).

B. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held

that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149; 95 S. Ct. 1504, 1515 (1975) (Sears). The courts have identified three traditional privileges that fall within this exemption: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184; 95 S. Ct. 1491, 1500 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be routinely or normally disclosed upon a showing of relevance." F.T.C. v. Grolier, 462 U.S. 19, 26; 103 S. Ct. 2209, 2214 (1983) (citing Sears, 421 U.S. at 148-49; 95 S. Ct. at 1515 (1975)). Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. See United States v. Weber Aircraft Corp., 465 U.S. 797, 799-801; 104 S. Ct. 1488, 1492-93 (1984).

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." See, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340; 99 S. Ct. 2800 (1979) (Merrill) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); Government Land Bank v. General Services Administration, 671 F.2d 663 (1st Cir. 1982) (Land Bank) (withholding a government generated real estate appraisal). "The Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information." Merrill, 443 U.S. at 356; 99 S. Ct. at 2810. The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. Id., 443 U.S. at 360; 99 S. Ct. at 2812. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." Land Bank , 671 F.2d 665 (footnote omitted).

The protection afforded by this privilege is limited in scope and lasts only as long as necessary to protect the government's commercial interests. Id. Moreover, the application of this privilege is not automatic. Merrill, 443 U.S. at 362; 99 S. Ct. at 2813. The burden is upon the agency to show that the records it seeks to withhold under the privilege are confidential and that their disclosure might be harmful. American Standard v. Pfizer, Inc., 828 F.2d 734, 746 (Fed. Cir. 1987) (applying the privilege in the civil discovery context). In the civil discovery context, once these burdens are met, the burden shifts to the party seeking disclosure to prove that disclosure should occur by establishing a substantial need for those documents. R&D Business Systems v. Xerox Corp., 152 F.R.D. 195; 196-197 (D. Colo. 1993) (Xerox). In the FOIA context, however, the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. See Merrill, 443 U.S. at 362-63; 99 S. Ct. at 2813, and cases cited therein. Accordingly, courts have found that documents which are immune from discovery absent a showing of substantial need are not "routinely" or "normally" available to parties in litigation and therefore are exempt from mandatory disclosure under Exemption 5. F.T.C. v. Grolier, Inc., 462 U.S. 19, 27; 103 S. Ct. 2209, 2214 (1983).

Accordingly, if the agency has shown that it has maintained the confidentiality of the withheld records and that their release might result in harm to the government's commercial interests, the agency could properly withhold records under Exemption 5. In the present case, there is no indication in the record that BPA has not maintained the confidentiality of the information in question. We therefore turn to the next issue before us: whether release of the price information would likely result in harm to BPA's commercial interests or its ability to consummate future contracts. We conclude that it would. Specifically, BPA has informed us that in the near future, it will be negotiating contracts similar to its agreement with Alcoa. See Memorandum of April 4, 2001 Telephone Conversation between Mr. Miller and Mr. Palmer. The withheld price information, if released, would establish a benchmark for future negotiations, and would make it extremely difficult for BPA to obtain more favorable terms. We therefore conclude that BPA properly applied Exemption 5 in withholding the information. See, e.g., The Oregonian, 26 DOE ¶ 80,336 (1997) (load amounts and exit fees properly withheld by BPA under Exemption 5); Convergence Research, 26

DOE ¶ 80,239 (1997) (load amounts and price information properly withheld by BPA under Exemption 5).

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1.

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information consists of confidential commercial information that if released would affect BPA's abilities to conduct future business. Any benefit that would accrue from the release of the withheld information is, we believe, outweighed by the likelihood of harm to these commercial interests. Accordingly, we conclude that release of the withheld information would result in foreseeable harm to the interests that are protected by the confidential commercial information privilege. See FOIA Update, U.S. Department of Justice, Office of Information and Privacy (Spring 1994); Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies (October 4, 1993) (in order to withhold material, agency must first determine that release would foreseeably harm basic institutional interests that underlie Exemption 5.)

It Is Therefore Ordered That:

(1) The Appeal filed by The Wenatchee World, Case No. VFA-0658, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 2001

(1)In its Appeal, The World contends that BPA withheld both the price at which it sold electricity to Alcoa and the price at which it purchased electricity from Alcoa. However, BPA did release its 1996 Wholesale Power and Transmission Rate Schedules, which set forth the price at which BPA sold to Alcoa. BPA Determination at 1.

Case No. VFA-0659

April 18, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Puget Sound Energy, Inc.

Date of Filing: March 19, 2001

Case Number: VFA-0659

On March 19, 2001, Puget Sound Energy, Inc., (Puget) filed an Appeal from a determination the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued to it on February 15, 2001. In that determination, BPA released redacted versions of material responsive to a request that Puget filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The FOIA requires that a federal agency generally release documents to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that a federal agency may withhold at its discretion. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

In its January 4, 2001 request for information, Puget sought copies of all executed or partially executed power sales contracts BPA has entered into since January 1, 2000. Request Letter dated January 4, 2001, from William A. Gaines, Vice President, Energy Supply, Puget, to Freedom of Information Act Officer, BPA. On February 15, 2001, BPA issued a determination releasing the information Puget had requested, but redacting portions of the contracts because the material was exempt from disclosure under Exemption 4 of the FOIA, which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Determination Letter dated February 15, 2001, from Gene Tollefson, BPA, to William R. Maurer, Perkins Coie, LLP, Attorney for Puget. Puget then filed this Appeal.

In its Appeal, Puget first argues that BPA's determination is inadequate, because it has not provided an explanation of why the information has been redacted. Appeal Letter dated March 16, 2001, from William R. Bue, Perkins Coie, LLP, Attorney for Puget, to Director, Office of Hearings and Appeals (OHA), DOE. Puget also challenges the withholding on the basis that the information is not commercial or financial, obtained from a person or confidential. *Id.* at 4.

We have spoken with BPA. Upon further review of the contracts, BPA believes that it has redacted too much information from the contracts that Puget requested. Memorandum of Telephone Conversation dated April 6, 2001, between Janet R. H. Fishman,

Attorney-Examiner, OHA, DOE, and Tim Johnson, Attorney, BPA. Therefore, we will remand the matter to BPA for a new determination.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Puget Sound Energy, Inc., on March 19, 2001, Case No. VFA-0659, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Bonneville Power Administration of the Department of Energy, which shall issue a new determination.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 16, 2001

Case No. VFA-0660, 28 DOE ¶ 80,161

April 12, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:John Kasprowicz

Date of Filing:March 19, 2001

Case Number: VFA-0660

This decision addresses the Freedom of Information Act (FOIA) appeal filed by John Kasprowicz (appellant) pursuant to 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. For the reasons set forth below, the appeal will be denied.

I. Background

Appellant filed a FOIA request with the DOE Chicago Operations Office (Chicago Office), in which he sought the individual dollar amounts of Business Plan Awards for fiscal year 2000 (the FY 2000 BP Awards) for all Chicago Office GS-13 and GS-14 employees, separated by division, as well as "all awards of any kind given to individuals in [the Technical and Administrative Services Group and the Safety and Technical Services Group (TAS-STS)] in the past [six] months by name and dollar amount." In its response, the Chicago Office released the dollar amounts of the GS-13 and GS- 14 FY 2000 BP Awards broken down by groups only, and withheld from the list the Office of the Manager and the Ames Group, the division-by-division breakdown, and the names of and dollar amounts given to employees in TAS-STS (collectively, "the withheld information"). Citing Exemption 6 of the FOIA, the Chicago Office explained that "release of [the withheld] information will allow with minimal analysis and process of elimination, the identification of individual business plan awards by employee." The Chicago Office asserted that "[t]hese records are withholdable from third parties under [the FOIA] Exemption 6, 5 U.S.C. 552(b)(6), [because] the employees' privacy interest in their awards clearly outweighs any minute public interest, if any, which might exist in discovering the individuals' award amounts."

In this appeal, appellant contends that although "[s]alary [and award] information may be alloyed with a significant privacy interest in the private sector, [it] is not granted such interest in federal employment, since the taxpayer has a weightier interest in that same employee's salary." Appeal at 2 (emphasis omitted). Appellant further argues that "the Office of Personnel Management (OPM)

has deemed [the withheld information] as releasable under FOIA" and cites OPM regulation, 5 C.F.R. § 293.311(a), which states, in relevant part:

The following information . . . about most present and former Federal employees, is available to the public: (1) Name; (2) Present and past position titles and occupational series; (3) Present and past grades; (4) Present and past annual salary (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)."

Appeal at 1-2. Finally, appellant asserts, the Chicago Office's determination not to release the awards received by TAS-STS employees raises the suspicion "that they are funneling awards to their friends through various means/methods" and "a presumption of disclosure is warranted where there may be significant evidence of corruption." Appeal at 4. Appellant seeks release of the withheld material.

II. Applicable Legal Standards

With nine exemptions, the FOIA requires federal agencies to release documents to the public upon request. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(6); 10 C.F.R. § 1004.10(b)(6). "Similar files" include all documents which contain information that applies to a particular individual. Department of State v. Washington Post, 456 U.S. 595, 599 (1982). If documents are of the type described in Exemption 6, then an agency must undertake a three step analysis, as enumerated by the Supreme Court in Department of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 495-96 (1994), in determining whether Exemption 6's protection applies. First, an agency must determine whether a privacy interest would be invaded by disclosure of the record. If no privacy interest is identified, the record may not be withheld under Exemption 6. See also Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. Finally, the agency must weigh the identified privacy interests against the public interest in order to determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.

III. Analysis

Application of the foregoing principles to this case reveals that Exemption 6 properly protects the withheld information. As a threshold matter, we find that withheld information applies to particular individuals and is therefore within the broad definition of a "similar file" for purposes of Exemption 6.

We next find, and agree with the Chicago Office, that there is a privacy interest at stake. Employees have a privacy interest in maintaining the confidentiality of their salaries and awards, because disclosure of the withheld information "would allow direct comparison between employee awards and almost certainly incite jealousy in those employees receiving lower awards." See Ripskis, 746 F.2d at 3.

We disagree with the Chicago Office's determination, however, that there is no public interest in the withheld information. We find that there is. In Robert J. Ylimaki, 28 DOE _____ (VFA-0651) (Mar. 23, 2001), which involved a FOIA appeal from the Chicago Office's withholding of bonus information for specific employees, "we recognize[d] that federal employees are public servants, and that the public has a significant interest in knowing how its employees are paid." Nevertheless, in balancing the privacy and public interests to find that Exemption 6 shielded the bonus information, we stated the following:

[T]he Chicago Office has demonstrated that there is a substantial possibility that harassment of GS-15 employees would result from this type of information. Specifically, the Chicago Office has cited specific instances of inappropriate behavior by some of its employees. . . . Such harassment would disrupt the functioning of the Chicago Office and would adversely affect its ability to perform the responsibilities with which it is charged. . . . Because the potential for harassment . . . outweighs the public interest in disclosure, we will deny Mr. Ylimaki's Appeal.

Here, as with the bonus information at issue in Ylimaki, the public has a significant interest in knowing how its employees are paid, including salaries and awards. However, also as in Ylimaki, the privacy interest in the withheld information overrides the public interest in disclosure. Because this appeal arises from a Chicago Office determination and regards salary and award information, our reasoning set forth in Ylimaki is applicable here. There is a substantial possibility that harassment of Chicago Office GS-13 and

GS-14 employees would result from release of the withheld information, and this potential for harassment outweighs the public interest involved. See also, William Hyde, 18 DOE ¶ 80,102 (1988) (finding potential for harassment of employees is sufficient justification for withholding information under Exemption 6). The withheld information is therefore protected by Exemption 6.

We reject appellant's assertion that OPM regulation, 5 C.F.R. § 293.311(a), requires disclosure of the withheld information. Pursuant to Section 293.311(b), information described in paragraph (a) (as cited supra) need not be released if it would "otherwise be protected from mandatory disclosure under an exemption of the FOIA." Because we find that Exemption 6 properly applies to this case, the withheld information is exempt from disclosure under 5 C.F.R. § 293.311(b).

We also reject appellant's assertion that "a presumption of disclosure is warranted where there may be significant evidence of corruption." Appeal at 4. "Any general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations." Barvick v. Cisneros, 941 F. Supp. 1015, 1022 (D. Kan. 1996) (citation omitted).

IV. Conclusion

Based upon the foregoing, we find that the significant privacy interest in the withheld information overrides the public interest involved and that therefore the information may be properly withheld under Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed on March 19, 2001, by John Kasprowicz, Case No. VFA-0660, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 12, 2001

Case No. VFA-0661, 28 DOE ¶ 80,164

April 19, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Caron Balkany

Date of Filing: March 19, 2001

Case Number: VFA-0661

This Decision and Order concerns an Appeal that Caron Balkany filed from a determination issued to her by the Department of Energy's (DOE) Albuquerque Operations Office (AOO). In this determination, AOO informed Ms. Balkany that it did not locate any documents that were responsive to a request for information that she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require AOO to conduct a further search for responsive materials.

I. Background

Ms. Balkany filed a request in which she sought information concerning "(1) The Department of Energy's 1989 investigation at Rocky Flats of Department of Justice search warrant allegations of illegal night time burning at Building 771 incinerator at Rocky Flats Nuclear Weapons Plant. This may have been a Tiger Team investigation. The results were made public in 1989, but apparently not the full investigation; and (2) A Letter from Michael J. Norton, U.S. Attorney for the District of Colorado to Deputy Secretary Henson Moore dated December 1, 1989." On March 2, 2001, AOO issued a determination which stated that a search was conducted at the Rocky Flats Office in Golden, Colorado, and at AOO, and found no documents responsive to Ms. Balkany's request. See Determination Letter. On March 15, 2001, Ms. Balkany filed the present Appeal with the Office of Hearings and Appeals. In her Appeal, Ms. Balkany challenges the adequacy of the search conducted by AOO.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for

responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-95 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at AOO and Rocky Flats to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Balkany's request might reasonably be located. We were informed of the following. Upon receiving Ms. Balkany's request for information, AOO instituted a search of its Environmental, Health and Safety Division, its Office of Chief Counsel, the DOE Reading Room at the University of New Mexico, and the Rocky Flats Field Office. AOO also indicated that in 1989, the AOO and Rocky Flats offices were raided by the FBI simultaneously. The FBI confiscated all original files pertaining to Rocky Flats that were located at either AOO or Rocky Flats. The FBI did not allow AOO or Rocky Flats to make copies of those files. March 20, 2001 Memorandum of Telephone Conversation between Terry Martin Apodaca, AOO, and Toni Brown, Paralegal Specialist, Office of Hearings and Appeals; March 22, 2001 e-mail message from Terry Martin Apodaca, AOO, to Toni Brown, Office of Hearings and Appeals. We contacted the FOIA Officer at Rocky Flats who informed us that an extensive search was conducted and that no responsive documents were located. March 30, 2001 Memorandum of Telephone Conversation between Mary Hammack, Rocky Flats and Toni Brown, Office of Hearings and Appeals. Rocky Flat's search included the Office of Chief Counsel, Kaiser Hill and employees of Kaiser Hill's Records Management Office.

Finally, AOO interpreted Ms. Balkany's request for the "DOE's 1989 investigation" as contending that the DOE created a report based on the FBI's 1989 investigation of Rocky Flats. AOO has informed us that the report Ms. Balkany seeks was not a DOE report, but rather a report prepared by the contractor, Rockwell Corporation, and AOO does not have a copy of that report. March 22, 2001 e-mail message from Terry Martin Apodaca, AOO to Toni Brown. A broader interpretation of that portion of the request would be for any documents concerning illegal night time burning at Rocky Flats that DOE created, even after the raid. We asked AOO and Rocky Flats to look for documents of this type. AOO reported that there were no documents responsive to that request. April 13, 2001 e-mail message from Margaret Sanchez, AOO, to Toni Brown. The Rocky Flats office stated that any reports created after the FBI's seizure of documents would have been generated by AOO, since the AOO office oversaw the Rocky Flats office. Furthermore, she mentioned that very few current Rocky Flats employees have personal knowledge of the seizure because they started their employment after that event occurred. April 10, 2001 Memorandum of Telephone Conversation between Mary Hammack, Rocky Flats, and Toni Brown, Office of Hearings and Appeals. Given the facts presented to us, we find that AOO conducted an adequate search, reasonably calculated to discover documents at AOO and Rocky Flats that were responsive to Ms. Balkany's request.

However, we believe that some Headquarters offices may have material responsive to Ms. Balkany's request. Therefore, we will refer this request to the Headquarters Freedom of Information and Privacy Act Division for a search of Headquarters elements, particularly the Offices of Environment, Safety and Health, the Inspector General, the General Counsel, and the Executive Secretariat for responsive documents. These offices are the Headquarters counterparts of offices that AOO searched and offices that may have received Tiger Team or other documents from AOO or Rocky Flats that would be responsive to Ms. Balkany's request. Therefore, we will grant Ms. Balkany's Appeal in part.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Caron Balkany, Case No. VFA-0661, on March 19, 2001, is hereby granted as set forth in Paragraph 2 below and denied in all other aspects.

(2) This matter is hereby referred to the Headquarters Freedom of Information and Privacy Act Division of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be

sought in the district in which the requester resides or has a principal place of business or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 19, 2001

Case No. VFA-0662, 28 DOE ¶ 80,162

April 12, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Attorney General of New Mexico

Date of Filing: March 19, 2001

Case Number: VFA-0662

On March 19, 2001, the Office of the Attorney General of New Mexico (AGNM) filed an Appeal from a determination issued to it in response to a request for documents that the AGNM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on February 15, 2001, by the DOE's Albuquerque Operations Office (DOE/AL). This Appeal, if granted, would require that DOE/AL perform an additional search.

I. Background

On February 1, 2001, the AGNM submitted a FOIA request to DOE/AL and the DOE's Carlsbad Operations Office (DOE/COO) for: (1) all documents that may identify or consider the Waste Isolation Pilot Plant (WIPP) site in Carlsbad, New Mexico as a potential site for the storage or disposal of spent reactor fuel or high-level radioactive wastes; (2) all documents suggesting the WIPP site in New Mexico as an alternative site to the Yucca Mountain site in Nevada; (3) all documents setting forth alternative sites if Yucca Mountain is not selected to be the DOE site receiving high level radioactive waste or spent reactor fuel; and (4) all letters and other correspondence to or from DOE concerning these issues (including internal communications). Letter from the AGNM to DOE/AL and DOE/COO (February 1, 2001) (Request).

On February 7, 2001, DOE/AL sent the AGNM a letter stating that both DOE/AL and DOE/COO were conducting a search for responsive records. Letter from Carolyn Becknell, FOIA Officer, DOE/AL to the AGNM (February 7, 2001) (Acknowledgment Letter). The DOE/AL FOIA Officer also stated in the letter that she had notified the DOE Headquarters WIPP Office (DOE/HQ WIPP Office) and the DOE Yucca Mountain Office (Yucca Mountain) about the request, and asked them to perform a "cursory search." *Id*; Memorandum from Carolyn Becknell, FOIA Officer, DOE/AL

to Valerie Vance Adeyeye, Staff Attorney, OHA (March 27, 2001) (Memo) at 1. (1) The DOE/HQ WIPP Office found no responsive records. Acknowledgment Letter at 1. Personnel at both offices advised the FOIA Officer that DOE/COO was the most likely site to contain responsive material. Memo at 1-2.

On February 15, 2001, DOE/AL sent a final determination. In the Determination Letter, DOE/AL indicated that it had searched its Waste Management Division, Site Programs Divisions, Nuclear Programs Division, Environment, Safety and Health Division, and Office of Chief Counsel but did not locate any responsive records. Letter from Carolyn Becknell, FOIA Officer, DOE/AL to the AGNM (February 15,

2001) (Determination). DOE/AL also stated that Yucca Mountain had no responsive records. *Id.* Finally, the FOIA Officer informed the AGNM that DOE/COO was still searching and would send a separate response directly to the requester. *Id.*

The AGNM filed this Appeal on March 19, 2001. Letter from the AGNM to Director, OHA (March 19, 2001). In the Appeal, the AGNM outlined five alleged "deficiencies" in the Determination: (1) failure to perform an adequate search in the DOE/AL offices; (2) failure to forward the request to DOE/HQ WIPP Office; (3) failure to forward the request to Yucca Mountain; (4) failure to forward the request to DOE/HQ FOIA Office; and (5) failure to have the decision signed off by an authorizing official. *Id.* The AGNM requested that OHA remand this matter for an adequate search. *Id.* at 3.

II. Analysis

A. ADEQUACY OF SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988). We contacted DOE/AL to ascertain the scope of the search and to address the five allegations set forth in the Appeal.

(1) Alleged Failure to Perform an Adequate Search at DOE/AL

In the Appeal, the AGNM argued that DOE/AL had performed an inadequate search of its offices because it had not searched remote offices under its control, such as Sandia National Laboratory, Los Alamos National Laboratory, Pantex, Carlsbad Operations or "a significant number of other site offices." Appeal at 2.

The DOE/AL FOIA Officer informed us that she performed an adequate but not exhaustive search. She stated that she searched the offices that were recommended to her as possibly containing responsive records, and all of the recommendations were that DOE/COO had the documents that the requester wanted. Memo at 1. According to the FOIA Officer, she was not required to search every office under DOE/AL's control without a reasonable belief that responsive records were located there. Electronic mail message from Carolyn Becknell, DOE/AL FOIA Officer to Valerie Vance Adeyeye, OHA (April 6, 2001).

(2) Alleged Failure to Forward the Request to the DOE/HQ WIPP Office in the Office of the Deputy Assistant Secretary for Integration and Disposition

The AGNM alleges that DOE/AL did not forward the request to the DOE/HQ WIPP Office. Appeal at 1. However, the DOE/AL FOIA Officer informed us that she did contact the WIPP office in Washington, D.C. directly and asked that office to perform a "cursory look." Its search found no responsive records. Memo at 2.

(3) Alleged Failure to Forward the Request to Yucca Mountain

The AGNM also alleges that the DOE/AL FOIA Officer did not forward the request to the Yucca Mountain Office. However, the FOIA Officer indicated that she promptly contacted an employee at Yucca Mountain, who also performed a "cursory look." Memo at 2. This employee found no responsive records,

and recommended that the FOIA Officer search DOE/COO. *Id.*

(4) Alleged Failure to Forward the Request to the DOE/HQ FOIA Office

The AGNM further contends that the DOE/AL FOIA Officer neglected to forward the request to the FOIA Office at DOE/HQ in Washington, D.C. Appeal at 1. The FOIA Officer confirms that she did not forward the request to DOE/HQ. Memo at 1. However, this is because she knew that the Office of the Secretary of Energy had received a copy of the request, and would follow its standard procedure of transferring the request to the FOIA Office at DOE/HQ for processing. *Id.* In order

to confirm this, she contacted DOE/HQ on February 6, 2001, to see if it had received the request. *Id.* She actively monitored the status of the request until notified that the FOIA Office at DOE/HQ had received the request and conducted a search. Memo at 2. The FOIA Office at DOE/HQ sent the AGNM a letter dated March 15, 2001, indicating that no responsive records were found. Memo at 2.

(5) Alleged Failure to Secure the Signature of an Authorizing Official on a Final Determination

The AGNM argues that "it is also not clear that the FOIA officer who handled this FOIA request was in fact the authorizing official who could sign the final response." Appeal at 3.

Ms. Becknell states that she is the FOIA Officer for DOE/AL and as such has the authority to sign acknowledgment letters or a "no responsive record" response to a request. Memo at 2. Her responses to the requester were also approved by the DOE/AL Office of Chief Counsel. *Id.* We also note that Ms. Becknell is recognized by this office as the FOIA Officer for DOE/AL.

B. Adequacy of the Initial Search

As a result of our communications with the FOIA Officer, it is clear that DOE/AL and the other DOE offices performed an adequate initial search. The search was not exhaustive, nor was it required to be. Contrary to the appellant's assertions, the FOIA Officer actively fulfilled her duties and contacted the offices named in Items 2-4 (DOE/HQ WIPP Office, Yucca Mountain, DOE/HQ FOIA Office). In addition, while processing this Appeal we were informed that DOE/COO, the site recommended to the FOIA Officer as containing responsive records, did in fact locate and release responsive material to the AGNM. Memo at 6-8. However, these records had not yet been released to the AGNM at the time that it filed the Appeal. *Id.*

C. Evidence of Additional Responsive Documents

In previous cases we have held that challenges to the adequacy of the agency's search must be supported by the presentation of some evidence that a requested document, unidentified by the agency in its search, does in fact exist. *See Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 at 80,630 (1995) (*Butler*) (citing *Sun Co.*, 11 DOE ¶ 80,114 (1983); *Vinson & Elkins*, 4 DOE ¶ 80,127 (1979)). The AGNM has presented evidence in the Appeal that additional responsive documents exist. First, the AGNM identified an April 9, 1999 newsletter published by the Sandia National Laboratory containing information that Sandia had done studies prior to 1980 concerning the

development of the WIPP site. Appeal at 2. In addition, the AGNM also identified a 1980 WIPP Environmental Impact Study (EIS) that was not located in the DOE/AL search. *Id.* (2)

We have also, in the past, remanded a case if a FOIA Officer confirms a "reasonable possibility that responsive documents may exist at another location." *See Butler*, 25 DOE at 80,630. However, the DOE/AL FOIA Officer has indicated that Sandia performed the WIPP studies under the direction of DOE/COO, and the search of DOE/COO uncovered documents that were actually created at Sandia.

Electronic mail message from DOE/AL FOIA Officer to Valerie Vance Adeyeye, OHA (April 6, 2001) *Id.* She is convinced that a search of Sandia would uncover only duplicate documents. *Id.* Her thesis is supported not only by consistent recommendations from FOIA personnel in other locations who advised her to focus her search efforts on DOE/COO, but also by the discovery of Sandia-created WIPP documents at DOE/COO. Memo at 1-2. Therefore, we find that DOE/AL conducted a search reasonably calculated to uncover the material requested by the AGNM. (3) Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Attorney General of New Mexico on March 19, 2001, OHA Case Number VFA-0662, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 12, 2001

(1)DOE/AL has informed us that a “cursory search” or “cursory look” is a form of initial inquiry used to determine whether responsive material exists at a certain location. The procedure is initiated by faxing a copy of the request to an office that may contain responsive records and asking that office to check indexes, file plans and other similar documents for responsive material. Unlike a full FOIA search, the responding office is not required to identify each document specifically. However, if the office finds responsive records, the FOIA Officer then transfers the request there. That location then conducts a thorough search and identifies the responsive material. Electronic Mail Message from Carolyn Becknell, FOIA Officer, DOE/AL to Valerie Vance Adeyeye, OHA Staff Attorney (March 28, 2001).

(2)We were informed that the EIS was located at DOE/COO and released to the AGNM on March 29, 2001. Memo at 6; Electronic Mail Message from DOE/AL to Valerie Vance Adeyeye, OHA (April 6, 2001).

(3)Despite her belief that all of the responsive documents were located at DOE/COO and released by that office, the DOE/AL FOIA Officer has agreed to ask Sandia to perform a “cursory search ” so that she can answer the AGNM’s concern about documents at that site. Electronic mail message from DOE/AL to Valerie Vance Adeyeye, OHA (April 6, 2001).

Case No. VFA-0663, 28 DOE ¶ 80,167

April 30, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: International Consulting Services

Date of Filing: March 23, 2001

Case Number: VFA-0663

On March 23, 2001, International Consulting Services (ICS) filed an Appeal from a determination issued to it on March 2, 2001, by the National Energy Technology Laboratory (NETL) of the Department of Energy (DOE). That determination concerned a request for information that ICS submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, NETL would be ordered to release the requested information or to issue a new determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

ICS filed a FOIA request seeking information regarding the Ultra Clean Fuels solicitations and the proposals submitted in response to the solicitation. In its March 2, 2001 determination letter, NETL identified a number of documents responsive to ICS's request. However, NETL withheld portions of this information pursuant to Exemption 4 of the FOIA. See March 2, 2001 Determination Letter.

On March 23, 2001, ICS filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, ICS challenges NETL's withholding of information it believes is non-proprietary. Specifically, ICS asserts that NETL should redact material not specifically found to be proprietary under Exemption 4. ICS asks that the OHA direct NETL to release the withheld information.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search, and if applicable, of the agency's intentions to withhold any of the responsive information under one or more of

the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." Id.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of the searches, (2) clearly indicate which information was withheld, and (3) specify any exemption under which information was withheld. Burlin McKinney, 25 DOE ¶ 80,205 at 80,797 (1996). It is well established that a FOIA determination must contain a reasonably specific justification for withholding material pursuant to a FOIA request. See Deborah L. Abrahamson, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to allow this Office to perform an effective review of the initial agency determination and to permit the requesting party to prepare a reasoned appeal. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. Id. In addition, the FOIA requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. See 5 U.S.C. § 552(b). See also FAS Engineering Inc., 27 DOE ¶ 80,131 (1998), quoting Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material).

In the present case, NETL withheld responsive information under Exemption 4 of the FOIA. We note that there does not appear to have been any attempt to segregate and release any non-exempt information from exempt information in any of the withheld information. Until NETL attempts to segregate non-exempt information for release, we will not consider the applicability of Exemption 4 to any of the withheld information. Accordingly, we shall remand this matter NETL either to release to ICS all of the information responsive to its request or to segregate and release any non- exempt information and issue a new determination adequately supporting the withholding of the information it does not release. If a new determination is issued, NETL should include a statement of the reason for denial, a specific explanation of how the exemption applies to the information withheld and a statement why discretionary release is not appropriate. See 10 C.F.R. § 1004.7(b)(1).

It Is Therefore Ordered That:

(1) The Appeal filed by International Consulting Services, OHA Case No. VFA-0663, on March 23, 2001, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory of the Department of Energy, which shall either release the responsive information withheld in its March 2, 2001 determination or issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 30, 2001

Case No. VFA-0664, 28 DOE ¶ 80,165

April 20, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Engineering Services

Date of Filing: March 26, 2001

Case Number: VFA-0664

On March 26, 2001, R.E.V. Engineering Services (the Appellant) filed an Appeal from a partial determination issued to it on March 8, 2001, by the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant contends that Rocky Flats has failed to: (1) acknowledge or respond to its FOIA request in a timely fashion, (2) conduct an adequate search for the requested document, (3) adequately explain or justify its determination, (4) provide for an adequate segregation of nonexempt information, and (5) properly classify it in the fee category which only requires payment of search fees, and (6) grant its request for a fee waiver.

By letter dated July 11, 2000, the Appellant filed a FOIA request with Rocky Flats seeking a copy of a document that is commonly known as the “1999 SSSP." On November 30, 2000, Rocky Flats informed the Appellant that the SSSP is currently a classified document and that the DOE would conduct a two stage review of the document in accordance with the DOE classification regulations.

On December 11, 2000, the Appellant filed an Appeal in which it alleged that Rocky Flats had (1) failed to acknowledge or respond to its FOIA request within the time required by law, and (2) failed to conduct an adequate search for an unclassified, electronic version of the 1999 SSSP. On January 10, 2001, the Office of Hearings and Appeals (OHA) issued a decision and order adjudicating these two issues. *R.E.V. Engineering Services*, 28 DOE ¶ 80,135 (2001) (*REV I*). In that opinion, we found that the portion of the Appeal that was based on the failure to process a FOIA request within the time specified by law must be dismissed because OHA does not have jurisdiction to decide such an issue. To this end, we stated:

Section 1004.8(a) has been construed to confer jurisdiction on OHA only when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. *Suffolk County*, 17 DOE ¶ 80,111 at 80,524 (1988). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when the requester has not received an initial determination from an Authorizing Official, or when an appeal is based on the agency’s failure to process a FOIA within the time specified by law. *John H. Hnatio*, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); *Tulsa Tribune*, 11 DOE ¶ 80,161 at 80,741 (1984) (no administrative remedy for agency's non-compliance with a timeliness requirement). Accordingly, the portion of the Appeal that deals with the agency’s failure to process a FOIA request within the time specified by law must be dismissed.

REV I, 28 DOE at 80,581. The Appellant has raised this same issue once again, and once again we will dismiss the portion of the present Appeal that merely reiterates the claim that Rocky Flats had not

responded to its FOIA request in a timely manner.

The Appellant also reiterates the claim, made in its previous appeal, that Rocky Flats' search for responsive documents was inadequate. We previously considered this contention in *REV I*. In that decision we found that: "Given the facts presented to us, we find that Rocky Flats conducted an adequate search which was reasonably calculated to discover an unclassified version of the 1999 SSSP. Therefore, we must deny this part of the Firm's Appeal." *REV I,* 28 DOE at 80,582. Since the Appellant has not presented any new evidence or compelling arguments concerning Rocky Flats' search for responsive documents, we will not reconsider our previous determination in *REV I*. Accordingly that portion of the present Appeal challenging the adequacy of the search by Rocky Flats will be dismissed.

The present Appeal also contends that Rocky Flats failed to adequately segregate non-exempt information from exempt information. However, and as the Appellant is well aware, the DOE has yet to make a determination concerning the SSSP's release. As we have discussed above, OHA's FOIA appeal jurisdiction exists only when an Authorizing Official has issued an actual determination on an issue. Until an Authorizing Official has issued a determination on an issue, that issue is not ripe for review by this office. Accordingly, we are dismissing that portion of the present Appeal challenging the adequacy of segregation by Rocky Flats.

The only currently justiciable issues raised by the Appellant concern Rocky Flats' fee determinations. The FOIA generally requires federal agencies to release documents to the public upon request, but provides that, absent a fee waiver, requesters must pay applicable processing fees. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. § 1004.9(a). The processing fees charged to a requester depend upon the nature of the request. The FOIA sets forth 3 categories of request for this purpose at 5 U.S.C. § 552(a)(4)(A)(ii). Depending on the identity of the requester and their intended use of the requested information, 5 U.S.C. § 552(a)(4)(A)(ii) provides for the charging of fees for: (i) document duplication alone for an "educational institution" or "representative of the news media," (ii) search time, duplication, and review time, where the request "appears to be for commercial use", and (iii) search time and duplication for all other requesters. The DOE FOIA regulations implement this provision at 10 C.F.R. § 1004.9.

Rocky Flats, correctly noting that the Appellant is a commercial concern, classified the Appellant's request as a "commercial use" request as defined in 5 U.S.C. § 552(a)(4)(A)(ii)(I). However, Rocky Flats determination is apparently based upon its reasoning that since the Appellant is a commercial concern, it seeks disclosure of the information for commercial use. This is not necessary true. It is conceivable that a commercial requester might make non-commercial use of information disclosed to it under the FOIA. Accordingly, we are remanding this portion of the Appeal to Rocky Flats. On remand, Rocky Flats must either re-categorize the request or explain why it has determined that the information was requested for commercial use.

Either an assurance of willingness to pay fees assessed in accordance with Section 1004.9, or a request for fee waiver, must be included in a FOIA request. The FOIA provides for a reduction or waiver of fees only if a requester satisfies his burden of showing that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the government (the public interest prong); and (2) is not primarily in the commercial interest of the requester (the commercial interest prong). 5 U.S.C. § 552(a)(4)(A)(iii).

In order to satisfy the public interest prong, the DOE requires that a requester show each of the following: (A) The subject of the requested records concerns the operations or activities of the government" (Factor A); (B) Disclosure of the requested records is "likely to contribute" to an understanding of government operations or activities (Factor B); (C) Disclosure of the requested records would contribute to an understanding of the subject by the general public (Factor C); and

(D) Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities (Factor D). 10 C.F.R. § 1004.9(a)(8)(i).

If a requester satisfies the four factors of the public interest prong, he must then satisfy the commercial interest prong by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. §§ 1004.9(a)(8)(ii). Administrative appeals of fee waiver denials generally are reviewed de novo. *See Tod N. Rockefeller*, 27 DOE ¶ 80,167 (1998).

The FOIA and DOE's FOIA regulations require that the agency provide the requester with a written determination notifying the requester of the results of a fee waiver determination. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.* The written determination letter serves to inform the requester of the results of the agency's fee waiver determination. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

In the present case, the determination letter fails to apply the four factors set forth at 10 C.F.R. §1004.9(a)(8)(i). As a result, the determination letter does not satisfy DOE's obligation to fully explain and justify its determination as required by the applicable FOIA case law. Accordingly, we are remanding this portion of the Appeal to Rocky Flats with instructions to apply the four factors set fourth at 10 C.F.R. §1004.9(a)(8)(i). After applying these factors, Rocky Flats must issue a new determination letter which either grants a full or partial fee wavier or denies the request for a fee waiver. If the new determination letter denies the request for a fee waiver it must include a full explanation of its determination. A full explanation of such a determination would include an explanation of how Rocky Flats applied the four factors set forth at 10 C.F.R. §1004.9(a)(8)(i).

Rocky Flats apparently reasoned that since the Appellant is a commercial concern, its interest in disclosure of the requested information is primarily in its commercial interest. This is not necessary true. It is conceivable that a commercial requester might have non-commercial interests in information disclosed to it under the FOIA. Accordingly, we are remanding this portion of the Appeal to Rocky Flats. On remand, Rocky Flats must grant the fee wavier request or provide a through explanation of why it is denying the Appellants fee wavier request.

It Is Therefore Ordered That:

(1) As set forth above, the Appeal filed by R.E.V. Engineering Services on March 26, 2001, is dismissed in part, granted in part as set forth in Paragraph (2), and denied in all other aspects.

(2) Those portions of the Appeal concerning fee determinations are hereby remanded to the Rocky Flats Area Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 20, 2001

Case No. VFA-0665, 28 DOE ¶ 80,169

May 9, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Attorney General of New Mexico

Date of Filing: April 11, 2001

Case Number: VFA-0665

The Attorney General of New Mexico (New Mexico) filed an Appeal from a determination issued on March 15, 2001, by the Waste Isolation Pilot Plant Office (WIPP Office) of the Department of Energy (DOE) in response to a request for documents submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. For the reasons set forth below, we are remanding this matter to the WIPP Office to perform an additional search for responsive documents.

On February 1, 2001, New Mexico submitted a FOIA request to DOE's Albuquerque Operations Office (Albuquerque) and Carlsbad Operations Office (Carlsbad) for (1) all documents that may identify or consider the WIPP site in Carlsbad, New Mexico as a potential site for the storage or disposal of spent reactor fuel or high-level radioactive wastes; (2) all documents suggesting the WIPP site in New Mexico as an alternative site to the Yucca Mountain site in Nevada; (3) all documents setting forth alternative sites if Yucca Mountain is not selected to be the DOE site receiving high level radioactive waste or spent reactor fuel; and (4) all letters and other correspondence to or from DOE concerning these issues (including internal communications).

On March 15, 2001, Paul Detwiler, an attorney-advisor in the DOE Office of General Counsel, issued a determination letter to New Mexico. In this letter, Mr. Detwiler indicated that he was responding to the February 1, 2001 FOIA request that New Mexico had sent to Albuquerque and Carlsbad, and also stated that the WIPP Office had reviewed its files and had not found any responsive documents. Mr. Detwiler further explained that "[t]he reason for this lack of responsive documents is that DOE does not consider WIPP as a potential storage or disposal facility for high- level waste or spent fuel because the WIPP Land Withdrawal Act explicitly prohibited these activities at WIPP."

On April 10, 2001, New Mexico appealed the March 15, 2001 determination issued by Mr. Detwiler. In this Appeal, New Mexico indicated that it believed that the search conducted by the

WIPP Office was inadequate because it appeared that a search had not been conducted for responsive documents that pre-date 1992.(1)

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident

that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

As we find that records that pre-date 1992 could reasonably contain information responsive to the FOIA request that New Mexico filed, we inquired into the adequacy of the search conducted by the WIPP Office. As part of this inquiry, we contacted Timothy Harms, an environmental engineer who conducted the search for responsive documents in the WIPP Office. Mr. Harms told us that he searched for documents that were responsive to New Mexico's FOIA request by reviewing his own records, the official WIPP Office (EM-23) files, and historical files from an organization (EM-34) that had previously been responsible for Headquarters management of the WIPP facility. Mr. Harms explained that he reviewed all the records in the WIPP Office which, in his professional opinion, had a reasonable probability for containing a discussion on the potential for disposal of either high-level waste or spent fuel at WIPP. Mr. Harms also explained that, as part of his search, he reviewed strategic plans (some dating back to 1982), legal briefs, and other programmatic documents, and also asked all of his colleagues in the WIPP office whether they had responsive documents. Electronic Mail Message from Timothy Harms, WIPP Office, to Linda Lazarus (May 4, 2001). After we explained that New Mexico was concerned about documents that pre-date 1992, Mr. Harms stated that an additional search was warranted. Memorandum of Telephone Conversation between Linda Lazarus and Timothy Harms (May 7, 2001). We will remand this matter to the WIPP Office to perform a new search. Following this search, the WIPP Office should issue a new determination letter that releases all information responsive to the request or identifies any responsive information it is withholding and provides adequate justification for such withholding.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Office of the Attorney General of New Mexico on April 11, 2001, OHA Case Number VFA-0669, is hereby granted. This matter is hereby remanded to the Waste Isolation Pilot Plant Office (WIPP Office) to perform an additional search for documents and to release them or provide justification for withholding any portion of them.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 9, 2001

(1)On March 15, 2001, New Mexico sent a FOIA request to the WIPP Office, the Headquarters FOIA Office, and the Nevada Operations Office in which it requested the documents that it had requested from Albuquerque and Carlsbad as well as certain other documents. In its Appeal, New Mexico also alleges that the determination issued by Mr. Detwiler on March 15, 2001, was really issued in response to that FOIA request. However, we find that the evidence is to the contrary. The determination letter issued by Mr. Detwiler on March 15, 2001, indicates that it is written in response to the FOIA request that New Mexico filed on February 1, 2001. Moreover, DOE has not yet issued a determination in response to the March 15, 2001 FOIA request filed by New Mexico. New Mexico will have the opportunity to appeal this determination after it has been issued. Memorandum of Telephone Conversation between Linda Lazarus, Staff Attorney, OHA and Alexander C. Morris, FOIA and Privacy Act Specialist, Headquarters FOIA Office (May 7, 2001).

Case No. VFA-0666

September 7, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Appellant:Martin Becker

Date of Filing:April 16, 2001

Case Number: VFA-0666

Martin Becker appeals from a determination of the Savannah River Operations Office (SROO) of the Department of Energy (DOE). The determination was issued in response to his request for documents, which he filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the DOE implementing regulations, 10 C.F.R. Part 1004. For the reasons set forth below, we will remand Becker's request for further processing.

Background

Becker filed a FOIA request with SROO on September 22, 2000. In his request, he sought "a copy of any leases (including renewals and/or extensions) by Westinghouse Savannah River Company [WSRC] (including any subsidiaries or affiliates thereof) at Centennial Corporate Center in Aiken [South Carolina] since 1/1/96." We will refer to the record requested by Becker as "the lease."

SROO has denied Becker's request three times. Each denial has been appealed by Becker. Following each of the first two appeals by Becker, we remanded the request for further processing. *Martin Becker*, 28 DOE ¶ 80,133 (2000) (*Becker I*); *Martin Becker*, 28 DOE ¶ 80,153 (2001) (*Becker II*).

In our two earlier decisions, we made the following findings. WSRC is the management and operating (M&O) contractor at the DOE's Savannah River Site. Westinghouse Safety Management Solutions (WSMS) is a subcontractor to WSRC, and is the tenant holding the lease. The relationship between WSMS, WSRC, and the DOE was explained by a DOE contracting official as follows:

WSMS ... provide[s] support to WSRC ... via a contractual document referred to as an "Interworks Requisition." WSMS' services are paid for by WSRC on a cost- reimbursement basis. The costs paid to WSMS by WSRC are then charged by WSRC to DOE.

Neither the DOE nor WSRC has a copy of the lease. *Becker I*, 28 DOE at 80,576-77; *Becker II*, 28 DOE at 80,622-23. WSMS, however, has at least one copy of the lease. *Becker II*, 28 DOE at 80,624.

We also found that the lease was not an agency record for the purposes of the FOIA, because it was neither created by the DOE, nor in the possession of the DOE at the time of the request. *Becker I*, 28 DOE at 80,576. We stated, however, that the lease may still be subject to mandatory disclosure under a provision of the DOE regulations, the Contractor Records regulation, 10 C.F.R. § 1004.3(e)(1). The Contractor Records regulation states:

When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b) [*i.e.*, the FOIA].

Thus, the Contractor Records regulation provides for the disclosure of certain records that are not subject to disclosure under the FOIA itself. *See Sangre de Cristo Animal Protection, Inc. v. Department of Energy*, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that the DOE neither possessed nor controlled and that were created by an agency contractor, although not agency records, are accessible under the Contractor Records regulation). Because we have previously determined that the lease is not subject to the FOIA, our discussion below is concerned solely with the applicability of the Contractor Records regulation to any copy of the lease in the possession of WSMS.

Analysis

To determine whether the lease is subject to disclosure under the Contractor Records regulation, we must consider three distinct criteria. First, we will consider whether the contract by which WSMS performs services for WSRC, and ultimately for the DOE, contains a provision whereby the Contractor Records regulation is applicable to WSMS. Next, we will consider whether the lease is a type of document that is deemed the property of the government by operation of the applicable contract. Finally, we will consider whether the lease was acquired or generated by WSMS in the performance of a relevant contract. As discussed below, we conclude that the lease meets all of these criteria.

1. Does the contract provide that records the contractor acquires or generates are the property of the government?

In *Becker I*, we examined certain provisions of WSRC's contract with the DOE dealing with whether the lease is the property of the government. We found in *Becker II* that the Contractor Records regulation is applicable to WSMS, though WSMS does not contract directly with the DOE. As we found in *Becker II*, the DOE acquisition regulations provide for the insertion of certain clauses regarding the government's ownership of contractor records into all M&O contracts. In addition, the regulations require that these clauses "pass down" to - *i.e.*, be integrated into - certain subcontracts between the M&O contractor and other parties. We noted in *Becker II* that WSMS acknowledges that some of its subcontracts meet the threshold for the pass down of these clauses. *Becker II,* 28 DOE at 80,622. We conclude that WSMS has at least one contract that includes the requisite provision.

2. Does the contract provide that the lease is exempt from government ownership?

In *Becker II*, we noted that Section H.27 of the contract between WSRC and the DOE incorporates the Access to and Ownership of Records clause (the "Ownership of Records clause").(1) *Becker II*, 28 DOE at 80,622. The Ownership of Records clause states that "except as provided in paragraph b of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government...." We noted that the relevant exception to the general policy of government ownership of records is found in paragraph b(3) of the Ownership of Records clause, which exempts "non-accounting records relating to any procurement action by the Contractor" from government ownership. WSMS contends that the lease is a non-accounting procurement record, and thus exempt from government ownership under paragraph b(3).

The term "non-accounting procurement record" is not explicitly defined in either the contract or the DOE regulations. We find, however, that a provision of the DOE acquisition regulations addresses the issue of accounting records. The Accounts, Records, and Inspection regulation, 10 C.F.R. § 970.5232-3, provides that "except as agreed upon by the Government and the contractor, all financial and cost reports, books of

account and supporting documents, system files, data bases, and other data evidencing costs allowable ... shall be property of the Government." The lease is clearly a form of "data evidencing costs allowable." As such, it serves an accounting purpose, and therefore cannot be considered a "non-accounting" procurement record. We conclude that the lease is an accounting record within the meaning of the Ownership of Records clause, and is therefore the property of the DOE.

3. Was the lease acquired or generated in the performance of a contract?

The next issue in determining whether the lease is subject to the Contractor Records regulation is whether WSMS acquired or generated the lease in the performance of its subcontract with WSRC. We find that it did.

WSMS was incorporated as a subsidiary of WSRC in January 1997. It entered into its first contract to provide services to WSRC on October 1, 1997. It acquired its lease for space in the Centennial Corporate Center on November 27, 1997.(2) A DOE contracting officer stated that "WSMS's services are paid for by WSRC on a cost-reimbursement basis. The costs paid to WSMS by WSRC are then charged by WSRC to DOE. I would assume that WSMS recovers the lease costs of its facilities by including those costs in its overhead rates charged to all customers, including WSRC."(3) In addition, WSMS has acknowledged that "the cost of [the lease] is indirectly part of the costs of the services WSMS provides for all of its customers, government and commercial, one of which is WSRC."(4)

Thus, WSMS pays rent on the lease while performing its contract with WSRC, and receives reimbursement for at least part of the rent under the terms of that contract. Finally, as stated above, WSRC then charges the costs that it pays to WSMS to DOE, under the terms of its contract with the agency. Acquiring a lease for office space and contemporaneously entering into a service contract that provides for reimbursement of the rent for that space is a sufficient factual basis for us to conclude that the lease in question was acquired or generated by the contractor in the performance of the contract.

Conclusion

We have found that the lease, which is partially paid for by DOE funds, was acquired or generated by WSMS in its performance of a contract, and is the property of the government. We therefore find that the lease is subject to mandatory disclosure to the public under the DOE's Contractor Records regulation. The lease or any portion thereof may be withheld, however, if it would be exempt from disclosure under the Freedom of Information Act. *See* 10 C.F.R. § 1004.3(e)(1)

We shall therefore remand this matter to SROO. On remand, SROO must review the lease, segregate and release all non-exempt portions of it, and issue a new determination that justifies any withholding.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Martin Becker, Case No. VFA-0666 is hereby granted in part as specified in Paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Savannah River Operations Office to issue a new determination in accordance with the instructions set forth in the above Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: September 7, 2001

(1) The Ownership of Records clause, which is found in the DOE regulations at 48 C.F.R. 970.5204.3, is required in all DOE M&O contracts.

(2) E-mails from Matt Alan, WSMS counsel, to OHA, February 15, 2001 and February 28, 2001. Alan also stated that WSMS had been allowed to occupy the rental space on October 1, 1997.

(3) E-mail from Thomas Reynolds, SROO, to OHA, February 27, 2001.

(4) E-mail from Matt Alan, WSMS, to OHA, February 9, 2001.

Case No. VFA-0668, 28 DOE ¶ 80,170

May 29, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Alan Hoffmann

Date of Filing: May 1, 2001

Case Number: VFA-0668

On May 1, 2001, Alan Hoffmann filed an Appeal from a final determination that the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) issued on April 16, 2001. That determination concerned a request for information submitted by Alan Hoffmann pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Albuquerque would be required to conduct a further search for responsive documents.

Background

On January 19, 2001, Alan Hoffmann submitted a FOIA request for "an overview of the scope of beryllium surface levels at the Kansas City Allied Signal-Honeywell Plant." Electronic Mail Request Letter dated January 19, 2001, from Alan Hoffmann to Terry Apodaca, Office of Public Affairs, Albuquerque (Request Letter). Mr. Hoffmann was specifically interested in the first six months of 1996 but indicated that anything available since 1996 would be satisfactory. *Id.* On April 16, 2001, Albuquerque issued a determination supplying Mr. Hoffmann with current surface samples. Determination Letter dated April 16, 2001, from Carolyn A. Becknell, Freedom of Information Officer, Office of Public Affairs, Albuquerque, to Alan Hoffmann (Determination Letter). In response to the April 16, 2001 Determination Letter from Albuquerque, Alan Hoffmann filed this Appeal asking that Albuquerque conduct an additional search for records from 1996. Appeal Letter received May 1, 2001, from Alan Hoffmann, to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter).

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th

Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

We have contacted the Kansas City Area Office(1) (Kansas City) to determine what type of search was conducted. That office indicated that it conducted a search of its database and other records. Memorandum of May 14, 2001 Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, DOE, and David Hampton, Office of Public Affairs, Kansas City. Ms. Hampton indicated that Kansas City did not conduct survey samples for beryllium prior to the year 2000.

Since no beryllium testing was conducted at the Kansas City plant prior to 2000, it is reasonable that no test results were located for the period 1996 to 1999. Nevertheless, Kansas City did perform a database search, though unsuccessful, for such records. Consequently, we conclude that Albuquerque conducted an adequate search for the requested information. Based on the circumstances of this case and the search Albuquerque performed, we are convinced that Albuquerque followed procedures which were reasonably calculated to uncover the material sought by Mr. Hoffmann in his request. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Alan Hoffmann, on May 1, 2001, Case No. VFA-0668, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 29, 2001

(1)Requests for information made to Kansas City fall under the purview of Albuquerque.

Case No. VFA-0669, 28 DOE ¶ 80,171

June 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Attorney General of New Mexico

Date of Filing: May 3, 2001

Case Number: VFA-0669

This Decision and Order concerns an Appeal that was filed by the Attorney General of New Mexico from a determination issued to him by the Freedom of Information Officer of the Department of Energy's (DOE) Carlsbad Field Office (CFO). In this determination, the CFO provided to the Attorney General 42 documents that he requested pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, the Attorney General challenges the adequacy of the search for responsive documents.

In his FOIA request, the Attorney General sought access to all documents identifying or considering the Waste Isolation Pilot Plant (WIPP) site in Carlsbad, New Mexico, as a potential site for storage or disposal of spent reactor fuel or high level radioactive wastes, and all documents setting forth alternative sites that may be considered if the Yucca Mountain site in Nevada is not selected to receive these materials. In response to this request, CFO searched its facilities and located the 42 documents, which were provided to the Attorney General in their entirety. In his Appeal, the Attorney General contends that further responsive documents exist, and requests that we remand this matter to the CFO for a further search.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine the scope of the search that was performed, we contacted the CFO. That Office informed us that certain facilities were inadvertently excluded from the initial search, and requested

that we remand this matter for the performance of a more complete search. See memorandum of May 30, 2001 telephone conversation between Robert Palmer, Office of Hearings and Appeals and Dennis Hurtt, CFO. We will therefore grant the Attorney General's Appeal and remand this proceeding to the CFO for another search.

It Is Therefore Ordered That:

(1) The Appeal filed by the Attorney General of New Mexico in Case No. VFA-0665 is hereby granted as set forth in paragraph (2).

(2) This matter is remanded to the Carlsbad Field Office for the performance of another search for responsive documents.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 1, 2001

Case No. VFA-0671, 28 DOE ¶ 80,175

June 27, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: May 15, 2001

Case Number: VFA-0671

On May 15, 2001, Barbara Schwarz (Schwarz) filed an Appeal from three determinations issued to her in response to requests for documents that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determinations were issued on March 22, April 19, and April 27, 2001, by the DOE Headquarters FOIA/Privacy Act Division (DOE/HQ). This Appeal, if granted, would require that DOE/HQ perform an additional search and grant Schwarz a fee waiver.

I. Background

This Appeal concerns three FOIA requests that Schwarz submitted to DOE, the Department of the Army, and the Department of State. The request that was originally submitted to the Department of State (DOS) was subsequently referred to DOE after DOS searched its files and found responsive information that related to DOE. The request that was submitted to the Department of the Army asked for material related to litigation with DOE.

In her first request, Schwarz asked that DOS send Schwarz a copy of all records pertaining to her. Letter from Schwarz to DOS (October 21, 1999). DOS searched, and during its search found one responsive document that also contained information related to DOE. Letter from M. Grafeld, DOS to Abel Lopez, DOE/HQ (March 26, 2001). DOS referred the document to DOE, and DOE released the document to Schwarz in its entirety. On September 13, 2000, Schwarz requested the Department of the Army (the Army) to provide her with copies of records relating to her litigation with several government agencies, including DOE. Letter from Schwarz to the Army (September 13, 2000). The Judge Advocate General (JAG) of the Army forwarded the portion of the request pertaining to DOE to DOE/HQ on March 26, 2001 for appropriate action. Letter from JAG to DOE/HQ (March 26, 2001). On April 19, 2001, DOE/HQ informed Schwarz that the DOE Office of General Counsel (DOE/OGC) searched but found no responsive documents relating to her litigation with DOE. Letter from DOE/HQ to Schwarz (April 19, 2001). Finally, in the third request at issue in this Appeal, Schwarz asked DOE/HQ on December 18, 2000, for all information on several matters including: (1) earthquakes that may have been caused by individuals with access to power plants;

(2) the negative affects of electricity in residential areas; (3) alleged bribes by the German Secret Service to Utah Power employees; (4) the mental health of DOE and nuclear power plant employees; and (5) the alleged secret and illegal infiltration of the DOE by the "German Nazi Secret Service." Letter from DOE/HQ to Schwarz (March 22, 2001) (Determination). She also requested that DOE waive fees in

processing her request. *Id.* On March 22, 2001, DOE/HQ denied Schwarz's request for a fee waiver and asked for an assurance that she would pay processing fees before initiating a search. *Id.* Schwarz appealed all of these determinations and asks that OHA grant the fee waiver and order DOE/HQ to conduct another search for responsive material. She also argues that she is entitled to two free hours of search time and 100 free pages of records. Letter from Schwarz to Director, OHA (May 15, 2001) (Appeal).

II. Analysis

Schwarz submits several reasons to justify her qualification for a fee waiver. First, she claims that she is indigent. Appeal at 2. Schwarz also contends that DOE has approved fee waivers for requesters who did not meet the requirements for a fee waiver. *Id. (1)* Finally, Schwarz argues that the requested information concerns government activities and that she is capable of disseminating the material to the public via the Internet and press releases. Appeal at 3.

A. Fee Waiver

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552 (a) (4)(A)(I); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two-pronged test for agencies to use in considering whether to waive fees. The two prongs can be summarized as the "public interest prong" and the "commercial interest" prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998) (*Murphy*). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government. 5 U.S.C. § 552 (a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. *Id.* The requester bears the burden of satisfying the two-prong test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997) (*Ott*).

In order to determine whether the requester meets the public interest prong (i.e., whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities) the DOE considers four factors:

(A) The subject of the request; whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure;

(D) The significance of the contribution to public understanding; whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. §1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997). In denying Schwarz's fee waiver request, the Director of the DOE/HQ based this conclusion on Schwarz's alleged failure to provide justification for any of the four factors. Determination at 1. After reviewing Schwarz's arguments *de novo*, we agree, and find that DOE/HQ properly denied Schwarz's request for a fee waiver based on the four factors in 10 C.F.R. § 1004.9(a)(8).

1. Factor A

DOE/HQ argues that the information requested "may not concern the operations or activities of the

government and specifically the Department of Energy." Letter from DOE/HQ to Schwarz (March 22, 2001) at 2. We agree. Information regarding electricity, earthquakes, and the causes of earthquakes is not likely to concern the operations or activities of government. Records must be sought for their informative value with respect to specifically identified government operations or activities. *See Van Fripp v. Parks*, No. 97-0159, slip op. at 10 (D.D.C. Mar 16, 2000). In addition, Schwarz has requested information on the mental health of DOE and power plant employees, and the alleged bribery of DOE employees. This information could, arguably, concern the operations of the agency. However, Schwarz has not specifically identified any DOE operations or activities nor has she made more than a conclusory statement about the public interest in this information. *Oglesby v. Department of the Army*, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing). Thus, there is a "tenuous link" between furnishing the requested information and any benefit to the general public. *NTEU v. Griffith*, 811 F.2d 644, 647 (D.C. Cir. 1987). For instance, Schwartz argues that the American people need to know this information because "whatever comes from the government might not always be in the best interest of the United States." Appeal at 3. She also states that Americans want to know of a "secretly infiltrated DOE" so that they can "protect their lives and those of their family members." *Id.* These are conclusory statements that do not enlighten the agency about any potential public interest in the requested material. Therefore, we find that Schwarz has failed to satisfy Factor A.

2. Factor B

In order for the disclosure to be "likely to contribute" to an understanding of specific DOE operations or activities, the responsive material must be meaningfully informative in relation to the subject matter of the request. *See Carney v. Department of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (stating that it is relevant to consider subject matter of fee waiver request). We cannot find that the requested information, if it exists, would contribute to an understanding of DOE operations or activities. Allegations of agency malfeasance do not warrant a fee waiver without further evidence that informative material will be found. *See AFGE v. Department of Commerce*, 632 F. Supp. 1272, 1278 (D.D.C. 1986); *aff'd on other grounds*, 907 F.2d 203 (D.C. Cir. 1990). Thus, Schwarz has failed to satisfy Factor B.

3. Factor C

This test requires us to consider whether the requested documents would contribute to the understanding of the subject by the general public. To satisfy this factor, the requester must have the ability and intention to disseminate this information to the public. See *STAND*, 27 DOE ¶ 80,250 (1999) (STAND); *Tod N. Rockefeller*, 27 DOE ¶ 80,184 (1999); *James L. Schwab*, 22 DOE ¶ 80,133 (1992).

We find that Schwarz has not proven an ability to disseminate the requested information to the public. She states that she wants to inform the public via the Internet and that she intends to prepare a document for Congress to use as a basis for legislation against the alleged infiltration. Appeal at 3. She adds that she is capable of dissemination via the Internet and press releases. *Id.*

This falls far short of the proof required to establish the requester's ability to disseminate responsive material to the public. *See STAND*, 27 DOE at 80,250. A requester cannot establish public benefit by alleging an intent to share the requested information with the public. *See Donald R. Patterson*, 28 DOE ¶ 80,107 (2000). In addition, Schwarz has not established that there is a broad audience of persons interested in the subject of earthquakes, alleged Nazi infiltration of the DOE and the mental health of DOE employees. Mere access to the Internet does not prove an individual's ability to disseminate information under Factor C. *Id; Barbara Schwarz*, 28 DOE ¶ 80,126 (2000). Therefore, we find that Schwarz has not satisfied the Factor C test.

4. Factor D

Under Factor D, disclosure must contribute "significantly" to public understanding of government

operations or activities. Because, as explained with regard to Factor A, Schwarz has not shown that the requested information relates to specifically identifiable government operations or activities,

release of the requested information will not significantly contribute to public understanding of government operations or activities. Thus, Schwarz has failed to satisfy Factor D. Because Schwarz has not satisfied the public interest prong, it is unnecessary to analyze the commercial interest prong. We therefore find that DOE/HQ properly denied Schwarz's request for a fee waiver. (2)

B. ADEQUACY OF SEARCH

Schwarz asks that OHA order DOE/HQ to conduct a new search because she contends that more responsive documents exist at DOE and that DOE must have records regarding her cases against the Departments of Treasury, Health and Human Services, and the FBI. Appeal at 1. She requests detailed information about the search for these documents, including "search records" and a "search declaration" by the Acting Deputy Counsel for Litigation. Appeal at 2.

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988). We have analyzed the search conducted by DOE/HQ and find that the search was adequate.

Schwarz filed a FOIA appeal with the Army on September 13, 2000. Her appeal contained a FOIA request for copies of records related to her litigation with DOE and other agencies. Letter from the Army to DOE/HQ (March 26, 2001). The Army searched its files in response to Schwarz's request and found no responsive material. The Army then referred the request to the agencies that were actually parties to the litigation. *Id.* In the request, Schwarz stated that she sued DOE and gave a specific case number. DOE/HQ contacted the Department of Justice (DOJ) about the case, and was informed that because Schwarz did not file the case properly, the case was never sent to DOE. Letter from Sheila Jeter, DOE/HQ to Valerie Vance Adeyeye, OHA (June 1, 2001). Nonetheless, DOE/OGC still conducted a search of its files using the case number, but found no responsive documents. Letter from DOE/HQ to Schwarz (April 19, 2001).

We find that DOE/OGC conducted an adequate search reasonably calculated to uncover the material requested by Ms. Schwarz. Even though DOJ informed DOE that the case was never sent to DOE, DOE/OGC still searched its files for responsive material using the case number. DOE/OGC was not required to provide a detailed description of its search or a "search certificate." The FOIA simply requires the agency to notify the requester of the determination, the reasons for the determination, and of the requester's right to appeal. *See Barbara Schwarz*, 27 DOE ¶ 80,245 at 80,872 (1999).

C. PROCEDURAL ISSUES

Schwarz raised other objections to the manner in which DOE/HQ handled the FOIA appeals. She alleged that DOE/HQ attempted to "act like the final authority," that she was not provided a copy of her appeal, and that she did not receive a transmittal form from the agencies. Appeal at 1. Upon review of Schwarz's allegations and DOE's response, we conclude that Schwarz has misinterpreted much of the correspondence relating to her requests for information. DOE/HQ has never claimed to be nor acted as if it were the final authority on the Army and DOS appeals. Rather, those agencies relinquished to DOE the responsibility for processing information related to DOE, and DOE has exercised that authority in its responses to Schwarz. *See* Letter from DOS to DOE/HQ (March 26, 2001); Letter from the Army to DOE/HQ (March 26, 2001). DOE/HQ has also stated that it will send Schwarz a copy of the transmittal memos that she requested in the Appeal. Letter from Sheila Jeter, DOE/HQ to Valerie Vance Adeyeye,

OHA (June 1, 2001).

In conclusion, we find that DOE/HQ conducted a search reasonably calculated to uncover the responsive material. DOE/HQ also properly denied Schwarz's request for a fee waiver. Accordingly, the Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Barbara Schwarz on May 15, 2001, OHA Case Number VFA-0671, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records

are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 27, 2001

(1)Schwarz did not offer any evidence that DOE approved "unqualified" FOIA requests. Therefore, we will not address that issue. We further note that indigence is not a basis for a waiver of fees under the FOIA. *See Barbara Schwarz,* 28 DOE ¶ 80,126 (2000); *Ely v. United States Postal Service*, 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents.").

(2)Regarding Schwarz's entitlement to two hours of free search time and 100 free copies, we note that DOE/HQ did not deny these items. 10 C.F.R. § 1004.9(a), (b)(4). *See Barbara Schwarz*, 28 DOE ¶ 80,126 (2000). Rather, the Determination denied only Schwarz's fee waiver request. It is the policy of DOE/HQ to require a requester to address fees before assigning a control number to the request and initiating a search. After DOE/HQ begins the search, the first two hours are free. *See Schwarz*, 27 DOE at 80,871 n2. However, DOE/HQ informed us that Schwarz did not include an assurance to pay in her request, nor did she submit one to that office after the determination letter specifically requested assurance. Memorandum of Telephone Conversation between Sheila Jeter, DOE/HQ and Valerie Vance Adeyeye, OHA (June 21, 2001).

Case No. VFA-0672, 28 DOE ¶ 80,172

June 14, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Anthony Delgado

Date of Filing: May 17, 2001

Case Number: VFA-0672

This Decision and Order concerns an Appeal that Anthony Delgado filed from a determination issued to him by the Department of Energy's (DOE) FOIA/Privacy Act Division. In that determination the FOIA/Privacy Act Division informed Mr. Delgado that no documents were located that were responsive to a request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the FOIA/Privacy Act Division to conduct a further search for responsive materials.

BACKGROUND

In his request, Mr. Delgado sought documents that discuss radiation exposure as the cause of neurofibromas (multiple nerve tumors). Mr. Delgado also asked for statistical information about DOE employees and DOE contractor employees who may have been afflicted with such tumors. The reformulated request was then assigned to the Headquarters Office of Environment, Safety and Health (E&H).

ANALYSIS

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the

government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a standard of reasonableness. McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security

Agency, 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at the Office of Environment, Safety and Health to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Delgado's request might reasonably be located. Upon receiving Mr. Delgado's request for information, the E&H official instituted a search of all personal documents, office documents, library books, and the memories of its employees, and requested the E&H California office to conduct a computer search for information pertaining to neurofibromas in current or former DOE employees. This search yielded no responsive documents.

E&H also informed us that within the morbidity and mortality studies of DOE contractor employees since the early 1970s there were no special analyses of neurofibromas, and the condition was not singled out in the tabular materials in the published reports. E&H further concluded that some individuals included in the studies may have had neurofibromas, without the existence of the tumors being recorded. In order to find out if any of those individuals did have neurofibromas, each death certificate would have to be reviewed on an individual basis. This information is maintained in a database by the National Institute for Occupational Safety and Health, and E&H has no access to it. Memorandum of May 31, 2001, Telephone Conversation between Dr. Gerald Petersen, E&H, and Toni Brown, Paralegal Specialist, Office of Hearings and Appeals.

Based on the foregoing, we find no reason to believe that additional responsive documents subject to the FOIA exist at the DOE. We conclude that the Headquarters' Office of Environment, Safety and Health's search for responsive documents was adequate, and that Mr. Delgado's Appeal should therefore be denied.(1)

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Anthony Delgado, Case No. VFA-0672, on May 17, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 14, 2001

(1)In an effort to assist Mr. Delgado, the Office of Environment, Safety and Health conducted a search of its public database system called the Human Radiation Experiments Information Management System (HREX). Employing a computerized word search, it located the term "neurofibromas" 22 times. That system is available to Mr. Delgado, as a member of the public, on the internet at http://hrex.dis.anl.gov.

Case No. VFA-0673, 28 DOE ¶ 80,174

June 26, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Nevada Desert Experience

Date of Filing: May 22, 2001

Case Number: VFA-0673

On May 22, 2001, Nevada Desert Experience (Nevada) filed an Appeal from a determination issued to it on April 23, 2001, by the Oakland Operations Office (Oakland) of the Department of Energy (DOE). That determination responded to a request for information Nevada filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Nevada challenges the adequacy of Oakland's search for documents responsive to its request.

I. Background

On February 12, 2001, Nevada filed a request for information in which it sought "information regarding DOE's activities related to the Vision for 2020 program overseen by the U.S. Space Command." On February 26, 2001, Oakland issued a determination which stated that it conducted a search at Oakland and the Lawrence Livermore National Laboratory (LLNL) and located a document responsive to Nevada's request. *See* February 26, 2001 Determination Letter. In addition, Oakland referred Nevada to the LLNL Department of Defense Program website and to two books available through the Air Force. On March 9, 2001, Nevada wrote to Oakland stating that its determination letter was inadequate. Specifically, Nevada asserted that Oakland did not appear to have searched DOE-wide for documents as originally requested.

On March 23, 2001, Oakland issued a second determination which stated that it conducted another search at Oakland and at DOE Headquarters and located no additional documents responsive to Nevada's request. *See* March 23, 2001 Determination Letter. Nevada responded to this letter on April 14, 2001, again stating its dissatisfaction with Oakland's search for responsive documents. On April 23, 2001, Oakland issued its final determination letter indicating that it conducted two separate and complete searches for documents responsive to Nevada's request. *See* April 23, 2001 Determination Letter. It further indicated that Nevada was provided with all documents responsive to its request that were found at the LLNL and that DOE Headquarters located no documents responsive to the request. *Id*. Further, Oakland stated that the searches conducted in response to Nevada's request were reasonably calculated to uncover all responsive documents. *Id*.

On May 22, 2001, Nevada filed the present Appeal with the Office of Hearings and Appeals. In its Appeal, Nevada challenges the adequacy of the searches conducted by Oakland. Specifically, Nevada requests that Oakland conduct a more thorough search for DOE-generated documents. *See* Appeal Letter at 2.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, e.g., *Hideca Petroleum Corp.*, 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Oakland to ascertain the extent of the searches that had been performed and to determine whether any other documents responsive to Nevada's request might exist. Upon receiving Nevada's request for information, Oakland instituted two separate searches of its database as well as referred Nevada's request to DOE Headquarters for an additional search. Based on these searches, Oakland located and produced one relevant record that was responsive to Nevada's request. Oakland has informed us that these searches, including the one conducted at DOE Headquarters, did not locate any other responsive documents. It further stated that searches were conducted in all locations that were likely to have responsive documents. Oakland reiterated that all personnel responsible for the searches were provided with a copy of Nevada's original FOIA request. *See* June 20, 2001 Record of Telephone Conversation between Jack Hug, Oakland and Kimberly Jenkins-Chapman, Office of Hearings and Appeals. Given the facts presented to us, we find that Oakland conducted an adequate search which was reasonably calculated to discover documents responsive to Nevada's request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Nevada Desert Experience, OHA Case No. VFA-0673, on May 22, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 26, 2001

Case No. VFA-0674, 28 DOE ¶ 80,173

June 20, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Southern California Edison

Date of Filing: May 22, 2001

Case Number: VFA-0674

On May 22, 2001, Southern California Edison (the Appellant) filed an Appeal from a final determination issued on April 26, 2001 by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA, responded to a Request for Information filed by the Appellant on March 7, 2001 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination released several responsive documents to the Appellant and withheld two documents. This Appeal, if granted, would require BPA to release the withheld information and to conduct an additional search for responsive documents.

I. BACKGROUND

This Appeal arises out of a contract dispute between the Appellant and the BPA. On March 7, 2001, the Appellant filed an eight-part request for information with BPA. On April 26, 2001, BPA issued a determination letter indicating that it was releasing several responsive documents and withholding two responsive documents under Exemption 5 of the FOIA. BPA also indicated that it did not have any documents that were responsive to three of the eight parts of the Appellant's request. The present Appeal challenges the adequacy of BPA's search and its withholdings under Exemption 5.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). The only exemption that BPA claims in the present case is found at 5 U.S.C. § 552(b)(5) (Exemption 5).

Exemption 5

BPA withheld two documents in their entirety under Exemption 5: (1) an e-mail message sent by Timothy

R. Smith to Claire Hobson on August 23, 2000 (Document 1), and (2) an e-mail message sent by Timothy R. Smith to four BPA employees on August 25, 2000 (Document 2).

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

The Deliberative Process Privilege

The determination letter indicates that BPA has withheld both documents under the deliberative process privilege. It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Coastal States*, 617 F.2d *at* 862.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. *See EPA v. Mink*, 410 U.S. 73, 87 (1973) (citing *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)) (*Mink*).

In order for the deliberative process to shield a document, it must be both pre-decisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

The Appellant claims that the deliberate process privilege does not apply to either of the two documents withheld by BPA. In support of this contention, the Appellant correctly notes that in order to be protected under the deliberative process privilege, information must be generated prior to the adoption of an agency's policy or decision. However, both documents, which consist of the author's opinions of how BPA should respond to a written inquiry submitted by the Appellant on August 18, 2000 (the August 18, 2000 inquiry), were generated as part of the agency's deliberations about its proper response to the August 18, 2000 inquiry. Accordingly, we find that both documents can be withheld under Exemption 5's deliberative process privilege.

The Attorney-Client Privilege

BPA withheld Document 2, an e-mail message sent by Timothy R. Smith to four BPA employees on August 25, 2000, under the attorney-client privilege as well as the deliberative process privilege. The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039 (11th Cir. 1990); *In Re Grand Jury Subpoena of Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); 8 J. Wigmore, *Evidence*, § 2291, p. 590 (McNaughton Rev. Ed. 1961); McCormack, *Law of Evidence*, Sec. 87, p.175 (2nd ed. E. Cleary 1972). Not all communications between attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992) (*Clark*). The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide

legal advice. *Fisher v. United States*, 96 S. Ct. 1569, 1577 (1976) (*Fisher*). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The Appellant claims that Document 2 cannot be withheld under the attorney-client privilege. This e-mail message proposes a course of action in response to a letter to BPA from the Appellant. One of the recipients of the message was a BPA attorney. It is clear from the context of the e-mail message that its author was soliciting legal advice from that BPA attorney (as well as comments from the other three recipients). This e-mail message was clearly a confidential communication between an attorney and his client made for the purpose of obtaining legal advice. Accordingly, this document is protected by the attorney-client privilege.

The Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Accordingly, even if a document can properly be withheld under Exemption 5, we must consider whether the public interest nevertheless demands disclosure pursuant to 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has adopted a "foreseeable harm" standard for defending FOIA exemptions. Memorandum from the Attorney General to Heads of Departments and Agencies, Subject: The Freedom of Information Act (October 4, 1993) (Reno Memorandum). The Reno Memorandum indicates that whether or not there is a legally correct application of an exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. *See* Reno Memorandum at 1, 2.

BPA's determination does not indicate that it considered the public interest in disclosing this information. Accordingly, we are remanding the portion of the Appeal withholding the two e-mail messages to the BPA. On remand, BPA must either release these two documents or issue a new determination indicating that release of these documents would not be in the public interest.

B. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Eugene Maples*, 23 DOE ¶ 80,106 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

The Appellant asserts that the BPA's search for responsive documents was flawed in a number of aspects. First, the Appellant indicates that one of the documents released to it by BPA, the December 21, 2000 Federal Columbia River Power System Biological Opinion, is not responsive to its request. The Appellant asserts that BPA should have instead released the May 2000 Federal Columbia River Power System Biological Opinion to it. BPA indicates that it apparently misunderstood that Appellant's request and is willing to conduct a further search for the May 2000 Federal Columbia River Power System Biological Opinion. Accordingly, we are remanding this portion of the Appeal to BPA. On remand, BPA shall conduct a further search for the May 2000 Federal Columbia River Power System Biological Opinion and shall then either release this document to the Appellant or issue a new determination letter justifying its withholding.

The Appellant further asserts that it was provided with an incomplete copy of one responsive document.

Apparently, the Appellant received pages 2 though 10 of this document, which it describes as "Convert Last Years." BPA indicates that it cannot identify any document entitled (or described as) Convert Last Years among the documents it released to the Appellant in response to the present request. Resolution of this situation will require BPA to consult with the Appellant. Accordingly, we are remanding this portion of the Appeal to BPA. On remand, BPA shall consult with the Appellant in order to identify the document the Appellant has described as Convert Last Years.

The Appellant also claims that it "requires definitions of the terms, rows, and columns on the chart contained [in the Convert Last Years document]." Appeal at Page 2. However, it is well settled that the FOIA does not require agencies to either create a document that does not already exist in order to satisfy FOIA requests or to answer questions directed at them by requesters. See 10 C.F.R. § 1004.4(d). Instead, the FOIA is limited to requiring the "disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 192 *(1975)*; *Yeager v. Drug Enforcement Administration*, 678 F.2d 315 (D.C. Cir. 1982).

The Appellant also contends that BPA failed to correctly interpret a part of its request. Part 5 of the Appellant's request sought:

All documents that evidence, support, or refer to **the representation** contained in the December 19, 2000, letter of Mr. Stephen R. Oliver to all BPA Pacific Northwest Regional Customers **showing that BPA determined it had sufficient surplus power for the August 1, 2000 to July 31, 200[1] operating year**.

Request at 2 (emphasis supplied). BPA's determination letter responded to this request in the following manner:

No such records exist. Contrary to the characterization in [the Appellant's] request, Mr. Oliver's letter does not in any way represent that BPA had sufficient surplus power for any operating year. It provided information only regarding the available authority for marketing Excess Federal power pursuant to 16 U.S.C. § 832m(b). That being the case, there are no documents that would be responsive to this request.

Determination Letter at 3. The Appeal claims that the Request sought "all documents ?that evidence, support or refer' to **the representations** made in the letter." Appeal at page 3 (emphasis supplied). It is clear that the Request sought those documents that support a specific alleged representation, while the Appeal claims that it sought any documents supporting any representation made in Mr. Oliver's letter. The Appeal is therefore attempting to broaden the scope of the Request. It is well settled that we do not permit FOIA appellants to broaden their requests for information in their appeals. *See, e.g., Alan J. White*, 17 DOE ¶ 80,117 *at* 80,539 (1988); *see also Arthur Scala*, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). Since the Appellant now wishes to obtain information of a broader nature than that which it sought initially, its broadened request is a new request for information. The Appellant should therefore file a new request for information with the BPA in order to obtain the information it is seeking.

III. CONCLUSION

We are remanding a portion of the present Appeal to BPA. On remand, BPA shall: either release all or part of the withheld e-mail messages or issue a new determination letter indicating that releasing this information would not be in the public interest, consult with the Appellant as indicated above, and conduct a further search for the May 2000 Federal Columbia River Power System Biological Opinion and then either release this document to the Appellant or issue a new determination letter justifying its withholding..

It Is Therefore Ordered That:

(1) The Appeal filed by Southern California Edison, Case No. VFA-0674, is hereby granted as specified in

Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 20, 2001

Case No. VFA-0675, 28 DOE ¶ 80,179

July 20, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Myrtle W. Bowers

Date of Filing: June 1, 2001

Case Number: VFA-0675

On June 1, 2001, Myrtle W. Bowers filed an Appeal from a determination the DOE's Albuquerque Operations Office (DOE/AL) issued on February 15, 2001. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Ms. Bowers requested from DOE/AL "radiation exposure information for John C. Bowers," the requester's late husband. Letter from Myrtle Waynick Bowers to Freedom of Information Officer, DOE/AL (Jan. 20, 2001). Mr. Bowers

started to work with AEC [the Atomic Energy Commission, predecessor agency to the DOE] at the Clarksville Modification Center in 1949 and worked there until 1960 then worked there for Mason & Hanger Inc. without interruption of his employment until late summer of 1965 when they moved much of the operation to Pantex [a DOE facility near Amarillo, Texas]. He chose not to move to Amarillo but took other employment in the Clarksville area . . . .

Electronic mail from Gilbert B. Bowers to Steve Goering, OHA (June 25, 2001).

On February 15, 2001, DOE/AL responded to Ms. Bowers, stating that the "Records Management personnel at our Pantex Plant in Amarillo, Texas, searched for exposure information pertaining to your deceased husband but could not locate any." Letter from Carolyn A. Becknell, Freedom of Information Officer, DOE/AL, to Myrtle W. Bowers (Feb. 15, 2001).

In her appeal, Ms. Bowers states,

I believe records should be available either at Pantex or in DOE records storage covering his radiation exposure for four primary reasons.

- First, radiation levels were monitored continuously at the Clarksville Modification Center both during AEC's operation of the Center from 1949

through 1960 and later during MHC's operation of the Center from 1960 through 1965 so overall information on environmental quality should exist.

- Second, while during the initial years under AEC individual dosage and exposure was not measured[,] it was measured and monitored with individual dosimeters during MHC's management of the Center so individual dosage and exposure information should be available for at least the period 1960 through 1965.
- Third, MHC's Chief Counsel did indicate in a message (copy attached) on January 16, 2001 that a container of records from Clarksville had been found at Pantex.
- Fourth, while handling a nuclear warhead [Mr. Bowers] sufferred a work related accident in which part of his index finger was cut off leading to his hospitalization at the base hospital. This occurred before the operations were taken over by MHC and would surely be a matter of record in AEC files for the period from 1949 through 1960.

Appeal at 1.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted the Pantex Plant and found out the following regarding its search. First, Pantex personnel explained to us that when the Clarksville site was closed in 1965, "at least some of the records were transferred to the Medina [Texas] site. When Medina closed the following year, 1966, records were transferred from Medina to the Fort Worth Federal Records Center [FRC] and to Pantex, another Mason & Hanger site." Electronic Mail from Clinton Fitts, Pantex, to Steven Goering, OHA (July 16, 2001);

In response to Ms. Bowers' request, Pantex Records Management personnel consulted an index of Clarksville/Medina records in its possession, and located an "Annual Report of Radiation Exposure for Clarksville for 1964," "a file labeled weekly reports from Clarksville," and 25 boxes "that have some Clarksville records in them." Id.; Electronic Mail from Clinton Fitts, Pantex, to Steven Goering, OHA (June 27, 2001); Electronic Mail from Clinton Fitts, Pantex, to Steven Goering, OHA (June 26, 2001). However, the Annual Report did not contain Mr. Bowers' name. Further, Pantex personnel do not believe the weekly reports or the 25 boxes (which, according to its index of records, contain "policy and procedure type files") would contain exposure records. Electronic Mail from Clinton Fitts, Pantex, to Steven Goering, OHA (June 27, 2001).

Pantex personnel also searched "the BWXT Pantex Inactive Records Database" for information concerning "57 boxes of personnel, medical and payroll records [that] were transferred from Pantex to the Fort Worth FRC by BWXT Records Management last year." Electronic Mail from Clinton Fitts, Pantex, to Steven Goering, OHA (July 16, 2001). (BWXT is the current DOE contractor operating the Pantex facility.) The database contains an "itemized listing of the records transferred." Id. This search revealed no responsive documents. Pantex also contacted the Fort Worth FRC to inquire about any other records it might have with respect to the Clarksville site. "The FRC searches records by agency number, specifically code 434 for the DOE. [The FRC] indicated there were no longer any records pertaining to the Medina/Clarksville site." Id. Finally, DOE/AL accessed a National Archives and Records Adminstration database and determined that the Atlanta Federal Records Center (the center responsible for the region in which Clarksville is located) did not have records identified as being from the Clarksville site. Electronic

Mail from Terry Apodaca, DOE/AL, to Steve Goering, OHA (July 16, 2001).

Based on the above descriptions, it appears clear to us that the Pantex Plant and DOE/AL performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Ms. Bowers sought. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Myrtle W. Bowers, Case Number VFA-0675, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 20, 2001

Case No. VFA-0676

September 26, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Arnold Kramish

Date of Filing: June 7, 2001

Case Number: VFA-0676

Arnold Kramish filed an Appeal from a determination that the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) issued to him on May 24, 2001. In that determination, Albuquerque denied in part a request for information that Mr. Kramish submitted on October 28, 1997, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for a copy of a letter he himself had written "from the AEC Office of Intelligence, on May 4, 1950, addressed to Frederic de Hoffman, at Los Alamos." Albuquerque provided a copy of the letter and its attachment from both of which information was withheld. That information was withheld as the result of the DOE's Document Declassification Division (formerly the Office of Declassification) reviewing the document and determining that it contained classified information. This Appeal, if granted, would require the DOE to release the information that it withheld from the letter and attachment.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In response to Mr. Kramish's request for a copy of his May 4, 1950 letter, Albuquerque provided a copy from which the bulk of the text had been withheld. As justification for withholding the information, Albuquerque asserted that the information was related to nuclear weapon design and therefore had been classified as Restricted Data pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* Such information, according to Albuquerque, is exempt from disclosure to the public under Exemption 3 of the FOIA. The present Appeal seeks the disclosure of the withheld portions of the letter and attachment. In his Appeal, Mr. Kramish contends that materials published subsequent to the date of the letter may contain information similar to that which has been withheld in this case, in which event the withholding of that information should be reconsidered.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by

statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of Security Affairs (now the Director of Security and Emergency Operations) (Director) reviewed those portions of the requested document for which the DOE had claimed exemption from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that the requested letter contains information concerning nuclear weapon research. This type of information has been classified as Restricted Data (RD) under the DOE's current classification guidance. Under the Atomic Energy Act of 1954, RD is one form of classified information, and is therefore exempt from mandatory disclosure under Exemption 3.

Mr. Kramish argues that a number of public documents, including the work of English and Soviet scientists, have disclosed "vast information on the dawn of the thermonuclear weapons era." The DOE has considered this claim carefully. We note that with respect to requests for classified information, the Court of Appeals for the District of Columbia Circuit has held that information must be "officially acknowledged" to have been released to the public in order for such a release to be considered a public disclosure. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). The DOE does not officially acknowledge that the information it continues to withhold has been released. That information is therefore classified under the current classification guidance.

Based on the Director's review, we have determined that the Atomic Energy Act requires the continued withholding of some portions of the letter and attachment under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, nevertheless such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the letter and attachment that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Director has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Because some previously deleted information may now be released, newly redacted versions of the letter and attachment reviewed in this Appeal will be provided to Mr. Kramish under separate cover. Accordingly, Arnold Kramish's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Arnold Kramish on June 7, 2001, Case No. VFA-0676, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of Arnold Kramish's May 4, 1950 letter, together with its attachment, addressed to Frederic de Hoffman at Los Alamos, in which additional information is released, will be provided to Mr. Kramish.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 26, 2001

Case No. VFA-0677, 28 DOE ¶ 80,176

July 3, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Southern California Edison

Date of Filing: June 13, 2001

Case Number: VFA-0677

On June 13, 2001, Southern California Edison (the Appellant) filed an Appeal from a final determination issued on May 14, 2001, by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA responded to a Request for Information filed by the Appellant on March 21, 2001 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination released several responsive documents to the Appellant. This Appeal, if granted, would require BPA to release additional information to the Appellant.

This Appeal arises out of a contract dispute between the Appellant and BPA. On March 21, 2001, the Appellant filed a twelve-part request for information with BPA. On May 14, 2001, BPA issued a determination letter indicating that it was releasing several responsive documents to the Appellant. On June 13, 2001, the Appellant submitted the present Appeal in which it challenges the adequacy of BPA's determinations. (1) Specifically, the Appellant notes that although a substantial amount of information has been redacted from the documents released to it by BPA, the determination letter neither attempts to justify these redactions nor even acknowledges that BPA has withheld any information. (2)

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

The statute requires that after conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

A written determination letter informs the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

In the present case, it is clear that BPA's determination is not adequate. Information has been redacted from responsive documents without any explanation or justification. Accordingly, we are remanding this Appeal to BPA. On remand, BPA must either release the information it redacted or issue a new determination letter which explains and justifies its withholdings in accordance with the requirements set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by Southern California Edison, Case No. VFA-0677, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 3, 2001

(1)The Appeal was based upon two separate determinations regarding two different FOIA requests. Accordingly, we have split the Appeal into two separate Appeals. Those issues arising from the determination letter issued on May 14, 2001, which responded to a request filed on March 21, 2001, will continue to be adjudicated under Case Number VFA-0677. Those issues arising from the determination letter issued on June 4, 2001, which responded to a request filed on April 21, 2001, will be adjudicated under Case Number VFA-0678.

(2)The Appellant also notes, correctly, that the determination letter fails to inform it of its appeal rights as required by 10 C.F.R. § 1004.7. Since the Appellant was able to file a valid appeal in a timely manner, despite this omission, BPA's error was harmless in this instance.

Case No. VFA-0678, 28 DOE ¶ 80,177

July 11, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Southern California Edison

Date of Filing: June 13, 2001

Case Number: VFA-0678

On June 13, 2001, Southern California Edison (the Appellant) filed an Appeal from a final determination issued on June 4, 2001, by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA responded to a Request for Information filed by the Appellant on April 2, 2001, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination released several responsive documents to the Appellant. However, BPA also withheld information under two FOIA exemptions. This Appeal, if granted, would require BPA to release additional information to the Appellant.

This Appeal arises out of a contract dispute between the Appellant and BPA. On April 2, 2001, the Appellant filed a seven-part request for information with BPA. On June 4, 2001, BPA issued a determination letter indicating that it was (1) releasing several responsive documents to the Appellant, and (2) withholding some responsive information under Exemptions 4 and 5. On June 13, 2001, the Appellant submitted the present Appeal in which it contends that BPA's withholdings were improper. (1)

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *See Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemptions 4 and 5 are at issue in the instant case.

The Two Contracts Withheld in Their Entireties

BPA has apparently withheld two contracts in their entireties under Exemption 4, contending that they are "proprietary and confidential" and could cause competitive harm to the parties that contracted with BPA if released. (2) The determination letter fails to explain why BPA concluded that release of these contracts could reasonably be expected to result in competitive harm.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade

secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, BPA's conclusory Exemption 4 determinations do not meet the requirements set forth above. Accordingly, we shall remand that portion of the Appeal pertaining to the two contracts to BPA for a more thorough justification of its withholdings. On remand, BPA must then either release the two contracts it has withheld or issue a new determination letter providing a detailed justification for withholding in accordance with the instructions set forth above. If BPA continues to withhold the two contracts, it must issue a new determination letter showing that it has applied the Exemption 4 analysis set forth above and the results of this analysis.

We note that BPA has apparently withheld the two contracts in their entireties. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, BPA should have also reviewed the withheld material under the standard set forth in 5 U.S.C. § 552(b). However, there is no indication in the record that BPA has done so. On remand, if BPA determines that withholding the contracts is appropriate, it must review them in order to determine whether any portions of the documents could be released without harming the interests protected by Exemption 4 (or any other

applicable FOIA exemption).

Pricing and Quantity Data

BPA has also apparently withheld pricing and quantity data under Exemption 5's confidential commercial information privilege from a number of the documents it released to the Appellant. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall within this exemption: the attorney-client privilege, the attorney work-product privilege and the executive "deliberative process" or "predecisional" privilege. *Coastal States*, 617 F.2d at 862. However, the Supreme Court has recognized that Exemption 5 also incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). Accordingly, "[t]he test under Exemption 5 is whether the documents would be ?routinely' or ? normally' disclosed upon a showing of relevance." *F.T.C. v. Grolier*, 462 U.S. 19, 26 (1983) (citing *Sears*, 421 U.S. at 148-49) Therefore, if a privilege is well recognized by statute or in the case law, it may properly be invoked under Exemption 5. *See United States v. Weber Aircraft Corp.*, 465 U.S. 797, 799-801 (1984).

Among the privileges incorporated by the courts under Exemption 5 is the "confidential commercial information privilege." *See, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979) (*Merrill*) (holding that since disclosure of Domestic Policy Directives would significantly harm the Government's monetary functions or commercial interests, they could properly be withheld under Exemption 5); *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982) (*Land Bank*) (withholding a Government-generated real estate appraisal). The courts have applied this privilege in the FOIA context to prevent the Government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. *Merrill*, 443 U.S. at 356. Exemption 5 therefore "protects the government when it enters the marketplace as an ordinary commercial buyer or seller." *Land Bank*, 671 F.2d at 665 (footnote omitted). However, it is important to note, the protection afforded by this privilege is limited in scope and lasts only as long as necessary to protect the government's commercial interests. *Id.*

In *Merrill*, the Court stated that the confidential commercial information privilege protects information generated in the process of awarding a contract. *Merrill*, 443 U.S. at 360. However, the Court also indicated that the privilege expires upon the awarding of the contract. *Id.* Since the pricing and quantity data withheld by BPA is contained in existing contracts between BPA and purchasers of electricity, it is not protected by the confidential commercial information privilege, which expires upon the awarding of a contract. Accordingly, we are remanding the pricing and quantity data to BPA for review. On remand, BPA must either release the information it redacted or issue a new determination letter which explains and justifies its withholdings in accordance with the requirements set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by Southern California Edison, Case No. VFA-0678, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are

situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 11, 2001

(1)The Appeal originally filed by the Appellant on June 13, 2001, was based upon two separate determinations regarding two different FOIA requests. Those issues arising from the determination letter issued on May 14, 2001, which responded to a request filed on March 21, 2001, were adjudicated under Case Number VFA-0677. Those issues arising from the determination letter issued on June 4, 2001, which responded to a request filed on April 21, 2001, will be adjudicated in the present decision under Case Number VFA- 0678.

(2)BPA also notes that the other parties to these contracts wish that the contracts be treated as exempt from disclosure.

Case No. VFA-0679, 28 DOE ¶ 80,178

July 19, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: June 20, 2001

Case Number: VFA-0679

On June 20, 2001, Barbara Schwarz filed an Appeal from a determination issued to her in response to a request for documents that she submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on June 7, 2001, by the DOE Headquarters FOIA/Privacy Act Division (DOE/HQ). This Appeal, if granted, would require that DOE/HQ grant Ms Schwarz a fee waiver.

I. Background

This Appeal concerns a FOIA request Ms Schwarz originally filed with DOE/HQ on May 17, 2001. The request did not contain either an assurance to pay any fees associated with the request or a request for a waiver of the fees as required by the DOE FOIA Regulations. On May 17, 2001, DOE/HQ sent Ms Schwarz a letter asking if she was willing to provide such an assurance or was requesting a fee waiver. Letter dated May 18, 2001, from Abel Lopez, Director, FOIA/PA Act Division, to Barbara Schwarz (May 18, 2001 Letter). Ms Schwarz responded on May 25, 2001, that she could not pay any fees and was entitled to a fee waiver since "the documents are in the public interest, because they contribute significantly to public understanding of the operations and activities of the government and I have no commercial interest at all with those documents." Letter dated May 25, 2001, from Barbara Schwarz, to Abel Lopez and Sheila Jeter, FOIA/PA Act Division (May 25, 2001 Letter). In response, DOE/HQ denied Ms Schwarz' fee waiver request. Determination Letter dated June 7, 2001, from Abel Lopez, Director, FOIA/PA Act Division, to Barbara Schwarz. She filed this Appeal on June 20, 2001, claiming that other similar requests for fee waivers from different individuals have been granted. Appeal Letter dated June 18, 2001, from Barbara Schwarz to George B. Breznay, Director, Office of Hearings and Appeals (OHA) (Appeal Letter).

II. Analysis

Ms Schwarz submits several reasons to justify her qualification for a fee waiver. First, she claims that she is indigent. Appeal Letter. Ms Schwarz also contends that DOE has approved fee waivers for other requesters in the same or similar circumstances. *Id.* Finally,

Ms Schwarz argues fee waivers were granted to other requesters who did not need the records as urgently as she and for requests that would not significantly contribute to the public's understanding of how the government works.(1) Appeal Letter.

The FOIA generally requires that requesters pay fees for the processing of their requests. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, it provides a two- pronged test for agencies to use in considering whether to waive fees. The two prongs can be summarized as the "public interest prong" and the "commercial interest" prong. *See Ruth Towle Murphy*, 27 DOE ¶ 80,173 (1998). The public interest prong requires an examination of whether disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii). The commercial interest prong asks whether the request is primarily in the commercial interest of the requester. *Id.* The requester bears the burden of satisfying the two-prong test for a fee waiver. *See Roderick Ott*, 26 DOE ¶ 80,187 (1997).

In order to determine whether the requester meets the public interest prong (*i.e.*, whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities), the DOE considers four factors:

(A) The subject of the request: whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure;

(D) The significance of the contribution to public understanding: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). A requester who satisfies the four factors of the public interest prong must then address the second prong by showing that disclosure of the information is not primarily in his or her commercial interest. *See Information Focus on Energy*, 26 DOE ¶ 80,199 (1997). In her May 25, 2001 Letter, Ms Schwarz does not even attempt to provide any justification for the four factors. In denying Ms Schwarz' fee waiver request, the Director of DOE/HQ based this conclusion on Ms Schwarz' alleged failure to provide any justification for any of the four factors. Determination Letter at 1. Given the lack of information in Ms Schwarz' fee waiver request and Appeal, we find that DOE/HQ properly denied Ms Schwarz' request for a fee waiver based on the four factors in 10 C.F.R. § 1004.9(a)(8).(2)

In her Appeal, Ms Schwarz argues that fee waivers were granted other requesters in the same or similar circumstances. Appeal Letter. She offers no support for this contention. All requesters must provide justification relating to the four factors in order to be granted a waiver, a requirement that she has not fulfilled. Finally, Ms Schwarz argues fee waivers were granted to others that did not need the records as urgently as she, and the information they sought would not contribute as significantly to the public's understanding of how the government works. *Id.* However, she has provided no support for this contention, and without more we have no means to consider its validity.

Ms Schwarz argues that despite the fee waiver denial, she is entitled to two hours of free search time and 100 pages of free copies. Only certain categories of requesters are entitled to two hours of free search time and 100 pages of free copies. *See* 10 C.F.R. § 1004.9(b). DOE/HQ made no determination as to Ms Schwarz' category. Therefore, we will remand the Appeal to DOE/HQ to determine Ms Schwarz' category and whether she is entitled to two hours of free search time and 100 pages of free copies.

III. Conclusion

DOE/HQ properly denied Ms Schwarz' request for a fee waiver because the request contained no justification for granting that waiver. However, DOE/HQ did not determine whether Ms Schwarz' category would entitle her to two hours of free search time and 100 pages of free copies. Accordingly, the

Appeal is denied in part and granted in part and remanded to DOE/HQ.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Barbara Schwarz on June 20, 2001, OHA Case Number VFA-0679, is hereby denied in part and granted as set forth in Paragraph (2) below.

(2) This matter is remanded to DOE Headquarters FOIA/Privacy Act Division for further processing in accordance with the instructions provided in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 19, 2001

(1)Ms Schwarz did not offer any evidence to support any of her claims. We note that indigence is not a basis for a waiver of fees under the FOIA. *See Barbara Schwarz,* 28 DOE ¶ 80,126 (2000); *Ely v. United States Postal Service*, 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents.").

(2)Also in the May 25, 2001 Letter, Ms Schwarz requests that her fee waiver requests of November 19, 2000, October 10, 2000, and December 18, 2000, be granted. DOE/HQ responded that two of those requests were previously denied and the third could not be identified. Determination Letter. Ms Schwarz does not address this issue in her Appeal. While her May 25, 2001 Letter could be considered a revival of her arguments raised in those previous requests, we note that those fee waiver requests have already been denied, and we will not address those arguments in this Decision.

Case No. VFA-0680

July 20, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Engineering Services

Date of Filing: June 21, 2001

Case Number: VFA-0680

On June 21, 2001, R.E.V. Engineering Services ("the Firm") filed an Appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004, because the FOIA and Privacy Act Division of the Office of the Executive Secretariat (FOIA Office) has failed to respond to the Firm's FOIA request in a timely fashion or provide an explanation for the delay. In its Appeal, the Firm requests that the FOIA Office release the requested information or explain the delay, and provide a date certain for the release of the requested information.

The Firm's appeal must be dismissed because OHA does not have the jurisdiction to decide matters that relate to whether the agency has responded to a FOIA request in a timely fashion. Section 1004.8(a) of the DOE regulations grants OHA jurisdiction to consider FOIA appeals in the following circumstances:

When the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees.

10 C.F.R. § 1004.8(a). Section 1004.8(a) has been construed to confer jurisdiction on OHA when an Authorizing Official has issued a determination that (1) denies a request for records, (2) states there are no records responsive to the FOIA request, or (3) denies a request for a waiver of fees. Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988). OHA has consistently held that Section 1004.8(a) does not confer jurisdiction when the requester has not received an initial determination from an Authorizing Official, or when an appeal is based on the agency's failure to process a FOIA within the time specified by law. John H. Hnatio, 13 DOE ¶ 80,119 at 80,566 (1985) (dismissing appeal because no determination issued); Tulsa Tribune, 11 DOE ¶ 80,161 at 80,741 (1984) (no

administrative remedy for agency's non-compliance with a timeliness requirement). Accordingly, this Appeal must be dismissed.(1)

It Is Therefore Ordered That:

(1) As set forth above, the Appeal filed by R.E.V. Engineering Services on June 21, 2001, is dismissed .

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 20, 2001

(1)Because it did not receive a timely response to the FOIA request that it submitted, the Firm is considered to have exhausted its administrative remedies. See 10 C.F.R. § 1004.5(d)(4); 5 U.S.C. § 552(a)(6)(c). Accordingly, under the FOIA, the Firm may seek the release of the requested documents in federal district court. 5 U.S.C. § 552(a)(4)(B). However, the agency's failure to comply with the statutory time limit does not result in a waiver of any FOIA exemptions. See Suffolk County, 17 DOE ¶ 80,111 at 80,524 (1988); James E. Davis, 11 DOE ¶ 80,151 at 80,689 (1983).

Case No. VFA-0681, 28 DOE ¶ 80,181

July 23, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:David B. McCoy

Date of Filing:June 27, 2001

Case Number: VFA-0681

This decision addresses the Freedom of Information Act (FOIA) appeal filed by David B. McCoy (Appellant) pursuant to 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. For the reasons set forth below, the appeal will be granted in part and remanded.

I. Background

Appellant filed a FOIA request with the DOE Idaho Operations Office (Idaho) for 23 categories of documents ostensibly related to "Liquid Radioactive Waste Management Systems," and specifically, the Process Equipment Waste Evaporator (PEWE). Appellant also sought a waiver of the fees associated with processing his request, stating that his FOIA request is in the public interest and he has no commercial interest in obtaining the requested documents.

In response, the Idaho FOIA Office (Idaho/FOI) asked Appellant to complete the filing of his FOIA request by providing additional information justifying a fee waiver. Appellant filed a supplement (the supplement), in which Appellant asserted that he is entitled to a fee waiver, because

1. The DOE has not provided adequate information to the public regarding the [Resource Conservation and Recovery Act] Part B Application [for the PEWE].
2. Appellant is an attorney with "prior experience in analyzing nuclear industry documents," and that information "from facilities which [he has] received, analyzed and briefed was disseminated and resulted in . . . legal actions publicized in the press . . . utilized by other public organizations as well as reporters for newspapers . . . [and] posted on the Internet by organizations such as [the Environmental Defense Institute (EDI)] and utilized in press releases by EDI . . . ."
3. Appellant has "no commercial interest in obtaining the FOIA materials but wish[es] only to provide the public with a clear picture of the actions of the government in its ongoing failure to properly permit and inform the public of the serious consequences of ill-made past and present decision making."

Appellant's supplemental letter, April 30, 2001.

The Idaho/FOI accepted as filed Appellant's original FOIA request and the supplement on April 30, 2001. After considering both documents, the Idaho/FOI denied Appellant's request for a fee waiver. In its determination, the Idaho/FOI cited the regulations governing fee waiver requests, 10 C.F.R. § 1004.9(a)(8), which provide that a waiver or reduction of a FOIA fee will be granted where disclosure of

the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. The Idaho/FOI found that Appellant failed to meet the applicable standard, because

1. Although Appellant "specifically linked the requested information to the [PEWE] . . . the link [between the requested information and the operations or activities of the government] is tenuous for some of the documents requested . . . ."
2. Appellant failed to show that the information requested is "meaningfully informative about government operations" and would "be likely to contribute to an increased public understanding of the operations or activities. . . . Additionally, [his] previous requests regarding the PEWE, in which [he had] been granted a fee waiver, are very similar to this request. As such, this additional information . . . will not increase the public's understanding beyond what [has been provided]."
3. Appellant failed to show the ability to extract, synthesize and convey the requested information to a reasonably broad audience of persons interested in the subject matter.
4. Appellant has not shown that the requested information will significantly increase the public's understanding of the operation of the PEWE "beyond what is already being provided to you in a previous request."

Determination letter, May 21, 2001.

In his appeal, Appellant argues on procedural grounds that by failing to respond to his request within the regulatory deadline, the Idaho/FOI wholly "waived its right to deny the fee waiver request." Appellant responds to the substance of Idaho/FOI's determination as follows:

1. "DOE has the burden of proof that the documents requested do not relate to government operations."
2. The requested documents "taken as a whole" relate to serious public health and safety concerns at the Idaho National Engineering and Environmental Laboratories (INEEL). There is a public need for the information "due to the extraordinary veil of secrecy that shrouded" INEEL and the DOE's failure to provide adequate information regarding the PEWE Part B application. Appellant "is not held to laying out in advance with specificity what documents will show in relation to government operations . . . . The nature of the documents can only be shown by the documents themselves." In addition, because, "on far less information than is currently requested," the Idaho/FOI waived the fees associated with processing Appellant's previous FOIA request, the Idaho/FOI is "arbitrarily raising the level of its fee information requirements to avoid disclosure of embarrassing information."
3. Members of the EDI and "[n]umerous persons in Idaho" are interested in the requested information. In addition, as stated in the supplement, Appellant is an environmental attorney whose analysis of nuclear industry documents has been utilized by the press and public interest groups. Appellant submitted copies of seven newspaper articles that either were authored by Appellant or make reference to him and his analysis.
4. Because "nothing has been provided to [Appellant] from his previous FOIA Request regarding the PEWE," the Idaho/FOI unjustifiably relied upon that request as a basis for denying Appellant a fee waiver here.

Appeal letter, June 16, 2001.

II. Applicable Legal Standards

The FOIA generally requires federal agencies to release documents to the public upon request, but provides that, absent a fee waiver, requesters must pay applicable processing fees. 5 U.S.C. § 552(a)(4)(A)(i); 10 C.F.R. § 1004.9(a). The FOIA provides for a reduction or waiver of fees, but only if a requester shows that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to public understanding of the operations or activities of the government (the public interest prong); and (2) is not primarily in the commercial interest of the requester (the commercial

interest prong). 5 U.S.C. § 552(a)(4)(A)(iii).

In order to satisfy the public interest prong, a requester must show each of the following:

(A) The subject of the requested records concerns "the operations or activities of the government" (Factor A);

(B) Disclosure of the requested records is "likely to contribute" to an understanding of government operations or activities (Factor B);

(C) Disclosure of the requested records would contribute to an understanding of the subject by the general public (Factor C); and

(D) Disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities (Factor D).

10 C.F.R. § 1004.9(a)(8)(i).

If a requester satisfies the four factors of the public interest prong, he must then satisfy the commercial interest prong by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Fee waiver denials generally are reviewed de novo. See Tod N. Rockefeller, 27 DOE ¶ 80,167 (1998).

III. Analysis

As initial matters, we note the following. Contrary to Appellant's assertion, the Idaho/FOI issued a timely determination to him. 10 C.F.R. § 1004.5(d)(1) requires that the DOE respond to FOIA requests within 20 working days. Rather than rejecting Appellant's FOIA request as improperly filed, the Idaho/FOI allowed Appellant to amend his FOIA request by filing the supplement. Upon receipt of the supplement, the Idaho/FOI deemed it and the original request as having been filed on April 30, 2001. Thus, the Idaho/FOI's May 21, 2001 response was within the statutory deadline. In any case, the failure of a DOE office to respond to a FOIA request within 20 working days does not cause a of waiver of its ability to render a determination. Rather, it gives to the requester the right of review in district court. 5 U.S.C. § 552(a)(4); 10 C.F.R. § 1004.5(d)(4).

In addition, we emphasize that the FOIA places the burden on the individual to show that he qualifies for a fee waiver. Contrary to Appellant's contention, the burden is not on the government to show that he does not qualify. Finally, the fact that Appellant received fee waivers in the past is not necessarily relevant to determining whether he is entitled to a fee waiver here. As indicated by a reading of Factors A through D of the public interest prong, whether a requester is entitled to a fee waiver depends upon the nature of the specific request at issue.

We now turn to the issue of whether the public interest prong is satisfied in this case. As discussed below, we find that Appellant has satisfied each element of the public interest prong and therefore may be entitled to a fee waiver or partial fee waiver.

We begin with Factor A. Factor A requires that requested records be sought for their informative value with respect to a specifically identifiable government operation or activity. See Van Fripp v. Parks, No. 97-0159, slip op. at 10 (D.D.C. Mar. 16, 2000). Appellant requested 23 categories of documents ostensibly related to the PEWE. We have little trouble concluding that the requested information relates to a specifically identifiable government operation or activity, i.e., the PEWE. Indeed, the Idaho/FOI so found.

The Idaho/FOI further stated, however, that "the link is tenuous for some of the documents requested such as the Denson notegrams." The Idaho/FOI provided no additional detail on that point, perhaps because it

proceeded to find that disclosure of the requested information does not satisfy the other public interest factors and that, therefore, Appellant was not entitled to a fee waiver for any documents. As further discussed below, upon remand, the Idaho/FOI must segregate those documents that satisfy Factor A from those that it believes do not satisfy Factor A and provide an adequate explanation for the distinction.

We next proceed to Factor B. Factor B requires that the requested information be likely to contribute to the public's understanding of specifically identifiable government operations or activities. More specifically, Factor B asks whether the requested information is already in the public domain or is otherwise common knowledge among the general population. Glen Milner, 26 DOE ¶ 80,147 (1996). If the information is already within the public domain or common knowledge, then release to the requester would not likely contribute, or add to, public understanding of the subject matter. Milner, supra.

Appellant contends that the requested information is not already within the public domain; the Idaho/FOI contends that it is. In determining that the requested information does not satisfy Factor B, the Idaho/FOI found that the subject FOIA request is "very similar" to Appellant's "previous requests." Thus, reasoned the Idaho/FOI, the "additional information [Appellant is] requesting will not increase the public's understanding beyond what is already being provided to [him in response to previous requests]."

It may be true that the duplicative release of information that has already been released to the Appellant, and thereby placed in the public domain, will not contribute or add to the public's understanding of that information. This reasoning withstands scrutiny, however, only if Appellant indeed received documents responsive to his previous similar requests. The Appellant has not received documents responsive to his previous similar requests. OHA telephone conversation with Appellant, July 13, 2001. The Idaho/FOI confirmed that it has not produced documents responsive to the previous similar requests, as it is in the process of searching for information relative to those requests. OHA telephone conversation with Idaho/FOI, July 16, 2001. Whether and to what extent it will actually produce documents to Appellant will depend upon the nature of the documents discovered. The Idaho/FOI acknowledged that certain documents may fall within a FOIA exemption, which would protect them from disclosure.(1) Id. Because the Idaho/FOI has not released the documents responsive to Appellant's previous requests, those documents are not already within the public domain. We therefore find that disclosure of the documents requested here would satisfy Factor B.

Factor C asks whether disclosure of the requested material would contribute to the understanding of the subject matter by the public, meaning a "reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." See Judicial Watch, Inc. v. United States Dep't of Justice, 122 F. Supp. 2d 13, 18 (D.D.C. 2000) (Judicial Watch). Thus, the requester must have the ability and intention to disseminate the requested information to the public, and analyze and explain the information in a manner that will contribute to public understanding of it. See Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 & n.5 (D.C. Cir. 1988).

We find that Appellant satisfies Factor C. As the Idaho/FOI acknowledged, Appellant is knowledgeable on issues related to environmental law and the nuclear industry. The newspaper articles Appellant submitted, which either were authored by him or cite his work, demonstrate his ability to explain and analyze technical information, establish his contacts with press organizations and public interest groups, confirm his history of publicizing information, and evidence his ability and intention to disseminate the requested information at issue in this case. See Landmark v. Internal Revenue Serv., Civ. No. 97-1474, slip op. at 4 (D.D.C. 1997) (as discussed in Judicial Watch, supra, 122 F. Supp. 2d at 19) (finding past newspaper articles authored by non-journalist plaintiff demonstrated ability to disseminate requested information); Government Accountability Project, 25 DOE ¶ 80,203 (1996) (finding past ability to obtain media coverage and interest newspapers on certain issues demonstrated ability to disseminate requested information); Knolls Action Project, 25 DOE ¶ 80,148 (1995) (finding record of involvement with published articles demonstrated ability to disseminate requested information). In addition, the newspaper articles, which relate to environmental law and the nuclear industry, evidence that there exists a reasonably broad audience of persons who would be interested in information relating to the PEWE. Based

upon the foregoing, we find that Appellant has the ability and intention to explain, analyze and disseminate the requested information to a reasonably broad audience of interested persons.

In order to satisfy Factor D, disclosure of requested information must be likely to contribute *significantly* to the public understanding of government operations or activities. Put another way, the public understanding of the subject matter after disclosure, as compared to the level of public understanding prior to disclosure, must be likely to be enhanced by the disclosure to a significant extent. Glen Milner, 26 DOE ¶ 80,147 (1996).

Appellant contends that because there is little, if any, information regarding the PEWE within the public domain, disclosure of the requested information would enhance public understanding of the subject matter to a significant extent. As with Factor B, the Idaho/FOI contends that disclosure of the information would not enhance public understanding of the subject matter "beyond what is already being provided to [Appellant] in a previous request[s]." The Idaho/FOI's argument fails, however, for the same reason it fails with regard to Factor B. Appellant has not received documents responsive to the referenced previous requests, and, indeed, the Idaho/FOI has produced none. Thus, the information allegedly similar to the subject FOIA request is not already within the public domain. We therefore find that release of the requested documents would satisfy Factor D.

Based upon the foregoing, we find that disclosure of the requested documents is in the public interest. However, because the Idaho/FOI did not reach the issue of whether Appellant satisfies the commercial interest prong test set forth in the FOIA, we cannot review that finding here. Therefore, we will remand this matter to the Idaho/FOI for a further determination. Upon remand, the Idaho/FOI must specifically identify those documents which it found do not satisfy Factor A and provide an adequate explanation for that finding. For the remainder of the documents that do satisfy Factor A, the Idaho/FOI must proceed to analyze whether Appellant satisfies the commercial interest prong and therefore may be entitled to a fee waiver as to those documents. If, prior to issuing its determination in this matter, the Idaho/FOI releases documents responsive to Appellant's previous FOIA requests, the Idaho/FOI may provide an adequate explanation as to why disclosure of the information requested in this case does not satisfy Factors B or D. In that circumstance, the Idaho/FOI would not need to proceed to analyze whether Appellant satisfies the commercial interest prong.

It Is Therefore Ordered That:

(1) The appeal filed by David B. McCoy, Case Number VFA-0681, is hereby granted as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the DOE Idaho Operations Office to issue a new determination in accordance with the instructions set forth in this Decision and Order.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 23, 2001

(1) The FOIA provides nine exemptions under which an agency may withhold documents. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b).

Case No. VFA-0682, 28 DOE ¶ 80,183

August 28, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: American Friends Service Committee

Date of Filing: June 28, 2001

Case Number: VFA-0682

This Decision and Order concerns an Appeal that the American Friends Service Committee (hereinafter referred to as the Committee) filed from a determination issued to it by the Department of Energy's (DOE) Oak Ridge, Tennessee Operations Office (Oak Ridge). In this determination, Oak Ridge informed the Committee that it failed to locate documents responsive to two requests for information that the Committee filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Oak Ridge to conduct a further search for responsive materials.

I. Background

In the Committee's November 3, 1999 FOIA request, it sought information concerning "access to and copies of all documentation from both the DOE and Goodyear Atomic Corporation from 1969 to the present which addresses the deposit, presence, transportation and/or impact of radioactive and other materials at the community landfill in Uniontown, Ohio (known as either the 'Industrial Excess Landfill' 'IBL,' 'Kittinger landfill,' and/or 'Kittinger dump'). " The Committee's November 4, 1999 FOIA request sought information concerning "access to and copies of all documentation from 1966 to the present related to the transportation and/or disposal of radioactive materials from the centrifuge plant operated by the Goodyear Atomic Corporation for the federal government located at Wingfoot Lake in Suffield Township in Ohio." On May 23, 2001, Oak Ridge issued a determination letter regarding both FOIA requests. Oak Ridge's determination letter stated that a search had been conducted and no documents responsive to the Committee's requests could be found. See Determination Letter. On June 26, 2001, the Committee filed its present Appeal with the Office of Hearings and Appeals. In the Appeal, the Committee challenges the adequacy of the search conducted by Oak Ridge.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the

government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-95 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979).

One request concerns DOE's radioactive waste management activities at the Goodyear Aerospace facility at Wingfoot Lake. The other request concerns waste shipments to the industrial landfill in Uniontown, Ohio, which is located near Wingfoot Lake. Oak Ridge referred both requests to its Environmental Restoration and Waste Management Organization, which searched all facilities under Oak Ridge's jurisdiction in Piketon, Ohio; Weldon Spring, Missouri; Newport News, Virginia; the Oak Ridge Gaseous Diffusion Plant, Oak Ridge National Laboratory and the Y-12 Weapons plant in Oak Ridge, Tennessee; and the offices of its contractors. Oak Ridge also contacted individuals for background information on the work and record holders for any responsive records.

Oak Ridge was informed that the only DOE work performed at the Wingfoot Lake facility was the centrifuge project from approximately 1980 through 1984. All DOE official agency records on the project were archived according to DOE record managers at Oak Ridge. Oak Ridge employees familiar with this project have indicated that those archived records contain no information regarding the disposal of radioactive material from the Wingfoot Lake facility. August 21, 2001 Memorandum of Telephone Conversation between Amy Rothrock, Oak Ridge, and William Schwartz, Office of Hearings and Appeals. Some classified records from the late 1970's through early 1980's on the centrifuge project at the Wingfoot Lake facility were located in an Oak Ridge classified vault, but they deal only with project development and design, not waste management. See July 31, 2001 e-mail message from Amy Rothrock, Oak Ridge, to Toni Brown, Office of Hearings and Appeals.

Oak Ridge also indicated that Oak Ridge's waste management organization had no separate records of any waste shipments to the Kittinger landfill, such as manifests listing sanitary wastes or radioactive wastes. Any DOE waste from the DOE work at the Wingfoot Lake facility was designated classified waste, according to the DOE site representative assigned to the centrifuge project between 1980 and 1984. All classified waste would have been shipped to the Gaseous Diffusion Plant at Piketon, Ohio, for burial in a DOE classified burial ground, not shipped to a local industrial landfill. Finally, an Oak Ridge official stated that radioactive materials were not used at the Wingfoot Lake facility during the centrifuge project.(1)

Given the facts presented to us, and particularly the representation that no radioactive materials were used in the DOE work performed at Wingfoot Lake, we find that Oak Ridge conducted an adequate search, reasonably calculated to discover documents at Oak Ridge and the Piketon, Ohio facilities that were responsive to the Committee's request. The fact that no responsive documents were located, despite this extensive search, does not render the search inadequate. Consequently, we will deny the Committee's appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the American Friends Service Committee, Case No. VFA-0682, on June 28, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located or in the

District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 28, 2001

(1)We suggest that the Committee contact Goodyear Aerospace directly to obtain the information it seeks regarding work Goodyear may have performed for other entities, or contact other agencies for which the work was performed. The Committee may also want to contact the Nuclear Regulatory Commission (NRC) about any radioactive materials licensing or permitting of the facility for types of work other than the DOE work. The Committee may also want to check the township, county or State public records in Ohio, to see whether the industrial landfill was granted a permit to receive radioactive wastes. Finally, we have been informed that this landfill is an Environmental Protection Agency (EPA) Superfund site. The EPA may have records on any radioactive wastes deposited in the industrial landfill and where they originated from.

Case No. VFA-0684, 28 DOE ¶ 80,182

August 8, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Caron Balkany

Date of Filing: July 10, 2001

Case Number: VFA-0684

This Decision and Order concerns an Appeal that was filed by Caron Balkany from a determination issued to her by the Freedom of Information Officer of the Department of Energy's (DOE) Albuquerque Operations Office (AOO). In this determination, AOO informed Ms. Balkany that it was unable to locate a document that she requested pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Ms. Balkany challenges the adequacy of the search for this document.

In her FOIA request, Ms. Balkany sought access to portions of the 1989 Assessment of Environmental Conditions conducted by the DOE Special Assignment Environmental Team. In its response, AOO informed Ms. Balkany that its Environmental Restoration Division in Albuquerque had searched for this document, but had been unable to locate it. (1) In her Appeal, Ms. Balkany states that she is already in possession of portions of the document, and requests that the DOE conduct a "more thorough[] search" for the requested material. Appeal at 1.

In order to determine whether there was additional information that might assist AOO in locating the requested document, we contacted Ms. Balkany. She informed us that the document was an environmental assessment of the operations of the DOE's Rocky Flats facility, and that she obtained the portions of the document that were in her possession from a reading room located at Rocky Flats. She also stated that the document included the following caption: "DOE/EH-0107." See memorandum of July 31, 2001 telephone conversation between Robert Palmer, OHA Staff Attorney, and Ms. Balkany.

We then relayed this information to AOO. AOO confirmed that it does not have the document Ms. Balkany seeks, but informed us that there is a substantial possibility that the requested document is in the offices of the Assistant Secretary for Environment, Safety and Health (EH) at DOE Headquarters in Washington, D.C. We will therefore refer this matter to EH through the DOE Headquarters FOIA Office so that EH may conduct a search of its facilities.

It Is Therefore Ordered That:

(1) The Appeal filed by Caron Balkany in Case No. VFA-0684 is hereby granted.

(2) This matter is hereby referred to the Freedom of Information and Privacy Group, Office of the Executive Secretariat. The FOI and Privacy Group should take appropriate action to transmit Ms. Balkany's FOIA request to EH. EH should then contact Ms. Balkany directly with the results of its search.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 8, 2001

(1)During its search for this document, AOO contacted Ms. Balkany and asked if she had a more formal title for the document. Ms Balkany replied that she did not. In its determination, AOO invited Ms. Balkany to file another FOIA request if, at a later time, she found more identifying information concerning this document.

Case No. VFA-0685

September 7, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janel Hensley

Date of Filing: August 7, 2001

Case Number: VFA-0685

On August 7, 2001, Janel Hensley filed an Appeal from a determination issued to her on June 19, 2001, by the Richland Operations Office (Richland) of the Department of Energy (DOE). That determination responded to a request for information she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Ms. Hensley asks that Richland conduct an additional search for documents responsive to her request.

I. Background

Ms. Hensley filed a request for information in which she sought the Hanford site radiation exposure, employment and medical records of her deceased father, Mr. Robert Hensley, who worked at the Hanford site. On April 30, 2001, Richland issued a determination which stated that it conducted a search for the requested document and located a summary of Mr. Hensley's radiation exposure records and a copy of his employment records. These documents were provided to Ms. Hensley. In addition, medical records were forwarded to Ms. Hensley from the Hanford Environmental Health Foundation.

On May 13, 2001, Ms. Hensley provided Richland with additional information pertaining to her father's Hanford Site employment and requested that Richland search again for additional radiation exposure and employment records. On June 19, 2001, Richland issued another determination which stated that it conducted a thorough search for the requested documents and located no additional documents responsive to Ms. Hensley's request.

On August 7, 2001, Ms. Hensley filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Ms. Hensley challenges "the adequacy of the records available to search." She states that she believes Richland was diligent in their searches. However, she asks that OHA direct DOE to locate and search additional locations where other records may be stored. *See* Appeal Letter at 1.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Hideca Petroleum Corp.,* 9 DOE ¶

80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Richland to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Ms. Hensley's request might exist. While she believes Richland conducted thorough searches, Ms. Hensley also believes that there must be old records located somewhere else. Upon receiving Ms. Hensley's request for additional information, Richland instituted another search for radiation exposure and employment records at the Pacific Northwest National Laboratory and in the Richland office. Richland stated that it provided the laboratory with the additional information offered by Ms. Hensley, but the laboratory was unable to locate more responsive documents. *See* Record of Telephone Conversation between Dorothy Reilly, Richland, and Kimberly Jenkins-Chapman, OHA (August 20, 2001). Richland also indicated that all Hanford employee and visitor radiation exposure records are maintained solely by the laboratory and have not been shipped to another location for storage. *Id*. It further stated that the radiation exposure records may be tracked at the laboratory by using an employee's name and social security number. The employment records are searched using a database and a card catalogue. *Id*. Based on the foregoing, Richland has convinced us that it has searched all of the areas where Hanford employee radiation exposure and employment records may be found.

Given the facts presented to us, we find that Richland conducted an adequate search which was reasonably calculated to uncover documents responsive to Ms. Hensley's request. Accordingly, Ms. Hensley's Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Janel Hensley, OHA Case No. VFA-0685, on August 7, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 7, 2001

Case No. VFA-0686

September 4, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Northwest Power Alliance

Date of Filing: August 6, 2001

Case Number: VFA-0686

On August 6, 2001, Northwest Power Alliance (the Appellant) filed an Appeal from a final determination issued on June 13, 2001, by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA responded to a five-part Request for Information filed by the Appellant on May 23, 2001, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination indicated that it had only one document that is responsive to the Appellant's request. BPA released this responsive document to the Appellant. This Appeal, if granted, would require BPA to conduct a further search for responsive documents .

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In the present case, the Appellant argues that "BPA's assertions that it has ?no [other] responsive documents' are absurd." Appeal at 1. In support of the contention that additional relevant documents exist, the Appellant makes two claims. The Appellant claims that BPA must have draft copies of an April 26 letter from four Governors to BPA's Acting Administrator. The Appellant further claims that the existence of draft copies of this letter is evidenced by documents that it had previously received from BPA. The appellant has not supported this claim. On at least three occasions, we have requested that the Appellant provide OHA with copies of these documents that purportedly show that BPA has draft copies of the April 26 letter. The Appellant has not complied with these requests. In addition, it is not readily apparent to this office that a recipient of a letter would also have draft copies of that letter. Rather, it would seem to be unlikely. Without access to any evidence upon which this contention is purportedly based, we are unable to give it consideration.

The Appellant also claims that an article that appeared in "the May 4 Seattle Post-Intelligencer" supports its assertion that BPA has failed to locate documents responsive to the FOIA request. We have requested, on at least three occasions, that the Appellant provide us with a copy of this newspaper article. The

Appellant never complied with these requests. Once again, we are unable to consider a contention in the absence of the supporting documentation.

Our review of the determination letter does not reveal any inadequacies in BPA's search for responsive documents. Moreover, we are unable to assign any weight to the specific arguments made by the Appellant, since the Appellant has not cooperated with our attempts to obtain the evidence upon which these claims are based. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on August 6, 2001 by Northwest Power Alliance, Case No. VFA-0678, is hereby denied.

(2) This Appeal is not subject to judicial review, since by failing to cooperate with our administrative review process, Northwest Power Alliance has failed to exhaust its administrative remedies.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 4, 2001

Case No. VFA-0688, 28 DOE ¶ 80,184

August 28, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Nevada Desert Experience

Date of Filing: August 6, 2001

Case Number: VFA-0688

On August 6, 2001, Nevada Desert Experience (Appellant) filed a Motion for Reconsideration (Motion) of a Decision and Order issued to it by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). In that Decision, we denied the Appellant's Appeal regarding its Freedom of Information Act (FOIA) request to the DOE's Oakland Operations Office (Oakland). Nevada Desert Experience, 28 DOE ¶ 80,174 (2001). In its current Motion, the Appellant requests reconsideration based on one additional material fact it is presenting to this Office for the first time.

Background

On February 12, 2001, the Appellant filed a request for information in which it sought "information regarding DOE's activities related to the Vision for 2020 program overseen by the U.S. Space Command." On February 26, 2001, Oakland issued a determination which stated that it conducted a search at Oakland and the Lawrence Livermore National Laboratory (LLNL) and located a document responsive to the Appellant's request. *See* February 26, 2001 Determination Letter. In addition, Oakland referred the Appellant to the LLNL Department of Defense Program website and to two books available through the Air Force. On March 9, 2001, the Appellant wrote to Oakland stating that its determination letter was inadequate. Specifically, the Appellant asserted that Oakland did not appear to have searched DOE-wide for documents as originally requested.

On March 23, 2001, Oakland issued a second determination which stated that it conducted another search at Oakland and at DOE Headquarters and located no additional documents responsive to the Appellant's request. *See* March 23, 2001 Determination Letter. The Appellant responded to this letter on April 14, 2001, again stating its dissatisfaction with Oakland's search for responsive documents. On April 23, 2001, Oakland issued its final determination letter indicating that it conducted two separate and complete searches for documents responsive to the Appellant's request. *See* April 23, 2001 Determination Letter. It further indicated that the Appellant was provided with all documents responsive to its request that were found at the LLNL and that DOE Headquarters located no documents responsive to the request. *Id*. Further, Oakland stated that the searches conducted in response to the Appellant's request were reasonably calculated to uncover all responsive documents.

Id.

On May 22, 2001, the Appellant filed an Appeal with the Office of Hearings and Appeals. In its Appeal, the Appellant challenged the adequacy of the searches conducted by Oakland. Specifically, the Appellant

requested that Oakland conduct a more thorough search for DOE-generated documents. *See* Appeal Letter at 2. We denied the Appeal, stating that Oakland had conducted an adequate search which was reasonably calculated to discover documents responsive to the Appellant's request. *Nevada Desert Experience*, 28 DOE at 80,668.

In its Motion, the Appellant asserts that Oakland has stated that the DOE participated in the Commission to Assess U.S. National Security Space Management & Organization, and that it is therefore difficult to believe that not one DOE document was discovered. Motion for Reconsideration Letter from Sally Light, Executive Director, Nevada Desert Experience, to Kimberly Jenkins-Chapman, Staff Attorney, OHA.

Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *Nathaniel Hendricks*, 25 DOE ¶ 80,173 (1996). In the past, we have looked to the standards contained in OHA's procedural regulations for guidance as to the appropriate substantive standards for use in this type of case. *See Ron Vader*, 23 DOE ¶ 80,183 at 80,704 (1993). Those provisions require a showing of "significantly changed circumstances" be made before such motions are considered. 10 C.F.R. § 1003.35. According to this regulation, "significantly changed circumstances" include the discovery of material facts which were not known at the time of the initial proceeding. 10 C.F.R. § 1003.35(a)(1). The Appellant's Motion provides one material fact which, although the Appellant has previously brought to the DOE's attention, has not been specifically addressed by this Office. Therefore, we have decided to consider this material fact noted by the Appellant in his Motion for Reconsideration.

The Appellant asserts that the DOE participated in the Commission to Assess U.S. National Security Space Management & Organization and provided scientific support for two Air Force books on space activities in the 21st century. Motion for Reconsideration Letter. The Appellant maintains that this first fact indicates that there exist other responsive documents that were not provided to the Appellant. We asked Oakland whether anyone who attended the commission might have notes or other material. Oakland contacted all the Lawrence Livermore National Laboratory participants and reported to us that they did not. Electronic Mail Message from Jack Hug, Attorney-Advisor, Oakland, to William Schwartz, Staff Attorney, OHA, dated August 27, 2001. We do not believe that the information the Appellant seeks exists at DOE. Therefore, we shall deny the Appellant's Motion for Reconsideration.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Nevada Desert Experience, on August 6, 2001, Case Number VFA-0688, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 28, 2001

Case No. VFA-0689

September 17, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Clifford, Lyons & Garde

Case Number: VFA-0689

Date of Filing:August 16, 2001

On August 16, 2001, Clifford, Lyons & Garde filed an Appeal from a final determination that the Yucca Mountain Site Characterization Office (YMSCO) of the Department of Energy (DOE) issued on August 3, 2001. That determination concerned a request for documents submitted by Clifford, Lyons & Garde pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, Yucca Mountain would be required to conduct a further search for responsive documents.

Background

On July 13, 2001, Billie Pirner Garde, on behalf of Clifford, Lyons & Garde, submitted a FOIA request for "[a]ll documents that form the basis for, lead[] up to or that discuss, refer or relate in any way to the October 24, 2000 amendment to Audit Report SNL-ARC-99-013." Request Letter dated July 13, 2001, from Billie Pirner Garde to Diane Quenell, Freedom of Information/Privacy Act Officer, YMSCO (Request Letter). Ms. Garde was specifically interested in documents discussing the purpose behind the October 24, 2000 amendment. *Id.*

Pursuant to the Request Letter, on August 3, 2001, YMSCO issued a determination and produced copies of two memoranda. Determination Letter dated August 3, 2001, from Ms. Quenell to Ms. Garde (Determination Letter). One memorandum was dated January 8, 2001, and was from R.W. Clark to Lake Barrett, Deputy Director, Office of Civilian Radioactive Waste Management. *Id.* This memorandum provides the names of the participants and other details relating to the October 24, 2000 amendment, and also states the circumstances which formed the basis for the preparation of the amendment. *Id.* The second memorandum was dated August 1, 2000, and also discusses the amendment. *Id.*

In response to the Determination Letter from YMSCO, Ms. Garde filed this Appeal, requesting that YMSCO be directed to conduct an additional search, saying the explanation in the memorandum for the creation of the amendment was not credible. Appeal Letter. In support of her Appeal, Ms. Garde contends that YMSCO merely provided copies of documents that had already been produced in response to previous requests, and which Ms. Garde had faxed to YMSCO in connection with the instant request. *Id.* In addition, Ms. Garde protests YMSCO's charge to Clifford, Lyons & Garde of one half-hour of search time, totaling $17.32.

Analysis

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

In response to the Appeal, we contacted YMSCO to determine the scope of the search. Telephone Memoranda dated August 21, 2001 and September 5, 2001. YMSCO informed us it searched numerous times, and in all possible locations, for any and all documents related to the October 24, 2000 amendment. *Id.* YMSCO stated that the most recent search - the search at issue in this Appeal - did not produce any additional responsive documents. *Id.* YMSCO stated that it provided Ms. Garde the two previously produced memoranda, which explain the events leading up to the amendment. *Id.* The memorandum dated January 8, 2001, from R.W. Clark to Lake Barrett specifically discusses the amendment, stating it was issued to correct an error in the original Audit Report. *Id.* The second memorandum, dated August 1, 2000, is referenced in the January 8, 2001 memorandum, and also discusses the October 24, 2000 amendment. *Id*. These memoranda were found in previous searches YMSCO made in conjunction with a whistleblower case Ms. Garde was litigating. *Id.*

Since we find the documents provided to Ms. Garde to be responsive to her request, and YMSCO searched all possible locations, we find the search to be "reasonably calculated to uncover all relevant documents." We attribute no significance to the fact that the two responsive memoranda bore Clifford, Lyons & Garde's fax legend and other markings. YMSCO had originally provided these documents to Ms. Garde in response to previous requests, and Ms. Garde later faxed them to YMSCO in connection with the instant request. The fact that YMSCO did not produce copies without the fax legend does not mean that the search was inadequate. YMSCO is not obligated to produce multiple copies of the same documents. Moreover, the fact that the appellant does not agree with the memoranda does not mean that the search was inadequate or that other responsive documents exist. Accordingly, as indicated above, we find that YMSCO conducted a reasonable search for all existing responsive material.

As to the final issue raised in the Appeal, the one half-hour of search time charged to Clifford, Lyons & Garde, we remand this aspect of the Appeal to YMSCO to explain its rationale for assessing Ms. Garde fees for the searches it performed.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Clifford, Lyons & Garde on August 16, 2001, OHA Case Number VFA-0689, is hereby granted as set forth in paragraph (2) of this Order and denied in all other respects.

(2) This Appeal is remanded to the Yucca Mountain Site Characterization Office so that it may issue a new determination regarding the fees it assessed Billie Pirner Garde regarding her July 13, 2001 Freedom of Information Act request.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 17, 2001

Case No. VFA-0690

October 5, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Government Accountability Project

Date of Filing: August 17, 2001

Case Number: VFA-0690

On August 17, 2001, Government Accountability Project (GAP) filed an Appeal from a determination that the Idaho Operations Office of the Department of Energy (DOE/ID) issued in response to a request for documents that GAP submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. DOE/ID issued the determination on July 9, 2001. This Appeal, if granted, would require that DOE/ID release additional responsive information to GAP or provide a detailed explanation of its reasons for withholding such material.

I. Background

GAP is a non-profit organization that represents whistleblowers in legal matters. The group represents Clinton Jensen, an employee of Bechtel BWXT Idaho, a DOE/ID contractor. Mr. Jensen filed a whistleblower complaint (also called an "employee concern") against his employer. On September 1, 2000, GAP sent a FOIA request to DOE/ID for:

1. Any and all records related to or generated in connection with any and all investigations, inquiries, audits, and/or requests for information regarding allegations made by Mr. Clinton Jensen, an employee of Bechtel BWXT Idaho at the Idaho National Engineering and Environmental Laboratory (INEEL).
2. Any and all personnel, security, human resources, and/or other records retrievable by reference to Mr. Jensen's name, employee number or other unique identifying characteristic, whether in possession or control of the contractor or the government.

Letter from GAP to DOE/ID (September 1, 2000). On July 15, 2001, DOE/ID sent GAP a partial response in which the agency identified a total of 172 responsive documents: 60 were released in full and 112 were partially or entirely withheld under Exemptions 5 and 6. Letter from DOE/ID to GAP (July 15, 2001) (Determination). DOE/ID also explained that its delay in response was due to the volume and complexity of GAP's request, and that a contractor had additional responsive information that had not yet been sent to DOE for processing. DOE/ID forwarded additional documents to the DOE Headquarters FOIA office for review and a release determination. *Id.* Finally, DOE/ID informed GAP that it also withheld "handwritten personal notes of a DOE employee" because the agency did not consider those notes to be agency records. *Id.* at 2. In response, GAP filed this Appeal. Letter from GAP to OHA (August 17, 2001) (Appeal).

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). Nonetheless, DOE regulations provide that the agency should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and if disclosure is in the public interest. 10 C.F.R. § 1004.1. Accordingly, even if a document can properly be withheld under an exemption, we must also consider whether the public interest demands disclosure pursuant to DOE regulations.

A. Agency Records

Under the FOIA, an agency record is a document that (1) is either created or obtained by an agency, and (2) is under agency control at the time of the FOIA request. *Tri-Valley CAREs*, 27 DOE ¶ 80,260 (2000) (*Tri-Valley*) (citing *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and the document was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of National Affairs v. Department of Justice*, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*). In making the "agency records" determination, we look at the totality of circumstances surrounding the creation, maintenance and use of the documents in question. *BNA*, 742 F.2d at 1492-93.

GAP contends that DOE/ID improperly withheld the handwritten personal notes of a DOE employee because of an unfounded decision that the records were not agency records and thus not subject to FOIA. Appeal at 5. GAP alleges that the notes should have been released because their description (notes regarding the investigation of the employee concern) reveals that they are responsive to the FOIA request. *Id.* GAP further states that DOE/ID did not name the author of the notes, where the notes were found, or the agency's criteria for stating that they are not agency records. *Id.* at 5. We agree that DOE/ID did not reveal the author or location of the notes, but find that the agency did state its criteria for deciding that the notes were not agency records. According to the determination letter, the notes were not distributed to anyone--they were retained by the individual who wrote them, and they did not become part of an official DOE file. Determination at 2. *Ethyl Corp. v. U.S. Environmental Protection Agency*, 25 F.23d 1241, 1247 n.3 (4th Cir. 1994) sets forth criteria that the Department of Justice suggests an agency use to determine if personal records responsive to a FOIA request can be considered agency records. We find that DOE/ID properly applied several of these factors, such as the purpose, distribution, and location of the personal records. Determination at 2. Thus, we find that the notes are not agency records and are not subject to disclosure under FOIA.

B. Exemption 5

1. Attorney-Client Privilege

GAP appeals the withholding of the following three documents under the attorney-client privilege of FOIA Exemption 5: Document 158 (Draft Scope of Work); Document 163 (SMC Employee Concern); and Document 167 (Senate Gas Diffusion Plant Testimony). Appeal at 5. The attorney- client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead*); *California Edison*, 28 DOE ¶ 80,173 (2001) (*California Edison*). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254 n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id.* at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to

obtain or provide legal advice. *Fisher v. United States*, 96 S.Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665. GAP has appealed this withholding because it contends that the electronic mail messages appear to be informational communications between several employees. Appeal at 5.

This office examined the three documents in question. Document 158 is a message from one member of a team of employees created to assess the employee concern to two other team members, including an attorney. The employee sent the recipients a draft of the scope of work for a physician to assist the team. It appears that the sender was soliciting advice and opinions from the recipients about the content of the scope of work. In *California Edison*, we held that an e-mail from one employee to a group of colleagues (including a company attorney) was protected by the attorney- client privilege because the author was soliciting legal advice from the attorney as well as comments from the others. *California Edison*, 28 DOE at 80,665. This situation is similar to the facts in *California Edison*. The language of Document 158 invites additional comments, and it is not unreasonable to assume that the author of the document would seek legal advice on this key phase of the assessment team's activities. Thus, we find that portions of Document 158 are covered by the attorney-client privilege of Exemption 5. (1)

Document 163 is an e-mail that one employee sent to several others on the assessment team, including an attorney. The e-mail consists of four sentences, the last three redacted before release. This document is not soliciting legal advice from the attorney, nor was it used to obtain or provide legal advice. It appears to be transmitting and requesting routine information about a prospective meeting. We find that Document 163 is not covered by the attorney-client privilege, and remand this document to DOE/ID for release in its entirety, or for a further explanation of why the material is exempt from disclosure under the FOIA.

Document 167 is an e-mail message that refers to, and contains, an excerpt of the testimony of a physician at a Senate hearing. An assessment team member sent the document to the entire team for their information. However, the attorney on the team replied to the e-mail with an opinion regarding the testimony. Thus, this communication can be considered privileged. We note that DOE/ID properly released the non-exempt portions of the document.

2. The Deliberative Process Privilege

GAP has appealed DOE/ID's use of the deliberative process privilege on two grounds: (1) that DOE has not explained how each document is predecisional and deliberative; and (2) that DOE has failed to explain adequately its inability to segregate non-exempt material in 52 documents labeled "inextricably intertwined." (2) Appeal at 2-3. GAP contends that the agency must correlate the exemptions with passages within each document, rather than make blanket statements that all of the material is inextricably intertwined. *Id.* GAP argues that DOE/ID has violated the FOIA's intent of public disclosure, made it impossible for GAP to appeal the withholding, and may have withheld non-exempt material. *Id.* at 1-4. GAP argues that the FOIA requires DOE to link each document withheld under Exemption 5's deliberative process privilege with an agency decision or policy to which the document contributed. *Id.*

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974) (*Sears*). It is intended to promote frank and independent discussion among those responsible for making

governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

This office has conducted a *de novo* review of a representative sample of the documents at issue, and we conclude that the records contain material that is clearly pre-decisional and deliberative. However, there is a further inquiry required in this case because the issue currently under appeal is whether DOE/ID has provided the necessary information for GAP to understand DOE/ID's basis for withholding material under Exemption 5. We find that, although DOE/ID has described each document adequately, it has not provided GAP with enough information to properly formulate an appeal.

A document must be described with enough specificity to allow the requester (1) to ascertain whether the claimed exemptions reasonably apply to the documents and (2) to formulate a meaningful appeal. *See R.E.V. Eng.*, 28 DOE ¶ 80,116 at 80,543 (2000) (*R.E.V. Eng.*); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995), *citing James L. Schwab*, 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter*, 12 DOE at 80,527.

We find that DOE/ID has adequately described the withheld documents. The agency created a chart with seven columns, namely: document number, item, date, sender, recipient, subject or description, and exemption number or reason. Following are representative descriptions for the documents:

1) Status Report on Performance Assurance Division Review of Employee Concern (TS-PA000-030) (description of a draft memo). All inextricably intertwined.

2) Executive Summary (description of a draft executive summary). All inextricably intertwined.

3) Attachment 2.1. Beryllium in the Workplace (description of a draft paper, author and recipient unknown). All inextricably intertwined.

4) Draft Paper. IH Program Deficiencies. All inextricably intertwined.

Document Index for Items 1 and 2 of FOIA Request 00-123. Thus, DOE/ID has provided GAP with basic information regarding the document date, a brief description of the document, the author, and recipient.

However, a determination must also adequately justify the withholding of a document by explaining briefly how the claimed exemption applies to the document. *Arnold & Porter*, 12 DOE at 80,527; *Paul W. Fox*, 25 DOE at 80,622. DOE/ID withheld 94 of 172 responsive documents under the deliberative process privilege of Exemption 5. 52 of the 94 documents were labeled "all inextricably intertwined," and thus withheld in their entirety. By way of explanation, DOE/ID stated in the determination:

The information that has been withheld under Exemption 5 falls squarely within the deliberative process privilege, attorney client privilege or attorney work product privilege. Where possible, all factual information was segregated from predecisional and deliberative information and released to you. However, some documents containing interviews with personnel, thoughts, opinions, conjecture and supposition were withheld in their entirety due to the fact that this information was so inextricably intertwined with factual information that it was not reasonable or possible to segregate. Where this is the case, it is noted in the Document Index.

Determination at 2.

The paragraphs quoted above do not explain how Exemption 5 applies to the specific documents withheld from GAP. Rather, DOE/ID has restated the applicable law without explaining how that law applies to the withheld information. *See Animal Legal Defense Fund v. Department of Air Force*, 44 F. Supp. 2d 295 (D.D.C. 1999) (stating that the need to describe each withheld document under Exemption 5 is particularly

acute because the deliberative process privilege depends on the document and its role in the administrative process); *Senate of the Commonwealth of Puerto Rico v. Department of Justice*, 823 F.2d 574, 585-86 (D.C. Cir. 1987). *See also R.E.V. Eng.*, 28 DOE ¶ 80,156 (2001). DOE/ID has not explained what role the responsive documents played in the administrative process at issue in GAP's request for information related to its client's whistleblower complaint. For instance, DOE/ID withheld 22 Status Reports in their entirety. However, even though the status reports are adequately described (e.g., "Status Report to DOE/ID Human Resources on Review to Evaluate an Employee Concern," "Status Report to DOE/ID Human Resources on Review to Evaluate Allegations of Unsafe Work Place," "Status Report on Performance Assurance Division Review of Employee Concern"), there is no explanation of the role of each document, or of the role of Status Reports as a category of documents, in the deliberative process surrounding the evaluation of Mr. Jensen's employee concern. Thus, it is difficult for GAP to formulate its appeal. According to *Mead*, the courts do not favor "broad, sweeping generalized claims" of exemption. *Mead,* 566 F.2d at 251. Therefore, we find that DOE/ID has not provided the necessary information for GAP to understand the agency's basis for withholding 112 responsive documents under Exemption 5. On remand, the agency should provide this information to the requester.(3)

C. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). DOE/ID withheld 52 documents under Exemption 5 in their entirety, and determined that any non-exempt material in those documents was "inextricably intertwined" with exempt material and thus not subject to disclosure. Determination at 2.

This office reviewed a sample of the material that was withheld in its entirety, and based on our review, we find that DOE/ID should reconsider the issue of segregability. For example, we found some segregable factual material in Documents 72, 74-76, 77, 80, and 81. It is likely that other responsive documents may contain similar factual material, or other types of material--e.g., tables of contents, lists of tables or figures, and introductory matter--that may not qualify for protection under Exemption 5. *See Radioactive Waste Management Associates*, 28 DOE at 80,621. *Mead* states that non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead*, 566 F.2d at 261. Our review concluded that the responsive documents contain non-exempt material distributed in logically related groupings, such as sentences and paragraphs, that could be released to the requester. We do not believe that release of the selected facts would reveal the deliberative process. *See Radioactive Waste Management Associates,* 28 DOE at 80,620. Accordingly, this portion of the Appeal is remanded to DOE/ID.

D. Public Interest

DOE regulations direct the agency to release responsive, exempt material if the DOE determines such release to be in the public interest. 10 C.F.R. § 1004.1. In applying this regulation, we note that the Department of Justice has indicated that it is its policy to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Department and Agencies, Subject: The Freedom of Information Act (October 4, 1993) at 1-2. We note that DOE/ID made eight discretionary releases to GAP in its release under the Determination Letter. There may be additional information that could also be released to the requester on remand.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by GAP, August 17, 2001, OHA Case Number VFA-0690, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Idaho Operations Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 5, 2001

(1)However, we note that Document 158, although exempt from disclosure under Exemption 5, is a good candidate for discretionary release. In addition, we find that some factual information in the document is reasonably segregable. *See* segregability discussion *infra* Section II.C.

(2)See segregability discussion *infra* Section II.C.

(3)Given the large volume of material, it may be more efficient for DOE/ID (yet still responsive to the requester) to categorize the documents and explain the role of each category of documents in the deliberative process.

Case No. VFA-0691

September 13, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:R.E.V. Engineering Services

Date of Filing:August 23, 2001

Case Number: VFA-0691

This decision addresses the Freedom of Information Act (FOIA) appeal filed by R.E.V. Engineering Services (Appellant) pursuant to 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. For the reasons set forth below, the appeal will be granted in part and remanded.

I. Background

This appeal arises from two FOIA requests that the Appellant filed with the DOE FOI/Privacy Act Division (DOE/FOI) in Washington, D.C. In the first request, dated April 7, 2000 (the April 2000 request), Appellant sought

the agenda, briefing slides, briefing books, presentation notes and handouts from the briefing(s) given Gen. Eugene Habiger at the Rocky Flats Environmental [Technology] Site [(RFETS)] on or about April 6, 2000 [including] information presented to the Gen. about any changes proposed or implemented in security procedures since [he] last visited [RFETS].

In the second request, dated July 23, 2000 (the July 2000 request), Appellant sought

[d]ocuments pertaining to observations, recommendations, changes, additions or deletions to Safeguards and Security practices at [the Rocky Flats Environmental Technology Site (RFETS), the Rocky Flats Field Office (RFFO)] and/or their contractors or subcontractors generated as a result of visits [to the RFETS by Jack Pope and Rich Levernier].

On July 14, 2000, the DOE/FOI issued a determination regarding the April 2000 request, which stated that the Policy, Standards, and Analysis Division in the Headquarters Office of Safeguards and Security had not located any responsive documents. Appellant filed an appeal from that

determination, which challenged the adequacy of the DOE/FOI's search, but in a decision issued on September 1, 2000, the Office of Hearings and Appeals (OHA) upheld the DOE/FOI's determination. See R.E.V. Engineering Services, 28 DOE ¶ 80,109 (2000).

A document relevant to the April 2000 request surfaced, however, in the course of processing the July 2000 request. As explained in its August 7, 2001 determination issued to Appellant regarding the latter request, the DOE/FOI found only one document responsive to the July 2000 request, which was also responsive to the April 2000 request. As explained in the determination, the document includes a one page cover memorandum (the cover memorandum), dated April 3, 2000, from the Director of the Office of

Safeguards and Security to the Leader of the Safeguards and Security Team, that forwards an attached two page memorandum. The attached two page memorandum, dated March 28, 2000, from the Program Manager of Assessment and Integration to the Acting Director of the Field Operations Division, addresses deadly force training at Rocky Flats (the training memorandum). The DOE/FOI released to Appellant the cover memorandum. It withheld the training memorandum based upon Exemptions 2 and 5 of the FOIA, 5 U.S.C. § 552(b)(2) and (5), and its finding that release of the document would not be in the public interest.

On August 23, 2001, Appellant filed an appeal from the DOE/FOI's determination. Appellant challenges the adequacy of the DOE/FOI's search for documents and contends that the DOE/FOI improperly invoked Exemptions 2 and 5.

II. Analysis

A. Adequacy of the Search

Unless requested material falls within one of nine statutory exemptions, the FOIA generally requires a federal agency to release its records to the public upon request. 5 U.S.C. § 552(a); 10 C.F.R. § 1004.3. Putting aside for a moment the exemptions at issue here, we first address the adequacy of the DOE/FOI's search in responding to Appellant's July 2000 FOIA request.(1) For the reasons set forth below, we find that the DOE/FOI's search is incomplete and are therefore remanding this case for a final determination regarding all located responsive documents.

The FOIA requires an agency to "conduct a search reasonably calculated to uncover all relevant documents." Truitt v. United States Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990). A reasonably calculated search must be thorough and conscientious, but not absolutely exhaustive. Miller v. United States Dep't of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). "The issue is not whether any further responsive documents might conceivably exist but rather whether the government search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In responding to the July 2000 request, the DOE/FOI referred it to the DOE Headquarters Office of Safeguards and Security (OSS) Field Operations Division (FOD). OHA telephone conversations with DOE/FOI, Aug. 28, 29, 2001. We find that the FOD was the proper referent division, because at all times relevant to the processing of the July 2000 request, Mr. Levernier worked for the OSS, and Mr. Pope worked with him as a contractor employee. OHA telephone correspondence from DOE/FOI, Aug. 29, 30, 2001.

Appellant asserts that the RFFO should have been searched, as well. Appeal letter at 3. Indeed, upon receipt of the July 2000 request, the DOE/FOI contacted the RFFO, FOIA Division (RFFO/FOI). OHA telephone conversation with DOE/FOI and DOE/RFFO, Aug. 28, 2001. However, as the RFFO/FOI explained to the DOE/FOI in July 2000, and to OHA in the course of reviewing this appeal, all records regarding the results of Messrs. Levernier and Pope's security visit to the RFFO would be located at OSS Headquarters, where the records were generated. OHA telephone conversation with DOE/RFFO, Aug. 28, 2001. Messrs. Levernier and Pope did not write or leave relevant records at the RFFO, nor did they send relevant records to that office. Therefore, documents pertaining to the results of their visit would not be located there. Id.

Although we find that the FOD is the proper referent division, we are unable to ascertain whether it conducted an adequate search for documents, because apparently, the FOD's search is incomplete. While this appeal was pending, the FOD informed us that it located an additional document that may be relevant to the July 2000 request, but which has not yet been reviewed under the FOIA. OHA telephone conversation with FOD, Aug. 31, 2001. We will therefore remand this case to the DOE/FOI to complete its search and issue a revised, final determination regarding all documents responsive to the July 2000 request. Appellant may file a new appeal from that determination, if he deems it necessary at that time.

B. Exemption 2

We now turn to the issue of whether the FOD properly withheld the training memorandum. As stated above, the FOIA sets forth 9 exemptions pursuant to which an agency may withhold responsive documents. The DOE/FOI withheld the training memorandum pursuant to Exemptions 2 and 5. We begin our analysis with Exemption 2.

Exemption 2 permits an agency to withhold from public disclosure material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Following the U.S. Supreme Court's decision United States Dep't of Air Force v. Rose, 425 U.S. 352 (1976) (Rose), the courts have interpreted Exemption 2 to include two distinct categories of information. The first category, referred to as "low 2," includes information relating to internal matters of an agency in which the public could not reasonably be expected to have an interest, for example, information concerning lunch hours or parking regulations. Rose, 425 U.S. at 369-70. The second category, referred to as "high 2," encompasses information the disclosure of which "may risk circumvention of agency regulation." 425 U.S. at 369. As stated in Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (Crooker), high 2 information may be withheld if (i) it is used for predominantly internal purposes, and (ii) disclosure significantly risks circumvention of agency regulations or statutes (the Crooker test).

We have reviewed the training memorandum and find that its entire substantive text (the text) constitutes a high 2 record shielded from disclosure. The text addresses perceived training deficiencies at RFFO and is obviously an internal document not intended for dissemination outside the DOE. In addition, because the text discusses training deficiencies with regard to safeguards and security at a radioactive waste facility, its disclosure "might help outsiders to circumvent regulations or standards." Caplan v. Bureau of Alcohol, Tobacco and Firearms, 587 F.2d 544, 546 (2d Cir. 1978) (Caplan) (finding agency pamphlet that focused on techniques for apprehending those engaged in illegal behavior protected by Exemption 2). Release of the text might increase the risk of physical harm to agency officials or the public and significantly assist those engaged in nefarious activity by acquainting them with intimate details of the security strategies employed by the DOE. This raises the possibility of circumvention of those strategies. See Caplan, 586 F.2d at 547. As such, the text falls within the protective purview of Exemption 2.

However, we find that the heading of the training memorandum, including the issuing DOE facility, date, names of the author and addressee, and subject line (collectively, "the heading information") are not protected as low 2 or high 2 information. Indeed, the DOE/FOI appears to agree; although it withheld the entire training memorandum, it revealed the heading information to Appellant in its determination letter. Unless the heading information is protected under Exemption 5, that portion of the training memorandum, which is segregable from the text, must be released to Appellant.

C. Exemption 5

We therefore proceed to examine whether the withheld information is protected under Exemption 5. We find that it is not.

Exemption 5 of the FOIA shields from disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 incorporates the executive "deliberative process" privilege, which permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (Coastal States). The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. Coastal States, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. Renegotiation Board v. Grumman Aircraft Eng. Corp., 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and- take of the consultative process, Coastal States, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker, National Wildlife Federation v. United States Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988).

Information protected by the deliberative process privilege may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," Coastal States, 617 F.2d at 854, but does not include factual information, unless the factual material is "inextricably intertwined" with exempt material, Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). In some circumstances, "disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted under [Exemption 5]." Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (Mead Data).

As an initial matter, we agree with the DOE/FOI that the text of the training memorandum is protected under Exemption 5, as well as Exemption 2.(2) The text is predecisional, because it was prepared and gathered by an OSS manager in order to assist the Acting Director of the FOD in arriving at a decision regarding security training procedures. The text is also deliberative, as it represents the opinion of the OSS manager regarding security at the RFFO and sets forth a recommendation regarding security training.

On the other hand, the heading information is purely factual information that is not inextricably intertwined with exempt material, i.e., the text. The heading information does not hint at a predecisional or deliberative process and sits distinctly apart from the text. Thus, we find that it is not protected under the FOIA and must be released to Appellant on remand.

D. Public Interest

DOE regulations, 10 C.F.R. § 1004.1, provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the text of the training memorandum is protected under Exemptions 2 and 5, we must finally address whether disclosure of the text is in the public interest. We find that it is not.

As discussed above, the text directly relates to security issues and training deficiencies at RFFO, a radioactive waste facility. We agree with the DOE/FOI that disclosure of the text would "reveal certain vulnerabilities" at RFFO, which "could be exploited by those who might seek to harm the facility." DOE/FOI determination letter at 3. An administrative manual that sets forth or clarifies an agency's substantive or procedural regulations might be subject to the disclosure requirements, since there may be a "legitimate public interest in having those affected guide their conduct in conformance with the agency's understanding." Caplan, 587 F.2d at 548. On the other hand, revelation of the text, "which does not purport to set forth [the agency's] interpretation of substantive or procedural law, but rather focuses on the techniques for apprehending those who engaged in breaking the law, would not promote lawful behavior; it would only facilitate law evasion." Id. Clearly, such a result is not in the public interest.

III. Conclusion

Based upon the foregoing, we are unable to make a determination as to whether the DOE/FOI conducted an adequate search in response to the July 2000 request. We are therefore remanding this matter to the DOE/FOI so that it may complete its search for documents and issue a new determination. With respect to the document that the DOE/FOI has located, the training memorandum, we find that the text is protected

under the FOIA and DOE regulations. We further find, however, that the heading information in the training memorandum must be released.

It Is Therefore Ordered That:

(1) The appeal filed by R.E.V. Engineering Services on August 23, 2001, OHA Case No. VFA- 0691 is hereby granted as set forth in Paragraph (2) below, and denied in all other respects.

(2) This matter is hereby remanded to the FOI/Privacy Act Division of the Department of Energy Headquarters in Washington, D.C. for further action in accordance with the directions set forth in this decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 13, 2001

(1)As discussed above, we have previously determined that the DOE/FOI's search for documents in response to Appellant's April 2000 request was adequate, so we will not revisit that issue here.

(2)Our analysis of the text with regard to the FOIA could end with the finding that it is protected under Exemption 2, but we analyze it also under Exemption 5 for the purpose of distinguishing it from the heading information.

Case No. VFA-0694

October 22, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chinese for Affirmative Action

Date of Filing: September 7, 2001

Case Number: VFA-0694

This Decision and Order concerns an Appeal that was filed by Chinese for Affirmative Action (CAA) from a determination issued to it by the Department of Energy's (DOE) Albuquerque Operations Office (AOO). In this determination, AOO denied in part CAA's request for a waiver of fees with regard to a request that it filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its Appeal, CAA asks that we grant its request for a fee waiver in full.

The FOIA requires that federal agencies generally release documents to the public upon request. The Act also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

I. Background

In its FOIA request, CAA sought access to records from the Los Alamos and Sandia National Laboratories relating to alleged civil rights abuses and the possible use of racial profiling in monitoring and investigating American scientists and other national laboratory employees. CAA requested that all fees associated with the processing of the request be waived. Because CAA's request did not adequately address the DOE's criteria for granting fee waivers, in a letter dated June 26, 2001, AOO informed the requester of those criteria, and asked CAA for further information in support of its request.

After reviewing CAA's response to its June 26 letter, AOO granted CAA a partial fee waiver. While finding that CAA had no commercial interest in the requested records and that its justification satisfied the DOE waiver criteria in part, AOO concluded that CAA had not shown "present public interest [or its] ability to disseminate the requested records . . . ." AOO determination at 1. The ability

to disseminate the requested material to the public is a critical factor in determining whether a requester should be granted a waiver of fees. *Larson v. CIA*, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). *See also Ruth Towle Murphy*, 27 DOE ¶ 80, 173.

On September 7, 2001, CAA appealed AOO's determination. In its Appeal, CAA included additional information about the public interest in disclosure and about its ability to disseminate the material sought. This information appears to satisfy the deficiencies set forth in AOO's initial determination, and that

Office has requested that we remand this matter to it for the issuance of new fee waiver determination. Because AOO has not yet had an opportunity to consider CAA's request in light of this new information, we will remand this matter to it. Upon remand, AOO should review CAA's Appeal and promptly issue a revised fee waiver determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Chinese for Affirmative Action on September 7, 2001, is hereby granted as set forth in paragraph (2) below.

(2) This matter is remanded to AOO for the issuance of a new fee waiver determination.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 22, 2001

Case No. VFA-0695

October 24, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: IBEW Local 125

Date of Filing: September 10, 2001

Case Number: VFA-0695

On September 10, 2001, IBEW Local 125 (IBEW) filed an Appeal from a determination issued to it on August 23, 2001, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE). In that determination, BPA denied in part IBEW's request for information filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release portions of the requested information which it initially withheld.

The FOIA generally requires that documents held by federal agencies be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 2, 2001, IBEW filed a FOIA request with BPA seeking the following documents relating to the Shelton-Kitsap Project, Contract 5279:

1. Copies of bids received in response to the Shelton-Kitsap Project, including the names of the bidders, and amounts of the bids.
2. Copies of the labor classifications and pay rates of employees that will be working on the project.

On August 23, 2001, BPA issued a determination letter releasing responsive information to the Appellant. BPA, however, withheld the amounts of the bids proposed by the unsuccessful offerors to the Shelton-Kitsap Project under the FOIA Exemption 4. 5 U.S.C. § 552 (b) (4); 10 C.F.R. § 1004.10(b)(4). Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that are] privileged or confidential." *Id.* Relying upon Exemption 4, BPA stated that disclosure of the above information would "provide competitors with a picture of competitors' future pricing strategies." *See* August 23, 2001 Determination Letter at 1. BPA also stated that the public interest in disclosing pricing information concerning unawarded contracts is slight.

On September 10, 2001, IBEW filed the present Appeal challenging BPA's determination. Specifically, IBEW challenges the withholding of the "final dollar amount of bids that unsuccessful contractors bid on

projects at BPA." *See* Appeal Letter. IBEW requests that the withheld information be released.

II. Analysis

Exemption 4 permits an agency to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be exempt from mandatory disclosure under Exemption 4, a document supplied to the DOE on a non-voluntary basis must meet the following criteria: the document must contain either (A) "trade secrets" or (B) information which is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). *Cf*. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (information voluntarily provided to the Government is confidential under Exemption 4 if it is the kind of information that the provider would not customarily make available to the public). Commercial or financial information is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770.

We will analyze this case under the *National Parks* test described above because the contractors submitted the information in the proposals on a non-voluntary basis, as this information is required by the Department of Energy Acquisition Regulations. *See* 48 C.F.R. § 970.5204-22 (1992).

Under Exemption 4, BPA withheld the amounts of the bids proposed by the unsuccessful offerors. Clearly, this information is "commercial" within the meaning of Exemption 4 since the material was developed and submitted specifically for the purpose of acquiring a contract. *See Tri-City Herald*, 16 DOE ¶ 80,114 (1987). In addition, the information was obtained from a "person," as required by Exemption 4, since corporations are deemed "persons" for purposes of Exemption 4. *See Ronson Management Corp.*, 19 DOE ¶ 80,117 (1989). In the context of this case, a claim of privilege is highly unlikely; however, this material may possibly be "confidential," as defined in *National Parks*.

As stated above, for information to be found to be "confidential," it must meet one of two tests: its release would either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. *National Parks*, 498 F.2d at 770. Release of this information is not likely to impair the Government's ability to obtain necessary information of this type in the future because, as stated above, it is required to be submitted under the Department of Energy Acquisition Regulations. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release will substantially harm the submitter's competitive position.

We note that BPA had already awarded the contract at the time that IBEW made its FOIA request. As a result, this case is in a posture different from those where a FOIA request is filed prior to the award of the contract or grant. *John T. O'Rourke & Associates*, 12 DOE ¶ 80,149 at 80,704 (1985). After an award has been made, the justification for withholding contract proposal information requires more thorough scrutiny because the information's release can no longer affect the bidder's competitive position with respect to the bidding process of that particular proposal. *Id.* Nevertheless, after reviewing the withheld material, we find that release of the bids would cause the submitters of the bids a substantial competitive injury. In its determination letter, BPA concluded that "since the bids are based upon fairly simple components, release of the bid amounts may provide competitors with a picture of competitors' future pricing strategies." It further concluded that unsuccessful offerors who bid on government contracts have a higher expectation of confidentiality in this type of information than successful offerors. We agree with these findings. They are consistent with our rulings in other Exemption 4 cases stating that release of material disclosing the terms of an unsuccessful bid can assist competitors to make their offers more attractive in the future by allowing them to predict their competitors' future pricing behavior. *See Siebe Norton*, 11 DOE ¶ 80,113 (1993);

Storage Technology Corp., 17 DOE ¶ 80,105 (1988). We therefore find that the bid amounts sought by the Appellant are confidential and were properly withheld from the proposals. Accordingly, the Appeal filed by IBEW will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by IBEW Local 125 on September 10, 2001, Case Number VFA-0695, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 24, 2001

Case No. VFA-0697

October 18, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Roger K. Heusser

Date of Filing: September 18, 2001

Case Number: VFA-0697

This Decision and Order concerns an Appeal that Roger K. Heusser filed from a determination issued to him by the Department of Energy's (DOE) Office of Nuclear and National Security Information (NNS). In this determination, NNS informed Mr. Heusser that it did not locate any documents that were responsive to a request for information that he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require NNS to conduct a further search for responsive materials.

I. Background

Mr. Heusser filed a request in which he sought information concerning "the well-known memorandum from the Office of Intelligence Officials indicating that I should be prevented 'at all costs' from testifying to Congress on nuclear nonproliferation in the 1991 timeframe."

On August 22, 2001, NNS issued a determination which stated that a search was conducted at the Office of Nuclear and National Security Information, the Office of Safeguards and Security, and the Office of Intelligence, and found no documents responsive to Mr. Heusser's request. See Determination Letter. On September 18, 2001, Mr. Heusser filed the present Appeal with the Office of Hearings and Appeals. In his Appeal, Mr. Heusser challenges the adequacy of the search conducted by NNS.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076

(D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-95 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at NNS to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mr. Heusser's request might exist. We were informed of the following. Upon receiving Mr. Heusser's request for information, the NNS official instituted a search of its file room, contacted individuals on staff in the file room and conducted a search of its data base. This search yielded no responsive documents. NNS also informed us that it contacted the Office of Safeguards and Security, and the Office of Intelligence, which also searched their files and found no responsive documents. *See* September 27, 2001 Memorandum of Telephone Conversation between Richard Lyons, NNS, and Toni Brown, Paralegal Specialist, Office of Hearings and Appeals. Based on the description of the search that these offices performed, we are convinced that the search was adequate.

In his Appeal, Mr. Heusser indicated that the Office of Security Affairs should also have been searched. We contacted that office, which conducted a search at our request and located no responsive documents. *See* October 12, 2001 Memorandum of Telephone Conversation between Geralyn Praskievicz, Office of Security Affairs, and Toni Brown, OHA. Mr. Heusser also indicated that the document he seeks may have been included among the documents provided to the House Subcommittee on Oversight and Investigations under subpoena (April 1991). He contends that these documents have been returned to the Department of Energy and that the document he requests may still be located with these other materials. We have inquired about those subponeaed records with the Office of NNS and the Office of Security Affairs, and neither office has any of those purportedly subpoenaed documents or is even aware of their existence.

Based on the foregoing, we find no reason to believe that additional responsive documents subject to the FOIA exist at the DOE. We conclude that the search of the Headquarters Office of Nuclear and National Security Information, Office of Safeguards and Security, Office of Intelligence and the Office of Security Affairs for responsive documents was adequate. Accordingly, Mr. Heusser's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Roger K. Heusser, Case No. VFA-0697, on September 18, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 18, 2001

Case No. VFA-0698

October 18, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Nevada Desert Experience

Date of Filing: September 19, 2001

Case Number: VFA-0698

On September 19, 2001, Nevada Desert Experience (the Appellant) filed an Appeal from a final determination issued on August 9, 2001, by the Department of Energy's Albuquerque Operations Office (Albuquerque). In that determination, Albuquerque responded to a Request for Information the Appellant filed on April 14, 2001, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. Albuquerque's determination indicated that it had not located any documents responsive to the Appellant's request. This Appeal, if granted, would require Albuquerque to conduct a further search for responsive documents .

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

In the present case, the Appellant filed a FOIA request with Albuquerque seeking:

[Information] concerning the activities of the Los Alamos National Laboratory (LANL) and Sandia National Lab (SNL) that are related to the U.S. Space Command's 'Vision for 2020' program. Specifically, I am requesting all documents with information dating from January 1, 1990, to the present.

April 14, 2001 FOIA Request. On August 9, 2001, Albuquerque issued a determination letter indicating that its searches had failed to locate any documents that were responsive to the Appellant's April 14, 2001 request. The determination letter indicated that the search had included Los Alamos National Laboratory's (LANL) Nonproliferation and International Security Division, LANL's Structural Inorganic Chemistry Group, LANL's Department of Defense Program Office and Sandia National Laboratory's technical databases. On September 19, 2001, the present Appeal was filed. According to the Appellant:

The 'Vision for 2020' is a program that involves all three of DOE's nuclear weapons labs -this is known by virtue of the program's acknowledgments page contained in the Executive Summary of its 'Long Range

Plan.' Therefore, it is reasonable to expect that DOE documents do exist related to its activities with this program.

Appeal. In support of this contention, the Appellant has submitted a portion of the Vision for 2020 program's Long Range Plan entitled "Acknowledgments." This section of the report states:

USSPACECOM and its components wish to thank all the people and organizations whose invaluable assistance broadened our collective perspective, provided a continual reality check and helped us develop a plan to begin shaping our national space capabilities and forces to meet the challenges of the next century.

The remainder of this section of the Long Range Plan consists solely of a list of over 80 individuals and organizations. Three DOE laboratories were included in this list. However, that inclusion does not indicate that DOE's "involvement" with the program was anything more than peripheral. The fact that the Long Range Plan's authors wished to thank these departmental elements for assistance in broadening its horizons, providing a reality check and helping in the development of the plan does not indicate that these departmental elements' involvement with the Vision for 2020 program was significant or substantial. Moreover, it does not suggest that DOE has kept any records concerning the Vision for 2020 program. (1)

Our review of the record does not reveal any inadequacies in Albuquerque's search for responsive documents. Moreover, we do not assign any weight to the specific argument made by the Appellant. Accordingly, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 19, 2001, by Nevada Desert Experience, Case No. VFA-0698, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 18, 2001

(1)Moreover, even if DOE was substantially involved in this program at one time, the acknowledgment does not suggest that such information was generated subsequent to December 31, 1989. Since the Appellant limited its request to information generated on or after January 1, 1990, any information generated prior to that date would not be responsive to its request.

Case No. VFA-0699

October 31, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chinese for Affirmative Action

Date of Filing: September 27, 2001

Case Number: VFA-0699

On September 27, 2001, Chinese for Affirmative Action (CAA) filed an Appeal from a determination that the Oakland Operations Office of the Department of Energy (DOE/OAK) issued in response to a request for documents that CAA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. DOE/OAK issued the determination on August 27, 2001. This Appeal, if granted, would require that DOE/OAK release additional responsive information to CAA or provide a detailed explanation of its reasons for withholding such material.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a June 7, 2001 letter to DOE/OAK, CAA requested 19 specific categories of documents related to "possible civil rights abuses and the use of racial profiling in the country's national laboratories." Letter from Monica C. Hayde, Steinhart & Falconer, LLP, to Roseann Pelzner-Goodwin, DOE/OAK (June 7, 2001).

On August 27, 2001, DOE/OAK sent CAA a partial response to the request,(1) along with an unidentified number of documents. In its response, DOE/OAK cited FOIA Exemption 6 in withholding from the requester "names, addresses, e-mails, telephone numbers, birth dates, and identifiers of lab, contractors, DOE employees, complainants, and witnesses." Letter from Martin J. Domagala, Deputy Manager, DOE/OAK, to Monica C. Hyde, Steinhart and Falconer (August 27, 2001).

DOE/OAK also indicated that it was withholding information under FOIA Exemption 5. *Id. at 2-3.* Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this section exempts "those documents, and only those documents, normally privileged in the civil discovery context." *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Among these privileges are the executive or deliberative process privilege, the attorney work-

product privilege, and the attorney-client privilege. DOE/OAK cited all three privileges as a basis for withholding information.

CAA appeals what it calls DOE/OAK's "blanket assertions of FOIA exemptions 5 and 6 and its failure to correlate the proffered exemptions to any particular record or category of requests." Appeal at 1. Therefore, particularly relevant to our analysis below is the fact that DOE/OAK's determination did not (1) identify, with respect to the particular documents or portions of documents withheld from CAA, the FOIA exemption that was the basis for the withholding; or (2) describe the documents that were withheld in their entirety from the requester.

II. Analysis

It is well established that a FOIA determination must have reasonably specific justifications for withholding all or parts of documents responsive to a FOIA request. *See, e.g., Wisconsin Project on Nuclear Arms Control,* 22 DOE ¶ 80,109 at 80,517 (1992); *Davis Wright & Jones*, 19 DOE ¶ 80,104 at 80,509 (1989) (and cases cited therein). Conclusory and generalized claims by agency officials that material is exempt from disclosure are not acceptable. We strongly adhere to this position so that the requesting party may prepare an adequate appeal, and so that this Office may make an effective review of the initial agency determination. Thus, "when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,528 (1984). A sufficiently detailed explanation should indicate the issues addressed in a document and the functions of the document which render it exempt from mandatory disclosure. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980); *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1975); *Arnold & Porter,* 12 DOE at 80,528. These requirements are reflected in the DOE regulations, which require that a response to a properly submitted FOIA request include:

a statement of the reason for the denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, and to the extent consistent with the purposes of the exemption, a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

10 C.F.R. § 1004.7(b)(1)(i).

In past cases, we have held that a general discussion of the policies underlying the various exemptions that fails to explain why the specific documents withheld fall within the claimed exemption is inadequate. *Arnold & Porter,* 12 DOE at 80,528 (and cases cited therein). Instead, we have required the agency to support its application of an exemption providing the type of justification required by *Arnold & Porter*.

Moreover, a document withheld in its entirety must be described with enough specificity to allow the requester (1) to ascertain whether the claimed exemptions reasonably apply to the document and (2) to formulate a meaningful appeal. *See R.E.V. Eng.*, 28 DOE ¶ 80,116 at 80,543 (2000) (*R.E.V. Eng.*); *Paul W. Fox,* 25 DOE ¶ 80,150 at 80,622 (1995), *citing James L. Schwab,* 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE at 80,527. Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter,* 12 DOE at 80,527.

In this case we find that DOE/OAK's response to CAA's request does not permit either an adequate appeal or an effective review of its basis for withholding documents. Specifically, the response fails to identify which FOIA exemption (Exemption 5 or Exemption 6) applies to each document or portion of document withheld. Nor does the response identify or describe those documents that were withheld from the requester in their entirety.(2)

For these reasons, we will remand this matter to DOE/OAK so that it may issue a new determination to CAA. This new determination should, for each document or portion of document withheld from the requester, identify the FOIA exemption (and with respect to Exemption 5, the particular privilege) that is the basis for the withholding. In addition, any document that is withheld in its entirety should be identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter*, 12 DOE at 80,527.(3)

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by CAA on September 27, 2001, OHA Case Number VFA-0699, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Oakland Operations Office of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 31, 2001

(1)DOE/OAK stated that it was also forwarding the request to DOE Headquarters, which would respond directly to CAA.

(2)CAA requests that DOE/OAK "be directed to produce responsive documents from ***each*** of the three laboratories under its umbrella, rather than just one or two laboratories." Appeal at 4. However, until DOE/OAK has identified all responsive documents to the Appellant, it would be premature to consider any argument by CAA regarding the adequacy of DOE/OAK's search for documents.

(3)Though CAA complains of DOE/OAK's failure to correlate specific responsive documents to the enumerated categories of its request, we find no basis in the relevant statute or regulations that would require DOE/OAK to do so. Nonetheless, we do agree with CAA that this could facilitate its understanding of the reasons for the withholding of information.

Case No. VFA-0700

November 8, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Barbara Schwarz

Date of Filing: October 12, 2001

Case Number: VFA-0700

Barbara Schwarz filed this Appeal from a determination issued by the Department of Energy (DOE) Headquarters Freedom of Information and Privacy Act Division (FOI/PA). This determination responded to a request for information that Schwarz filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. As explained below, we will deny this appeal.

I. Background

Schwarz sent a letter to FOI/PA, dated September 8, 2001, requesting certain records. The portion of the request relevant to this Appeal is as follows:

Any records pertaining to Scientology. With records I mean: letters, cards, e-mail, fax transmittal sheets, articles, expertises [*sic*], notes, phone notes, referrals, invoices, copies of folders, computer printouts, subpoenas, declarations, certificates, FOIA/PA search documents, litigation records, logs, FOIA/PA work sheets, appeal processing records, inquiries, drafts, memoranda, form papers and any other form of records. Search in all offices, all records systems, search from present time as far back as possible.

FOIA/PA responded to Schwarz by asserting that the request was improper because she had not reasonably described the records sought. FOIA/PA stated that

The topic is too broad and could require a search of all the files of the Department. Such a search of all offices would be unreasonably burdensome to the Department. Please narrow your search by providing specific information such as a time period, titles of documents, offices to be searched and any other information that would identify the type of records that you are requesting....

If you need assistance to formulate your request to comply with the FOIA, please contact ... this office.... You should request this assistance by October 8, 2001. If [we] do not hear from you or receive a reformulated request by this date, no further agency action will be taken.

Schwarz declined the request to reformulate her request and instead filed the present Appeal. In the Appeal, she asks "how come that DOE did not consider my request for records on L. Ron Hubbard too broad and burdensome?" She claims that "all I gave you was [Hubbard's] name and you were able to retrieve records on him," and wonders "what is the problem searching under Scientology and to inform me what you found?"

II. Analysis

The FOIA specifies that a request for records must "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). A description "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978), quoting the legislative history of the 1974 FOIA amendments, H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271. In other words, the critical inquiry in determining whether a description is reasonable is "whether the agency is able to determine precisely what records [are] being requested." *Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982).

The rationale for this rule is that the "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives & Research Center v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). In addition, it prevents requesters from conducting "fishing expeditions" through agency files. *Immanuel v. Secretary of the Treasury*, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995), *affirmed*, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision).

Thus, a request that would require an agency to search through twenty-three years of unindexed files is unreasonably burdensome, while a search for a dated memorandum in agency files that are indexed chronologically is not. *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 892 (D.C. Cir. 1995). Similarly, a request for "all records" relating to a particular subject is unreasonably broad and does not enable the agency to find the records within a reasonable amount of time. *Massachusetts v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989).

Schwarz has clearly stated in her request letter that she seeks all records relating to Scientology, without any limitation. She has defined her request as encompassing all types of documents from all offices of the DOE, and all dates. A search for responsive documents would, therefore, require a review of all records in the possession of the Department of Energy.

Moreover, Schwarz is incorrect in claiming that her present request is essentially similar to her previous request for records pertaining to L. Ron Hubbard. In the previous request, dated June 18, 1999, she asked for records "as to L. Ron Hubbard and proposed energy programs and environmental programs and nuclear counterintelligence programs proposed by him." This request included information that enabled personnel conducting the search to determine precisely what records were being requested. In contrast, Schwarz's present request for all records pertaining to Scientology does not enable employees to locate responsive records with a reasonable amount of effort. FOIA/PA offered to work with Schwarz to formulate the request more precisely. Schwarz, however, declined the offer. Consequently, FOIA/PA cannot complete a search for responsive records with a reasonable amount of effort.

III. Conclusion

The FOIA requires a requester to reasonably describe the records sought. Case law defines a reasonable request as one that enables the agency to locate the requested records with a reasonable amount of effort. We find on appeal that Schwarz's request for all records pertaining to a subject is not a reasonable description, in that the DOE cannot conduct a search for all responsive records with a reasonable amount of effort. We will therefore deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Schwarz, Case No. VFA-0700, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place

of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 8, 2001

VFA-0701

November 5, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Schwarz

Date of Filing: October 5, 2001

Case Number: VFA-0701

On October 5, 2001, Ms Schwarz filed an Appeal from a final determination that the Office of Inspector General (OIG) of the Department of Energy (DOE) issued on September 26, 2001. That determination concerned a request for information Ms Schwarz submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, OIG would be required to conduct a further search for responsive documents.

Background

On May 10, 2001, Ms Schwarz submitted a FOIA request to the DOE for a large number of documents, including "[t]he correspondence logs of [OIG] of June 1999 till the present time as well as the subpoena logs, FOIA/PA requests and administrative appeal logs, as well as their offices litigation logs." Determination Letter dated September 26, 2001 from Judith D. Gibson, Assistant Inspector General for Resource Management, OIG, to Barbara Schwarz. In addition, she requested "[c]opies of all requests for waiver of fees that DOE granted to other requesters . . . for the last five years" and "any records pertaining to [her] request for the [OIG] investigation dated July 20, 2000, and the [OIG] records, and the OHA records of the three conversations with OIG to this request." *Id.* at 2. Finally, Ms Schwarz requested "search records that [OIG] generated to retrieve" the information responsive to this request, and search declarations detailing the search for the requested records. *Id.* at 2. Responding solely for its own office, OIG released its FOIA log to Ms Schwarz and stated that it did not have any other responsive information. *Id.*

In her Appeal, Ms Schwarz claimed that OIG released only pages one and three of the FOIA log and withheld all other logs, including correspondence and investigation logs. Appeal Letter dated October 2, 2001, from Barbara Schwarz to the Office of Hearings and Appeals (OHA). Further, OIG did not release any copies of requests for fee waivers. *Id.* Additionally, she argues that OIG withheld records pertaining to her request for an investigation dated July 20, 2000. *Id.* (1) Finally, Ms Schwarz contends that OIG did not include the search records or declarations she had requested relevant to her request. *Id.* She alleges that these failures, along with OIG's late response to her request, are evidence of bad faith, failure to search or an inadequate search and a cover up of existing records. *Id.*

Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must

"conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

We contacted OIG to determine what type of search was conducted. OIG indicated that it does not keep logs or lists of correspondence, subpoenas, administrative appeals, or litigation. Memorandum of Telephone Conversation dated October 22, 2001, between Janet R. H. Fishman, Attorney-Examiner, OHA, and Caroline Nielsen, OIG. It did release to Ms Schwarz its list of FOIA and Privacy Act requests that had been filed in during the period June 1999 through early September 2001, as Ms Schwarz had requested. However, she only received page one and three of the list. OIG has indicated that it will resend the entire list. *Id.* In response to Ms Schwarz' claims that OIG withheld its investigation logs, we note that she did not request investigation logs in her initial request. A requester cannot broaden the request on Appeal. *Barbara Schwarz*, 28 DOE ¶ 80,140 (2001), *citing F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991). Since investigation logs were not included in the original request, we find this part of Ms Schwarz' Appeal to be groundless. If Ms Schwarz wants the investigation logs from OIG, she will need to submit a request under the FOIA asking for that information.

Ms Schwarz claims that OIG did not release any previously granted fee waiver requests to her. The OIG informed us that it does not consider any fee waiver requests and, therefore, does not have copies of any fee waivers granted to other requesters. Any such requests would be handled by the Freedom of Information and Privacy Act office of the DOE. *Id.* Ms Schwarz next states that OIG withheld records pertaining to her request for investigation dated July 20, 2000. She bases this claim on a letter OHA sent to her stating that OIG considered her request carefully. We have determined that OHA and OIG did not correspond regarding her request but rather communicated by telephone without producing any documentation of the communication. Further, notwithstanding the fact that OIG asserted that it considered Ms Schwarz's request carefully, it provided no documentation of its consideration, and there is nothing to indicate that it generated any records pertaining to her July 20, 2000 request. OIG also searched its files of requests for investigation that have been denied and did not discover anything responsive to Ms Schwarz' request. In our contact with OIG, we determined that OIG has no records responsive to this portion of Ms Schwarz' request. October 22, 2001 Telephone Memorandum.

Finally, Ms Schwarz alleges that OIG withheld its search declaration and records pertaining to this request. In requesting the search records and declaration, Ms Schwarz is asking for information that did not exist at the time of her request, if it exists at all. The FOIA applies to information in existence at the time of the request. It cannot be used to create information or request future information. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2). We note that no search records or declaration were created in response to this request, nor are such documents routinely created in response to any request. Further, as we have explained to Ms Schwarz before, neither the FOIA nor the relevant DOE regulations requires the agency to supply a "search certificate" or a detailed description of the search that was conducted. The FOIA simply requires the agency to notify the requester of the determination, the reasons for the determination, and of the requester's right to appeal. *Barbara Schwarz*, 28 DOE ¶ 80,175 (2001); *see Barbara Schwarz*, 27 DOE ¶ 80,245 at 80,872 (1999). Moreover, we believe that requiring a "search declaration" at the administrative stage of review is unnecessary and unproductive. We will therefore deny this portion of the appeal.

Conclusion

OIG followed procedures reasonably calculated to uncover the information Ms Schwarz requested in her FOIA request. The fact that OIG did not uncover the information requested does not indicate that the search was inadequate. For the foregoing reasons, we will deny Ms Schwarz' appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Ms Schwarz on October 5, 2001, Case No. VFA-0701, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 5, 2001

Case No. VFA-0703

January 15, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Caron Balkany

Date of Filing:October 31, 2001

Case Number: VFA-0703

On October 31, 2001, Caron Balkany appealed a determination issued by the Office of the Inspector General (OIG) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In her appeal, Ms. Balkany contends that the OIG had failed to conduct an adequate search for documents responsive to FOIA requests that she had filed. For the reasons detailed below, we find that the OIG conducted an adequate search for responsive documents and deny Ms. Balkany's appeal.(1)

I. BACKGROUND

Ms. Balkany filed FOIA requests with DOE seeking documents concerning a Tiger Team or other DOE investigation of allegations of illegal nighttime burning at the Rocky Flats Nuclear Weapons Plant in 1989. Additionally, Ms. Balkany sought a copy of a letter from Michael J. Norton, U.S. Attorney for the District of Colorado, to Deputy Secretary Henson Moore dated December 1, 1989.

On September 20, 2001, the OIG issued a determination in response to Ms. Balkany's FOIA requests. With its determination, the OIG provided documents containing information concerning the OIG's involvement in a joint agency task force investigation of allegations of environmental crimes at Rocky Flats as well as information on illegal burning at Rocky Flats and the Tiger Team

investigation.(2) The OIG also indicated that it had been unable to locate a copy of the letter from Mr. Norton to Deputy Secretary Moore. Ms. Balkany then filed an appeal in which she challenged the adequacy of the OIG search based on her belief that the OIG would have located a copy of the DOE Tiger Team report and a copy of the letter from Mr. Norton to Deputy Secretary Moore if its search had been adequate.

II. ANALYSIS

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999). In these cases we have held that "[t]he issue is not whether any further responsive documents

might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing this appeal, we contacted Ruby Isla, an attorney-advisor with the OIG, to obtain information concerning the search that had been conducted for documents responsive to Ms. Balkany's FOIA requests by the OIG's Office of Investigations (Investigations), Office of Inspections (Inspections) and Office of Audit Services (Audit). See Electronic Mail Messages from Ruby Isla to Linda Lazarus, Staff Attorney, Office of Hearings and Appeals (various dates). Ms. Isla informed us that Audit had no involvement with the 1989 investigation and, as a result, did not search for responsive records. Ms. Isla also told us that Investigations found documents that were responsive to Ms. Balkany's FOIA request by conducting a manual search of older files as well as a database search of the investigative records that are contained in the Energy Inspector General Project Tracking system (EIGPT). (3) Ms. Isla also explained that Inspections had been unable to locate responsive records after conducting a manual review of lists of issued reports and other documentation.(4)

Based on these facts, we find that the OIG conducted a search that was reasonably calculated to discover documents responsive to Ms. Balkany's FOIA requests. As detailed above, Investigations and Inspections both conducted a manual search for responsive documents and Investigations also conducted a database search. As a result of these searches, the OIG found and produced responsive documents. We disagree with Ms. Balkany's position that the OIG would have found the Tiger Team report or the letter from Mr. Norton to Deputy Secretary Moore if a reasonable search had been conducted. Ms. Isla informed us that the Tiger Team is not a component of the OIG and the OIG did not conduct or participate in the Tiger Team investigations. Id. Moreover, we have no indication that the OIG ever had a copy of the letter from Mr. Norton to Deputy Secretary Moore.

It Is Therefore Ordered That:

(1) As set forth above, the appeal filed by Caron Balkany on October 31, 2001, is dismissed in part and denied in part.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 15, 2002

(1)Ms. Balkany also appealed a related determination issued by the FOIA and Privacy Act Division of the Office of the Executive Secretariat (FOIA Office) on the grounds that the FOIA Office had failed to conduct an adequate search because it had only requested that the OIG and the Office of Environment, Safety and Health search for documents responsive to her FOIA request. However, this portion of Ms.

Balkany's appeal has become moot because the FOIA Office issued a new determination in which it indicated that two additional DOE offices had been asked to search for responsive documents.

(2)Although the OIG found documents that mentioned the Tiger Team investigation conducted by DOE, it was unable to locate the DOE Tiger Team report itself.

(3)Ms. Isla informed us that Investigations searched the following fields – case titles, complaint/allegation information, executive briefs, and names (including names of subjects, suspects, witnesses, and sources of information) – in the EIGPT database for the following terms: Tiger Team; Building 771; Incinerator; Night Time Burning; Norton; Michael Norton; Henson Moore; Moore; Rocky Flats Nuclear Weapons Plant; Rocky Flats; and RFNW. Id.

(4)Ms. Isla also indicated that Inspections did not search the EIGPT database for responsive documents because Ms. Balkany was seeking information about an investigation that occurred in 1989, and Inspections did not start entering documents into the EIGPT database until 1996 or 1997. Id.

Case No. VFA-0704

December 5, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martin Becker

Date of Filing: October 29, 2001

Case Number: VFA-0704

On October 29, 2001, Martin Becker filed an Appeal from a determination that the Savannah River Operations Office (SROO) of the Department of Energy (DOE) issued to him on October 18, 2001. In that determination, SROO denied in part a request for information that Mr. Becker filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require SROO to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In his FOIA request, Mr. Becker asked for any documents reflecting any notice of election to extend any Westinghouse Savannah River Company (WSRC) or affiliate lease of the premise at Centennial Corporate Center. In response to this request, SROO provided Mr. Becker a document entitled "Third Amendment to Lease." This document relates to the leasing of Centennial Corporate Center by Westinghouse Safety Management Solutions LLC (WSMS), a subcontractor of WSRC. SROO withheld portions of the document pertaining to the amount of space leased and the rent charged pursuant to Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). In its determination, SROO concluded that the document was voluntarily provided to the DOE by WSMS, and that under the relevant case law, such information is confidential, and can therefore be withheld under this Exemption, if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C.. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*).

In his Appeal, Mr. Becker contests the adequacy of SROO's search for responsive documents. Specifically, he argues that SROO should also have provided copies of the original lease and the first and second amendments thereto. Moreover, Mr. Becker argues that SROO used an improper standard in determining that portions of the document were exempt from mandatory disclosure under Exemption 4. He contends that because the lease is the property of the federal government, it was not submitted by WSMS voluntarily, and that the *Critical Mass* standard is therefore inapplicable. He requests that SROO be instructed to provide all of the lease documents without redaction.

II. Analysis

We have been informed by SROO that it recently received the original lease and the first two amendments from WSRS, and that these documents will be released to Mr. Becker shortly, after any appropriate redactions are made. Therefore, the only remaining issue before us is whether SROO used the proper standard in making its Exemption 4 determination regarding the third amendment to the lease. For the reasons that follow, we find that it did not.

Exemption 4 shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government is "confidential" for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government's ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770; *Critical Mass*. In *Critical Mass*, however, the court limited the *National Parks* test to information that was submitted to the government on an involuntary basis, while holding that information that is provided to an agency voluntarily is considered "confidential" if "it is of a kind that the provider would not customarily make available to the public." *Critical Mass*, 975 F.2d at 879.

In a previous Decision issued to Mr. Becker, we found that the lease documents in question here were subject to the Contractor Records provision, 10 C.F.R. § 1004.3(e)(1), of the DOE regulations implementing the FOIA. That regulation states that

[w]hen a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, the DOE will make available to the public such records that are in the possession of the government or the contractor, unless the records are exempt from public disclosure under [the FOIA].

We concluded that WSRC's contract with the DOE contained a provision that all documents acquired or generated by the contractor in the performance of its duties, with certain specified exceptions, shall be deemed the property of the DOE, that this provision was applicable to WSMS as a subcontractor, and that the lease documents did not fall under any of the specified exceptions. We therefore found that the documents were the property of the DOE, and we instructed SROO to review them and release any non-exempt material to Mr. Becker. *Martin Becker*, Case No. VFA- 0666 (September 7, 2001).

In previous cases involving the procurement process, we have consistently found information submitted in conjunction with a government contract to have been supplied on an involuntary basis. *See, e.g., City of Federal Way*, 27 DOE ¶ 80,191 (1999). In this case, WSMS entered into a contract that provided that certain documents, including the lease and its amendments, are the property of the DOE. Therefore, the contractor could not appropriately refuse a government request to produce these documents, and the lease and its amendments were consequently submitted on an involuntary basis. We will therefore remand this matter to SROO. On remand, SROO should apply the *National Parks* test in determining whether portions of the lease and its three amendments are exempt from mandatory disclosure.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Martin Becker, Case No. VFA-0704, on October 29, 2001, is hereby granted as set forth in paragraph (2) below.

(2) This matter is hereby remanded to the Savannah River Operations Office for the issuance of a new determination in accordance with the instructions set forth in the Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 5, 2001

Case No. VFA-0705

December 13, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Collier Shannon Scott

Date of Filing: November 7, 2001

Case Number: VFA-0705

On November 7, 2002, Ms. Christina B. Parascandola, on behalf of Collier Shannon Scott (Collier), filed an Appeal from a determination issued to her on September 25, 2001, by the Freedom of Information and Privacy Act Division (FOIA Division) of the Department of Energy (DOE). That determination responded to a request for information Collier filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Collier challenges the adequacy of the FOIA Division's search for documents responsive to its request.

I. Background

On April 23, 2001, Collier filed a request for information in which it sought "copies of any and all documents and records in the custody or control of the United States Department of Energy ("DOE"), relating to DOE's decision to include facilities in Bayonne, New Jersey, and Huntington, West Virginia, on the covered facility list published in the Federal Register on January 17, 2001." DOE listed both facilities as "atomic weapons employers." On August 6, 2001, the FOIA Division issued a determination which stated that responsive documents were located in the Office of Environment, Safety and Health (EH). It released 60 pages of responsive documents in their entirety. On May 8, 2001, Collier amended its request to include "the names, birth dates, hiring dates, termination dates, job titles, and social security numbers of employees [at the facilities in question] who were issued dosimetry badges or film badges." See Determination Letter. On September 25, 2001, the FOIA Division issued a second determination which stated that EH conducted a search for responsive documents pursuant to Collier's amended request. Id. The determination further stated that EH was determined to be the office most reasonably expected to possess responsive documents. However, the search of EH's files located no responsive documents. Id.

On November 7, 2001, Collier filed the present Appeal with the Office of Hearings and Appeals. In its Appeal, Collier challenges the adequacy of the search initiated by the FOIA Division. Specifically, Collier contends that (1) DOE unlawfully limited its search to only one office within the agency; (2) DOE should have consulted with its historian and DOE employees responsible for carrying out the agency's responsibilities under the Energy Employees Occupational Illness Compensation Program Act; and (3) DOE's denial was conclusory and did not indicate how DOE's search was reasonably calculated to uncover all relevant documents. Collier asks the Office of Hearings and Appeals (OHA) to direct the FOIA Division to initiate another search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In its Appeal, Collier asserts that DOE “unlawfully limited its search to only one office within the agency.” See Appeal Letter at 3. More specifically, it argues that DOE did not search any of the appropriate field operations offices where DOE may have handled matters related to either or both of the Bayonne and Huntington facilities. Further, it argues that the Office of Worker Advocacy (OWA) was not searched. In addition to these arguments, Collier contends that DOE should have consulted with a historian and DOE employees “reasonably expected to know the location of the information we requested.” Id. at 5. Finally, Collier asserts that the FOIA Division provided no justification for its denial, but “merely provided a conclusory statement that its search of EH files produced no responsive documents.” Id. In addition, it argues that the FOIA Division did not describe any of the measures it took to ensure that its search was reasonably calculated to uncover all relevant documents.

In reviewing the present Appeal, we contacted officials in the FOIA Division to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Collier’s request might exist. Upon receiving Collier’s request for information, the FOIA Division referred the request to EH and the office of Environmental Management (EM) which both instituted a search of their files. Specifically, EH searched its records and located responsive documents that were contained in a records collection under EM’s jurisdiction. Those documents were released to Collier in their entirety. When Collier amended its request to include personal information relating to employees at the Bayonne and Huntington facilities, EH stated that it conducted another search and found no responsive documents. Officials at EH have informed us that EH and EM would be the only offices that would possibly contain the information requested by the Appellant. They further informed us that the personal information sought by Collier in its amended request would not be the type of information maintained by the government, but would be kept by the private companies involved. See December 4, 2001 Record of Telephone Conversation between Roger Anders, EH, and Kimberly Jenkins-Chapman, OHA.

While the searches conducted in this case were not exhaustive, they were not required to be. The FOIA Division actively fulfilled its duties by contacting the offices most likely to possess documents responsive to Collier’s request, and was not obligated to consult with a historian and other DOE employees as suggested by the Appellant. Nor was the FOIA Division required to describe its search in detail as part of its determination letter. The fact that the search did not uncover documents that Collier believes may be in the possession of DOE does not mean that the search was inadequate. In addition, the FOIA Division has informed us that contrary to the Appellant’s assertion, OWA was searched for responsive documents. According to officials in EH, OWA is a part of EH. When EH conducted its initial search for responsive documents, the documents that were located belonged to OWA. They further explained that OWA extracted that particular set of files from EM. Finally, EH was correct in stating that the personal information sought by Collier would not be the type of information maintained by the government.

Personnel records of contractor employees, as in this case, are generally not the property of the DOE and therefore are not releasable by DOE.

Given the facts presented to us, we find that the FOIA Division initiated an adequate search which was reasonably calculated to discover documents responsive to Collier's request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Collier Shannon Scott, OHA Case No. VFA-0705, on November 7, 2001, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 13, 2001

Case No. VFA-0707

January 16, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David B. McCoy

Date of Filing: November 21, 2001

Case Number: VFA-0707

On November 21, 2001, David B. McCoy filed an appeal from a determination issued to him in response to five requests for documents that he submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on October 22, 2001, by the DOE Idaho Operations Office (Idaho). This Appeal if granted, would require that Idaho perform an additional search for the information Mr. McCoy requested.

I. Background

This Appeal concerns five FOIA requests that Mr. McCoy submitted to Idaho.(1) Mr. McCoy's first request, Idaho Request No. 01-041 (Request No. 41), concerns the Liquid Effluent Treatment and Disposal Facility (LET&D). The second request, Idaho Request No. 01-043 (Request No. 43), concerns Idaho National Engineering and Environmental Laboratory (INEEL). The third request, Idaho Request No. 01-044 (Request No. 44), concerns the Processing Equipment Waste Evaporator (PEWE). The fourth request, Idaho Request No. 01-045 (Request No. 45), concerns the High Level Liquid Waste Evaporator (HLLWE). The fifth and final request, Idaho Request No. 01-048 (Request No. 48), concerns a number of different facilities.

Idaho determined that a number of the items Mr. McCoy was requesting did not exist or could not be located. Idaho indicated that Item No. 41-1a, a letter from the Environmental Protection Agency (EPA) to the Hanford site, should be requested from the EPA, because it originated with that agency. For two Items, Item Nos. 41-5 and 41-27, Idaho found that each request is too broad, because the number of documents responsive to his request is extensive.

Mr. McCoy challenges the adequacy of Idaho's search for some documents. He bases these challenges on other documents that indicate certain tests were to be conducted and reports generated. He also bases these challenges on other documents that indicate the facilities were being operated under consent order or permits for which an application is needed. Further, he protests the withholding of the letter from EPA to Hanford , claiming that the FOIA requires release of documents held by federal agencies. He is also challenging the requirement to clarify the two Items that Idaho believes are too broad.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must

"conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

In order to determine what type of search was conducted, we contacted Idaho. Idaho indicated that the DOE conducted a computer search of its database and also a hand search of its hard files. The contractor conducted a similar search. Neither the DOE nor the contractor recovered anything responsive to Mr. McCoy's Item Nos. 41-1b, 41-1c, 41-2, 41-19, 41-20, 43-4, 44-3, 44-21, 44-24, 45-1, 45-17, 45-20, 45-25, and 48-7b. We believe that the search of both computer and hard files, which was done in this case, is sufficient to recover the information Mr. McCoy is requesting. In most instances, Mr. McCoy has not provided any additional information or support, beyond his belief that responsive documents exist. We will address each of the specific challenges he has raised.

Mr. McCoy challenges Idaho's failure to find responsive documents for Item Nos. 41-1b, 41-1c, and 41-2, claiming that DOE believes EPA must provide any responsive documents. However, Idaho was unable to locate documents responsive to Item Nos. 41-1b, 41-1c, and 41-2. At no time did Idaho indicate that it expected EPA to provide to Mr. McCoy any responsive document. Idaho was merely stating it was unable to find documents.

For Item Nos. 44-3 and 45-1, in his Appeal Mr. McCoy did not provide any further argument or proof that the document responsive to these requests exist. He merely claims that the search was inadequate. He does not indicate where any responsive documents could be found. Idaho was unable to locate anything responsive, although the search it conducted, of both its computer and paper files, was calculated to uncover the requested information. Mr. McCoy's belief that the information must exist is not a sufficient argument that Idaho must find the information or that the search was somehow inadequate.

In regard to Item No. 41-19, Mr. McCoy requested the screening level risk assessment for the LET&D. Idaho responded that no specific screening level risk assessment was conducted and, therefore, nothing responsive to Mr. McCoy's request exists. Again, Mr. McCoy merely states that the search was inadequate, and that is insufficient to warrant reversal. The reports requested in Item No. 41-20, biannual operation reports from 1990 to present, do not exist. Mr. McCoy has not presented any evidence to the contrary and merely states that Idaho did not conduct an adequate search. Again, without some indication of where to find the documents or proof that they exist, Mr. McCoy's allegations are insufficient. Next, Mr. McCoy requested documents analyzing the cumulative risk from all thermal treatment units at the INEEL in Item No. 43-4. Idaho found nothing responsive to this request. Mr. McCoy challenges that finding, quoting the November 16, 1995 Resource Conservation Recovery Act (RCRA) quarterly meeting minutes, which state that "the cumulative risk from all thermal treatment units on the INEL *will* be calculated at some point." Appeal Letter at 3 (emphasis added), quoting November 16, 1995 RCRA quarterly meeting minutes at 4. Idaho responded that the anticipated work was never accomplished. Therefore, there are no documents responsive to Mr. McCoy's request.

In addition, Mr. McCoy asked for RCRA Part A and Part B permits issued by the Idaho Department of Environmental Quality (DEQ) for the PEWE and HLLWE in Item Nos. 44-21 and 45-17. Idaho responded that there is no Part A permit under the RCRA, just a Part A application, which has already been provided to Mr. McCoy. Further, no Part B permit has been issued by DEQ, although the Part B application has been submitted and is available in the Idaho public reading room. In Item Nos. 44-24 and 45-20, Mr. McCoy requests "[a]ny documents issued in lieu of a permit by DEQ and/or EPA for operation" of PEWE and HLLWE. Request Letter Nos. 44 and 45. Idaho found nothing responsive. Item No. 45-25 requests "all written or electronic documents identifying all liquid discharges or groundwater discharges, including leaks from the HLLWE." Request Letter No. 45. Idaho indicated that no leaks have occurred at HLLWE,

and therefore, there are no documents responsive to this request. Mr. McCoy requests documents that support an analysis that a number of facilities were unpermittable. He is referring to a document which states that a number of the facilities will be operated under interim status and a consent order because the facilities were "unpermittable." Item No. 48-7b. Idaho responded that it had no responsive documents. Mr. McCoy counters that the decision that the facilities were "unpermittable" could not have been made in a vacuum. Idaho has advised this Office that the analysis supporting the document Mr. McCoy has, upon which his request was based, was not memorialized in writing.

In Item No. 41-26, Mr. McCoy requests "any pending applications for LET&D." Request Letter No. 41. Mr. McCoy objects that the Idaho search was not adequate because the information was not recovered. DOE has stated that at the date of Mr. McCoy's request, the Part B application had not been submitted, despite Mr. McCoy's assertion to the contrary. The FOIA does not require that documents not in existence at the time of the request be released. It cannot be used to create information or request future information. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2); *Barbara Schwarz*, 28 DOE ¶ 80,199 (2001).

Repeatedly, Mr. McCoy requests copies of consent orders about the various facilities, Item Nos. 41-14, 41-15, 44-5, 45-8, and 45-9. At the time of the determination, Idaho believed that it had no documents responsive to these requests. Mr. McCoy challenged that response, claiming that EPA issued Consent Orders about the various facilities. Idaho did not locate any Consent Orders responsive to Mr. McCoy's request. However, it now believes that the search it conducted for the Consent Orders may not have been thorough enough. Therefore, we will remand this aspect of the matter for a further search on Item Nos. 41-14, 41-15, 44-5, 45-8, and 45-9.

In addition, Mr. McCoy requested a copy of a letter from EPA to Hanford, Item No. 41-1a. DOE responded that the letter belongs to EPA and should be requested from that agency. We disagree. Once the letter was received by Idaho, it became a DOE document. Therefore, Idaho must either release the letter or issue a new determination that justifies its withholding.

The final two items of Mr. McCoy's requests are Item Nos. 41-5 and 41-27. In Item No. 41-5, Mr. McCoy asked that Idaho "[p]rovide the index for all written or electronic documents that contain documents contained in the administrative record for the LET&D." Request Letter No. 41 at 2. Idaho responded that the request was unclear and needed clarification. In his Appeal, Mr. McCoy did clarify his request. Therefore, we will remand this matter to Idaho for a further determination on Item No. 41-5. In Item No. 41-27, Mr. McCoy asks for "all correspondence between DOE and DEQ and/or EPA respecting the LET&D." Request Letter No. 41. In its determination, Idaho asked that Mr. McCoy narrow the focus of the request. We do not believe this is an adequate determination in response to his request. In this case, Idaho does not claim that the search is burdensome, but rather that a burdensome number of documents will be located. Under these circumstances, Idaho cannot require that Mr. McCoy narrow the focus of his request. *Burlin McKinney*, 26 DOE ¶ 80,215 at 80,847-48 (1997). Idaho must provide the requested information, though it may recoup all applicable fees from Mr. McCoy.(2) Therefore, we will remand this matter to Idaho for a further determination.

III. Conclusion

Idaho was unable to locate some of the information Mr. McCoy requested, although the search it conducted was calculated to uncover all relevant documents. Idaho searched both its computer database and hard files. Mr. McCoy was unable to provide any additional information, other than his individual belief that the search was inadequate, to direct Idaho to the location of the documents. For those items where Idaho was unable to locate documents responsive to his requests, we will deny Mr. McCoy's Appeal. However, we are remanding the matter for a new determination on a number of items. Idaho must locate and identify copies of any Consent Orders Mr. McCoy requested. Idaho must issue a new determination in regard to Item No. 41-1a, the letter from EPA to the Hanford site. Finally, Idaho must locate the information requested in response to two of the request items, even if there are an immense

number of documents responsive to the requests. After locating the above information, Idaho must release it, subject to fees where applicable, or issue a new determination that justifies the withholding of any information. Therefore, we are denying Mr. McCoy's Appeal in part and granting it in part and remanding the matter to Idaho.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by David B. McCoy on November 21, 2001, OHA Case Number VFA-0707, is hereby denied in part and granted in part.

(2) This matter is hereby remanded to the Idaho Operations Office for the issuance of a new determination in accordance with the instructions set forth in the Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requestor resides or has a principle place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 16, 2002

(1)Each of Mr. McCoy's five overall requests will be referred to only by the last two digits of the request number assigned by Idaho. Further, each requests contain numerous itemized requests. In order to identify an item within a specific request to which we are referring, without recreating Mr. McCoy's extensive lists, we will refer to the item by the request number assigned to the letter by Idaho and the item number Mr. McCoy utilized in that request. For example, the second item of request number 43 will be referred to as Item No. 43-2.

(2)Mr. McCoy did not request a fee waiver in Request No. 41, as he did in some of the other requests, Nos. 43, 45, and 48.

Case No. VFA-0709

January 23, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Keep Yellowstone Nuclear Free

Case Number: VFA-0709

Date of Filing:December 17, 2001

On December 17, 2001, Keep Yellowstone Nuclear Free (KYNF) filed an Appeal from a final determination that the Idaho Operations Office of the Department of Energy (DOE-ID) issued on November 26, 2001. That determination concerned a request for documents submitted by KYNF pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE-ID would be required to search for and provide further responsive documents.

Background

On August 13, 2001, Erik Ringelberg, on behalf of KYNF, submitted a FOIA request for "All written communications (including but not limited to: emails, memos, faxes, reports, minutes, and personal notes) between DOE-ID, EM-50, and ATG regarding:

1. Legal permit status of the ATG plasma melter/vitrifier.
2. Interpretations of the ATG plasma melter/vitrifier as an incinerator.
3. Any issues with air monitoring and compliance with ATG plasma melter/vitrifier.
4. The efficacy of the ATG plasma melter/vitrifier air pollution control system.
5. The proposed testing and/or use of INEEL waste at the ATG plasma melter/vitrifier.
6. The proposed volumes, and waste types of INEEL waste for testing and/or use at the ATG plasma melter/vitrifier."

Request Letter dated August 13, 2001, from Erik Ringelberg to Nicole Brooks, Freedom of Information Officer, DOE-ID (Request Letter). Mr. Ringelberg was specifically interested in documents to assist the public in understanding the relationship between DOE and its contractor, and to better the public's understanding of what may happen with waste and its treatment in relation to the melter/vitrifier. *Id*.

On September 18, 2001, DOE-ID e-mailed Mr. Ringelberg and advised him they were working on his requests. E-mail dated September 18, 2001, from Ms. Brooks to Mr. Ringelberg (E-mail Reply to Requests). Ms. Brooks estimated to KYNF that DOE-ID would have a response to their requests on approximately November 9, 2001. *Id*.

On November 26, 2001, DOE-ID provided KYNF with five responsive documents in response to Requests 1, 3, 4, 5, and 6, but indicated they had found no responsive documents for Request 2. Determination Letter dated November 26, 2001, from Ms. Brooks to Mr. Ringleberg (Determination Letter).

In response to the Determination Letter from DOE-ID, Mr. Ringelberg filed this Appeal, saying he wanted to obtain a precise determination of why DOE-ID denied elements of his original request, and to request a further and in-depth examination of DOE and DOE contractor files. Appeal Letter dated December 12, 2001, from Mr. Ringelberg to the Director of OHA (Appeal Letter). In support of his Appeal, Mr. Ringelberg first questions the validity of DOE-ID's determination because DOE-ID provided its response past the statutory deadline. *Id*. He also states he believes the response provided to KYNF was incomplete. *Id*. Mr. Ringelberg argues that the documents provided in response to Request 1 contained only particular pages of what was requested, with no explanation as to why the entire document was not provided. *Id*. Regarding Request 2, Mr. Ringelberg argues that the DOE's response was deficient because DOE-ID did not specify why responsive documents had not been found. *Id*. Concerning Request 3, Mr. Ringelberg states that DOE-ID provided a document entitled "Broad Spectrum Contacts Current Status, updated August 2001," but argues that this document contains no information related to this request regarding the testing and use of INEEL waste at the ATG facility. *Id*. With respect to Request 4, Mr. Ringelberg argues that DOE-ID provided information regarding waste acceptance *from* Hanford, when KYNF was requesting information regarding waste sent *to* Hanford or ATG. *Id*.

Analysis

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

In response to the Appeal, we contacted DOE-ID to determine the scope of its search. Telephone Memoranda dated January 3, 2002 and January 11, 2002 (Telephone Memoranda), and E-mail Message dated January 11, 2002 (E-mail Message). DOE-ID informed us it conducted a reasonable search in all possible locations, for any documents related to the requests submitted by KYNF. (Telephone Memoranda). As an initial matter, DOE-ID stated that although it did issue its determination approximately three months after it received the request, it informed KYNF via an e- mail message dated September 18, 2001, that it was currently processing other requests filed by KYNF, and would begin the search for the current request as soon as possible. (E-Mail Message).

Although the Determination Letter does not detail DOE-ID's search process, DOE-ID personnel thoroughly explained to us the search process involved with the six separate items in KYNF's current request. (Telephone Memoranda). First, where KYNF asserts that it only received portions of the document "ATG Proposal Number 2000-03-010," DOE-ID stated that it provided only the responsive portions of the document to KYNF. *Id*. DOE-ID stated it will provide the remaining portions of the document if KYNF so desires. *Id*. Secondly, DOE-ID stated that it located one document it did not provide to KYNF addressed from the State of Washington to ATG, but since this document was not generated by the DOE, nor addressed to the DOE, it should be released by the State of Washington. *Id*. DOE-ID stated that Mr. Ringelberg had previously indicated to them that he had filed an information request with the State of Washington for this information. *Id*. Thirdly, in response to KYNF's assertion that DOE-ID provided a document entitled "Broad Spectrum Contacts Current Status, updated August 2001," which contained no responsive information related to the testing and use of INEEL waste at the ATG facility, DOE-ID maintains the document is responsive. Moreover, it stated that they did locate other responsive documents, but these documents are intra-agency, pre-decisional recommendations and opinions of DOE employees covered under Exemption 5 of the FOIA. *Id*. DOE-ID indicated it would be willing to segregate the pre-decisional information from the factual information and provide the releasable information in these documents to KYNF. *Id*.

Finally, DOE-ID stated that after the date of KYNF's original request, a letter was written in response to an information request from the State of Washington to DOE-ID. *Id*. DOE-ID stated that this letter, dated September 5, 2001, discusses information that may be responsive to KYNF's current request. *Id*. DOE-ID stated that it would now provide this letter to KYNF as a summary of INEEL's plans for having waste treated at the ATG facility. *Id*. DOE-ID stated that this letter was not provided to KYNF because it came into existence after KYNF's original request. *Id*.

Accordingly, it appears that DOE-ID provided responsive documents in response to five of KYNF's six requests. The only request where no documentation was provided was Request 2. In relation to this request, DOE-ID searched all of its electronic records and its hand files. We are convinced DOE- ID searched in all possible locations and conducted a reasonable search. In relation to the five other requests, we are also convinced DOE-ID conducted a reasonable search, which produced responsive material to KYNF. However, since the filing of the Appeal, DOE-ID has obtained further documentation responsive to Mr. Ringelberg's request. DOE-ID has agreed to provide this documentation to KYNF. DOE-ID has also indicated it is willing to provide KYNF with the entire document where it had provided only the portion it believed to contain responsive information. DOE- ID has also indicated it will extract protected information from a document found to be responsive to Mr. Ringelberg's request, and provide that document as well. Despite DOE-ID's willingness to provide further documentation to KYNF, we find that DOE-ID previously searched all possible locations, and provided all relevant documentation to KYNF. Thus, we find the entire search to be "reasonably calculated to uncover all relevant documents."

Nevertheless, in addition to the actions to which DOE-ID has committed to perform, it must locate and review the document addressed to ATG from the State of Washington. A document in DOE's possession is an agency record, regardless of how it was created or obtained, and is therefore subject to disclosure under the FOIA. *See* 5 U.S.C. § 552(a)(3); United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Keep Yellowstone Nuclear Free on December 17, 2001, OHA Case Number VFA-0709, is hereby denied in part and granted to the extent set forth in Paragraph 2.

(2) This case is hereby remanded to the Department of Energy's Idaho Operations Office to complete its processing of this request in accordance with the above Decision, and to issue a new Determination Letter.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 23, 2002

Case No. VFA-0710

May 2, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martin Becker

Date of Filing: December 18, 2001

Case Number: VFA-0710

On December 18, 2001, Martin Becker (Becker) filed an Appeal from a determination that the Savannah River Operations Office (SR) of the Department of Energy (DOE) issued to him. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, SR released redacted copies of responsive documents. This Appeal, if granted, would require the DOE to release the documents in their entirety.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1. Only FOIA Exemption 4 is at issue in the instant case.

I. Background

Westinghouse Savannah River Company (WSRC) is the management and operating contractor for SR. Westinghouse Safety Management Solutions (WSMS), created in 1997 by WSRC, rents office space in Building 3 of Centennial Corporate Center, located at 1993 S. Centennial Avenue in Aiken, South Carolina. The building, part of an "office park," is owned by Centennial, L.L.C. (Centennial). In September 2000, Becker submitted a FOIA request to SR for "any documents reflecting any notice of election to extend any Westinghouse Savannah River Company (WSRC) or affiliate lease of the premise at Centennial Corporate Center." *See Martin Becker*, 28 DOE ¶ 80,133 (2001) (*Becker I*). In response to this request, SR sent Becker a determination stating that the responsive records were the property of the contractor and were not agency records. Letter from SR to Becker (October 26, 2000). Becker filed an appeal on November 13, 2000, the first of five appeals that he has filed in response to this request. *Becker I*. On December 11, 2000, OHA granted the appeal and determined that the lease may be subject to disclosure under DOE regulations, specifically 10 C.F.R. § 1004.3(e)(1).

On December 21, 2000, SR issued a new determination letter to Becker and stated that the responsive documents did not exist. Becker filed another appeal on February 7, 2001, insisting that WSRC must have a copy of the lease. OHA agreed, and ordered DOE to provide a copy of the non-exempt portions of the lease to Becker. *Martin Becker*, 28 DOE ¶ 80,153 (2001) (*Becker II*).

SR issued a third determination letter denying Becker's request and he again appealed on April 16, 2001.

OHA found that the lease was subject to disclosure under DOE's contractor records regulations, and for the third time granted Becker's appeal and remanded the case to SR yet again for disclosure of all responsive, non-exempt material. *Martin Becker*, 28 DOE ¶ 80,187 2001) (*Becker III*).

On October 18, 2001, SR released a redacted copy of the third amendment to the lease, but denied in part Becker's request for information. On October 29, 2001, Becker appealed SR's determination. He argued, and OHA agreed, that SR had applied the wrong standard to its analysis of the issue. Becker argued that the material was submitted involuntarily to WSRC, and that WSRC must prove that disclosure would cause substantial competitive harm to its competitive position. OHA again granted Becker's appeal, and remanded the matter to SR for processing under the appropriate test, found in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). *See Martin Becker*, 28 DOE ¶ 80,201 (2001) (*Becker IV)*.

On December 10, 2001, SR sent Becker a fifth determination along with three additional responsive documents: the lease, the first amendment to the lease, and the second amendment to the lease. Letter from SR to Becker (December 10, 2001) (Determination). However, SR withheld the following portions of the responsive documents under FOIA Exemption 4, this time applying the *National Parks* test: rate per square foot, rentable square feet (space actually rented by WSMS), lease term, expiration date, lease renewal option period, monthly rent, security deposit, phone service reimbursement, annual minimum rent, total rentable area in building, and utility reimbursement. *Id*. SR claimed that the withheld information was confidential commercial information and if released would substantially harm the competitive position of both parties to the contract. *Id.* Becker filed this Appeal on December 18, 2001, and argued that (1) there is no evidence that disclosure of the responsive material will impair the government's ability to obtain future documents, and (2) there is no competitive harm to the provider of the lease because Centennial owns the only office space in Aiken that is suitable for WSMS' offices. Becker asked OHA to remand this Appeal to SR with directions to release the lease documents in their entirety. Letter from Becker to OHA (December 18, 2001) (Appeal). [(1)]

II. Analysis

A. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*).

Under the *National Parks* test, the agency must first determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g.*, *Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Thus, we find that the lease terms, rates and square footage withheld by SR are commercial information. Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). We find that SR obtained this material from a person, WSRC, because the FOIA considers a corporation a person for the purposes of Exemption 4. *See William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999).

Finally, the agency must determine whether the withheld information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was involuntarily or voluntarily submitted. *Critical Mass Energy Project v. NRC*, 975 F.2d

871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). In *Becker IV*, we found that the material at issue in the instant case was submitted involuntarily to SR by WSMS, a subcontractor to WSRC, based on WSRC's contract with DOE. *See Becker IV.* Under Exemption 4, in order to withhold information that has been involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Using the "competitive harm" prong of the *National Parks* test, SR withheld the following items from the lease and its amendments: rate per square foot, rentable square feet (space actually rented by WSMS), lease term, expiration date, lease renewal option period, monthly rent, security deposit, phone service reimbursement, annual minimum rent, total rentable area in building, and utility reimbursement. Determination Letter at 1. SR alleges that release of the withheld information is likely to cause substantial competitive harm to WSMS and its landlord Centennial. *Id.* SR goes on to state that "[a] competitor could use the release of these lease terms to easily determine how to adjust its own lease rates to offer more favorable terms than [Centennial] and/or limit the ability of WSMS to negotiate for space in the future. WSMS and [Centennial] could be limited to rates no more favorable than those found in the current lease." Letter from SR to OHA (December 28, 2001).

B. Becker's Arguments

First, Becker argues that Centennial has no competition in Aiken, South Carolina. Appeal at 1. He contends that even though there is another office building in Aiken with 30,000 to 50,000 square feet of space (a size similar to Becker's estimate of the area of WSMS' current office space), that building should not be considered in a competitive analysis because WSMS is growing and could not keep all of its offices in one location if it leased space in that building. Memorandum of telephone conversation between Becker and Valerie Vance Adeyeye, OHA (January 15, 2001). He insists that Aiken is the only city that should be considered a viable option for the location of WSMS' offices, because the closest cities (North Augusta, South Carolina and Augusta, Georgia) are very different real estate markets that were previously considered and rejected by WSMS in its search for an office site.[(2)] Becker also alleges that WSRC or its predecessor made a commitment to SR to keep its offices in Aiken. Memorandum of telephone conversation with Becker (April 22, 2002).

Second, Becker contends that WSMS has no competition because WSRC, its parent, created WSMS solely to serve its own business purposes, thereby giving WSMS a monopoly on all work involving WSRC. Therefore, he argues, WSMS has no competition for the work it performs for WSRC.[(3)] He states that the disclosure of the redacted information in the lease would not cause any competitive harm to the contract between WSMS and WSRC, nor could a competitor use those figures to determine what WSMS charges WSRC for its services at SR. Memorandum of telephone conversation between Becker and Valerie Vance Adeyeye (April 22, 2002). Third, Becker submits that the information that he is requesting is "stale" because of its age, and thus its disclosure could not cause substantial competitive harm to either of the parties to the lease. Voice mail message from Becker to W. Schwartz, OHA (April 14, 2002). [(4)]

C. Submitters' Comments

As is customary in an Exemption 4 case, OHA extended an opportunity to both WSMS and Centennial to state their views as to whether the responsive information should be released. Both parties submitted responses as follows.

1. WSMS's Response

WSMS submitted a statement claiming that it faces competition "on a daily basis for various commercial and government opportunities. . . ." Electronic mail message from Matt Alan, Esq., WSMS to SR (January

15, 2002). We find this brief sentence conclusory. *See Public Citizen Health Research Group v. Food and Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (conclusory and generalized allegations of substantial competitive harm cannot support withholding responsive material). However, we are familiar with WSMS and its operations, and the WSMS website www.wxsms.com presents information on several contracts that the company was recently awarded in competitions. WSMS also argues that a competitor with access to rental payments, the rentable square footage, and telephone improvement reimbursements could use this information to identify a specific indirect cost. *Id.* WSMS further responds that the security deposit and broker information could, if disclosed, be copied by a competitor to negate a competitive advantage. *Id.* According to WSMS, a competitor could use the lease start date, term, and option periods to identify a period of time to which a specific indirect cost applies, and could use the total lease cost to identify an indirect cost and profit margin. *Id.*

2. Centennial's Response

In response to Becker's arguments, Centennial states that it has "numerous competitors in Aiken, North Augusta, and Augusta." Electronic mail message from Centennial to Valerie Vance Adeyeye, OHA (April 8, 2002). Centennial also says that it owns and manages in Aiken only. Electronic mail message from Centennial to Valerie Vance Adeyeye, OHA (April 5, 2002). One Aiken competitor, Centre South, has a vacant 40,000 square foot building. Electronic mail message from Centennial to Valerie Vance Adeyeye, OHA (April 8, 2002). According to Centennial, the two companies compete "on every occasion for every potential lease." *Id.* Centennial also lists the BASF building in North Augusta (150,000 square feet) as a potential competitor, and further submits that there is a substantial amount of "class A office space in large blocks that is currently available for lease" in Augusta. *Id.*

Centennial further informs us that, according to their tenants, the difference in the commute to Aiken, North Augusta and Augusta is "negligible." *Id.* Some of its clients had considered Augusta but chose Aiken. *Id.* According to Centennial, they are "at this moment in serious negotiations regarding another lease," and disclosure of the redacted information could seriously harm this negotiation and give its competitor an unfair advantage. *Id.;* electronic mail message from Centennial to Valerie Vance Adeyeye, OHA (April 5, 2002). Centennial greatly fears the competitive disadvantages that would result from the release of the specifics of its rates and terms to the public or to the tenants in its office campus. *Id.*

D. Competitive Harm Analysis

This office has conducted a *de novo* review of this matter. We find that actual competition exists for both parties, and that disclosure of all of the redacted information would cause substantial competitive harm to Centennial. We cannot, however, conclude that WSMS would suffer substantial harm to its competitive position if the withheld data were released.

1. Centennial

First, we find that Centennial has presented sufficient evidence that it faces competition not only in Aiken but in the entire Central Savannah River Area (CSRA) for WSMS' business. Centennial has identified by name one other property in Aiken that is not owned by Centennial and that could house most or all of WSMS' operations. Further, we have no solid evidence that WSMS requires all of its offices to be in Aiken and in the same building, nor has Becker offered any. We also have no real evidence that WSMS has committed to keeping its offices in Aiken. Centennial has also identified competitors in North Augusta and Augusta.[(5)] As additional proof that the CSRA could be considered one metropolitan area, SR informs us that approximately 40% of its employees live in Georgia, and the remainder live in South Carolina. Telephone conversation between Timothy Fischer, SR, and Valerie Vance Adeyeye, OHA (April 8, 2002). Thus, we agree with Centennial that the pertinent market area includes the entire CSRA.

In addition, we conclude that Centennial has presented evidence that disclosure of the redacted information could lead to substantial competitive harm. Centennial is currently in negotiations for another sizable lease,

and makes a valid argument that releasing its lease terms and rates on the WSMS space to the public, especially at this time and in this limited market area, could derail those negotiations. In a similar case, the State of Utah submitted a FOIA request to the Bureau of Indian Affairs (BIA) of the Department of the Interior seeking disclosure of the terms of a lease allowing a group of electric utility companies to store spent nuclear fuel on land belonging to an Indian tribe. *State of Utah v. Department of the Interior*, 256 F.3d 967 (10th Cir. 2001) (*Utah).* As in the instant case, the BIA released a copy of the lease with certain important sections redacted (including provisions governing the termination of the lease, lease payment, and payment of rent and interest). *Id.* at 968. Utah sued BIA for full disclosure of the lease terms, and lost at trial and on appeal. *Id.* at 970 (stating that release of redacted lease information could put party in a weaker position at the bargaining table in negotiating future deals because prior business agreements would be in public domain). Centennial, in its statements, presented arguments against disclosure that contained a similar level of detail as the affidavits that the *Utah* court found legally sufficient. *Id.* at 970-971.

Thus, we find that Centennial has presented evidence demonstrating the existence of potential economic harm. *See Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (stating that evidence demonstrating the existence of potential economic harm is sufficient); *William Logan, Jr.*, 27 DOE ¶ 80,198 (1999) (upholding redaction of negotiated payment equations in a lease between Shell Pipeline Corporation and the DOE).

2. WSMS

As an initial matter, we find that WSMS faces actual competition for its services, as shown by the list of contracts awarded to WSMS after successful competition against other firms. *See* Section C.1., *supra*. We also find that Becker's attempted focus on competition for services provided under the IWR is too narrow and does not afford WSMS the protection intended by Exemption 4. WSMS faces competition in the larger market for its services. However, even though we conclude that WSMS could suffer an undefined level of competitive harm if the documents were disclosed in their entirety, it is not clear that WSMS would suffer substantial competitive harm if the redacted information were released. Further, we need not address this issue since we have concluded that Centennial would suffer substantial competitive harm if SR released the redacted information to the public.

3. Analysis of Becker's Supplemental Arguments

We reject Becker's supplemental argument that the release of the information he requests could not cause competitive harm to either submitter because the material is "stale." *See* Sec. II.B., *supra*. The lease and its amendments were signed between 1997 and 2001. Thus the responsive data are fairly recent, between 1 and 5 years old. In addition, SR does not believe that the information is stale or outdated because it states that the terms have not changed significantly over the period of the lease. Memorandum of telephone conversation between Timothy Fischer, SR and Valerie Vance Adeyeye, OHA (April 22, 2002). *See Niagara Mohawk Power Corporation*, 28 DOE ¶ 80,105 (2000) (finding that 5 to 8 year old responsive information is not "stale" because the information did not change significantly from year to year). (6)

In conclusion, we find that WSMS and Centennial have presented evidence of actual competition in the relevant markets. In addition, Centennial has presented sufficient evidence that disclosure of the redacted information would cause substantial competitive harm to its operations. *See Utah*, 256 F.3d at 971 (submitter must present evidence that actual competition exists and that disclosure would lead to substantial competitive injury). The redacted information is clearly proprietary to Centennial and thus exempt from disclosure under Exemption 4. Accordingly, this Appeal should be denied.

E. The Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public

interest. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group,* 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

It Is Therefore Ordered That:

(1) The Appeal filed by Martin Becker on December 18, 2001, OHA Case No. VFA-0710, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be

sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 2, 2002

1. During the processing of this Appeal, Becker requested that the Appeal be held in abeyance until March 8, 2002. Electronic mail message from Becker to Valerie Vance Adeyeye, OHA (January 25, 2002).

2. Aiken, North Augusta, and Augusta are located in an area called the Central Savannah River Area.

3. WSMS provides support to WSRC via a contractual document referred to as an "Interworks Requisition (IWR)." WSRC pays for the services on a cost-reimbursement basis, and then charges those costs to DOE. *Becker III*.

4. The arguments described in this paragraph were submitted by Becker after the filing of this Appeal. However, we will address his arguments in the interest of administrative efficiency, given the long history of appeals in this case.

5. The DOE-WSRC contract does not permit WSRC to bind itself in perpetuity to a leasehold. Memorandum of telephone conversation between Timothy Fischer, SR and Valerie Vance Adeyeye, OHA (April 22, 2002).

6. Becker also alleged that Centennial did not face competition because a competing landlord, if one existed, would approach WSMS directly, ask WSMS how much it pays Centennial for rent, and then offer WSMS a better price. Voice mail message from Becker (April 17, 2002). We disagree. Even though this scenario is possible, we cannot assume that WSMS would willingly disclose its rental payments under those conditions. In fact, this scenario supports Centennial's premise that public disclosure of its lease terms would enable a competitor to undercut Centennial and thus lure away an important customer.

Case No. VFA-0711

March 1, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Mr. Dallas Register

Date of Filing:January 8, 2002

Case Number: VFA-0711

On January 8, 2002, Mr. Dallas Register filed an appeal of a determination issued on October 30, 2001, by the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. As detailed below, we shall deny the appeal filed by Mr. Register because the records at issue are not agency records.

Background

Mr. Register filed a FOIA request with DOE seeking documents related to a comparative analysis study. On October 30, 2001, the Albuquerque FOIA Officer issued a determination in response to Mr. Register's request which indicated that the DOE Kansas City Area Office had been unable to locate any documents that were responsive to the FOIA request. The Albuquerque FOIA Officer also indicated that:

It has been determined that the documents you are requesting are records contained in the legal files of Honeywell FM&T at the Kansas City Plant, are in the possession and control of Honeywell FM&T and are, therefore, not ?agency records' subject to the provisions of the FOIA. ?Agency records' are defined as records in a federal agency's possession and control at the time of the FOIA request. However, pursuant to U.S. Department of Energy (DOE) policy, records in the possession and control of a management and operating contractor, such as those mentioned above, will be made available by DOE when the contract specifically provides that such records are the property of the Government. However, the contract between the DOE and Honeywell FM&T clearly defines the records that you have requested as belonging to them and not the DOE. Accordingly, these records are also not subject to release under DOE policy.

Mr. Register appealed this determination on the grounds that the documents he requested should be in the DOE Contracting Officer's file because they are necessary to establish the contractor's compliance with the "substantially equivalent benefits" requirement contained in DOE's Request for Proposal (RFP) for managing the Kansas City Plant. Mr. Register also claimed that Albuquerque should have provided the requested document to him because the contract between the contractor and DOE provides that DOE has the right to inspect and copy all records acquired or generated by Honeywell FM&T (Honeywell) under this contract.(1)

Analysis

For the reasons set forth below, we conclude that the records in question are not "agency records" and are

also not subject to release under the DOE regulations. Our threshold inquiry in this case is whether the requested documents are "agency records," and thus subject to the FOIA, under the criteria set out by the federal courts. *Cf.* 5 U.S.C. § 552(f) (describing the scope of the term “agency” under the FOIA). The statutory language of the FOIA does not define the essential attributes of "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis fashioned by the courts for determining whether documents created by non-federal organizations are subject to the FOIA. *See, e.g., BMF Enterprises*, 21 DOE ¶ 80,127 (1991); *William Albert Hewgley*, 19 DOE ¶ 80,120 (1989); *Judith M. Gibbs*, 16 DOE ¶ 80,133 (1987) (*Gibbs*). That analysis involves a determination of (I) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See Gibbs*, 16 DOE at 80,595.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The courts have identified certain factors to consider in determining whether to regard an entity as an agency for purposes of federal law. In *United States v. Orleans*, 425 U.S. 807 (1976), a case that involved a statute other than the FOIA, the Supreme Court defined the conditions under which a private organization must be considered a federal agency as follows: "[T]he question here is not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its day- to-day operations are supervised by the Federal Government." *Id*. at 815. In other words, an organization will be considered a federal agency only where its structure and daily operations are subject to substantial federal control. *See Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977). Subsequently, the Supreme Court ruled that the *Orleans* standard provides the appropriate basis for ascertaining whether an organization is an "agency" in the context of a FOIA request for "agency records." *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (*Forsham*). *See also Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (degree of independent governmental decision-making authority considered); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

Under its contractual relationship with the DOE, Honeywell is the contractor responsible for maintaining and operating the Kansas City Plant. Contract No. DE-AC04-01AL66850. While DOE obtained Honeywell's services and exercises general control over the contract work, it does not supervise the contractor’s day-to-day operations. We therefore conclude that Honeywell is not an "agency" subject to the FOIA.

Although Honeywell is not an agency for the purposes of the FOIA, the records requested by Mr. Register could have become "agency records" if they had been obtained by DOE and were within the agency’s control at the time the firm made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989); *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); *Forsham*, 445 U.S. at 182. In order to determine whether DOE had obtained these records and whether they were in the control of the agency at the time of Mr. Register's FOIA request, we contacted Terry Apodaca, a FOIA Officer at Albuquerque, about the search that had been conducted for responsive documents. Ms. Apodaca informed us that she had asked the Contracting Officer in the Albuquerque Office of Contracts and Procurement to search for documents that were responsive to Mr. Register's FOIA request, and that the Contracting Officer in Albuquerque told her that:

they knew [that the record requested by Mr. Register] was a record belonging to Honeywell . . . and that Honeywell never sent them a copy but in order to be responsive and to show good faith, they searched their administrative files on Honeywell. No responsive documents could be located.

Ms. Apodaca also indicated that the Kansas City Area Office had searched the administrative files of its Office of the Director and Legal Counsel, but could not locate any documents that were responsive to Mr. Register's FOIA request.

We also contacted Patrick Currier, counsel for the Kansas City Area Office, to determine whether Honeywell had submitted the documents sought by Mr. Register to the DOE Contracting Officer. Mr. Currier explained that Honeywell was the only entity that submitted a proposal for the management of the Kansas City Plant, and that DOE had awarded the contract to Honeywell without discussion. Mr. Currier also told us that he had participated in a discussion about "substantially equivalent benefits" between Honeywell and DOE human resources people in Albuquerque and Kansas City. Mr. Currier indicated that this discussion occurred after the contract was awarded and, at the time of this discussion, DOE did not have a copy of the documents sought by Mr. Register. Mr. Currier also indicated that, after he received the FOIA request, he checked with DOE human resources people in Albuquerque and Kansas City and confirmed that they had never had a copy of the requested records. Mr. Currier also informed us that counsel for Honeywell told him that the documents at issue were not paid for by DOE funds but were paid for by Honeywell's main office. Based on the above information, we find that the records sought by Mr. Register had not been obtained by DOE at the time of the FOIA request. As such, the documents sought by Mr. Register never became "agency records."(2)

Even though these records are not agency records, they may still be subject to release under the DOE regulations if "a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government." 10 C.F.R. § 1004.3(e)(1). Although the contract between Honeywell and DOE contains such a provision, the provision is inapplicable because the requested records were not acquired or generated by the contractor in the performance of the contract.(3) Accordingly, we find that the records sought by Mr. Register are neither "agency records" within the meaning of the FOIA nor subject to release under the DOE regulations.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal that Dallas Register filed on January 8, 2002, OHA Case No. VFA-0711, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 1, 2002

(1)Because we hold that the records at issue are not agency records and that the contractual provision on inspection and copying contained in the contract between Honeywell and DOE is inapplicable, it is unnecessary to determine whether the release of the documents sought by Mr. Register would violate the privacy rights of other individuals.

(2)Mr. Register also contends that the records he seeks are agency records because, under the contract with Honeywell, DOE has the right to inspect and copy these records. We disagree. It is clear that DOE's ability to access and copy records that are owned by DOE contractors does not transform such records into agency records under the FOIA. See *The Cincinnati Enquirer*, 26 DOE ¶ 80,205(1997).

(3)We also note that because these documents were not acquired or generated by the contractor under the contract, DOE is not entitled to inspect and copy these documents under Section 113(d) of the contract between Honeywell and DOE.

January 23, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Glen Milner

Date of Filing: December 28, 2001

Case Number: VFA-0712

Glen Milner (the Appellant) filed an Appeal from a determination that the Office of the Navy (the Navy) issued on October 31, 2001. In that determination, the Navy denied in part a request for information that the Appellant submitted on March 25, 1999, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In this Determination, the Navy released four documents. However, the Navy withheld portions of each document. That information was withheld as the result of reviews of the documents by the Department of Energy (DOE) Office of Declassification and the Navy, after which they determined that the documents contained classified information. This Appeal, if granted, would require the DOE to release the information that the DOE withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 25, 1999, the Appellant requested "all information regarding the safety of Trident Missiles and Trident nuclear weapons . . . including W76 and W88 nuclear warheads." The Navy responded to the request by identifying four responsive documents to the Appellant and releasing portions of each. However, the Navy withheld from release portions of each document pursuant to (1) the Navy's determination that this information warranted protection from disclosure under Exemptions 1, 3 and 5 of the FOIA and (2) the DOE's determination that some of the withheld information was classified and therefore warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the withheld information described above. In his Appeal, the Appellant contends that

> [I]nformation was improperly withheld under the Freedom of Information Act. I believe that information was withheld or deleted that is neither in the interest of national defense or foreign policy, in the interest of the free and candid exchange of ideas, or exempted under atomic energy defense programs.

Appeal at 1.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive,* 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein,* 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Acting Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that the withheld portions of the four documents contain information that has been classified as Restricted Data (RD) or Formerly Restricted Data (FRD) under the DOE's current classification guidance. Under the Atomic Energy Act of 1954, RD and FRD are forms of classified information, and are therefore exempt from mandatory disclosure under Exemption 3. The material that the DOE continues to withhold under Exemption 3 of the FOIA is identified in the margin of the documents as "DOE (b)(3)." The Director has also informed us that some of the material the DOE withheld from the documents may now be released. The denying official for the DOE's withholdings is Mr. Marshall Combs, Acting Director, Office of Security, Department of Energy. The Navy has also reviewed the four documents and determined that it will continue to withhold all of the information it previously withheld under Exemptions 1, 3 and 5. The denying official for the Navy's withholdings is Rear Admiral Alan S. Thompson, Director, Supply, Ordinance and Logistics Operations Division, Office of the Chief of Naval Operations. The material that the Navy continues to withhold under Exemptions 1, 3 and 5 is identified in the margin of the documents as "DON b(1)", "DON b(3)" or "DON b(5)."

Based on the Director's review, we have determined that the Atomic Energy Act requires DOE to continue withholding significant portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Director has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Therefore, the DOE will release newly redacted versions of the four documents reviewed in this Appeal to the Appellant under separate cover. Accordingly, the Appellant's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Glen Milner on December 28, 2001, Case No. VFA-0712, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the documents in which additional information is released will be provided to Glen Milner.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 23, 2004

Case No. VFA-0714

February 14, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Mark J. Chugg

Date of Filing: January 17, 2002

Case Number: VFA-0714

On January 17, 2002, Mark J. Chugg (the Appellant) filed an Appeal from a final determination issued on January 9, 2002, by the Department of Energy's Office of Hearings and Appeals (OHA). In that determination, OHA responded to a Request for Information filed by the Appellant on December 4, 2001, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OHA's determination withheld personally identifiable information from the Appellant. This information was withheld under FOIA Exemption 7(C) and Privacy Act Exemption (d)(5). This Appeal, if granted, would require OHA to release the information it withheld.

The Appellant had filed a complaint with OHA under 10 C.F.R. Part 708 alleging that his employer had retaliated against him for whistleblowing. The complaint was then investigated by an OHA attorney who issued a report of investigation on October 10, 2001. A copy of the report of investigation and the case file on which it was based was provided to the Appellant in accordance with 10 C.F.R. § 708.23(b). However, certain information that identified sources used in the investigation was not provided to the Appellant. (1) The Appellant subsequently filed a request for information seeking the withheld information with the DOE's Freedom of Information and Privacy Division, which referred the Appellant's request for information to OHA on December 4, 2001. On January 9, 2002, OHA issued a determination letter in which it withheld the requested information under FOIA Exemption 7(C) and Privacy Act Exemption (d)(5), citing the "obvious possibility of harassment, intimidation or other personal intrusions." Determination Letter at 1. The Appellant filed the present Appeal on January 17, 2001, seeking the information withheld by the January 9, 2002 determination letter. (2)

The withheld information is personally identifiable information that specifically concerns the Appellant and is contained in a system of records from which records are retrieved. 5 U.S.C. § 552(b). Therefore, the Privacy Act and the FOIA mandate its release to the Appellant unless the agency can show that it can be withheld under (a) an applicable exemption to the Privacy Act disclosure provisions, **and** (b) an applicable exemption to the FOIA disclosure provisions. Therefore, we will consider the present appeal under both acts.

The Privacy Act

OHA withheld the information which identifies investigative sources under Privacy Act Exemption (d)(5).

That exemption provides:

Nothing in this section shall allow an individual access to information compiled in reasonable anticipation of a civil action and proceeding.

5 U.S.C. § 552a(d)(5) (Exemption (d)(5)). (3) The D.C. Circuit has previously upheld an agency's withholding, under Exemption (d)(5), of witness notes and statements collected by a government attorney during an investigation of allegations of retaliation against a whistleblower. In *Martin v. Office of Special Counsel*, 819 F.2d 1181(D.C. Cir. 1987) (*Martin*), the D.C. Circuit found that such information is properly withheld under Exemption (d)(5) when it is collected in reasonable anticipation of a "quasi-judicialadministrative hearing." *Id.* at 1187-88. The D.C. Circuit defined a quasi-judicial administrative hearing as an administrative proceeding with three specific attributes: the proceeding must (1) be adversarial in nature, (2) be subject to the rules of evidence, and (3) include discovery proceedings. *Id.* at 1188. The DOE's Whistleblower Protection Regulations provide for a hearing that is adversarial in nature, includes discovery, and is subject to some evidentiary rules. 10 C.F.R. Part 708. Accordingly, we find that the DOE Whistleblower hearings are quasi-judicial in nature.

Since the withheld information was compiled in reasonable anticipation of a quasi-judicial administrative hearing, it is properly withheld under Exemption (d)(5).

The FOIA

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *See Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 7(C) is at issue in the instant case.

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

The threshold test for withholding information under Exemption 7(C) is whether such information is compiled as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982). The scope of Exemption 7 encompasses enforcement of both civil and criminal statutes. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974). In the instant case, OHA is charged with investigating allegations of retaliation against whistleblowers. 10 C.F.R. Part 708. OHA is therefore a classic example of an organization with a clear law enforcement mandate. In the present case, the OHA documents were created during an investigation of a whistleblower complaint filed by the Appellant. Consequently, the OHA documents at issue were clearly created for a law enforcement purpose.

In order to determine whether a record may be withheld under Exemption 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *See Ripskis v. Department of Housing and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified

against the public interest in order to determine whether release of the record could reasonably be expected to constitute an unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3; *Stone v. FBI*, 727 F. Supp. 662, 663-64 (D.D.C. 1990).

We find that there is a privacy interest here. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). We have followed the courts' lead. *James L. Schwab*, 21 DOE 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE 80,129 (1990). Therefore, we find that release of the individuals' identities or information that could identify these individuals would result in significant invasions of privacy.

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within the public interest as that term is used in the FOIA. *Id.* We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities or information that could identify these individuals.

After weighing the significant privacy interests present in this case against an insubstantial or non- existent public interest, we find that release of information revealing the individuals' identities would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that information that would reveal the identities of the individuals was properly withheld under Exemption 7(C).

Conclusion

Since the withheld information was properly withheld by OHA under FOIA Exemption 7(C) and Privacy Act Exemption (d)(5), we find that the present appeal should be denied.

While we are strongly committed to keeping the public fully informed about DOE actions, we are also mindful of the need to preserve the privacy rights of individuals as well as the integrity of the whistleblower investigation process. By releasing the responsive documents with only those redactions necessary to prevent identification of specific individuals, which is what has been done here, the agency can provide as much information as possible while safeguarding individual privacy rights.

It Is Therefore Ordered That:

(1) The Appeal under the Freedom of Information Act and the Privacy Act filed by Mark J. Chugg on January 17, 2002 (Case Number VFA-0714) is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 14, 2002

(1)A report of investigation is typically issued prior to the commencement of a proceeding before an OHA hearing officer.

(2)In order to provide an independent and objective review of OHA's initial determination, OHA Deputy Director, Thomas O. Mann issued the determination letter in response to the Appellant's request, while the present appeal was adjudicated by OHA's Director, George B. Breznay.

(3)The Appellant did not file a request under the Privacy Act. However, it is DOE policy to apply the Privacy Act when individuals request information about themselves that is contained in a system of records.

March 14, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Anjan Majumder

Date of Filing: February 11, 2002

Case Number: VFA-0715

This Decision and Order concerns an Appeal that Anjan Majunder from a determination issued to him by the Department of Energy's (DOE) Idaho Operations Office. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the determination, the Idaho Operations Office released some responsive information. The Appeal, if granted, would require the DOE to release a specific document to Mr. Majumder.

I. Background

Mr. Majumder filed a request in which he sought information concerning the criteria that Bechtel BWXT Idaho LLC at Idaho National Engineering and Environmental Laboratory (BWXT) used to make the determination as to which employees to layoff under BWXT's involuntary separation plan.

On December 10, 2001, the Idaho Operations Office issued a determination which provided Mr. Majumder with a copy of a document entitled "Process for Making Selection Decisions." He was informed that BWXT used the analysis criteria contained in that document in the layoff determination process. He was further informed that a copy of the completed evaluation analysis for each of the employees was never provided to DOE and as such is not an "agency record" subject to the FOIA. See February 12, 2002 Memorandum of Telephone Conversation between Nicole Brooks, Idaho Operations Office, and Toni Brown, OHA. On appeal Mr. Majumder seeks a copy of the evaluation analysis BWXT used in its decision to lay him off.

II. Analysis

The FOIA applies to "records" that are maintained by "agencies" within the executive branch of government. 5 U.S.C. § 552(f). Consequently, the FOIA is applicable only where the requested document may be considered an "agency record."

The language of the FOIA does not define the term "agency records," but merely lists examples of the types of information agencies must make available to the public. 5 U.S.C. § 552(a). In interpreting the phrase "agency records," we have applied a two-step analysis for determining whether documents created by non-federal organizations, such as BWXT, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." Los Alamos Study Group, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department,

Government corporation, Government controlled corporation, or other establishment in the executive branch . . . or any independent regulatory agency." 5 U.S.C. § 552(f). BWXT is an entity that does not fit into any of these categories. However, the courts have found that some outside entities should still be considered agencies for FOIA purposes. The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 190 & N. 11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, although BWXT was a contractor for DOE, the DOE did not conduct extensive, detailed, and day-to-day supervision of BWXT's operations. We therefore conclude that BWXT is not an "agency" within the meaning of the FOIA.

Although BWXT is not an agency for the purposes of the FOIA, its records relevant to Mr. Majumder's request could become "agency records" if the DOE obtained them and they were within the DOE's control at the time Mr. Majumder made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). In this case, the completed evaluation analysis regarding Mr. Majumder was not in the DOE's control or possession at the time of the request. See February 14, 2002 Memorandum of Telephone Conversation between Dale Claflin, BWXT's FOIA Representative, and Toni Brown, OHA. Rather, it was found in BWXT's files. Based on these facts, the document does not qualify as an "agency record" under the test set forth in Tax Analysts.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We therefore next look to the contract between the DOE and BWXT to determine the status of the requested record.

Contract No. DE-AC07-99ID13727, Section I.61, Paragraph (b) of the contract states that the "following records are considered the property of the contractor . . . (1) Employment-related records, . . . except for those records described by the contract as being maintained in Privacy Act System of records." The record sought here is not contained in any Privacy Act system of records described in the contract. *See* Contract No. DE-AC07-99ID13727, Section H.9. Consequently, it is a contractor-owned record, if it exists, and not "the property of the Government." We therefore find that the record sought by Mr. Majumder is neither an "agency record" within the meaning of the FOIA nor subject to release under the DOE regulations.

III. Conclusion

As stated above, Idaho stated in its determination letter that it did not have the document sought by Mr. Majumder. Nothing raised in Mr. Majumder's Appeal causes us to question Idaho's determination. Based on our findings above, we conclude that this document, if it does exist, would not be an agency record within the meaning of the FOIA, and would not be deemed DOE property by the contract. Consequently, we conclude that the document is not subject to release pursuant to the FOIA or DOE regulations. We will accordingly deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. Anjan Majumder, Case No, VFA-0715, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated

or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 14, 2001

Case No. VFA-0716

March 13, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dianne Taylor

Date of Filing: February 1, 2002

Case Number: VFA-0716

This Decision and Order concerns an Appeal that was filed by Dianne Taylor from a determination issued to her by the Freedom of Information Officer of the Department of Energy's (DOE) Oak Ridge Operations Office (Oak Ridge). In this determination, Oak Ridge responded to a request for information that Ms. Taylor filed pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If we were to grant the Appeal, this matter would be remanded to Oak Ridge for a new search for documents responsive to her request.

Ms. Taylor's FOIA request, in which she seeks access to her deceased father's medical and personnel records, was originally filed with the DOE's Savannah River Operations Office. (1) After a search produced no responsive documents, Savannah River forwarded the request to Oak Ridge. It is Oak Ridge's response to the request that is the subject of this Appeal. Oak Ridge's search produced one responsive document, an index card which was sent to Ms. Taylor, containing the decedent's name, the letters DEC, the date "4-30-48," and a five digit number. In her Appeal, Ms Taylor challenges the adequacy of Oak Ridge's search for responsive documents.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to ascertain the scope of the search that was performed, we contacted Oak Ridge. *See* memorandum of March 7, 2002 telephone conversation between Robert Palmer, Office of Hearings and Appeals, and Leah Ann Schmidlin, Oak Ridge. We were informed that the search was performed both manually and by computer, using the decedent's social security number. The search encompassed Oak Ridge's Records Holding Area, the Y-12, X-10 and K-25 facilities, and the East Tennessee Technology Park. Ms Schmidlin stated that she was unaware of any facility in which responsive documents were likely to be located that had not already been searched. Based on the information before us, we find that the search was reasonably calculated to uncover the materials sought, and was therefore adequate. We will therefore deny Ms. Taylor's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Dianne Taylor in Case No. VFA-0716 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 13, 2002

(1)Ms. Taylor indicated that her father had worked at the Savannah River site “in the early 50's.” FOIA request at 1.

Case No. VFA-0717

March 26, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: VerdaBelle C. Jones

Date of Filing: February 5, 2002

Case Number: VFA-0717

On February 5, 2002, VerdaBelle C. Jones, filed an Appeal from a determination issued to her on January 8, 2002, by the Department of Energy's Richland's Operation Office (Richland). That determination was issued in response to a request for information that Mrs. Jones submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Mrs. Jones asserts that Richland did not provide her with responsive documents in its possession regarding her request for information.

I. Background

On September 24, 2001, Mrs. Jones filed a request for information in which she sought the medical and radiation exposure records of her deceased husband, Richard G. Jones. See October 19, 2001 Determination Letter at 1. On October 19, 2001, Richland issued a determination which stated it conducted a search of its files and located a summary of Mr. Jones' radiation exposure record. The summary included all of his Hanford Site dosimetry data and was generated from the site's comprehensive database for radiation exposure records, known as the Hanford Radiological Exposure Reporting System (REX). Id. In this determination letter Richland indicated that it did not include the supporting documents related to Mr. Jones' radiation exposure record (i.e., handwritten calculations, training rosters, yearly dose sheets, copies of punch cards, and personal radiation exposure history forms) all of which were previously entered in REX. Id. On January 8, 2002, Richland issued a second determination releasing the supporting material referred to in its October 19, 2001 determination letter.

On February 26, 2002, Mrs. Jones filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Mrs. Jones challenges the adequacy of the search conducted by Richland Specifically, Mrs. Jones argues that Richland failed to provide her with "everything" it possesses regarding her husband. Mrs. Jones further contends that there are unexplained gaps in her husband's medical records. She believes Richland possesses additional information. Mrs. Jones asks that the OHA direct Richland to conduct a new search for additional responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and

conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Hideca Petroleum Corp., 9 DOE ¶ 80,108 (1981); Charles Varon, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Richland to ascertain the extent of the search that had been performed. As stated above, upon receiving Mrs. Jones' request for information, Richland conducted a search of the site's comprehensive database for radiation exposure records. Based on this search, Richland released a summary of Mrs. Jones' husband's radiation exposure record. In addition, Richland informed Mrs. Jones that a copy of her husband's medical record, maintained for the DOE by the Hanford Environmental Health Foundation (HEHF) would be forwarded to her from HEHF. Consequently, HEHF provided 702 pages of occupational health records to Mrs. Jones. According to Richland, HEHF conducted its search by name and social security number. We have ascertained that the records that the DOE and HEHF provided to Mrs. Jones are all the responsive records they located. Richland has informed us that HEHF would not possess private physician medical records as Mrs. Jones' Appeal suggests. See Record of Telephone Conversation between Sarah Prein, Richland, and Kimberly Jenkins-Chapman, OHA (March 13, 2002). Given the facts presented to us, we find that Richland conducted an adequate search which was reasonably calculated to discover documents responsive to Mrs. Jones' Request. Therefore, we must deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by VerdaBelle C. Jones, OHA Case No. VFA-0717, on February 26, 2002, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 26, 2002

Case No. VFA-0718

March 7, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Shirley E. Kates

Date of Filing: February 6, 2002

Case Number: VFA-0718

Shirley E. Kates filed this Appeal from a determination issued to her by the Oak Ridge Operations Office (ORO) of the Department of Energy (DOE). The determination responded to a request for information she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In her Appeal, Kates challenges the adequacy of ORO's search for documents responsive to her request.

I. Background

Kates submitted a request for:

any electronically-distributed or any hard copy list developed by any level of ORO's senior management between January 1, 2001 and the current time and which contains the names of DOE employees, including mine, that are or were targeted for elimination from the Federal government.

On September 24, 2001, ORO issued a determination stating that it had found no records responsive to Kates' request. Kates then filed the present Appeal.

In her Appeal, Kates contends that ORO's search was inadequate. She supports this claim by stating that during the week of March 26, 2001, she saw an e-mail version of a document within the scope of the request. She also stated that she saw, at or near the top of the e-mail, the name of a senior manager at ORO.

In addition, Kates states that she spoke with an employee of the Information Resource Management Division at ORO, who has access to tape backups of e-mail messages. The employee told Kates that he had not been asked to search the tape backups in connection with a search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. A FOIA request deserves a thorough and conscientious search for responsive documents, and, in the event of an appeal, we will remand a case where it is evident that the search conducted was inadequate. *See, e.g., Hideca Petroleum Corp.*, 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980).

In a case involving the adequacy of the agency's search, however, "the issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982). To determine whether an agency's search was adequate, we therefore examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

We reviewed the search conducted by ORO in order to assess its adequacy. ORO identified three senior managers who would potentially know about the requested documents. Each of the three stated that, to the best of his or her knowledge, no responsive documents existed. ORO also contacted an administrative officer in the Human Resources Division at the Oak Ridge facility. The Human Resources Division reported that no responsive documents were found in its files. On the basis of these responses, ORO concluded that no responsive documents existed.

In addition, we contacted the senior manager, whose name Kates said she saw on the e-mail. We asked her about the e-mail message that Kates claimed to have seen. While the senior manager did recall receiving from the Human Resources Division a hard-copy list of employees who were expected to retire within three years, she stated that she had never seen a list like the one described by Kates.

We also contacted the FOIA office at ORO and were informed that, at the time the request was filed, ORO policy provided for retaining tape backups of e-mail for two weeks.(1) We find no reasonable basis, therefore, to remand this matter for a further search of the backup tapes.

III. Conclusion

Given the facts presented to us, we find that ORO conducted an adequate search that was reasonably calculated to discover documents responsive to Kates' request. The senior manager whom Kates believed to have had a responsive document denied any knowledge of it. In addition, it is unlikely that a copy of the e-mail exists in the backup tapes, since the policy in effect at the time provided for the tapes to be retained for only two weeks. Therefore, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Shirley E. Kates, Case No. VFA-0718, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:n March 7, 2002

(1) In February, 2002, the policy was changed to provide for retaining tape backups of e-mail messages for

six months.

Case No. VFA-0719

March 20, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. ENG. Services

Date of Filing: February 6, 2002

Case Number: VFA-0719

On February 6, 2002, R.E.V. ENG. Services filed an Appeal from a determination that the Freedom of Information Act/Privacy Act Division (FOIA/PA) of the Department of Energy (DOE) issued on December 14, 2001.(1) In its determination, FOIA/PA categorized the Appellant as a commercial use requester. For the reasons set forth below, the Appeal will be denied.

I. Background

On August 29, 2001, the Appellant filed a FOIA request with FOIA/PA asking for "information pertaining to the Motion to Dismiss [Civil Action No. 97-WM-2191, *USA ex rel Ridenour, et al. v. Kaiser-Hill, et al.*] in the US District Court for the District of Colorado." Request Letter dated August 29, 2001, from R.E.V. ENG Services to Abel Lopez, Director, FOIA/PA (Request Letter). On October 4, 2001, FOIA/PA notified the Appellant that it was classified as a "commercial use" requester. Letter dated October 4, 2001, from Abel Lopez to David E. Ridenour, P.E. (October 4, 2001 Letter). FOIA/PA also indicated that the Appellant would be charged search, review, and duplication costs associated with its request. *Id.* In its December 14, 2001 Determination Letter, FOIA/PA outlined its finding that the Appellant was a "commercial use" requester relying on the fact that the information the Appellant is requesting is related to its *qui tam* action.(2) Determination Letter dated December 14, 2001 from Abel Lopez to David E. Ridenour, P.E. (Determination Letter). The Appellant argues, in its Appeal, that (1) FOIA/PA did not respond in a timely fashion to its request because it did not make a determination on the merits of the request and (2) FOIA/PA's categorization of the Appellant as a commercial use requester is erroneous. Appeal Letter dated December 20, 2001, from David E. Ridenour, P.E., to George B. Breznay, Director, Office of Hearings and Appeals (OHA) (Appeal Letter). The Appellant also argues that OHA previously remanded the commercial classification issue to the Rocky Flats Field Office (RFFO) and RFFO subsequently granted a waiver.(3) *Id.* Further, the Appellant asserts that release of the requested information is in the public interest and that it will disseminate the information to the public. *Id.*

II. Analysis

The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"--and places requesters into three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. §

552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

The Appellant asserts that the FOIA/PA erroneously categorized it as a "commercial use requester." We disagree with the Appellant. The DOE Regulations state that a "?[c]ommercial use' request refers to a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester." 10 C.F.R. § 1004.2(c). The Supreme Court has stated that *qui tam* plaintiffs are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997). The requested information concerns the Appellant's *qui tam* action. The purpose for this request cannot be separated from the *qui tam* action's monetary motive. Therefore, we agree with FOIA/PA that the Appellant is a commercial use requester.

III. Conclusion

Based on the foregoing, we conclude that FOIA/PA correctly categorized the Appellant as a commercial use requester. Therefore, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by R.E.V. ENG Services, Case No. VFA-0719, on February 6, 2002, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeal

Date: March 20, 2002

(1)In light of the anthrax that was found in October 2001 in federal mail, in November 2001, the United States Postal Service began sending for irradiation all first class mail addressed to the DOE. The Appeal letter received on February 6, 2002, was mailed on December 20, 2001, and therefore is deemed a timely filing.

(2)Qui Tam is a provision of the Federal Civil False Claims Act that allows a private citizen to file a suit in the name of the federal government charging fraud by government contractors and other entities who receive or use government funds, and to share in any money recovered.

(3)Fee waiver determinations depend on the substance of the information requested as well as the nature of the requester. Although the requester in the case cited by the Appellant is the same, the information requested is different. Therefore, although RFFO may have granted the fee waiver in a previous case, this does not mandate that a fee waiver is appropriate in this case, which deals with different information. Moreover, no fee waiver has been requested in this instance.

Case No. VFA-0720

March 22, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mavis L. Larson

Date of Filing: February 13, 2002

Case Number: VFA-0720

On February 13, 2002, Mavis L. Larson filed an Appeal from a determination the DOE's Richland Operations Office (DOE/RL) issued on February 15, 2001. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Ms. Larson requested from DOE/RL "the employment and radiation exposure records of my deceased husband, Ahlert G. (Red) Larson. He worked at the Hanford site for Battelle from 1960-1975 as a sheep shearer." Letter from Mavis L. Larson to DOE/RL (November 27, 2001). Mr. Larson died from leukemia in 1992. Appeal at 1. On December 12, 2001, DOE/RL sent a letter to Ms. Larson, informing her that it had "conducted a thorough search by name and Social Security Number (SSN) for records related to your husband and we were unable to locate any employment records, nor is there any indication he was monitored for radiation exposure at Hanford." Letter from DOE/RL to Mavis Larson (December 12, 2001). Ms. Larson's Appeal was filed on her behalf by her son, Darold Larson, who states, "I do not understand why you do not have any records of his employment as I personally know that he worked there numerous years." Appeal at 1.(1)

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted DOE/RL and found out the following regarding its search. Because Ms. Larson's request stated that her husband worked for Battelle, DOE/RL referred the request to Pacific

Northwest National Laboratory (PNNL). Battelle, a DOE contractor, has operated PNNL and performed research and development for the DOE's Hanford site since 1965. Battelle searched both its employment records and radiation exposure records for any records pertaining to Mr. Larson. Both sets of records were searched by name and Social Security Number. Battelle located no records for Mr. Larson. DOE/RL also searched, by Social Security Number, the files of the Hanford Environmental Health Foundation, which maintains occupational health and medical records for the Hanford site. That search also revealed no responsive records. Finally, DOE/RL searched, by name, records that it maintains for trade employees (i.e., welders, pipefitters, construction, etc.) and its general employment records for former employees of Hanford prime contractors and major sub-contractors. Again, no records regarding Mr. Larson were found.(2)

Based on the above descriptions, it appears clear to us that DOE/RL performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Ms. Larson sought. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Mavis L. Larson, Case Number VFA- 0720, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 22, 2002

(1)The DOE regulations require that a FOIA Appeal be filed within 30 days of the receipt of a determination in response to a FOIA request. 10 C.F.R. § 1004.8(a). DOE/RL's determination was dated December 12, 2001, and the present Appeal was postmarked December 31, 2001. However, the U.S. Postal Service is currently sanitizing mail addressed to federal agencies, resulting in a significant delay in delivery. Thus, Ms. Larson's Appeal did not reach the OHA until six weeks after it was mailed. Given these unusual circumstances, we will consider the present Appeal to be timely filed.

(2)Mr. Larson also submitted a copy of a letter he received from the U.S. Department of Labor (DOL), which is responsible for administering the Energy Employees Occupational Illness Compensation Program. Mr. Larson filed a claim with the program related to his father's leukemia and his employment at Hanford. The letter from DOL states, "We have confirmation of employment from the Department of Energy." Letter from Johnna Funk, DOL, to Mr. Larson (December 28, 2001). We contacted Ms. Funk and she explained that the letter was in error. The confirmation received from DOE was essentially confirmation that the DOE had completed a search of records and located no records on Mr. Larson. This search apparently duplicated the search of PNNL employment and radiation exposure records performed by DOE/RL in response to Ms. Larson's FOIA request. Memorandum to file (March 12, 2002). To assist the DOL in processing Mr. Larson's compensation claim, DOE (separate from the processing of the FOIA request at issue in this case) is currently in the process of obtaining historical records that may verify his father's employment at the Hanford site. Electronic mail from Lorna Zaback, DOE/RL, to Steven Goering, OHA (February 28, 2002) ("Pacific Northwest National Laboratory did have people employed as sheep shearers on the Hanford Reservation in the past. Although we are not required to produce this information,

we are awaiting some historical documentation about these people, the jobs that they performed, and the time frame in which they worked.")

Case No. VFA-0721

April 12, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Sempra Energy Solutions

Date of Filing: February 11, 2002

Case Number: VFA-0721

On February 11, 2002, Sempra Energy Solutions (Sempra) filed an Appeal from a determination issued to the company in response to a request for documents that Sempra submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on November 19, 2001, by the Corporate Services Division of the DOE Headquarters Procurement Services (DOE/HQ). This Appeal, if granted, would require that DOE/HQ perform an additional search.

I. Background

This Appeal concerns a FOIA request that William Westcott, Esq. (Westcott), then an attorney with Greenberg Peden, P.C., submitted to DOE/HQ. *See* Letter from Westcott to DOE FOIA/Privacy Act Division (August 2, 2001). In the request, Westcott asked for "any and all documentation relating to the Energy Savings Performance Contract between Sempra Energy Solutions, Inc. and Hill Air Force Base, Utah 84056, Task Order No. 5 specifically related to the Fusion Lighting installation and Hanger 225 from 1994 to the present." *Id.* However, when DOE/HQ then called Westcott to determine whether he had additional information that would help in the search, Westcott was no longer employed at Greenberg Peden. Memorandum from James Webber, DOE/HQ, to Valerie Vance Adeyeye, OHA (March 6, 2002). Nonetheless, Greenberg Peden instructed DOE/HQ to send it the reply. *Id.* Consequently, on November 19, 2001, DOE/HQ issued a determination letter to Greenberg Peden stating that a search for responsive material was unsuccessful, and that no responsive records exist. Letter from DOE/HQ to Westcott (November 19, 2001) (Determination).

On December 27, 2001, Westcott, now employed by another law firm, contacted DOE/HQ via electronic mail asking for an update of the status of his request. *See* electronic mail message from Westcott to DOE/HQ (December 27, 2001). DOE/HQ then sent Westcott a copy of the Determination at his new address. *See* electronic mail message from DOE/HQ to Westcott (January 4, 2002). On February 11, 2002, Westcott appealed the determination on behalf of Sempra, attaching a 1997 letter from Pacific Northwest National Laboratory (PNNL) that discussed a project between PNNL and Sempra at Hill Air Force Base. (1) Sempra asks that OHA order DOE/HQ to conduct another search for responsive records. Letter from Sempra to Director, OHA (February 11, 2002) (Appeal).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988). We have analyzed the search conducted by DOE/HQ and find that the search was adequate.

DOE/HQ maintains a database of all open contracts, the Procurement and Assistance Data System (PADS). Memorandum of Meeting between James Webber, DOE/HQ and Valerie Vance Adeyeye, OHA (March 14, 2002). Using the information provided in Westcott's request, DOE/HQ searched this database but found no responsive records. *Id.* DOE/HQ then requested that the contractor who maintains files of closed and archived contracts perform an additional search for responsive material. *Id.* That search was also unsuccessful. *Id.*

Sempra argues that it has evidence of a project that was conducted at Hill Air Force Base with the participation of PNNL, Sempra, and DOE, and that therefore DOE/HQ must have responsive records in its files. Appeal at 1. Westcott submitted a FOIA request to PNNL, and received some documents relating to PNNL's work on the project. *See* electronic mail message from Westcott to OHA (March 12, 2002). He also received responsive documents from Hill Air Force Base. *Id.* According to Westcott, the purpose of the current request is to determine if DOE Headquarters also had any involvement in the project. *Id.* As proof of DOE Headquarters involvement, Sempra offers a letter from PNNL addressed to Sempra's predecessor company (CES) that discusses a project at Hill Air Force Base. *See* Letter from PNNL to CES (February 3, 1997). The project involved PNNL "in its support role to DOE, facilitat[ing] in areas where the state-of-the-art technology posed additional work for CES." *Id.*

We find that the PNNL letter, standing alone, is insufficient to prove that responsive records exist at DOE Headquarters. DOE/HQ maintains that PNNL's acknowledged participation in a project with Sempra (1) does not confirm that the project was conducted via a contract; and (2) does not confirm that DOE was a party to any contract relating to that project, if one existed. *See* Memorandum of Meeting between James Webber, DOE/HQ and Valerie Vance Adeyeye, OHA (March 14, 2002). The DOE entity that actually participated in the project, PNNL, has released responsive material to Sempra. (2) Thus, Sempra has not provided any evidence that DOE Headquarters was a party to any contract relating to the Hill Air Force Base project.

In addition, DOE/HQ was unaware that Sempra did business under the name of "CES/Way" until Westcott submitted this Appeal in February 2002. *See* electronic mail message from James Webber, DOE/HQ to Valerie Vance Adeyeye, OHA. (March 20, 2002). When DOE/HQ called Westcott at Greenberg Peden in December 2001 to solicit additional information about his request, Westcott was no longer employed there. Thus, DOE/HQ conducted its search based on information in the original request, a letter that never mentioned the name "CES." Therefore, we find that DOE/HQ conducted an adequate search reasonably calculated to uncover the material requested by Sempra.

Nonetheless, after we contacted DOE/HQ with information about the company's old name, DOE/HQ conducted another search of its database of contracts and found a contract related to CES. *See* electronic mail message from James Webber, DOE/HQ to Valerie Vance Adeyeye, OHA (March 20, 2002). Accordingly, this Appeal is granted in part, and this matter is remanded to DOE/HQ to release any additional responsive material to Westcott or to issue a new determination letter justifying the withholding of any information it redacts from any responsive material it provides to Westcott.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Sempra Energy Solutions on February 11, 2002,

OHA Case Number VFA-0721, is hereby granted as set forth in paragraph (2) of this Order, and denied in all other respects.

(2) This matter is remanded to DOE Headquarters Procurement Services for processing in accordance with the guidance in the Decision above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records

are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 12, 2002

(1)PNNL is a research laboratory that is managed and operated by Battelle for DOE.

(2)Westcott stated that the documents that PNNL released to him were non-responsive and "wholly irrelevant" to his request. *See* electronic mail from Westcott to OHA (March 20, 2002). We cannot comment on that matter since that particular request is beyond the scope of this Appeal.

Case No. VFA-0722

March 21, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Southern California Edison

Date of Filing: February 13, 2002

Case Number: VFA-0722

The present Appeal is one of several that have arisen out of a contract dispute between the Appellant and BPA. On March 21, 2001, the Appellant filed a twelve-part request for information with BPA. On May 14, 2001, BPA issued a determination letter in response to the March 21, 2001 request. On June 13, 2001, the Appellant appealed BPA's determination. On July 3, 2001, we issued a Decision and Order granting the Appeal in part and remanding portions of it to BPA for further processing. *Southern California Edison*, 28 DOE ¶ 80,176 (2001) (*VFA-0677*). (1)

On January 11, 2002, BPA issued a second determination letter in response to the instructions set forth in VFA-0677. In its January 11, 2002 determination letter, BPA adequately described the results of its searches, clearly indicated which information it was withholding and appropriately specified the exemptions under which each item of withheld information was withheld. BPA also produced two additional long term contracts in their entirety and portions of additional short term and long term contracts. However, the January 11, 2002 determination letter continued to withhold portions of a number of documents under Exemptions 4 and 5 of the Freedom of Information Act. 5 U.S.C. § 552. On February 13, 2002, the present appeal was filed contending that BPA has improperly withheld information under Exemptions 4 and 5.

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

The information that BPA continues to withhold falls under two categories. The first category consists of information contained in contracts made directly between BPA and outside entities to which it sold, from which it purchased or with which it exchanged electrical power (bi-lateral agreements). The second category consists of information contained in bids submitted by BPA to either the California Independent System Operator (CISO) or the California Power Exchange (CPX).

Bilateral Agreements

BPA, citing Exemption 4, redacted information which consisted of “amounts of energy, total energy amounts, price and total revenue, . . . advance reservation fees, . . . quantity, demand limits, total megawatt hour (MWh), . . . and monthly revenue” from bilateral agreements it released to the Appellant. (2)

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). “Like all FOIA exemptions, Exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute.” *Washington Post Co. v. United States HHS*, 865 F.2d 320, 324 (D.C. Cir. 1989). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*).

Where, as in this case, the agency determines that the information at issue is not a trade secret, but is instead “commercial or financial” and “obtained from a person,” it must then determine whether the information is "privileged or confidential." If the information is subject to a valid claim of legal privilege on the part of its submitter or is confidential, it may properly be withheld under Exemption 4. In order to determine whether the information is "confidential" the agency must first decide whether the information was involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*Critical Mass*), *cert. denied*, 113 S. Ct. 1579 (1993). Information is considered to have been submitted involuntarily if, as in this case, any legal authority compels its submission, including informal mandates that call for the submission of the information as a cost of doing business with the government. *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *aff’d in part, rev’d in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir.1999). Since such information is involuntarily submitted, the agency must show that its disclosure is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained before withholding it under Exemption 4. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d 871 at 879.

Once the DOE decides to withhold information, both the FOIA and the Department’s implementing regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to understand the basis for claiming the exemption and to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Kleppe*, 547 F.2d at 680 ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

In the January 11, 2002 determination letter, BPA invoked Exemption 4 claiming that release of the redacted information which consisted of “amounts of energy, total energy amounts, price and total revenue, . . . advance reservation fees, . . . quantity, demand limits, total megawatt hour (MWh), . . . and monthly revenue” would cause substantial competitive harm to those entities that had entered into the

contracts at issue if released. The only rationale provided by BPA for its conclusion is that one of those entities that had entered into the contracts at issue requested that BPA keep this information confidential. Although, pursuant to Executive Order No. 12,600, consultation with a submitter of financial or business information is a required step in the FOIA evaluation process, an agency is required to determine for itself whether the information in question should be disclosed. *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y. 1996); *accord* Exec. Order No. 12,600 § 5 (notification procedures specifically contemplate that agency makes ultimate determination concerning release). There is no evidence in the record that BPA made the requisite determination.

Moreover, BPA's justification consists of conclusory and generalized allegations of substantial competitive harm. As the cases set forth above clearly indicate, such conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents under the FOIA.

Accordingly, we are remanding those portions of the Appeal concerning the bilateral agreements to BPA. On remand, BPA shall either promptly release the information it has withheld under Exemption 4 to the Appellant (after complying with the mandate set forth by Executive Order No. 12,600), or issue a new determination letter withholding the information with an appropriate justification.

Bids Submitted to Either the California Independent System Operator (CISO) or the California Power Exchange (CPX)

BPA also redacted information from many of the bids it submitted to either the CISO or CPX that it released to the Appellant. This information indicates the prices at which electrical power was purchased or sold, the quantities of electric power that was purchased or sold and the descriptions of any options in current or recent historical trading. In support , BPA contended that release of this information would cause harm to the BPA's own commercial interests, and it invoked Exemption 5's confidential commercial information privilege. (3)

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). To qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter- agency or intra-agency document, i.e. its source and its recipient must each be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. *Department. of Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*). The Appellant, citing *Klamath*, however, contends that this information is not intra-agency or inter-agency in character. Specifically, the Appellant contends that the information at issue is contained in "negotiated contracts . . . which are the product of interaction with outside parties." Appeal at 4.

In *Klamath*, the Court noted that in some cases courts have found that communications between the government and outside consultants hired by them are, in effect, inter-agency or intra-agency documents and therefore protected by Exemption 5. Noting further that "in such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," the Court found:

[T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id., 121 S. Ct. at 1066-67. In contrast, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective outside consultant are clearly not inter-agency or intra-agency documents. *Id.,* 121 S. Ct. at 1067-69. Turning to the present case, it appears that bids submitted to the CISO or CPX can be considered to constitute "inter-agency or intra-agency"

communications pursuant to Exemption 5.

The California Independent System Operator (CISO) and Power Exchange (CPX) are both nonprofit public benefit corporations organized under the laws of California. The CISO was created to ensure efficient use and reliable operation of the electric transmission grid. The CPX was created to provide an efficient, competitive energy auction open on a non-discriminatory basis to all suppliers and purchasers. In order to accomplish these objectives, the CISO and CPX provided a neutral clearinghouse for energy and ancillary service transactions.

All non-governmental utilities in California were required by law to sell all their power into, and purchase all their power out of, the CPX, until it was dissolved on January 31, 2001. The CPX established a "market clearing price" equal to the last, highest bid received. All successful sale bidders received the market-clearing price, regardless of the amount of their bid. In this manner, the CPX acted objectively to facilitate the trade, matching up energy sale bids with purchaser requests. When the energy sale was accomplished, the sellers did not know who the buyers were on the other side of the transaction, and vice versa. There was no negotiation between the bidders and the CPX, simply the submission of the bid, and then a response indicating whether the bidder was successful, and if so, what the market-clearing price will be. The CPX also collected money owed for CPX transactions from buyers, and disbursed money for CPX sales to the sellers.

Similarly, the CISO operates the supplemental energy market in California for reliability purposes. CISO market participants can submit bids into the CISO supplemental energy markets. The CISO is the ultimate purchaser of the energy, which is used to satisfy ancillary services and other reliability requirements for CISO transmission system operation. However, just as in the case of the CPX, the price of this transaction is not determined pursuant to a bilateral negotiation between buyer and seller, but is set as a “market clearing price” similar to that described above. The CPX and CISO therefore acted as objective agents, performing marketing functions on behalf of BPA. Moreover, the CPX and CISO, in facilitating the marketing of BPA’s electrical power, acted to further BPA’s interest and did not act on their own behalf at the expense of other outside parties’ interests.

Even if the information that BPA withheld under Exemption 5 is part of the agency’s inter-agency or intra-agency communications, it still cannot be properly withheld under Exemption 5, unless it falls within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. The Supreme Court has held that Exemption 5 exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The Supreme Court has recognized that Exemption 5 incorporates those “privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context.” *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). Accordingly, “[t]he test under Exemption 5 is whether the documents would be ?routinely’ or ? normally’ disclosed upon a showing of relevance.” *F.T.C. v. Grolier*, 462 U.S. 19, 26 (1983) (citing *Sears*, 421 U.S. at 148-49)

Among the privileges incorporated by the courts under Exemption 5 is the “confidential commercial information privilege.” *See, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979) (*Merrill*) (holding that since disclosure of Domestic Policy Directives would significantly harm the government’s monetary functions or commercial interests, they could properly be withheld under Exemption 5); *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982) (*Land Bank*) (withholding a government-generated real estate appraisal). The courts have applied this privilege in the FOIA context to prevent the government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. *Merrill*, 443 U.S. at 356. Exemption 5 therefore “protects the government when it enters the marketplace as an ordinary commercial buyer or seller.*” Land Bank*, 671 F.2d at 665 (footnote omitted). It is this privilege upon which BPA bases its Exemption 5 claim on in this case.

It is important to note that the protection afforded by this particular privilege is limited in scope and lasts

only as long as necessary to protect the government's commercial interests. *Id.* In *Merrill*, the Court stated that the confidential commercial information privilege protects information generated in the process of awarding a contract. *Merrill*, 443 U.S. at 360. However, the Court also indicated that the privilege expires upon the awarding of the contract. *Id.* Nevertheless, it is conceivable that the release of some information generated during the awarding of a contract might potentially continue to place the government at a competitive disadvantage if released even after the contract in question has been executed. Accordingly, we will remand this portion of the Appeal to BPA to afford it an opportunity to show (1) that the release of the information it is withholding under Exemption 5's confidential commercial information privilege would place the government at a competitive disadvantage, and (2) that this information could be withheld without departing from the holdings set forth in *Merrill*.

Conclusion

We are remanding the present Appeal to BPA with instructions either to promptly release the information it withheld from the Appellant in its January 11, 2002, determination letter or to issue a new determination letter which adequately justifies continued withholding of the information.

It Is Therefore Ordered That:

(1) The Appeal filed by Southern California Edison, Case No. VFA-0722, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 21, 2002

(1)The Appeal in, VFA-0677 was originally based upon two separate determinations regarding two different FOIA requests. Accordingly, we split the Appeal into two separate cases. Those issues arising from the determination letter issued on May 14, 2001, which responded to a request filed on March 21, 2001, were adjudicated under Case Number VFA-0677. Those issues arising from the determination letter issued on June 4, 2001, which responded to a request filed on April 21, 2001, were adjudicated under Case Number VFA-0678.

(2)The May 14, 2001, determination letter also withheld this information under Exemption 5's confidential commercial information privilege. However, BPA has withdrawn its claim that the information it withheld from the bilateral agreements is exempt from disclosure under Exemption 5.

(3)BPA also invoked Exemption 4 to withhold this information. We have determined that BPA was the source of this information. That fact is a necessary prerequisite for reliance on Exemption 5, as discussed below. At the same time, however, it also rules out the application of Exemption 4 to the same information, as Exemption 4 requires that the information to be protected must be "obtained from a person," that is, created outside BPA and submitted to BPA. *Allnet Communication Svcs. v. FCC*, 800 F.

Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities invluding corporations, associations and public or private organizations other than agencies"), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994).

Case No. VFA-0723

March 25, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Southern California Edison

Date of Filing: February 14, 2002

Case Number: VFA-0723

This Appeal arises out of a contract dispute between Southern California Edison (the Appellant) and the Bonneville Power Administration (BPA). On April 2, 2001, the Appellant filed a seven-part request for information with BPA under the Freedom of Information Act (FOIA). On June 4, 2001, BPA issued a determination letter to the Appellant. The Appellant appealed the June 4, 2001 determination letter to the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) on June 12, 2001. (1) On July 11, 2001, OHA issued a decision and order remanding the June 12, 2001 Appeal to BPA for further processing. On January 14, 2002, BPA issued a new determination letter in which it released additional information to the Appellant. However, BPA continued to withhold information under Exemptions 4 and 5 of the FOIA. The present appeal was filed on February 14, 2002 contending that the information that BPA continues to withhold under Exemptions 4 and 5 cannot properly be withheld under those exemptions and therefore should be released. (2)

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *See Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemptions 4 and 5 are at issue in the instant case.

Exemption 4

BPA withheld price and quantity information from contracts which it has executed for the purchase or sale of electrical power under Exemption 4 contending that its release could cause competitive harm to the parties that contracted with BPA. (3) Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen*

Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd inpart, rev'd in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir.1999). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, BPA claims that release of price and quantity information from contracts which it has executed for the purchase or sale of electrical power could cause substantial competitive harm to the parties that it has contracted with. The only rationales provided by BPA for this conclusion are (1) that BPA's customers view pricing information as commercially sensitive, and (2) that BPA's customers competitors could use pricing and quantity information to "undercut prices being offered to penetrate their customer base." January 14, 2002 Determination Letter at 5.

Although, pursuant to Executive Order No. 12,600, consultation with a submitter of financial or business information is a required step in the FOIA evaluation process, an agency is required to determine for itself whether the information in question should be disclosed. *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y. 1996); *accord* Exec. Order No. 12,600 § 5 (notification procedures specifically contemplate that agency makes ultimate determination concerning release). Accordingly, BPA's customers' objections to release of the information do not alone establish that its release could cause substantial competitive harm.

More importantly, BPA's conclusory contention that its customers' competitors could use information about the price and quantity of electric power that they have purchased from BPA in the past to underbid BPA's customers in future sales of electric power is without merit. Courts have traditionally viewed with great skepticism the claim that the release of past pricing and quantity data would allow competitors to

predict an entity's future pricing strategy, since past pricing determinations involve a number of fluctuating variables. *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1114 (9th Cir. 1994); *Acumenics Research & Tech. v. Department of Justice*, 843 F.2d 800, 805-8 (4th Cir. 1988). BPA has not shown how its customers' competitors could use past pricing and quantity information to predict BPA's customers' future offering prices for resales of electric power or for sales of goods and services produced with the electric power purchased from BPA. Accordingly, we are remanding that portion of the present Appeal concerning withholdings under Exemption 4 to BPA. On remand, BPA must promptly either release the withheld information or issue a new determination letter withholding the information under a different FOIA exemption or providing a much more detailed and convincing explanation of how its release could cause substantial competitive harm to its customers. (4)

Exemption 5

BPA has also invoked Exemption 5 to withhold price and quantity information, as well as the descriptions of any options in current or recent historical trading floor contracts, from bids it made to the California Independent System Operator (CISO) or to the California Power Exchange (CPX). Specifically, BPA contends that release of this information would cause harm to the BPA's own commercial interests.

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). To qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter-agency or intra-agency document, i.e. its source and its recipient must each be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. *Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*). The Appellant, citing *Klamath*, however, contends that this information is not intra-agency or inter-agency in character. Specifically, the Appellant contends that the information at issue is contained in "negotiated contracts . . . which are the product of interaction with outside parties." Appeal at 4.

In *Klamath*, the Court noted that in some cases courts have found that communications between the government and outside consultants hired by them are, in effect, inter-agency or intra-agency documents and therefore protected by Exemption 5. Noting further that "in such cases, the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," the Court found:

[T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id., 121 S. Ct. at 1066-67. In contrast, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective outside consultant are clearly not inter-agency or intra-agency documents. *Id.*, 121 S. Ct. at 1067-69. Turning to the present case, it appears that bids submitted to the CISO or CPX can be considered to constitute "inter-agency or intra- agency" communications pursuant to Exemption 5.

The CISO and CPX are both nonprofit public benefit corporations organized under the laws of California. The CISO was created to ensure efficient use and reliable operation of the electric transmission grid. The CPX was created to provide an efficient, competitive energy auction open on a non-discriminatory basis to all suppliers and purchasers. In order to accomplish these objectives, the CISO and CPX provided a neutral clearinghouse for energy and ancillary service transactions.

All non-governmental utilities in California were required by law to sell all their power into, and purchase all their power out of, the CPX, until it was dissolved on January 31, 2001. The CPX established a "market

clearing price" equal to the last, highest bid received. All successful sale bidders received the market-clearing price, regardless of the amount of their bid. In this manner, the CPX acted objectively to facilitate the trade, matching up energy sale bids with purchaser requests. When an energy sale was accomplished, the seller did not know who the buyer was, and vice versa. There was no negotiation between the bidders and the CPX, simply the submission of the bid, and then a response indicating whether the bidder was successful, and if so, what the market-clearing price will be. The CPX also collected money owed for CPX transactions from buyers, and disbursed money for CPX sales to the sellers.

Similarly, the CISO operates the supplemental energy market in California for reliability purposes. CISO market participants can submit bids into the CISO supplemental energy markets. The CISO is the ultimate purchaser of the energy, which is used to satisfy ancillary services and other reliability requirements for CISO transmission system operation. However, just as in the case of the CPX, the price of this transaction is not determined pursuant to a bilateral negotiation between buyer and seller, but is set as a “market clearing price” similar to that described above. The CPX and CISO therefore acted as objective agents, performing marketing functions on behalf of BPA. Moreover, the CPX and CISO, in facilitating the marketing of BPA’s electrical power, acted to further BPA’s interest and did not act on their own behalf at the expense of other outside parties’ interests.

Even though we find the information that BPA withheld under Exemption 5 is part of the agency’s inter-agency or intra-agency communications, it still cannot be properly withheld under Exemption 5, unless it falls within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. The Supreme Court has held that Exemption 5 exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The Supreme Court has recognized that Exemption 5 incorporates those “privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context.” *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). Accordingly, “[t]he test under Exemption 5 is whether the documents would be ?routinely’ or ? normally’ disclosed upon a showing of relevance.” *F.T.C. v. Grolier*, 462 U.S. 19, 26 (1983) (citing *Sears*, 421 U.S. at 148-49)

Among the privileges incorporated by the courts under Exemption 5 is the “confidential commercial information privilege.” *See, e.g., Federal Open Market Comm. v. Merrill,* 443 U.S. 340 (1979) (*Merrill*) (holding that since disclosure of Domestic Policy Directives would significantly harm the government’s monetary functions or commercial interests, they could properly be withheld under Exemption 5); *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982) (*Land Bank*) (withholding a government-generated real estate appraisal). The courts have applied this privilege in the FOIA context to prevent the government from being placed at a competitive disadvantage and to facilitate the consummation of contracts. *Merrill*, 443 U.S. at 356. Exemption 5 therefore “protects the government when it enters the marketplace as an ordinary commercial buyer or seller.*”* *Land Bank*, 671 F.2d at 665 (footnote omitted). It is this privilege upon which BPA bases its Exemption 5 claim in this case.

It is important to note that the protection afforded by this particular privilege is limited in scope and lasts only as long as necessary to protect the government’s commercial interests. *Id.* In *Merrill*, the Court stated that the confidential commercial information privilege protects information generated in the process of awarding a contract. *Merrill*, 443 U.S. at 360. However, the Court also indicated that the privilege expires upon the awarding of the contract. *Id.* Nevertheless, it is conceivable that the release of some information generated during the awarding of a contract might potentially continue to place the government at a competitive disadvantage if released even after the contract in question has been executed. Accordingly, we will remand this portion of the Appeal to BPA to afford it an opportunity to show (1) that the release of the information it is withholding under Exemption 5's confidential commercial information privilege would place the government at a competitive disadvantage, and (2) that this information could be withheld without departing from the holdings set forth in *Merrill*.

The January 14, 2002 Determination Letter cites a previous opinion issued by this office in support of

BPA's contentions that (1) "release of contract pricing information would harm BPA's commercial interests by interfering with its ability to negotiate future contracts," and (2) "power sale pricing information in executed contracts with BPA are [sic] properly exempt from disclosure under Exemption 5." January 14, 2002 Determination Letter at 5, *citing Wenatchee World*, 28 DOE ¶ 80, 129 (2001) (*Wenatchee*). BPA's reliance upon *Wenatchee* is, however, misplaced for several reasons. First, the *Wenatchee* opinion clearly indicated that its holding was limited to a unique and specific fact pattern. *Wenatchee*, 28 DOE at 80,639-40. Second, the *Wenatchee* opinion was based upon an overly broad reading of *Merrill* that failed to take note of *Merrill's* holding that the confidential commercial information privilege expires upon the execution of a contract. Third, the *Wenatchee* opinion did not consider the issues raised by the Supreme Court's clarification, in *Klamath*, of when data can be considered as intra-agency or inter-agency information. Had it done so, it clearly would have concluded that the contracts in question were not intra-agency or inter-agency documents and therefore would not have found them to be protected by Exemption 5.

Conclusion

For the reasons set forth above, we are remanding this Appeal to BPA. BPA must either release the information it has withheld to the Appellant or issue a new determination letter which contains a sufficient justification for its withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed by Southern California Edison, Case No. VFA-0723, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 25, 2002

(1)The Appeal originally filed by the Appellant on June 12, 2001, was based upon two separate determinations regarding two different FOIA requests. Those issues arising from the determination letter issued on May 14, 2001, which responded to a request filed on March 21, 2001, were adjudicated under Case Number VFA-0677. Those issues arising from the determination letter issued on June 4, 2001, which responded to a request filed on April 21, 2001, were adjudicated under Case Number VFA-0678. The present proceeding concerns the documents at issue in Case Number VFA-0678.

(2)BPA has withdrawn its Exemption 5 claim for any information it redacted from bilateral agreements with purchasers of BPA's electrical power. BPA continues to withhold information redacted from bids it submitted to the California Independent System Operator (CISO) and the California Power Exchange (CPX) under Exemption 5.

(3)BPA also notes that the other parties to these contracts wish that the contracts be treated as exempt from

disclosure.

(4)BPA also withheld information from bids submitted to the CISO and CPX under Exemption 4. We have determined that BPA was the source of this information. That fact is a necessary prerequisite for reliance on Exemption 5, as discussed below. At the same time, however, it also rules out the application of Exemption 4 to this information, as Exemption 4 requires that the information to be protected must be "obtained from a person," that is, created outside BPA and submitted to BPA. *Allnet Communication Svcs. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994).

Case No. VFA-0724

August 15, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:John C. Fredriksen

Date of Filing: February 12, 2002

Case Number: VFA-0724

John C. Fredriksen filed an Appeal from a determination that the Department of the Air Force issued to him on November 5, 2001. In that determination, the Air Force denied in part a request for information that Dr. Fredriksen submitted on August 31, 1999, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Of the three documents requested, the Department of Energy's (DOE) Office of Classified Controlled Information Review reviewed two of them, and determined that one contained classified information. Both the DOE and the Air Force withheld the classified information from the requester under the FOIA. This Appeal, if granted, would require the DOE to release the information that it withheld from the version of the document supplied to Dr. Fredriksen. Other portions of the three requested documents were withheld by the Air Force alone; those withholdings are not a part of this Appeal.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On August 31, 1999, Dr. Fredriksen requested specific pages of three Tactical Air Command histories under the FOIA from the Air Force. The Air Force responded to the request by providing the requested pages. Some information on some of the pages, however, was deleted. In its November 5, 2001 determination letter, the Air Force explained that it had withheld some information as exempt from release under Exemption 1 of the FOIA, and the DOE had withheld some information as exempt under Exemption 3 of the FOIA. The DOE withheld information from only one of the requested documents, "History of Tactical Air Command, July- December 1951."

The present Appeal seeks the disclosure of the portions of the document that the DOE withheld. In his Appeal, Dr. Fredriksen contends that the withholdings concern "both the B-45 jet and the Mark 5 atomic device [which] are no longer extant," and questions how the withheld information could "possibly compromise national security."

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of

national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); see 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1. *See Greenpeace*, 28 DOE ¶ 80,191 (2001); *National Security Archive*, 26 DOE ¶ 80,118 (1996); *Keith E. Loomis*, 25 DOE ¶ 80,183 (1996); *A. Victorian*, 25 DOE ¶ 80,166 (1996).

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute of the type to which Exemption 3 refers. *See, e.g., Greenpeace*, 28 DOE ¶ 80,191 (2001); *National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Director of Security Affairs has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of Security Affairs (now the Director of Security) (Director) reviewed those portions of the document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that the document contains information concerning the design of nuclear weapons and nuclear weapon yields and weapon effects. These types of information have been classified as Restricted Data (RD) and Formerly Restricted Data (FRD), respectively, under the DOE's current classification guidance. Under the Atomic Energy Act of 1954, RD and FRD are forms of classified information, and are therefore exempt from mandatory disclosure under Exemption 3. The Director has marked all deletions the DOE has made as "DOE b3" in the margin of the document. The denying officer for these withholdings is Joseph S. Mahaley, Director, Office of Security, Department of Energy.

In performing his review the Director requested that the Air Force also review the validity of the deletions it originally made from the portions of the document in which the DOE had withheld information. The Air Force has completed its review. The Director has marked all deletions made at the direction of the Air Force, under Exemption 1 of the FOIA, as "ACC/DON b1" in the margin of the document. The Air Force has withheld the same information under Exemption 1 as the DOE has withheld under Exemption 3. In addition, a small amount of information has been withheld solely by the Air Force, also under Exemption 1. This information consists of the last four deleted phrases on page 60 of the document. The denying official for these withholdings is Colonel Gerald F. Alexander, Jr., Deputy Director, Communications and Information Systems, Department of the Air Force.

Based on the Director's review, we have determined that Executive Order 12958 and the Atomic Energy Act require the continued withholding of significant portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Air Force and the Director have reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Because some previously deleted information may now be released, newly redacted versions of the portions of the document reviewed in this Appeal will be provided to Dr. Fredriksen under separate cover. Accordingly, his Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by John C. Fredriksen on February 12, 2002, Case No. VFA-0724, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the document entitled "History of Tactical Air Command, July-December 1951," in which additional information is released, will be provided to Dr. Fredriksen.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 15, 2002

Case No. VFA-0725

March 25, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: R.E.V. Eng. Services

Date of Filing: February 25, 2002

Case Number: VFA-0725

This Decision and Order concerns an Appeal that was filed by David Ridenour d/b/a/ R.E.V. Eng. Services from a determination issued to him by the Freedom of Information Officer of the Department of Energy's (DOE) Rocky Flats Field Office (Rocky Flats). In this determination, Rocky Flats responded to a request for information that Mr. Ridenour filed pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), as implemented by the DOE in 10 C.F.R. Part 1004. If we were to grant the Appeal, this matter would be remanded to Rocky Flats for a new search for documents responsive to his request.

In his request, Mr. Ridenour seeks access to copies of "acknowledgement" letters pertaining to three FOIA requests that he filed. These letters are often sent out by program offices to FOIA requesters when the time required for processing their request exceeds the statutory limit. The letters usually indicate the reason for the delay and provide a general time frame in which the requester can expect a response. In its response, Rocky Flats states that the files generated in response to these requests were searched, and no responsive documents were located. Mr. Ridenour contends in his Appeal that these letters should be done as a matter of course, and asks that a more comprehensive search be performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether Rocky Flats' search was adequate, we contacted the FOIA Officer for that Office, and were informed that no such letters were written with regard to the requests specified by Mr. Ridenour. *See* memorandum of March 18, 2002 telephone conversation between Robert Palmer, OHA Staff Attorney, and Mary Hammack, Rocky Flats. Any further search would therefore prove fruitless. Consequently, we will deny Mr. Ridenour's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by R.E.V. Eng. Services in Case No. VFA-0725 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has

a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 25, 2002

Case No. VFA-0726

April 12, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Southwest Research and Information Center

Date of Filing: February 26, 2002

Case Number: VFA-0726

On February 26, 2002, Southwest Research and Information Center (Southwest) filed an Appeal from a determination issued to it in response to a request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on January 29, 2002, by the Carlsbad Field Office of the Department of Energy (Carlsbad). This Appeal, if granted, would require that Carlsbad grant Southwest a fee waiver.

The FOIA requires that federal agencies generally release documents to the public upon request. The Act also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

I. Background

In its FOIA request, Southwest sought information and documents related to the Waste Isolation Pilot Plant. Southwest requested that all fees associated with the processing of the request be waived. Because Southwest's request did not adequately address the DOE's criteria for granting fee waivers, in a letter dated January 29, 2002, Carlsbad informed Southwest that its request for a fee waiver was denied. *See* Determination Letter at 2.

In its Determination Letter, Carlsbad concluded that Southwest did not adequately explain its ability and intention to disseminate the requested information to the public. *Id*. The ability to disseminate the requested material to the public is a critical factor in determining whether a requester should be granted a waiver of fees. *Larson v. CIA*, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). In addition, Carlsbad concluded that Southwest failed to demonstrate that disclosure of the requested records would contribute significantly to the public understanding of the issues identified. Determination Letter at 2.

On February 26, 2002, Southwest appealed Carlsbad's determination. In its Appeal, Southwest included additional information about the public interest in disclosure and about its ability to disseminate the material sought. This information may satisfy the deficiencies set forth in Carlsbad's initial determination, and Carlsbad has agreed to reconsider this matter on remand. Therefore, in light of this new information, we will remand this matter to Carlsbad. Upon remand, Carlsbad should review Southwest's Appeal and

promptly issue a revised fee waiver determination.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Southwest Research and Information Center on February 26, 2002, OHA Case Number VFA-0726, is hereby granted as set forth in paragraph (2) below.

(2) This matter is remanded to the Carlsbad Field Office of the Department of Energy for the issuance of a new fee waiver determination.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 12, 2002

Case No. VFA-0727

March 27, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Mitchell G. Brodsky

Date of Filing:February 27, 2002

Case Number: VFA-0727

Mitchell G. Brodsky filed this Appeal in response to a determination issued to him by the Department of Energy's Yucca Mountain Site Characterization Office (YMSCO). The determination deals with a request that Brodsky submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy at 10 C.F.R. Part 1004. In his Appeal, Brodsky requests the release of material responsive to the request. As explained below, we will grant the Appeal and remand Brodsky's request for further processing.

I. Background

Brodsky's FOIA request sought the release of a report prepared for the DOE by John Nicoletti (the Nicoletti report). The Nicoletti report concerns an investigation into allegations by Brodsky that he was subjected to a hostile work environment.

YMSCO located a copy of the Nicoletti report. However, YMSCO withheld the Nicoletti report in its entirety, claiming it was exempt from mandatory release pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6). Brodsky then filed the present Appeal with the Office of Hearings and Appeals.

II. Analysis

The FOIA generally requires that all federal agency records be made available to the public, while providing for nine categories of records that are exempt from mandatory disclosure. YMSCO withheld the draft report under Exemption 6 of the FOIA, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d

Cir. 1991); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770.

The fact that some material in a record meets the criteria for withholding discussed above does not necessarily mean that the record may be withheld in its entirety. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979).

YMSCO states in the Determination Letter that it is withholding the report pursuant to Exemption 6 because "release of this document, in its entirety, would compromise substantial privacy interests and would clearly be an unwarranted invasion of personal privacy." The basis for this claim appears to be the fact that the Nicoletti report contains the names of Brodsky's fellow employees that were interviewed by Nicoletti, and a summary of their statements regarding Brodsky's allegation. YMSCO also states that "the release of the names and identifying information in this case could chill employees from providing candid information in the future."

We obtained a copy of the Nicoletti report and reviewed it in light of the Exemption 6 criteria. It consists of summaries of interviews Nicoletti conducted with Brodsky and other employees, and Nicoletti's assessment of Brodsky's claim. In our review, we found that YMSCO is correct in withholding some material under Exemption 6. We also found, however, segregable passages that do not appear to qualify for withholding under Exemption 6. For example, the report contains an "Assessment Summary," a summary of Nicoletti's interview with Brodsky, and a summary of documents that Brodsky submitted to Nicoletti. It appears to us that each of these sections consists primarily of material does not disclose personal information about any person other than Brodsky. Such material could therefore be released, either unredacted or with minor redactions, without compromising the privacy interests of other persons interviewed by Nicoletti.

III. Conclusion

On remand, YMSCO must review the withheld document, segregate and release all nonexempt portions of the document, and issue a new determination that justifies the withholding of any material from Brodsky.

It Is Therefore Ordered That:

(1) The Appeal filed by Mitchell G. Brodsky (Case No. VFA-0727) is hereby granted as set forth in paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Yucca Mountain Site Characterization Office for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 27, 2002

VFA-0728

April 17, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Graeme Sephton

Date of Filing: March 20, 2002

Case Number: VFA-0728

On March 20, 2002, Graeme Sephton (the Appellant) filed an Appeal from a final determination that the Brookhaven Area Office (Brookhaven) of the Department of Energy (DOE) issued on January 30, 2002. That determination concerned a request for information the Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The determination indicated that no responsive documents were identified as a result of the search conducted in response to the Appellant's request. In his Appeal, the Appellant asserts that Brookhaven's search for records was inadequate. If granted, this Appeal would require Brookhaven to conduct a further search.

Background

On December 16, 2001, the Appellant requested information related to a report he says originated at Brookhaven National Laboratory (BNL). The Appellant had obtained a copy of the report through the FOIA from the Federal Bureau of Investigation (FBI). The request for information submitted to the FBI pertained to the FBI investigation of the accident of TWA Flight 800. Request Letter dated December 16, 2001, from Graeme Sephton to Brookhaven (Request Letter). The BNL report referred to an item number 1B28 in a list of items recovered from the accident site. That item had been recovered during an autopsy of one of the victims of the TWA Flight 800 accident. The FBI had asked BNL to perform an analysis of the item. The Appellant requested the results of the analysis. Request Letter.

On December 30, 2001, Brookhaven issued a determination stating that a thorough search was conducted, including contractor-owned records. Determination Letter dated December 30, 2001, from Michael D. Holland, Area Manager, Brookhaven, to Graeme Sephton. Brookhaven found no documents responsive to the request. *Id.* On March 20, 2002, the Appellant filed this Appeal, challenging Brookhaven's search as inadequate. Appeal Letter finalized March 20, 2002, from Graeme Sephton to Director, Office of Hearings and Appeals (OHA), DOE (Appeal Letter). The Appellant suggested that contacting the person or persons who "signed off on, or transmitted the analysis and conclusions to the FBI" would be the best way to find copies of the results. *Id.*

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

We contacted Brookhaven to determine what type of search was conducted for documents responsive to the request. Brookhaven informed us that it did contact the scientists responsible for conducting the analysis requested by the FBI. Brookhaven reported that they do not have any responsive records. Apparently, the FBI sent a special agent with the item and it remained in his possession at all times. In addition, any results were immediately delivered to him. At no time did Brookhaven or BNL keep copies of the analysis.

We are convinced that Brookhaven followed procedures which were reasonably calculated to uncover the material the Appellant sought in her request. *See Miller*, 779 F.2d at 1384-85. The fact that the search did not uncover documents that the Appellant believes may be in the possession of DOE does not mean that the search was inadequate. Brookhaven searched both its records and those of BNL. The persons who analyzed the item were contacted, and they informed Brookhaven and BNL that no records were retained. Nor were any responsive records located. Therefore, we will deny the Appellant’s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on March 20, 2002, by Graeme Sephton, Case No. VFA-0728, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 17, 2002

Case No. VFA-0729

April 8, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Dallas D. Register

Date of Filing: March 11, 2002

Case Number: VFA-0729

On March 11, 2002, Dallas D. Register filed a Motion for Reconsideration of a Decision and Order that the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) issued on March 1, 2002. Mr. Dallas Register, Case No. VFA-0711 (March 1, 2002). The Decision and Order considered Mr. Register's Appeal of a final determination that the Albuquerque Operations Office (DOE/AL) of the Department of Energy (DOE) issued on October 30, 2001.

I. Background

Mr. Register filed a FOIA request with DOE seeking documents related to a comparative analysis study. On October 30, 2001, the DOE/AL FOIA Officer issued a determination in response to Mr. Register's request which indicated that DOE's Office of Kansas City Site Operations (DOE/KC) had been unable to locate any documents that were responsive to the FOIA request. The DOE/AL FOIA Officer also indicated that:

It has been determined that the documents you are requesting are records contained in the legal files of Honeywell FM&T at the Kansas City Plant, are in the possession and control of Honeywell FM&T and are, therefore, not ?agency records' subject to the provisions of the FOIA. ?Agency records' are defined as records in a federal agency's possession and control at the time of the FOIA request. However, pursuant to U.S. Department of Energy (DOE) policy, records in the possession and control of a management and operating contractor, such as those mentioned above, will be made available by DOE when the contract specifically provides that such records are the property of the Government. However, the contract between the DOE and Honeywell FM&T clearly defines the records that you have requested as belonging to them and not the DOE. Accordingly, these records are also not subject to release under DOE policy.

Mr. Register appealed this determination on the grounds that the documents he requested should be in the DOE Contracting Officer's file because they are necessary to establish the contractor's compliance with the "substantially equivalent benefits" requirement contained in DOE's Request for Proposal (RFP) for managing the Kansas City Plant. Mr. Register also claimed that DOE/AL should have provided the requested document to him because the contract between the contractor and DOE provides that DOE has the right to inspect and copy all records acquired or generated by Honeywell FM&T (Honeywell) under this contract. We denied Mr. Register's Appeal, finding that the documents in question are not "agency records" subject to the FOIA, nor are they subject to release under DOE regulations. In seeking reconsideration of our decision, Mr. Register does not contend that the documents he seeks are "agency records," but rather argues that they are records that were "acquired or generated" by Honeywell FM&T "in the performance" of its contract with the DOE, and therefore are subject to release under DOE regulations.

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. See 10 C.F.R. ' 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. See, e.g., Nathaniel Hendricks, 25 DOE & 80,173 (1996). We will exercise that discretion here to consider the issues the Appellant raised. .

II. Analysis

As we discussed in our decision on Mr. Register's Appeal, even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under" the FOIA. 10 C.F.R. § 1004.3(e)(1).

The contract between DOE and Honeywell FM&T does have the provision described in the DOE regulations. That clause in the contract provides, in relevant part, as follows:

113. DEAR 970.5204 79 ACCESS TO AND OWNERSHIP OF RECORDS (JUN 1997) (MODIFIED)

(a) Government owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the process of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

(b) Contractor owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. . . .

(1) Employment related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/ health related records and similar files), and non-employee patient medical/health related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

. . . .

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government; and

. . . .

(d) Inspection, copying, and audit of records. All records acquired or generated by the contractor under this contract in the possession of the contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the contracting officer, the contractor shall deliver such records to a location specified by the contracting officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(e) Applicability. Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date

or origination of such records.

. . . .

(g) Subcontracts. The contractor shall include the requirements of this clause in all subcontracts that are of a cost reimbursement type if any of the following factors is present:

(1) The value of the subcontract is greater than $2 million (unless specifically waived by the Contracting Officer);

(2) The contracting officer determines that the subcontract is, or involves, a critical task related to the contract; or

(3) The subcontract includes 48 CFR 970.5204-2, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

Contract No. DE-AC04-01AL66850 at H-173 to -75.

In our Appeal decision, we found that the above clause would not apply to the records sought by Mr. Register because those records were not acquired or generated by the contractor in the performance of the contract. This finding was based on information from counsel for DOE/KC "that the documents at issue were not paid for by DOE funds but were paid for by Honeywell's main office." In his Motion for Reconsideration, Mr. Register states,

It is my position that the OHA failed to adequately pursue my claim that there were two total compensation studies prepared under the direction of Honeywell FM&T/KC and that no documents were provided by Honeywell to the DOE to substantiate their verbal claim that the requested documents had been prepared and funded by Honeywell Corporate funds.

Motion at 1.

For purposes of ruling on Mr. Register's Motion, we need not decide whether there were in fact "two total compensation studies," though DOE/KC states that it is aware of only one. And while we have no reason to question DOE/KC or Honeywell FM&T's statements regarding the funding of the study (or studies), proving the truth of those statements is not necessary to our decision. As we explain below, even assuming there are two studies as described by Mr. Register, and regardless of who prepared or funded the studies, those studies would, because of their subject matter, be defined as property of Honeywell FM&T under the contract clause quoted above.

Mr. Register's Motion describes one study "prepared to verify the value of the Honeywell total compensation of members [of] the Facility and Utility Engineering Department . . . identified to be outsourced through a service subcontract to a local Architect and Engineering firm," and a second study "prepared to verify that the total compensation provided to the former Honeywell employees outsourced by subcontract met the ?substantially equivalent' requirements of" the contract between DOE and Honeywell FM&T. Motion at 1.

As described by Mr. Register, both studies are the property of the contactor. The documents fall under subparagraph (b)(1) and (b)(3) of the clause quoted above, because they are "[e]mployment related records (such as . . . records on salary and employee benefits; . . ." and "[r]ecords relating to any procurement action by the contractor.(1) Mr. Register states that both studies were prepared to "verify . . . the total compensation" of employees, and in that respect both would be "employment related" and concern "salary and employee benefits." And because Mr. Register describes both studies as related to "outsourc[ing] through a service subcontract to a" local firm, both studies would have related to the procurement action through which this outsourcing was accomplished.

Paragraph (b) of the clause states that documents described under any of its subparagraphs "are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. . . .(2) Thus, the contract explicitly provides that documents such as those Mr. Register is seeking are not government-owned records, and therefore would not be subject to release under DOE regulations.(3)

For the above-stated reasons, Mr. Register's Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Dallas D. Register on March 11, 2002, Case No. VFA-0729, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 8, 2002

(1) Subparagraph (b)(3) states that it does not apply to records that under 48 CFR 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government. Under 48 C.F.R. 970.5204-9, "all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, . . ." Contract No. DE-AC04-01AL66850 at I-94. However, as this contract clause pertains to the requirement that the contractor "maintain a separate and distinct set of" records for accounting purposes, we do not agree with Mr. Register that the studies he seeks would fall within the scope of the clause. *Id.*

(2) Mr. Register further contends that paragraphs (d) and (e) of the ownership of records clause apply to the records at issue. While these paragraphs may apply to the records sought by Mr. Register, they are nonetheless not helpful in determining whether those records fall within the scope of paragraph (a).

(3)Mr. Register also argues that the studies he seeks may have been provided to the subcontractor to whom work was outsourced. It is possible that this subcontract contains the ownership of records clause since paragraph (g) of the clause, as quoted above, requires that the ownership of records clause be included in certain subcontracts. However, even if this were the case, the provisions of paragraph (b) of the clause would still apply to exclude the studies from the scope of paragraph (a).

Case No. VFA-0734

MAY 2, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David A. Hannum

Date of Filing: April 4, 2002

Case Number: VFA-0734

On April 4, 2002, the Office of Hearings and Appeals (OHA) received an Appeal that David A. Hannum filed from a determination issued to him by the Director of the Office of Intergovernmental, Public and Institutional Affairs at the Department of Energy's (DOE) Richland Operations Office (hereinafter referred to as "the Director"). The Director issued his determination in response to a request for information under the Privacy Act of 1974 (PA), 5 U.S.C § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. For purposes of administrative efficiency, the Director also processed Mr. Hannum's requests under the Freedom of Information Act (FOIA), 5 U.S.C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would result in the release of a specified document to Mr. Hannum.

The Privacy Act permits individuals to gain access to their records or to information pertaining to them that is contained in systems of records maintained by the agencies. 5 U.S.C. § 552a(d)(1). The FOIA generally requires that documents held by federal agencies be released to the public upon request. 5 U.S.C. § 552.

I. Background

In his requests, Mr. Hannum sought access to all of his files that contain any derogatory information and all personnel files pertaining to his employment with Master Lee Hanford Corporation, a DOE subcontractor. In his response, the Director released three documents to Mr. Hannum and withheld a fourth. This document was located in the office of the legal counsel for Fluor Hanford, Inc., a DOE contractor. In justifying its withholding, the Director stated that according to Fluor Hanford, Inc.'s contract with the DOE, "legal records, including legal opinions, litigation files, and documents covered by attorney-client and attorney work product privileges are not government records and as such, are not subject to the provisions of the FOIA or the PA." Director's response at 1. In his Appeal, Mr. Hannum contests the withholding of this document.

II. Analysis

As previously stated, the PA allows individuals access to information contained in systems of records maintained by agencies. The FOIA generally requires the federal government to release agency records upon request. Therefore, our threshold inquiry is whether Fluor Hanford is an "agency" for purposes of the PA and the FOIA. We conclude that it is not.

An agency is defined as any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch..., or any independent regulatory agency." 5 U.S.C. § 552(f). Fluor Hanford is a privately owned and operated entity that has contracted with the DOE to manage the DOE's Hanford facility. Because its day-to- day operations are not controlled by the DOE, it is not an "agency" within the meaning of the PA and the FOIA. Therefore, the document in question is not located in a system of records maintained by an agency and is thus not subject to the PA. Moreover, we have been informed that the document has never been in the possession and control of the DOE. *See* memorandum of April 21, 2002 telephone conversation between Robert Palmer, OHA Staff Attorney, and Dorothy Riehle, Richland Operations Office. Consequently, the document is not an "agency record" for purposes of the FOIA. *See Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (Documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request).

A finding that the document is not an agency record, however, does not preclude the DOE from releasing it. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). Accordingly, we have examined the relevant portions of the contract between Fluor Hanford and the DOE, and we conclude that under that agreement, Fluor Hanford's legal files are the property of Fluor Hanford, and are not subject to release under the agency records regulation. *Accord, William H. Payne*, 26 DOE ¶ 80,161 at 80,700 (1997).

The Director correctly determined that the document at issue is not an agency record, and is not subject to disclosure under the PA, the FOIA, or under 10 C.F.R. § 1004.3(e)(1). We will therefore deny Mr. Hannum's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by David A. Hannum on April 4, 2002 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 2, 2002

Case No. VFA-0735

July 2, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Steven Wallace

Date of Filing: May 6, 2002

Case Number: VFA-0735

On May 6, 2002, Steven Wallace (Wallace) filed an Appeal from a determination issued to him on February 21, 2002, by the Office of Inspector General (IG) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

In 2001, Wallace wrote to the FOIA/Privacy Act Group at DOE headquarters and requested all documents pertaining to Former Deputy Secretary T.J. Glauthier's denial of redress for Wallace under the DOE Contractor Employee Protection Program. The FOIA/Privacy Act Group forwarded the request to the IG. The IG conducted a search of its files and located 103 responsive documents. On February 21, 2002, the IG notified Wallace in a determination letter that it was releasing 27 documents in their entirety and making partial disclosure of 30 documents. The remaining documents were either forwarded to the appropriate offices for determinations concerning their release or were documents created by the Appellant, and therefore not sent back to him in response to his FOIA request. Material in the partially disclosed documents was withheld pursuant to FOIA Exemptions 6 and 7(C). In this Appeal, Wallace challenges the IG's withholding of the 30 partially disclosed documents. As explained below, we will uphold the IG's determination regarding these documents.

II. Analysis

A. Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and

embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). We find that the withheld documents meet the threshold test of Exemption 6 as they are "similar files," the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, that is, as part of or in connection with an agency law enforcement proceeding. *See William Payne*, 26 DOE ¶ 80,144 (1996); *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982) *(Abramson*). The IG is a law enforcement body charged with investigating and correcting waste, fraud or abuse in programs administered or financed by the DOE. *See* Inspector General Act of 1978, codified as amended at 5 U.S.C. app. §§ 2(1)-(2), 4(a)(1), (3)-(4), 6(a)(1)-(4), 7(a), 9(a)(1)(E). As a result of its duties, we find that the IG compiles reports involving official misconduct for "law enforcement purposes" within the meaning of Exemption 7(C). *See Burlin McKinney*, 25 DOE ¶ 80,149 (1995).

In order to determine whether information may be withheld under Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3 (Exemption 6); *Stone v. FBI*, 727 F. Supp. 662, 663-663 (D.D.C. 1990) (Exemption 7(C)).

We have previously considered cases in which both Exemptions 6 and 7(C) were invoked, and we stated that in such cases, providing the Exemption 7 threshold requiring a valid law enforcementpurpose is met, we would analyze the withholding only under Exemption 7(C), the broader of the two exemptions. *See, e.g., David Ridenour*, 27 DOE ¶ 80,143 (1998); *Richard Levernier*, 26 DOE ¶ 80,182 (1997); *K.D. Moseley*, 22 DOE ¶ 80,124 (1992). Since, as discussed below, the responsive documents that were withheld pursuant to Exemptions 6 and 7 (C) were also compiled for law enforcement purposes, any document that satisfies Exemption 7(C)'s "reasonableness" standard will be protected. Conversely, documents not protected by Exemption 7(C) will be unable to satisfy Exemption 6's more restrictive requirement for withholding that release would constitute a clearly unwarranted invasion of personal privacy.

1. Privacy Interest

In its determination, the IG stated that the partially disclosed documents contain names and information that would tend to disclose the identity of certain individuals involved in the IG's investigation of Wallace's complaint, which in this case include subjects, witnesses, sources of information and other individuals. According to the IG, these individuals are "entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions." Determination Letter at 1.

This office has contacted the IG to ascertain the specific type of information that was withheld from

Wallace. The pertinent documents contain names of individuals who had some relation to the investigation. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals providing information to government investigators. *See Department of State v. Ray*, 502 U.S. 154, 176 (1991) ("[t]he invasion of privacy becomes significant when personal information is linked to particular interviewees"); *Safecard Services, Inc., v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991) (*Safecard*); *Blumberg, Seng, Ikeda & Albers*, 25 DOE ¶ 80,124 at 80,563 (1995); *James Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991). Therefore, we find that the individuals whose identities are being withheld in this case have significant privacy interests in maintaining their confidentiality.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). It is well settled that disclosure of the identity of individuals who have provided information to government investigators is not "affected with the public interest." *See, e.g., Safecard*, 926 F.2d at 1205. In his Appeal, Wallace did not offer any explanation of why he believes release of the material would be in the public interest. In fact, he did not address this issue at all. Therefore, we find that there is no public interest in the disclosure of the documents at issue.

3. The Balancing Test

In determining whether the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989); *Safecard*, 926 F.2d 1197 (D.C. Cir. 1991).

We have concluded above that there is a cognizable privacy interest at stake in this case. Moreover, we found that Wallace has not provided any information about the existence of a public interest in the disclosure of the withheld information. After a thorough examination, we found no public interest in the withheld material. In the absence of any public interest to weigh against the real and identifiable privacy interest, the privacy interest must prevail.

B. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b) (1982). Our review of the documents found that the IG properly withheld information in the documents pursuant to Exemptions 6 and 7(C). Therefore, we find that the IG properly disclosed only the non-exempt, reasonably segregable portions of the responsive material to Wallace.

It Is Therefore Ordered That:

(1) The Appeal filed by Steven Wallace on May 6, 2002, OHA Case No. VFA-0735, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 2, 2002

Case No. VFA-0736

July 30, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeffrey T. Richelson

Date of Filing: April 16, 2002

Case Number: VFA-0736

On April 16, 2002, Jeffrey Richelson appealed three determinations issued by the Albuquerque Operations Office (Albuquerque) of the Department of Energy (DOE) which denied his requests to be considered as a member of the news media and for fee waivers under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. For the reasons set forth below, we find that Mr. Richelson is a representative of the news media and remand these matters to Albuquerque to issue new determinations in response to Mr. Richelson's requests for a fee waiver.

BACKGROUND

On January 9, 2002, Mr. Richelson sent a FOIA request to Albuquerque in which he asked for copies of Los Alamos Scientific Laboratory (LASL) and Los Alamos National Laboratory (LANL) studies of the French nuclear weapons program produced between January 1, 1970 and December 31, 1985 (Control No. FOIA 02-008-A). On January 26, 2002, Mr. Richelson sent a FOIA request to Albuquerque in which he asked for a copy of a document entitled "D.B. Stillman and H.T. Hawkins, ?October 1990 Visit to China,' IT-DO-92-052, August 1992" (Control No. FOIA 02-012- A). On March 18, 2002, Mr. Richelson sent a FOIA request to Albuquerque in which he asked for copies of certain LASL and LANL studies of Indian nuclear tests (Control No. FOIA 02-032-A). In all three requests, Mr. Richelson asked Albuquerque to categorize him as a member of the news media and for a waiver of copying fees.

On March 27, 2002, Albuquerque issued three determinations that denied Mr. Richelson's requests to be categorized as a member of the news media and for waivers of copying charges. In all three determinations, Albuquerque concluded that Mr. Richelson was not a representative of the news media because he (1) is a free-lance writer who lacks the ability to deliver news directly to the public, (2) has failed to express a firm intention to publish documents related to information sought in the FOIA request, and (3) has failed to indicate that the planned publication pertains to a particular topic of current interest.

Albuquerque denied Mr. Richelson's requests for a waiver of copying fees on the grounds that he (1) failed to show how disclosure of the requested information would likely contribute to the public's understanding of specifically identifiable government operations or activities, (2) failed to demonstrate how the requested information would be disseminated, and (3) failed to demonstrate that disclosure of the requested information would contribute significantly to the public's understanding of the issues involved. In addition, Albuquerque denied Mr. Richelson's requests for a waiver of copying fees in Control No. FOIA 02-008-A and Control No. FOIA 02-032-A because he failed to show that the requested records have informative value with respect to any specifically identifiable operation or activity of the U.S. government.

By letter dated April 9, 2002, Mr. Richelson appealed these determinations to OHA. In his appeal, Mr. Richelson asserts that Albuquerque should have categorized him as a representative of the news media because he has an established history of publishing books and articles, intends to use the documents requested under the FOIA to write a book entitled “Spying on the Bomb, U.S. Intelligence and Foreign Nuclear Weapons Programs,” which is under contract to be published by W.W. Norton in the spring of 2005, and has been categorized as a representative of the news media by DOE on at least two occasions.(1) Appeal Letter.

In this appeal, Mr. Richelson also maintained that Albuquerque erroneously denied his requests for a waiver of copying fees. In support of this position, Mr. Richelson asserts that the production of studies on a foreign nuclear weapons program by a United States government organization is a specifically identifiable operation of the government and that nuclear intelligence activities are a very significant component of government operations and are a matter of public interest and importance. Mr. Richelson further maintains that publication of his book will disseminate the information to a broad audience and that Albuquerque has used the wrong standard to assess his arguments. *Id.*

ANALYSIS

The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"-- and places requesters into three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and representatives of the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b). For the reasons detailed below, we find that, for the purposes of these FOIA requests, Mr. Richelson is a representative of the news media and should not be required to pay search and review costs. We also remand these matters to Albuquerque to issue new determinations in response to Mr. Richelson’s requests for a fee waiver.

A. Representative of the News Media

Under the DOE FOIA regulations, the term “representative of the news media" refers to:

any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all- inclusive. . . . In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

10 C.F.R. § 1004.2 (m).

We find that Mr. Richelson is a representative of the news media. As set forth above, Mr. Richelson has an established history of publishing books and articles and intends to use the documents requested under the FOIA to write a book which is under contract to be published by W.W. Norton. Publication is projected to be in the spring of 2005. Under Section 1004.2(m), a freelance journalist with a publication contract may be regarded as a representative of the news media. See *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989) (defines the term “representative of the news media” to include a person who gathers information of potential interest to a portion of the public, uses editorial skills to turn this information into a distinct work, and then distributes the work to an audience).

Moreover, our cases hold that a freelance journalist who intends to use documents requested under the FOIA to write a book is a representative of the news media. *See John H. Carter*, 21 DOE ¶ 80,122 (1991); *David DeKok*, 20 DOE ¶ 80,118 (1990). Finally, Mr. Richelson's proposed book about U.S. intelligence operations is "news" because the topic is of current interest to the public and will continue to be of interest when Mr. Richelson's book is published, which is projected to be in 2005. Accordingly, we conclude that Mr. Richelson is a representative of the news media.

B. Waiver of Copying Fees

Under the DOE FOIA regulations, the agency will furnish documents without charge if disclosure of the requested information is in the public interest "because it is likely to contribute significantly to public understanding of the operations or activities of the Government and disclosure is not primarily in the commercial interest of the requester." 10 C.F.R. § 1004.9(a)(8).

In determining whether disclosure of the information is in the public interest, Section 1004.9 indicates that the FOIA Officer should consider the following four factors:

(1) Whether the subject of the request concerns "the operations or activities of the government;"

(2) Whether the disclosure of this information is "likely to contribute" to an understanding of government operations or activities;

(3) Whether disclosure of this information will contribute to an understanding by the general public of the subject; and

(4) Whether disclosure of this information is likely to contribute "significantly" to public understanding of government operations or activities.

Here we are unable to determine whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of government because all of the documents that have been located which are responsive to Mr. Richelson's FOIA requests are classified. See Memorandum of Telephone Conversation between Terry Martin Apodaca, FOIA Officer, Albuquerque and Linda Lazarus, Staff Attorney, OHA (June 14, 2002). Until the classification reviews are complete, we cannot know what type of information, if any, will be released. As such, we cannot assess the significance of the information at issue and whether Mr. Richelson would be entitled to a waiver of copying fees. Accordingly, we will remand this matter to Albuquerque to issue new determinations on the waiver of copying fees that contain specific findings about the type of information that will be released in response to Mr. Richelson's FOIA requests.

We are, however, able to conclude that disclosure of the information would not be "primarily in the commercial interest of the requester." In determining whether disclosure of information is "primarily in the commercial interest of the requester," Section 1004.9 indicates that the FOIA Officer should consider the existence and magnitude of a commercial interest and the primary interest in disclosure. Section 1004.9(b)(3) also provides that "a request for records supporting the news dissemination function of the requester will not be considered to be a request for commercial use." Thus, as Mr. Richelson has made these requests as a representative of the news media, we find

that disclosure of the requested information would not be primarily in his commercial interest. *See also National Security Archive v. U.S. Department of Defense*, 880 F.2d at 1388 (requests from news media entities in furtherance of their news gathering function are not for commercial use).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Jeffrey T. Richelson on April 16, 2002, OHA Case

No. VFA-0736, is hereby granted. This matter is hereby remanded to the Albuquerque Operations Office to issue new determinations consistent with this Decision and Order.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 30, 2002

(1)We note that it is irrelevant that DOE has previously categorized Mr. Richelson as a representative of the news media because a determination of whether an individual or an entity is a representative of the news media must be made on a case-by-case basis in light of the totality of the circumstances in existence at the time of the request.

Case No. VFA-0739

May 8, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Qwest/GSD

Date of Filing: April 19, 2002

Case Number: VFA-0739

On April 19, 2002, the Government Systems Division of Qwest Communications International Inc. (Qwest) filed an Appeal from a final determination that the Albuquerque Operations Office (DOE/AL) of the Department of Energy (DOE) issued on March 26, 2002. The determination was in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In its determination, DOE/AL informed Qwest that it located no agency records responsive to its request, and that the documents requested were procurement records of a DOE contractor that are not subject to release under the FOIA or DOE regulations.

I. Background

On March 14, 2002, Qwest requested from DOE/AL a copy of "Contract AU06975," a document containing "terms and conditions for Verizon Corporation's performance of Sandia National Laboratories Operation and Maintenance (O&M) requirements." Letter from William McAndrew, Qwest, to DOE/AL (March 14, 2002); Appeal at 1. In its March 26, 2002 response to the request, DOE/AL informed Qwest that the

Office of Kirtland Site Operations (OKSO) (formerly the Kirtland Area Office), [which has] oversight responsibility for the Sandia National Laboratories (SNL), searched for responsive documents but could not locate any. The OKSO further stated that . . . the records you are requesting are procurement records of the Sandia Corporation, and are, therefore, not "agency records" subject to the provisions of the FOIA.

Letter from Carolyn A. Becknell, DOE/AL, to William McAndrew, Qwest (March 26, 2002) at 1. DOE/AL also found that "the contract between the DOE and the Sandia Corporation, clearly defines the records that you have requested as belonging to [Sandia] and not the DOE." *Id.* In its Appeal, Qwest states,

Although Sandia is performing an inherent Government/DOE contracting function wherein copies of contracts are routinely releasable, they have refused our request since they are a privately owned contractor. We do not believe that the intent of the FOIA, as well as U.S. Government policy of full disclosure, should allow this administrative manipulation.

Appeal at 1.

II. Analysis

The statutory language of the FOIA does not define "agency records," but merely lists examples of the types of information agencies must make available to the public. *See* 5 U.S.C. § 552(a). In interpreting this phrase, we have applied a two-step analysis the courts have fashioned for determining whether documents created by non-federal organizations, such as Sandia Corporation, are subject to the FOIA. *See, e.g., Los Alamos Study Group*, 26 DOE ¶ 80,212 (1997) (*LASG*). That analysis involves a determination (i) whether the organization is an "agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." *See LASG*, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f). The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." *Forsham v. Harris*, 445 U.S. 169, 180 & n.11 (1980) (*citing United States v. Orleans*, 425 U.S. 807 (1976)). In the present case, the entity in possession of the requested contract is Sandia Corporation. Although Sandia Corporation is contracted by the DOE to operate the Sandia National Laboratories, the DOE does not supervise the contractor's day-to-day operations. We therefore conclude that Sandia Corporation is not an "agency" subject to the FOIA.

Although Sandia Corporation is not an agency for the purposes of the FOIA, their records responsive to the present request could become "agency records" if DOE obtained them and they were within the DOE's control at the time Qwest made its FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (*Tax Analysts*). However, as discussed above, the DOE office responsible for oversight of Sandia National Laboratories searched for the contract at issue at the time of the request, and it did not have a copy. Based on these facts, the document does not qualify as an "agency record" under the test set forth by the federal courts. *See Tax Analysts*, 492 U.S. at 145-46.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to release if the contract between the DOE and that contractor provides that the records in question are the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under" the FOIA. 10 C.F.R. § 1004.3(e)(1).

The relevant provisions in the contract between DOE and Sandia are as follows:

126. DEAR 970.5204-79 ACCESS TO AND OWNERSHIP OF RECORDS (JUN 1997) (See Clause H-18)

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this Contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the Contracting Officer may from time to time direct during the process of the work or, in any event, as the Contracting Officer shall direct upon completion or termination of the contract.

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.

. . . .

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR (DEAR) 970.5204-9, Accounts, Records, and Inspection, are described as the property of the Government; . . .

Contract No. DE-AC04-94AL85000, Clause I-126.

DOE/AL describes the contract sought by Qwest as a "procurement record." Letter from Carolyn A. Becknell, DOE/AL, to William McAndrew, Qwest (March 26, 2002) at 1. We agree with this characterization, which is not disputed by the Appellant. As such, because the contract between DOE and Sandia Corporation provides that records "relating to any procurement action by the contractor" are *not* property of the Government, such records are not subject to release under DOE regulations.(1)

In sum, because we find that the document sought by Qwest is neither an agency record subject to the FOIA, nor a government-owned record subject to release under DOE regulations, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Qwest/GSD on April 19, 2002, Case No. VFA-0739, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. §552 (a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 8, 2002

(1) The exception to the contractor's ownership of procurement records, found in 48 CFR (DEAR) 970.5204-9, Accounts, Records, and Inspection (Contract Clause I-74), encompasses "all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, . . ." We do not find that the contract requested by the Appellant would fall within this exception.

Case No. VFA-0742

October 2, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Jeffrey T. Richelson

Date of Filing: April 30, 2002

Case Number: VFA-0742

Jeffrey T. Richelson filed an Appeal from a determination that the National Nuclear Security Administration's Nevada Operations Office issued to him on April 9, 2002. In that determination, the Nevada Operations Office denied a request for information that Mr. Richelson submitted on January 19, 2002, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In that request, Mr. Richelson sought a copy of "the 1995 report of the Sewell review group on NEST," the Nuclear Emergency Search Team. The Nevada Operations Office reviewed the requested document, which has been identified as the "Nuclear Emergency Search Team Assessment Team Report," dated July 12, 1995. It determined that the document contained Unclassified Controlled Nuclear Information (UCNI) and withheld the document in its entirety from Mr. Richelson pursuant to Exemption 3 of the FOIA. Mr. Richelson has appealed this total withholding, contending that much of the document is not UCNI and should be released.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular

types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute of the type to which Exemption 3 refers. *See, e.g., Greenpeace,* 28 DOE ¶ 80,191 (2001); *National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2153(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of Security Affairs has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 0204-139, Section 1.l (December 20, 1991). Upon referral of this appeal from the Office of Hearings and Appeals, the Director of Security Affairs (now the Director of Security) (Director) reviewed the document that Mr. Richelson requested.

The Director determined on review that the document contains UCNI. He also determined, however, that the majority of the document's contents is not UCNI. The Director has provided this office with a copy of the document from which the UCNI has been withheld. Beside each deletion, "b3" has been written in the margin of the document. The denying officer for these withholdings is Joseph S. Mahaley, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that the Atomic Energy Act requires the continued withholding of certain portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Director has now determined to be UCNI must be withheld from disclosure.

At this time, however, we will not provide a copy of the redacted version of the document to Mr. Richelson. At the Director's suggestion, we will remand this document to the Nevada Operations Office for a new review, in which it must consider whether any other provisions of the FOIA dictate that other portions of the document should not be released to Mr. Richelson. After completing its review, the Nevada Operations Office should either release the currently redacted version of the requested document or issue a new determination that provides adequate justification for any additional information that it withholds from the document it provides to Mr. Richelson. Mr. Richelson will have the opportunity to appeal that determination, if he so desires. Accordingly, Mr. Richelson's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeffrey T. Richelson on April 30, 2002, Case No. VFA-0742, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A redacted version of the document entitled "Nuclear Emergency Search Team Assessment Team Report," dated July 12, 1995, bearing markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted, will be remanded to the Nevada Operations Office of the National Nuclear Security Administration. The Nevada Operations Office shall promptly review the document and either release it in its entirety or issue a new determination that provides adequate justification for any additional information that it withholds from the copy it provides to Mr. Richelson.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 2, 2002

Case No. VFA-0743

June 4, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Martin Becker

Date of Filing: May 6, 2002

Case Number: VFA-0743

On May 6, 2002, Martin Becker (Becker) filed a Motion for Reconsideration of a Decision and Order that the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) issued on May 2, 2002. *Martin Becker*, Case No. VFA-0710 (May 2, 2002). The Decision and Order considered Becker's Appeal of a determination issued by the Savannah River Operations Office (SR) of the DOE on December 10, 2001.

I. Background

Becker filed a FOIA request with SR seeking a copy of a lease between Westinghouse Safety Management Solutions (WSMS) and the lessor Centennial, L.L.C. for office space in Building 3 of the Centennial Corporate Center in Aiken, South Carolina. Becker's request was the subject of three previous FOIA appeals. On December 10, 2001, SR issued a determination letter in which it released a copy of the Centennial lease to Becker. However, SR redacted portions of the Lease under FOIA Exemption 4. Specifically, SR redacted those portions of the lease which would reveal the following types of information: rate per square foot, rentable square feet (space actually rented by WSMS), lease term, expiration date, lease renewal option period, monthly rent, security deposit, phone service reimbursement, annual minimum rent, total rentable area in building, and utility reimbursement. SR claimed that the withheld information was confidential commercial information that would substantially harm the competitive position of both parties to the contract if released. Becker appealed SR's withholdings under Exemption 4 to this office. On May 2, 2002, OHA issued a decision and order upholding SR's withholdings under Exemption 4 and denying Becker's Appeal. *Martin Becker,* Case No. VFA-0710 (May 2, 2002). On May 6, 2002, Becker filed the present motion for reconsideration contending that "OHA ignored specific law requiring the release of the information [he] requested." Motion for Reconsideration at 1.

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. See 10 C.F.R. ' 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See*, *e.g.*, *Nathaniel Hendricks*, 25 DOE ¶ 80,173 (1996). We will exercise that discretion here to consider the issue raised by Becker's present motion.

II. Analysis

Becker's Motion for Reconsideration is based solely upon his contention that the Federal Acquisition

Regulations (FAR) mandate that DOE must release the information SR has withheld under Exemption 4. Specifically, Becker argues that 48 C.F.R. § 15.503(b)(iv) of the FAR requires that "the items, quantities and any stated unit prices"of the lease be made publically available. Motion for Reconsideration at 1. Becker's reliance on the FAR is misplaced, however. The lease between Centennial and WSMS was not entered into or awarded under a FAR-based competitive procurement. May 22, 2002 Letter from Tim Fischer, Attorney-Advisor, Office of Chief Counsel, Savannah River Operations Office to George B. Breznay, Director, Office of Hearings and Appeals, at 2. Accordingly, the provisions of the FAR cited by Becker are inapplicable to the circumstances of the present case.

For the above stated reason, Becker's Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Martin Becker on May 6, 2002, Case No. VFA- 0743, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S. C. §552 (a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 4, 2002

Case No. VFA-0748

July 8, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Dorismae M. Meers

Date of Filing: June 3, 2002

Case Number: VFA-0748

On June 3, 2002, Dorismae Meers appealed a determination issued by the Richland Operations Office (Richland) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In her appeal, Ms. Meers contends that Richland had failed to conduct an adequate search for documents that were responsive to a FOIA request that she had filed. For the reasons detailed below, we find that Richland conducted an adequate search for responsive documents and will deny Ms. Meers' appeal.

BACKGROUND

By letter dated April 2, 2002, Ms. Meers filed a FOIA request with Richland in which she asked for the complete employment and radiation dose exposure records of her deceased father, George A. Schliep, Senior. In this letter, Ms. Meers indicated that Mr. Schliep had worked at the Hanford Atomic Site (Hanford Site) with the firm of Morrison, Bechtel and McCone from about 1943 to 1946.

On May 3, 2002, Richland issued a determination letter in response to Ms. Meers' FOIA request which contained the following information:

We have conducted a thorough search by name and Social Security Number and were unable to locate any employment records for your father, nor is there any indication that he was ever monitored for radiation exposure at Hanford. Therefore, your request must be denied.

Ms. Meers appealed this determination to OHA on the grounds that Richland had failed to conduct an adequate search for her father's records. In support of this appeal, Ms. Meers submitted evidence that her father had worked at the Hanford Site and argued that if an adequate search had been performed, Richland would have located her father's employment records.

ADEQUACY OF THE SEARCH

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. E.g. Eugene Maples, 23 DOE ¶ 80,106 (1993); Marlene R. Flor, 23 DOE ¶ 80,130 (1993); Native Americans for a Clean Environment, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files;

instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing this Appeal, we contacted Sarah Prein, a member of the Richland FOIA and Privacy Act staff, to obtain information about the search for Mr. Schliep's employment and radiation exposure records.(1) Ms. Prein told us that between 1943 and 1946, the Army Corps of Engineers managed the Hanford Site and that Richland does not have access to the personnel records for the Army Corps of Engineers.(2) *See* Electronic Mail Messages from Sarah Prein to Linda Lazarus, Staff Attorney, OHA (various dates).

Ms. Prein also told us that between 1943 and September of 1946, E. I. duPont de Nemours (Dupont) was the prime contractor at the Hanford Site. Ms. Prein indicated that the employment, medical and radiation exposure records of individuals whose employment terminated during the period when Dupont was the prime contractor were archived with Dupont and have subsequently been destroyed.(3) Ms. Prein also indicated that Richland has a list of the people who worked for Dupont. *Id.*

Ms. Prein further told us that General Electric became the prime contractor at the Hanford Site in September of 1946, and that Richland has custody of General Electric's (G.E.) personnel records from the contracting period.(4) Ms. Prein also indicated that although Richland does not have any employment records or a listing of the personnel who were employed by Morrison, Bechtel and McCone, it does have some personnel records for "craft" employees from a variety of small construction and trade contractors. *Id.*

Ms. Prein explained that Rhonda Renz has listings of employment records for craft employees and that Linda Maday has listings of employment records for former Hanford prime contractor employees and major sub-contractors, including the list of people who worked for Dupont.(5) Ms. Prein indicated that on April 9, 2002, she provided Ms. Maday and Ms. Renz with Mr. Schliep's name and social security number and asked them to search for Mr. Schliep's employment records. On April 10, 2002, after searching the records for craft employees, Ms. Renz indicated that she had no records for Mr. Schliep. On April 17, 2002, after searching the contractor and sub-contractor files and the list of Dupont employees, Ms. Maday informed Ms. Prein that she had been unable to locate any records that were responsive to the FOIA request that had been filed by Ms. Meers. *Id.*

Ms. Prein also told us that she faxed the FOIA request that she had received from Ms. Meers to Pacific Northwest National Laboratory's (PNNL) legal department and radiation exposure records group. She explained that PNNL's radiation records department maintains the Hanford Radiological Exposure Reporting System (REX), which is the site's comprehensive database for radiation exposure records. Moreover, Ms. Prein indicated that the records in this database are identifiable by name and social security number and contain information about the individuals who were monitored for radiation exposure while at Hanford. Ms. Prein further informed us that PNNL's legal department also communicates with the Human Resources department to verify employment with PNNL (also known as Battelle-Northwest). Battelle's contract with the government at the Hanford Site did not begin until 1965. *Id.*

Ms. Prein indicated that she was subsequently informed that PNNL's radiation records department had found no indication that Mr. Schliep was ever monitored for radiation exposure at the Hanford Site and that PNNL Legal could not locate any records about Mr. Schliep. *Id.*

Ms. Prein also informed us that on April 29, 2002, Mr. Schliep 's name, social security number, and date of birth were e-mailed to Cheryl Holland at the Hanford Environmental Health Foundation (HEHF). Ms. Prein explained that HEHF maintains all the occupational health and medical records for Richland. The records are cataloged by name and social security number and are not limited to employees of direct government contractors. On April 29, 2002, Ms. Holland informed Ms. Prein that she had been unable to locate any records about Mr. Schliep.(6) *Id.*

Based on this information, we conclude that Richland conducted a thorough and conscientious search for

responsive records and followed procedures that were reasonably calculated to uncover the materials sought by Ms. Meers in her FOIA request. As detailed above, Richland contacted people who would have knowledge of whether relevant documents exist, and these individuals searched for records following appropriate procedures. As such, I find that the search for responsive documents was therefore adequate.(7)

It Is Therefore Ordered That:

(1) The Appeal filed by Dorismae M. Meers on June 3, 2002, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 8, 2002

(1)During a telephone conversation, Ms. Prein told us that Richland has never disputed that Mr. Schliep worked at the Hanford site, but was only indicating that it had been unable to locate any records that reflected Mr. Schliep's employment. *See* Memorandum of Telephone Conversation between Sarah L. Prein and Linda Lazarus, OHA Staff Attorney (June 11, 2002).

(2)Ms. Prein indicated that, if such records exist, they would be in the possession of the Department of Defense, and would probably be located in the Military Personnel Records Center (MPRC). Ms. Meers may wish to contact the MPRC at the following address: National Personnel Records Center, Military Personnel Records, 9700 Page Avenue, St. Louis, Missouri 63132-5100.

(3)Ms. Prein also suggested, however, that it might be possible to obtain more information about the Dupont records from the Hagley Museum and Library, Business Archives, Attention Michael Nash, P.O. Box 3690, Wilmington, Delaware 19807-0630.

(4)The files are indexed on 3x5 cards in the Records Holding Area (RHA). The cards show the employee's name, payroll number, and the box number into which the employment record was retired.

(5)The listings that were searched refer to records that are stored, amongst other places, in the Federal Records Center in Seattle.

(6)Ms. Holland searched indices that identify records that are stored in the Federal Records Center in Seattle.

(7)During the pendency of the FOIA appeal, Ms. Meers located pay stubs that had been issued to her father by Morrison, Bechtel and McCone. We note that Richland has already conducted an adequate search for records that would indicate that Mr. Schliep worked for Morrison, Bechtel and McCone, and is not required to take further action based on the existence of these pay stubs.

Case No. VFA-0749

June 28, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William D. Hooker, Sr.

Date of Filing: June 5, 2002

Case Number: VFA-0749

This Decision and Order concerns an Appeal that William D. Hooker, Sr. filed from a determination issued to him by the Department of Energy's (DOE) Savannah River Operations Office (SR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S. C § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In this determination, the Savannah River Operations Office released some responsive information. The Appeal, if granted, would require the SR to conduct a further search for a specific document.

I. Background

Mr. Hooker filed a request in which he sought information concerning seven various documents. On May 9, 2002, the Savannah River Operations Office (SR) issued a determination which provided Mr. Hooker with copies of the documents he requested, with the exception of item no. 2 - "SU-75- 41R; Radiocesium Levels in Black Vultures and Turkey Vultures" ("Vargo SREL"). Mr. Hooker was informed that the SR site found no documents responsive to his request for a copy of Vargo SREL. In his appeal, Mr. Hooker challenges the adequacy of the search conducted by SR.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on

rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d 1378, 1384-95 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at SR to ascertain the extent of the search that had been performed and to determine whether any documents existed that were responsive to Mr. Hooker's request for a copy of Vargo SREL. We were informed of the following. Upon receiving Mr. Hooker's request for information, the Savannah River Ecology Laboratory (SREL) searched its files and provided a copy of all the documents requested by Mr. Hooker with the exception of the Vargo SREL, which it could not locate. The SR then requested that Westinghouse Savannah River Company (WSRC) search its files. WSRC searched files in each of its departments, including its document control office, and found no responsive documents. The SR searched the DOE Public Reading Room database. This search yielded no responsive documents. See June 17, 2002 E-mail Message from Pauline Conner, SR, to Toni Brown, Office of Hearings and Appeals.

Based on the foregoing, we find no reason to believe that additional responsive documents subject to the FOIA exist at the DOE. SR conducted a search of the Savannah River Ecology Laboratory, various departments within the Westinghouse Savannah River Company, and the SR's Reading Room Database for responsive documents. These are the locations most likely to possess a copy of Vargo SREL, and they were searched. Given the facts, we believe SR's search was adequate. Accordingly, Mr. Hooker's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by William D. Hooker, Sr., Case No. VFA-0749, on June 5, 2002, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business or in which the agency records are located, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 28, 2002

Case No. VFA-0750

August 13, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: International Union of Operating Engineers Fringe Benefit Fund

Date of Filing: July 3, 2002

Case Number: VFA-0750

On July 3, 2002, Mr. Richard Rodriguez on behalf of International Union of Operating Engineers Fringe Benefit Fund (International) filed an Appeal from a determination issued to him on May 17, 2002, by the Brookhaven Area Office (BAO) of the Department of Energy (DOE). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Mr. Rodriguez challenges the adequacy of BAO's search for documents responsive to his request.

I. Background

On March 25, 2002, Mr. Rodriguez filed a request for information in which he sought procurement information and copies of any labor and material payment bonds regarding work done at Brookhaven National Laboratory (BNL) by LaFramboise Well Drilling, Inc., covering the period August 2001 through October 2001. On May 17, 2002, BAO issued a determination which stated that it conducted a search for the requested information and did not locate any documents responsive to the request. According to BAO, due to the nature of the work, no bonds were required or obtained. *See* Determination Letter.

On July 3, 2002, Mr. Rodriguez filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Rodriguez challenges the adequacy of the search conducted by BAO and disputes the assertion by BAO that no bonds exist. Mr. Rodriguez asks that the OHA direct BAO to conduct a new search for the requested information. *See* Appeal Letter.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Hideca*

Petroleum Corp., 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076

(D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at BAO to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Mr. Rodriguez' request might exist. Upon receiving Mr. Rodriguez' request for information, BAO conducted a search of its Business Management Divison records. In addition, the BNL contractor at BNL, the Brookhaven Science Associates, LLC (BSA), was contacted to conduct a search for responsive documents. Based on these searches, neither BAO nor BSA located any records responsive to Rodriguez' request. BAO stated that due to the nature of the work, no bonds were required or obtained.(1) However, BAO did provide the requester with some contractor-held information, which was not required to be released under the FOIA. In a telephone conversation with officials of BAO, BAO reiterated that its search did not locate documents responsive to the Appellant's request. See Record of Telephone Conversation between Louis Sadler, BAO, and Kimberly Jenkins-Chapman, OHA (July 31, 2002).

Given the facts presented to us, we find that BAO conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Rodriguez' request. Accordingly, Mr. Rodriguez' Appeal is denied.

It Is Therefore Ordered That:

(1) The Appeal filed by International Union of Operating Engineers Fringe Benefit Fund, OHA Case No. VFA-0750, on July 3, 2002 is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 13, 2002

(1) In his Appeal Letter, Rodriguez asserts that "pursuant to the Miller Act § 270(a) contractors are required to furnish payment and performance bonds before any contract is awarded." *See* Appeal Letter. This argument is incorrect. BAO has informed us that the work in question involved "drilling wells for testing purposes in the site precharacterization phase of that particular remediation system." The statutory cite the Appellant refers to relates to *construction* projects. According to BAO, "the wells were not a part of a remediation system (e.g. pump and treat system) that would be considered a construction project requiring Miller Act performance or payment bonds." *See* Electronic Message from Louis Sadler, BAO to Kimberly Jenkins-Chapman, OHA (August 6, 2002).

Case No. VFA-0752

July 12, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Iva D. Moore

Date of Filing: June 14, 2002

Case Number: VFA-0752

On June 14, 2002, Iva D. Moore filed an Appeal from a determination the DOE's Oak Ridge Operations Office (DOE/OR) issued on May 16, 2002. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Ms. Moore requested from DOE/OR

a copy of any and all of the following records of her husband, DOE contractor employee Elbert Ray Moore, . . .

Medical Records Industrial Hygiene Records

Chest X-Rays Personnel Records

Radiation Exposure RecordsPersonnel Security File

OPM background investigation

[Mr. Moore] was employed at the Bendix/Allied Signal/Honeywell plant in Kansas City, Missouri from 1949 through 1983. Mr. Moore is now deceased.

Letter from Mark A. Kille, Boyd & Kenter, P.C., to Amy Rothrock, DOE/OR (October 25, 2001). In a May 16, 2002 determination letter, DOE/OR informed Ms. Moore that a "search of the files of [DOE/OR] was conducted. However, no records could be found." Letter from Amy Rothrock to Mark A. Kille (May 16, 2002).

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted DOE/OR and found out the following regarding its search. DOE/OR holds certain records containing information on employees of contractors of the DOE and its predecessor agencies "from the 40's through the late 50's." These records are kept in boxes in a classified warehouse. Electronic mail from Amy Rothrock to Steven Goering, OHA (June 14, 2002). The records are not indexed, and so the

boxes have to be searched manually - folders contain documents such as rosters of multiple names and data which have to be searched line by line. This data was never organized so that the data could be retrievable by identifier.

For this request, we searched the Records Holding Area where these boxes are for Privacy Act records (retrievable by his identifier), and the Oak Ridge Associated Universities epidemiology records by identifier. Since he never worked at Oak Ridge and his employers (Bendix, Allied Signal and Honeywell) at Kansas City had no contracts with Oak Ridge, those two locations in Oak Ridge were the only reasonable repositories to search at Oak Ridge. Since his employers had DOE contracts with the Kansas City Plant through DOE Albuquerque, it is reasonable that Albuquerque should send it to their Kansas City Plant for a search of former contractor employee files [at] that site.

Electronic mail from Amy Rothrock to Steven Goering, OHA (June 18, 2002). DOE/OR has forwarded a copy of Ms. Moore's request to the DOE's Albuquerque Operations Office, which will issue a separate response to Ms. Moore.

Based on the above descriptions, it appears clear to us that DOE/OR performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Ms. Moore sought. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Iva D. Moore, Case Number VFA-0752, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 12, 2002

Case No. VFA-0753

August 5, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Martin Becker

Date of Filing: July 3, 2002

Case Number: VFA-0753

Martin Becker files this Motion for Reconsideration of a Decision and Order issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. *Martin Becker*, Case No. VFA-0710, 28 DOE ¶ 80,222 (2002). As explained below, we will deny this Motion.

I. Background

The present case has a long and complex background. In September 2000, Becker requested a copy of a lease executed by Westinghouse Savannah River Company (WSRC) or its affiliates for office space at the Centennial Corporate Center in Aiken, South Carolina. In the course of a series of appeals, we found that the lease in question was executed by Westinghouse Safety Management Solutions (WSMS), a firm that contracts with WSRC to provide support for WSRC's role as the management and operating contractor at the Savannah River Site. WSMS was a subsidiary of WSRC at the time it first executed the lease, but is now an independent firm. In addition, we found that the lease was not subject to release under the Freedom of Information Act, but was subject to release under the DOE's Contractor Records regulation, 10 C.F.R. § 1004.3(e)(1). *See Martin Becker*, Case No. VFA-0627, 28 DOE ¶ 80,133 (2000); *Martin Becker*, Case No. VFA-0649, 28 DOE ¶ 80,153 (2001); *Martin Becker*, Case No. VFA-0666, 28 DOE ¶ 80,187 (2001); *Martin Becker*, Case No. VFA-0704, 28 DOE ¶ 80,201 (2001).

On December 10, 2001, the Savannah River Operations Office (SR) released a copy of the lease to Becker, but withheld certain data pursuant to Exemption 4 of the FOIA. Exemption 4 protects from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). The data withheld were: rate per square foot, rentable square feet (space actually rented by WSMS), lease term, expiration date, lease renewal option period, monthly rent, security deposit, phone service reimbursement, annual minimum rent, total rentable area in building, and utility reimbursement. SR asserted, pursuant to Exemption 4 case law, that the withheld data were confidential information, and were protected because release would impair the government's ability to obtain similar data in the future, and would cause competitive harm to the person from whom the information was obtained.

The present case marks the third time that Becker has appealed SR's withholding of data. In his initial Appeal of the determination, Becker argued that there was no evidence that disclosure of the responsive material would impair the government's ability to obtain future documents, and that there was no competitive harm to the lessor. We denied Becker's Appeal and upheld SR's withholding. *Martin Becker*, Case No. VFA-0710, 28 DOE ¶ 80,222 (2002).

In his second Appeal, Becker asserted that release of the withheld data was required under the Federal Acquisition Regulation (FAR). He claimed that the withheld data fell within the provisions of the FAR at 48 C.F.R. § 15.503(b)(iv), which requires the disclosure of "items, quantities and any stated unit prices" of successful competitive offers. We rejected Becker's assertion, finding that the lease between WSMS and Centennial Partners was not entered into or awarded under a FAR-based competitive procurement.

The basis for our finding was a letter we received from Timothy Fisher, a DOE attorney at the Savannah River site, who was familiar with the contract and who stated that WSMS's lease was not subject to the FAR. We therefore concluded that the provisions of the FAR cited by Becker were inapplicable to the lease and that release of the withheld data was not mandated by the FAR. *Martin Becker*, Case No. VFA-0743 (June 4, 2002).

In his present Motion, Becker renews his claim that the FAR mandates disclosure of the withheld data. He now argues that "since it has been repeatedly admitted that appropriated funds are being used for the lease, the WSMS lease by definition is governed by the FAR - see 48 C.F.R. § 2.101 (?Acquisition' and ? Contract').(1) He later amended his Motion, first to include a claim that a contractual provision mandates release of the withheld data, and later to claim that some of the data he sought had been published in a DOE report, and that DOE had therefore waived its right to withhold it under a FOIA exemption.

II. Analysis

Applicability of the FAR

We find that Becker has misread the FAR in claiming that it applies to the information he seeks. According to the terms of the FAR, its provisions apply only to acquisitions made by the federal government, not to acquisitions made by a private entity such as WSMS. For example, the section titled "Purpose" states that "the Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all *executive agencies*." 48 C.F.R. § 101.1 (emphasis added).

Furthermore, the provisions cited by Becker not only fail to support his argument, but confirm that the FAR does not apply to transactions between private entities. For example, the FAR definition of "acquisition" cited by Becker states that an acquisition is "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the *Federal Government* through purchase or lease...." 48 C.F.R. § 2.101 (definition of "Acquisition") (emphasis added).

Similarly, the FAR definition of "contract" cited by Becker states that a contract is "a mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them. It includes all types of commitments that *obligate the Government* to an expenditure of appropriated funds...." 48 C.F.R. § 2.101 (definition of "Contract") (emphasis added).

Based on the definitions cited above, we find that the lease at issue is not subject to the provisions of the FAR. The lease provides a private company with office space, but it does not effect the acquisition of any supplies or services by the DOE or any other federal agency. It obligates WSMS to pay rent, but does not obligate the federal government to any expenditure of funds. The lease is an agreement between two private parties, and the provisions of the FAR have no applicability to it.(2) We therefore reject Becker's claim that the disclosure provisions of the FAR require the release of the withheld data.

Release under Contractual Provisions

Becker amended his present Motion to include a claim that the data withheld by SR in must be disclosed under the terms of the contract between the DOE and WSRC. In support of his claim, Becker cites Paragraph H.40 of the contract, headed "Release of Subcontractor Information." The paragraph states:

The purchasing system ... must provide for notification to bidders/offerors that an abstract of bids/offers/proposals containing the names of bidders/offerors and the lump sum or unit prices submitted will be released after award to any interested party.... In no event will the Contractor release other information regarding a bid/offer/proposal without the written permission of the submitting firm.

The applicability of this paragraph depends on whether the data withheld by SR in this case - rate per square foot, rentable square feet (space actually rented by WSMS), lease term, expiration date, lease renewal option period, monthly rent, security deposit, phone service reimbursement, annual minimum rent, total rentable area in building, and utility reimbursement - fall within the definition of unit prices. We find they do not.

In the letter cited above, Fisher, the attorney at SR, stated that "the lease terms sought by Mr. Becker are not ?unit prices' as contemplated by the FAR and routinely contained in a bid for a government contract.... The cases in which courts have released contract prices or costs have relied on the fact that unit prices are made up of so many variables that it would make it extremely difficult or impossible to derive specific information that could cause competitive harm."

We agree with Fisher's position. As we have stated previously,

... courts have held that the release of "unit prices" would not provide information that would competitively harm the submitter of the information because the unit prices are themselves composed of many components which would still remain hidden or are highly variable. *See, e.g., Pacific Architects & Engineers v. Department of State*, 906 F. 2d 1345 (9th Cir. 1990); *Acumenics Research & Tech., Inc. v. Department of Justice*, 843 F. 2d 800 (4th Cir. 1988). Unlike those cases, the rental fees ... would constitute a single price element of [the submitter's] cost....

B.P. Exploration, Inc., Case No. VFA-0503, 27 DOE ¶ 80,216 (1999).

The data requested by Becker are not composed of many components, but are individual cost elements. They are therefore not unit prices, and not subject to release under the contractual provision cited by Becker. *See also Burns Concrete, Inc.*, Case No. VFA-0284, 26 DOE ¶ 80,185 (1997).

Waiver

In his second amendment to his Motion, Becker claimed that the DOE had waived its right to withhold the data under Exemption 4 because it had previously disclosed the data. Becker's claim is based on the principle that if an agency has previously disclosed certain data, it may have waived its ability to later withhold the data under a FOIA exemption. *Carson v. United States Department of Justice*, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) (*Carson*). Determining whether such a waiver has been made requires a careful analysis of the specific nature of, and circumstances surrounding, the prior disclosure involved. *Carson*, 631 F.2d at 1016 n.30.

The threshold consideration is whether the prior disclosure matches the exempt information in question. If the requested information differs in some material respect from that which the requester claimed had been released previously, then no waiver has occurred. The burden is on the requester to establish that the requested information is duplicative of the disclosed information. *Ashfar v. Department of State*, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (*Ashfar*).

In claiming the withheld information was previously disclosed, Becker cites a report issued by the DOE's Office of the Inspector General, titled "Privatization of Safety Management Practices at the Savannah River Site," report number DOE/IG-0559, issued June 18, 2002. Appendix 2 of the report includes a table headed "Comparison of Actual Cost to Recommended Cost." The table shows actual costs billed by WSMS from 1998 to 2001, divided among four categories: "Direct Labor," "Indirect Labor," "WSRC Support," and "Subcontract Cost." These categories are not broken down further. A second table shows estimated costs for WSRC if equivalent work had been performed in-house, rather than subcontracted to

WSMS. A footnote to the second table states that "other indirect costs include items such as computer hardware and software, indirect support subcontracts, rent/leases, travel, division overhead, and facilities and utilities costs." Referring to this section, Becker asks whether "the public disclosure of category costs that reference the inclusion of rent/leases and facilities costs for WSMS provides a basis for the release of the WSMS leases that I have requested?"(3)

We find that Becker's claim of waiver is unfounded. The category of "Indirect Costs" includes "rent/leases" among a number of other unrelated costs. There is no ascertainable method for calculating the lease data that Becker is requesting. Thus, the table is not duplicative of the withheld data, and, under the *Ashfar* decision, no waiver has occurred.

III. Conclusion

As discussed above, we find that the lease between WSMS and Centennial Partners is not subject to the FAR, and that the disclosure provisions of the FAR are therefore inapplicable to it. In addition, we find that the withheld data are not subject to mandatory release under the terms of the contract between the DOE and WSRC. Finally, we find that the publication of the data in the Inspector General's report cited by Becker does not waive the DOE's right to invoke a FOIA exemption for the material withheld from the lease. We will therefore deny Becker's Motion for Reconsideration.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by Martin Becker, Case No. VFA-0753, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 5, 2002

(1)” Whether WSMS received "appropriated funds" is an open question. We have made no finding on the issue, but found rather that "WSMS pays rent on the lease while performing its contract with WSRC, and receives reimbursement for at least part of the rent under the terms of that contract.... WSRC then charges the costs that it pays to WSMS to DOE, under the terms of its contract with the agency..." *Martin Becker*, 28 DOE ¶ 80,187 (2001).

(2) As explained in the previous footnote, WSMS is compensated by the DOE, through WSRC, for some portion of the rent it pays to Centennial Partners. However, WSMS is obligated to pay rent whether it receives federal funding or not.

(3) E-mail from Martin Becker to the OHA, dated July 3, 2002.

Case No. VFA-0754

December 19, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cynthia Frey Nordstrom

Date of Filing: July 9, 2002

Case Number: VFA-0754

On July 9, 2002, Cynthia Frey Nordstrom (Nordstrom) filed an Appeal from a determination issued to her by the Department of Energy's Office of the Inspector General (IG). In that determination, the IG released some documents in their entirety, released some documents with redactions, and withheld some documents in their entirety. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the DOE to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On February 15, 2002, Nordstrom filed a FOIA request for copies of documents related to an IG investigation conducted into alleged drug use and leave abuse in the Office of Pipeline Certificates at the Federal Energy Regulatory Commission (FERC). Letter from Nordstrom to IG (February 15, 2002). The IG released three documents in their entirety, released 32 documents with material withheld pursuant to FOIA Exemptions 6 and 7(C), and released two documents with material withheld under Exemptions 5, 6, and 7(C). Letter from IG to Nordstrom at 1 (May 9, 2002) (Determination Letter). On July 9, 2002, Nordstrom filed this Appeal with OHA protesting the failure of the IG to release to her the interviews of Maynard Ugol (a FERC official who retired in 1997) and Deborah Grayson, a secretary at FERC. Letter from Nordstrom to Director, OHA (July 9, 2002). Nordstrom argues that the IG released a "heavily redacted, partial response that gave the impression that the investigation had ended months before Maynard Ugol testified to IG investigator, Yvette Milam." Appellant's Comments on FOIA Exemption 6 and Public Interest (December 6, 2002).

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and

embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard). *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

B. Exemption 7(C)

Exemption 7(C) applies to a much narrower class of cases than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Pursuant to Exemption 7(C), agencies may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii). Both Exemptions 6 and 7(C) require a balance of the interest in personal privacy in the withheld information against the public interest in the same information. There are, however, two significant differences between Exemptions 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of privacy." Pursuant to the provisions of Exemption 7(C), we have examined investigations conducted by the IG in response to complaints by individuals, as in this case, and found that they are law enforcement activities. *See, e.g., Stoel Rives, LLP*, 25 DOE ¶ 80,189 at 80,723 (1996); *Robert Burns*, 19 DOE ¶ 80,134 at 80,596-97 (1989). Since the documents at issue in this case meet Exemption 7(C)'s threshold test, we need only examine the IG's actions pursuant to the standard of Exemption 7(C), i.e., whether release of the withheld material would result in a reasonable expectation of an unwarranted invasion of personal privacy. *See, e.g., J. G. Truher*, 26 DOE ¶ 80,154 (1997); *Burlin McKinney*, 25 DOE ¶ 80,149 at 80,620 (1995); *K.D. Moseley*, 22 DOE ¶ 80,124 at 80,550 (1992).

C. Privacy Interest of the Interviewees

This office has reviewed unredacted copies of the material that the IG withheld pursuant to Exemptions 6 and 7(C) and found that it contains the names, titles and addresses of those individuals who were interviewed during the course of the IG's investigation. All of the individuals whose names and identifying information were withheld are either actual sources or possible sources in the investigation into alleged drug and leave abuse at FERC. We have previously found that there is a strong privacy interest in the names and related identifying information of sources and witnesses to an investigation. Sources and witnesses have an obvious privacy interest in remaining anonymous. *See James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,109 at 80,524 (1990). Furthermore, the public interest favors protecting the identities of sources and witnesses, rather than disclosing them, to ensure that witnesses continue to provide information voluntarily for law enforcement investigations, without fear of retribution. *See generally King v. Department of Justice*, 830 F.2d 210, 232-36 (D.C. Cir 1987). Since there are strong privacy and public interests in protecting these identities, we find that the IG properly withheld the names and other identifying information of the interviewees.

D. Public Interest in Disclosure

Having established the existence of a privacy interest in the identity of a witness in an investigation, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996) (*Flor*). The requester has the burden of establishing that disclosure would serve the public interest. *Id.* (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)).

Ms. Nordstrom argues that the public has an interest in the alleged misconduct of a high ranking government official. She further contends that withholding testimony under Exemption 6 will "conceal waste, fraud and abuse, and other inappropriate and unlawful behavior in government, and expose the inappropriate and retaliatory conduct of FERC management and the IG." Appellant's Comments at 2. According to Nordstrom, the testimony of Ugol and Grayson is critical to proving her complaint. *Id.*

We conclude that Ms. Nordstrom has not demonstrated, and we do not find, any public interest in the disclosure of the requested information. She merely speculates that agency misconduct exists, and can only speculate that Ugol and Grayson might provide supportive testimony for her complaint. The D.C. Circuit Court of Appeals found that "when . . . Governmental misconduct is alleged as the justification for disclosure, the public interest is "insubstantial" unless the requester puts forward ?compelling evidence that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought ?is necessary in order to confirm or refute that evidence.' " *Davis v. Department of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (quoting *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991). *See also Martin Becker*, 28 DOE ¶ 80,123 (2000). Moreover, we find that release of the names (and other identifiers) of the interviewees in this investigation would not aid the public in understanding how FERC performs its statutory duties.(1) Therefore, in view of the fact that there is no apparent public interest to balance against the significant potential invasion of personal privacy, we find that the IG properly withheld the names and identifying information of the interviewees. (2).

E. Segregable Information

The FOIA also requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material).

This office performed a simultaneous page-by-page comparison of the unredacted IG file and the redacted information that was released to the requester. There was sufficient information in each document of the redacted package to make sense of the documents and to determine the subject of each interview. Dates were not redacted, interviews were clearly identified as such, and the IG did not redact sections that described the subject matter of the investigation or the purpose of the interview. Therefore, we find that the IG properly released all segregable, non-exempt factual material in this case.

It Is Therefore Ordered That:

(1) The Appeal filed by Cynthia Frey Nordstrom, on July 9, 2002, OHA Case No. VFA-0754, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: December 19, 2002

(1) Ms. Nordstrom continues a friendly correspondence with Ugol in his retirement, and submitted copies of their email messages for the record in this case. There is no evidence in the messages that Ms. Nordstrom has ever asked Ugol to examine the material that the IG sent to her in order to confirm or deny her allegation that his testimony, if it exists, was withheld.

(2)Consequently, if the testimony of Ugol and Grayson is in the IG file, FOIA Exemptions 6 and 7(C) prevent us from releasing their identities to Ms. Nordstrom.

Case No. VFA-0755

August 20, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Elaine M. Blakely

Date of Filing: July 15, 2002

Case Number: VFA-0755

This Decision and Order concerns an Appeal that Elaine M. Blakely filed from a determination issued to her by the Acting Assistant Inspector General for Inspections, Office of Inspector General (OIG). In this determination, OIG responded to Ms. Blakely's request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In her Appeal, Ms. Blakely challenges the adequacy of the search for responsive documents.

In her FOIA request, Ms. Blakely sought access to information pertaining to allegations, made in communications with the OIG, about the handling of hazardous wastes at the Fluor Fernald Waste Pits Remedial Action Project. Specifically, she requested a copy of the findings of any investigation of her allegations, and for the documentation supporting those findings. In its response, OIG identified 50 documents as being responsive to Ms. Blakely's request. Of these 50 documents, 11 were released in their entirety, seven were released with portions withheld pursuant to 5 U.S.C. § 552(b)(6) and (b)(7)(C) (Exemptions 6 and 7(C)) of the FOIA, 15 originated in other DOE Offices and were referred to those Offices for the issuance of separate determinations, and the remaining 17 documents were not provided since they either originated from Ms. Blakely or had previously been provided to her. In her Appeal, Ms. Blakely states that there was nothing in the information provided that would indicate that a formal investigation had been performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted was adequate, we contacted OIG. We were informed that when Ms. Blakely's allegations were received by OIG, a case file was established. The contents of this file were identified as responsive to Ms. Blakely's request. *See* memorandum of July 25, 2002 telephone conversation between Caroline Nielsen, OIG, and Robert Palmer, OHA staff attorney. Also, we were informed that the allegations were referred to the DOE's Assistant Secretary for Environmental Management and the Ohio Field Office for an investigation into the merits of the allegations. *See* memorandum of August 12, 2002 telephone conversation between Ruby Isla, OIG, and Mr. Palmer. As previously indicated, documents located in the OIG file which were generated by these Offices were

referred to the Offices for the issuance of separate determinations to Ms. Blakely. It is quite possible that the information that she seeks is included in those documents. In any event, there is no reason to believe that responsive documents existed outside of the OIG file. Based on the information before us, we find that the search for responsive documents was reasonably calculated to uncover the information sought, and was therefore adequate.

It Is Therefore Ordered That:

(1) The Appeal filed by Elaine M. Blakely in Case No. VFA-0755 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 20, 2002

Case No. VFA-0756

July 24, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Lon L. Peters

Date of Filing: June 24, 2002

Case Number: VFA-0756

On June 24, 2002, Lon L. Peters (the Appellant) filed an Appeal from a final determination issued on May 22, 2002, by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA responded to a Request for Information filed on February 18, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination released several responsive documents to the Appellant. This Appeal, if granted, would require BPA to release additional information to the Appellant.

I. BACKGROUND

On March 21, 2001, the Appellant filed a request for information with BPA seeking

. . . copies of all executed contracts entered into by [BPA] that have been, are or will be included in the calculation of ?Augmentation Pre-Purchase Costs' (as exemplified on line 1 of Table 4 in the LB-CRAC workshop handout distributed by BPA on February 14, 2002, attached), for the period from October 1, 2001 through September 30, 2006.

Determination Letter at 1 (quoting Appellant's March 21, 2001 request for information). On May 22, 2001, BPA issued a determination letter (the Determination Letter) indicating that it was releasing several responsive documents to the Appellant. However, six of the documents released by the Determination Letter were released in redacted form. These six documents were described in the Determination letter as "agreements between BPA and Direct Service Industry customers." The information that was redacted from these six documents was described in the Determination Letter as "tables . . . that display the customer's unique financial information," "price and revenue information," "transaction details (months, demand limit, hours price etc.)," "proprietary financial information," "a diurnal power amount table," and "power amounts and rates." BPA provided the following justification for these withholdings:

These Direct Service Industry customers consider this information to be business sensitive. BPA has withheld this information pursuant to 5 U.S.C. § 552(b)(4) (Exemption 4 of the FOIA). This commercial information is confidential. All Direct Service Industry customers have requested BPA to redact and withhold from public disclosure such information. The release of this information would provide the competitors of each Direct Service Industry customer with information not otherwise publicly available concerning each customer's operating plans. This information is commercially sensitive and if released, could cause significant competitive harm to the customer. In addition this information has been traditionally protected from disclosure under the FOIA by BPA.

Determination Letter at 2. On June 24, 2002, the Appellant submitted the present Appeal in which it challenges the adequacy of BPA's withholding determinations. Specifically, the Appellant contends:

BPA has redacted the price charged for power under certain contracts where BPA sells power to direct service industry customers, the amount of power provided under certain contracts, and when it will sell power under certain contracts. While this may be information arrived at through negotiations with a person outside the government, the information was not ?obtained' from a person outside the government but was in fact developed by the government. It is not private confidential information but government information. Therefore it is not exempt from disclosure under 5 U.S.C. § 552(b)(4).

Appeal at 2.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin*., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*).

If, as in the present case, the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The information at issue in the present case is clearly commercial and financial in nature.

Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The term "person" in the context of Exemption 4 applies to a wide range of entities, including corporations, associations and public or private organizations. *See, e.g., Allnet Communication Services, Inc. v. Federal Communications Commission,* 800 F. Supp. 984, 988 (D.D.C.1992), *aff'd,* No. 92-5351 (D.C. Cir. May 27, 1994). The only type of entity that is not a considered a "person" under Exemption 4 is an agency of the federal government. *See Federal Open Market Committee v. Merrill,* 443 U.S. 340, 360, 99 S. Ct. 2800 (1979).

In the present case, the Appellant contends that some of the information withheld by BPA was not "obtained from a person" since it was created as a result of negotiations between BPA and direct service industry customers. The Appellant is correct in concluding that the withheld information was created as a result of negotiations between BPA and its direct service industry customers. However, the fact that the

information was created in such a fashion does not preclude a conclusion that it was "obtained from a person." Under the FOIA, information contained within an agency record is either "inter- or intra-agency" or "obtained from a person." In some circumstances, it is not readily apparent which of these two categories a particular item of information belongs in. This difficulty arises because some information, such as the information at issue in the present case, is obtained or created through collaboration or interaction between the government and outside entities. Accordingly, in order to determine whether information was "obtained from a person" in the context of an Exemption 4 analysis it is useful to consider whether such information meets Exemption 5's inter- or intra- agency threshold.

In a recent Exemption 5 case, the United States Supreme Court articulated a new test for determining whether communications between an outside entity and a government agency could be considered inter- or intra-agency in nature. In *Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*), the Court found that some records created or obtained by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel. In such instances, the Court found that the information was intra- or inter- agency in nature. The Court explained:

[T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id., 121 S. Ct. at 1066-67. Conversely, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective outside consultant are clearly not inter-agency or intra-agency documents. *Id.*, 121 S. Ct. at 1067-69. Application of the *Klamath* test to the present case, reveals that the information at issue cannot be considered "inter-agency or intra- agency" communications pursuant to Exemption 5. It is the product of communications that occurred between BPA and outside parties (the direct service industries) that were clearly not acting as objective outside consultants, since at the time they were negotiating with BPA in efforts to obtain the most favorable business arrangements possible. Since the withheld information cannot be considered to be intra- or inter-agency in nature, we find that it was, for the purposes of the FOIA, "obtained from a person." Such a determination is in accord with our previous determinations in which we have concluded that information created or obtained as a result of negotiations between an agency and an outside entity is "obtained from a person" for Exemption 4 purposes. *See, e.g., B.P. Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,797 (1999); *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999).

Finally, in order to determine whether information of this type can be withheld under Exemption 4, an agency must consider whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must determine that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the

requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc*., 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, BPA's conclusory Exemption 4 determinations do not meet the requirements set forth above. In order to meet the requirements set forth above, BPA needs to provide both a more through description of the information it is withholding as well as an explanation of the reasoning underlying its conclusion that release of this information could reasonably be expected to cause its direct service industry customers substantial competitive harm.

Accordingly, we shall remand this Appeal to BPA for a more thorough justification of its withholdings. On remand, BPA must then either release the information it has withheld or issue a new determination letter providing a detailed justification showing that it has applied the Exemption 4 analysis set forth above and the results of this analysis.

It Is Therefore Ordered That:

(1) The Appeal filed by Lon L. Peters, Case No. VFA-0756, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 24, 2002

Case No. VFA-0757

August 1, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

APPEAL

Name of Petitioner: Hazel S. Jones

Date of Filing: July 9, 2002

Case Number: VFA-0757

This Decision and Order concerns an Appeal that Hazel S. Jones filed from a determination issued to her by the Department of Energy's (DOE) Oak Ridge Operations Office. In that determination the Oak Ridge Operations Office informed Mrs. Jones that no documents were located that were responsive to a request for information that she filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Oak Ridge to conduct a further search for responsive materials.

BACKGROUND

In her request, Mrs. Jones sought copies of all documentation pertaining to Mr. Harvey R. Frye, her deceased father. The records requested were medical records, personnel records, radiation exposure records, industrial hygiene records, the personnel security file and the OPM Background Investigation of Mr. Frye. On June 10, 2002, Oak Ridge issued a determination letter regarding Mrs. Jones's request. Oak Ridge's determination letter stated that a search had been conducted and no documents responsive to Mrs. Jones's request could be found. See Determination Letter. On July 9, 2002, Mrs. Jones filed her Appeal with the Office of Hearings and Appeals. In the Appeal, Mrs. Jones challenges the adequacy of the search conducted by Oak Ridge, since her father died on the premises of the Oak Ridge National Laboratory in 1945.

ANALYSIS

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., David G. Swanson, 27 DOE ¶ 80,178 (1999); Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably

exist but rather whether the government's search for responsive documents was inadequate." Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a standard of reasonableness. McGehee v. CIA, 697 F.2d 1095, 1100-01, modified in part on rehearing, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." Miller v. Department of State, 779 F.2d

1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at the Oak Ridge Operations Office to ascertain the extent of the search that had been performed and to determine whether any other documents responsive to Mrs. Jones's request might reasonably be located. Upon receiving Mrs. Jones's request for information, Oak Ridge instituted a search of the Department of Energy's Oak Ridge, Paducah and Portsmouth sites. The records searched were located at the Records Holding Offices, the Oak Ridge Associated Universities, and the Y-12, X-10, and Bechtel Jacobs (formerly K-25) Plants. The searches were done electronically and manually, by using Mr. Harvey Frye's name and Social Security Number. The Y-12 National Security Complex was unsuccessful in locating any personnel, medical, industrial hygiene, and occupational radiation exposure records pertaining to Mr. Frye. The ORNL (Oak Ridge National Laboratory) instituted a search of its personnel monitoring databases (both current and old) and also searched its health and safety record management systems for any personal monitoring data records of former employees; the ORAU (Oak Ridge Associated Universities) searched their files, Bechtel Jacobs searched the Portsmouth Historical Database and its BJC Personnel Dosimetry Files; and the Health Physics Office and the Safety & Ecology Corporation located at the Paducah Site searched their Radiation Exposure and Personal Dosimetry Records. The search of these offices yielded no responsive documents. See Memorandum of July 16, 2002 Telephone Conversation between Leah Ann Schmidlin, Legal Assistant, Oak Ridge, and Toni Brown, Paralegal Specialist, Office of Hearings and Appeals.

Based on the foregoing, we find no reason to believe that any responsive documents exist. Also, the DOE has reviewed similar searches and determined them to be legally adequate. American Friends Service Committee, 28 DOE ¶ 80,183 (2001); Mary L. Michel, 27 DOE ¶ 80,269 (2000). We conclude that the Oak Ridge Operations Office's search for responsive documents was adequate, and that Mrs. Jones' Appeal should therefore be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Hazel S. Jones, on July 9, 2002, Case No. VFA-0757, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 1, 2002

:

Case No. VFA-0758

September 4, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Newhouse News Service

Date of Filing: July 9, 2002

Case Number: VFA-0758

On July 9, 2002, Newhouse News Service (Newhouse) filed an Appeal from a determination issued to it on June 19, 2002 by the FOIA and Privacy Act Division (FOIA Division) of the Department of Energy (DOE). That determination concerned a request for information that Newhouse submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the information withheld and to search for additional responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On March 2, 2001, Newhouse filed a FOIA request seeking the names of aluminum industry representatives who met with Secretary of Energy Spencer Abraham on or about February 13, 2001. In addition, Newhouse asked for correspondence or briefing papers that were distributed at the meeting. *See* Appeal Letter at 1. On June 19, 2002, the FOIA Division issued a determination which stated that two responsive documents were located. The FOIA Division provided Newhouse with one of these documents in its entirety. The other document was provided to Newhouse with certain deletions made pursuant to Exemption 5 of the FOIA. The FOIA Division stated the withheld material is “pre-decisional” and “deliberative.” *See* Determination Letter at 1.

On July 9, 2002, Newhouse filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Newhouse challenges the FOIA Division’s determination and asserts that material was improperly withheld under Exemption 5. In addition, Newhouse contends that the FOIA Division’s determination was incomplete and that more responsive materials must exist. *See* Appeal Letter at 2. For these reasons, Newhouse requests that the OHA direct the FOIA Division to release the requested information.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). In withholding portions of a memorandum written to Secretary Abraham, the FOIA Division relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)) (*Mink*). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested document at issue, we have concluded that the determination made by the FOIA Division in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Newhouse consists of comments and opinions prepared by a DOE employee and intended only for internal DOE use. The information requested in this case properly falls within the definition of "intra-agency memoranda" in the FOIA. In addition, the comments and opinions contained in the memorandum are clearly predecisional and deliberative. They were created by a subordinate of the Secretary of Energy for consideration and do not represent a final agency position. Furthermore, we note that the release of these opinions could inhibit employees from expressing their candid views if they believed that those views could become public knowledge. As such, the document at issue is precisely the sort of document which the deliberative process privilege of Exemption 5 is designed to protect. *Sears*, 421 U.S. at 153 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967)). Accordingly, we hold that the comments and opinions withheld from the memorandum meet all the requirements for withholding material under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the comments and opinions contained in the memorandum at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Adequacy of Search

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Circ. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *David G. Swanson*, 27 DOE ¶ 80,178 (1999); *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995).

In the present case, Newhouse asserts that a search for responsive documents should have included "any communication with or between the Department and Bonneville Power Administration officials." *See* Appeal Letter at 2. It further argues that "it is apparent from the public record that such material must exist, but you did not provide them as requested." *Id.* In response to Newhouse's Appeal, we contacted the FOIA Division to determine the scope of the search. *See* Record of Telephone Conversation between Brenda Washington, FOIA Division and Kimberly Jenkins- Chapman, OHA (August 8, 2002). The FOIA Division informed us that it searched the Office of Executive Secretariat and the Office of the Assistant Secretary of Congressional and Intergovermental Affairs for any documents related to Newhouse's request. These two offices were the ones determined to be most likely to contain responsive material. The FOIA Division stated that it provided Newhouse with two responsive documents. According to the FOIA Division no other responsive documents exist. Specifically, with respect to the meeting Secretary Abraham had on or about February 13, 2001 with aluminum industry representatives, the FOIA Division informed us that no handouts or other correspondence were provided at this meeting and that the representatives only exchanged business cards. *Id.*

Given the facts presented to us, we find that the FOIA Division conducted an adequate search which was reasonably calculated to uncover documents responsive to Newhouse's request. Accordingly, Newhouse's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Newhouse News Service, OHA Case No. VFA-0758, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 4, 2002

Case No. VFA-0759

August 9, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Rocky Mountain Peace & Justice Center

Date of Filing: July 12, 2002

Case Number: VFA-0759

On July 12, 2002, Rocky Mountain Peace & Justice Center (the Appellant) filed an Appeal from a final determination that the Rocky Flats Field Office (Rocky Flats) of the Department of Energy (DOE) issued on June, 24, 2002. That determination concerned a request for information the Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Six documents were located and released to the Appellant in response to its request. In its Appeal, the Appellant asserts that Rocky Flats' search for records was inadequate because it failed to uncover additional responsive documents. If granted, this Appeal would require Rocky Flats to conduct a further search.

Background

On June 15, 2001, the Appellant requested information related to "the decision to use the wildlife refuge worker scenario to calculate the radio nuclide soil action levels" for Rocky Flats. The Appellant wanted to know who initially proposed the scenario, who commented on it prior to its approval, and who approved the scenario. Request Letter dated June 15, 2001, from LeRoy Moore, Appellant, to Mary Hammack, FOIA Officer, Rocky Flats (Request Letter). On February 14, 2002, Rocky Flats released six documents to the Appellant. Letter dated February 14, 2002, from Mary Hammack to LeRoy Moore.(1) On June 24, 2002, Rocky Flats issued a determination finding no additional responsive documents, except one which originated with the Colorado Department of Public Health and Environment (CDPHE). Determination Letter dated June 24, 2002, from Mary Hammack to LeRoy Moore. In the June 24, 2002 Determination Letter, Rocky Flats attempted to provide the Appellant with

sufficient information about the document so that he could determine whether it had received the document from CDPHE or not. Memorandum of July 29, 2002 Telephone Conversation between Janet R. H. Fishman, Attorney-Examiner, OHA, and Mary Hammack (July 29, 2002 Memorandum). In its Appeal, the Appellant asks that another search be completed. Appeal Letter at 2. The Appellant does not suggest where Rocky Flats could look further that might uncover the information but merely requests an additional search.

Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

We contacted Rocky Flats to determine what type of search was conducted for documents responsive to the request. Rocky Flats informed us that it searched both the Rocky Flats Field Office administrative records and Kaiser Hill Company, L.L.C. (Kaiser-Hill) records. Included in the Rocky Flats administrative records are those of Mr. Legare, the person from whom the Appellant learned that the wildlife refuge worker scenario would be used; the Environment and Stewardship department; the Records and Management department; and Alpha Trac, the support service contractor. Rocky Flats conducted an initial computerized search. July 29, 2002 Telephone Memorandum. Some documents were identified by the computerized search as possibly responsive to the Appellant's request. *Id.* These documents were then examined to determine if they were in fact responsive. *Id.* Only the six documents released in February 2002 and one possibly responsive document were located. The one document originated with CDPHE. June 24, 2002 Determination Letter. Likewise, the Kaiser-Hill Records Management and Environmental Media Management Departments files were searched by computer, and all identified documents were determined not to be responsive to the request. Electronic Mail Message from Mary Hammack to Janet Fishman July 31, 2002.

With regard to the document which originated at CDPHE, Rocky Flats believes either that the Appellant has already received it from CDPHE or that CDPHE has the responsibility for releasing the document to the Appellant. We disagree. If CDPHE was a federal agency and subject to the FOIA, Rocky Flats could send the document to it for a determination whether it should be released or not. However, CDPHE is not a federal agency, but a state agency and therefore not subject to the FOIA. The document is in the possession and control of Rocky Flats and therefore subject to the FOIA. *David B. McCoy*, Case No. VFA-0707, 28 DOE ¶ 80,204 (2002). Therefore, we are going to remand the matter to Rocky Flats for a new determination either releasing the CDPHE document or justifying its withholding.

Notwithstanding the remand, we are convinced that Rocky Flats followed procedures which were reasonably calculated to uncover the material the Appellant sought in its request. *See Miller*, 779 F.2d at 1384-85. The search did uncover seven total documents. The fact that the search did not uncover the documents that the Appellant believes may be in the possession of the DOE does not mean that the search was inadequate. Rocky Flats searched both its records and those of Kaiser-Hill Company, L.L.C. Documents identified as possibly responsive were reviewed by responsible officials. Only seven responsive records were located. Therefore, we will deny the Appellant's Appeal in part and grant the Appeal in part. We will remand the matter to Rocky Flats for a new determination on the document which originated with CDPHE.

It Is Therefore Ordered That:

(1) The Appeal filed on July 12, 2002, by Rocky Mountain Peace & Justice Center, Case No. VFA-0759, is hereby is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Rocky Flats Field Office of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: August 9, 2002

(1)The Appellant filed an Appeal from the February 14, 2002 letter on March 4, 2002, with the Office of Hearings and Appeals (OHA) of the DOE. Letter dated March 4, 2002, from LeRoy Moore to Director, OHA, DOE. On April 10, 2002, that Appeal was dismissed because no appealable determination had yet been issued. Dismissal Letter dated April 10, 2002, from Thomas O. Mann, Deputy Director, OHA, to LeRoy Moore.

Case No. VFA-0760

August 26, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Todd J. Lemire

Date of Filing: July 16, 2002

Case Number: VFA-0760

On July 16, 2002, Todd J. Lemire filed an Appeal from a determination the DOE's FOIA/Privacy Act Division (DOE/FOIA) issued on April 22, 2002. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. Background

Mr. Lemire requested from DOE "an undeleted copy of the Atomic Energy Commission document entitled ?Conversation with Senator Humphrey and Mr. Doyle Northup on Unidentified Signals, Note by the Secretary,' dated April 15, 1958," and "documents that relate to Meeting 1347 on March 28, 1958, . . ." Letter from Abel Lopez, Director, DOE/FOIA, to Todd Lemire (April 22, 2002). In response, DOE/FOIA informed Mr. Lemire that a "search for responsive documents was conducted of the files of the History Division in the Office of the Executive Secretariat. The search, however, did not locate any documents that are responsive to the request." *Id.* DOE/FOIA also stated that the "History Division informed us that any documents that may be responsive to your request have been transferred to the National Archives and Records Administration (NARA)." *Id.* DOE/FOIA provided Mr. Lemire with a contact and address for requesting records from NARA. *Id.*

II. Analysis

Since Mr. Lemire filed his appeal, we have learned that the History Division does in fact have a document responsive to Mr. Lemire's request, specifically, a "bound copy of the minutes [of Meeting 1347] that have not had a classification review. Because NARA has the same collection in an unbound, reviewed copy, they can respond to FOIA's much faster." Electronic Mail from Cliff Scroger, History Division, to Steven Goering, OHA (July 24, 2002). Nonetheless, the DOE must identify all documents in its possession that are responsive to a FOIA request. 5 U.S.C. § 552(a)(3); 10 C.F.R. § 1004.5(b). We will therefore remand this matter to DOE/FOIA so that it may conduct a new search, identify all documents responsive to all items of Mr. Lemire's request in the possession of DOE, and release to Mr. Lemire information in those documents that is not exempt from the FOIA.(1)

In conducting its new search, DOE/FOIA should consider expanding the scope of its search for responsive documents to include the DOE Nevada Operations Office (DOE/NV). Mr. Lemire points out in his appeal that he was able, via a search of the DOE OpenNet web site, to identify documents located at DOE/NV that appear to be responsive to his request. Appeal at 1. Based on this information, we believe a "search reasonably calculated to uncover the sought materials" should include DOE/NV. *Miller v. Department of*

State, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Todd J. Lemire on July 16, 2002, OHA Case Number VFA-0760, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the FOIA/Privacy Act Division of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date:August 26, 2002

(1) DOE/FOIA may wish to consult with Mr. Lemire to determine if he wants to file a request with NARA, instead of with DOE, for a copy of the minutes of Meeting 1347 or any other documents that he may be able to obtain more quickly from NARA.

Case No. VFA-0761

September 13, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Muriel F. Sorensen

Date of Filing: August 12, 2002

Case Number: VFA-0761

On August 12, 2002, Muriel F. Sorensen (Sorensen) filed an Appeal from a determination issued to her in response to a request for documents concerning her father, Acle Parke, that Sorensen submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The determination was issued on June 24, 2002, by the Richland Operations Office (Richland). This Appeal, if granted, would require that Richland perform an additional search.

I. Background

On May 21, 2002, Muriel Sorensen requested information regarding the " . . . employment and/or medical records [Richland] might have pertaining to her father, Acle Parke." Electronic mail message from Sarah Prein, Richland, to Valerie Vance Adeyeye, Office of Hearings and Appeals (OHA) (September 5, 2002). Ms. Sorensen stated that she "believed that [her] father was employed at the Hanford Nuclear Reservation site sometime in the 1940's." Letter from Sorensen to Director, OHA (July 23, 2002). Richland conducted a search by name and Social Security number for responsive material, but was unable to locate any employment or medical records for Acle Parke. As a result, Richland denied the request, and Sorensen filed this Appeal.

II. Analysis

A. ADEQUACY OF SEARCH

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. United States Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

We contacted Richland to ascertain the scope of the search. Richland received the request on May 29, 2002, and faxed the request, along with Mr. Parke's death certificate, to the Hanford Environmental Health Foundation (HEHF), which maintains all occupational health records for the Hanford Site, including pre-employment physicals, exit exams, and first aid treatments. Electronic mail message from Sarah Prein, Richland, to Valerie Vance Adeyeye, OHA (August 26, 2002). HEHF searched but found no responsive material. (1) *Id.* Richland also forwarded the request to two Richland employees who maintain record

listings for employment records–one for trade employees and another for former Hanford prime contractor and subcontractor employees. *Id.* Both individuals searched the data in their possession and found no responsive records. *Id.* Richland then contacted its Human Resources Department to determine if Mr. Parke had ever been employed by the Atomic Energy Commission. *Id.* That department found no responsive material. *Id.* Finally, Richland asked the Radiation Exposure Records group to search for any information suggesting that Mr. Parke had been monitored for radiation exposure at Hanford. *Id.* That group found no responsive material. *Id.*

Based on the information above, we find that Richland has conducted a search reasonably calculated to uncover any records relating to Acle Parke. We also note that the language in Ms. Sorensen's request and Appeal suggests that she was not certain that her father had ever worked at the Hanford Nuclear Site. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Muriel Sorensen on August 12, 2002, OHA Case Number VFA-0761, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the

requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 13, 2002

(1)The HEHF information begins in 1943, when DuPont began operations at Hanford. Electronic mail message from Sarah Prein, Richland, to Valerie Vance Adeyeye, OHA (August 26, 2002). The Hanford site was selected in December 1942 and work began on the site in the spring of 1943. Electronic mail message from Sarah Prein, Richland, to Valerie Vance Adeyeye, OHA (September 9, 2002).

Case No. VFA-0763

November 27, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Carla Mink

Date of Filing:July 26, 2002

Case Number: VFA-0763

Carla Mink filed this Appeal from a determination issued to her by the Rocky Flats Field Office (RFFO) of the Department of Energy (DOE). The determination responded to a request for information she filed under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, the DOE would be required to conduct a further search for the requested information.

Mink submitted a request to RFFO for copies of medical, radiation, and employment records relating to her father, Charles Donaldson. Mink said that Donaldson was a former employee of Swinerton and Walberg, a contractor at the RFFO site. She added that Donaldson worked as a plumber at the site during the 1960's.

RFFO responded with a Determination Letter, stating that it had conducted an extensive search and found no records responsive to Mink's request. Mink appealed this determination. In her Appeal, Mink states;

I know for a fact that my father worked at Rocky Flats during the 1960's.... I know that over 30 years have passed since my father worked at Rocky Flats, but I also know that the United States Government keeps records of employees, and that his records must be on file.

(Emphasis in the original.)

II. Analysis

The Privacy Act (PA) requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). A PA request requires only that the agency search systems of records, in contrast with the Freedom of Information Act (FOIA), which requires an agency to search all of its records. Nevertheless, we require a search for relevant records under the PA to be conducted with the same rigor that we require for searches under the FOIA. *Stephen A. Jarvis*, Case No. VFA-0764, 29 DOE ¶ _____ (2002). We will therefore analyze the adequacy of the search conducted by RFFO in light of the principles we have applied in cases under the FOIA.

A FOIA request deserves a thorough and conscientious search for responsive records, and we will remand a case where it is evident that the search was inadequate. *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). A search must be reasonably calculated to find the requested records, but it need not be exhaustive. *Miller v. Department of State*, 779 F.2d 1378 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476 (D.C.Cir. 1984). Thus, in analyzing the adequacy of a search, "the issue is not whether any further documents might conceivably exist but rather whether the government's search for

responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C.Cir. 1982).

In our review of Mink's Appeal, we contacted Mary Hammack of the Freedom of Information and Privacy Act Office at RFFO.(1) Hammack stated that Mink's request was given to employees in the Records and Information Management office at the RFFO site. These employees searched three computerized data bases - employment records, medical records, and radiological records. The searches uncovered no records relating to Charles Donaldson.

Hammack also said it was not surprising that no records relating to Donaldson were found. She explained that Donaldson, as a plumber working for Swinerton and Walberg, was categorized for record- keeping purposes as a construction worker. Until the early 1980's, Hammack said, construction workers' records were held by their employer, and not by RFFO. Since Donaldson left his employment at the RFFO site before the 1980's, it is unlikely that his records were transferred from Swinerton and Walberg to RFFO.

III. Conclusion

We believe that RFFO conducted a search that was reasonably calculated to find the materials requested by Mink. Moreover, based on the information provided by Hammack, we find no reason to believe that a further search would uncover records responsive to the request. We will therefore deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Carla Mink, Case No. VFA-0763, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(g)(1). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 27, 2002

(1)Although Mink's request was for records pertaining to her father, and not to herself, her request was processed by RFFO as a PA request and not a FOIA request. Hammack told the OHA that this was done because the PA would give Mink broader access to records than the FOIA would, and that she performed the same full search for responsive records that she would have performed for a FOIA request.

Case No. VFA-0764

October 23, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Stephen A. Jarvis

Date of Filing: September 17, 2002

Case Number: VFA-0764

This Decision and Order concerns an Appeal that Stephen A. Jarvis filed from a determination issued to him by the Privacy Act Officer, Office of Communications, Richland Operations Office (Richland). In this determination, Richland responded to Mr. Jarvis' request for information under the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. The PA requires that each federal agency permit an individual to gain access to information about himself that is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Appeal, if granted, would require Richland to conduct another search for responsive documents.

In his request, Mr. Jarvis sought a copy of his Hanford site radiation exposure record and a copy of his personnel security file. In its response, Richland provided a copy of the exposure record, but stated that the personnel security file had been destroyed in April 1990 in accordance with a Records Inventory and Disposition Schedule (RIDS). The response further stated that these schedules are approved by the Archivist of the United States and mandate how long specific records are to be maintained. In his Appeal, Mr. Jarvis challenges the adequacy of Richland's search for the file.

DOE regulations define a system of records as "a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual." 10 C.F.R. § 1008.2(m). Under the PA, an office that issues a determination to a requester must insure that it has searched for records that are retrieved by name or other personal identifier of the requester in every relevant system of records under its control. *Diane C. Larson*, 27 DOE ¶ 80,110 (1998).

We have often reviewed the adequacy of a search conducted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. A PA request requires only a search of systems of records, rather than a search of all agency records, as is required under the FOIA. Nevertheless, the standard of sufficiency that we demand of a PA search is no less rigorous than that of a FOIA search. Therefore, we will analyze the adequacy of the search conducted by Richland in the case at hand using principles that we have developed under the FOIA.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further

documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted was adequate, we contacted Richland. We were informed that the applicable RIDS schedule called for the destruction of Mr. Jarvis' file 10 years after it became inactive in 1980. When Richland's security division searched its database for the file, an entry for Mr. Jarvis was discovered, with the notation "Destroyed." Richland security personnel also searched the national database for DOE personnel security files without success. This database is purged of files that have been inactive for 10 months. *See* memorandum of October 9, 2002 telephone conversations between Robert Palmer, OHA Staff Attorney, and Sarah Prein, Richland.

Based on the foregoing, we conclude that Richland's search was adequate, and that Mr. Jarvis' file has in fact been destroyed. We will therefore deny his Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Stephen A. Jarvis in Case No. VFA-0764 is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 23, 2002

Case No. VFA-0765

September 3, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:Michael P. Cawley

Date of Filing:August 6, 2002

Case Number: VFA-0765

On August 6, 2002, Michael P. Cawley filed an appeal from a determination issued on July 23, 2002, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In this appeal, Mr. Cawley contends that Idaho erroneously denied his request for the names of individuals who had worked at the Idaho National Engineering and Environmental Laboratory (INEEL) during a certain time period and filed a claim for radiation illness.(1) For the reasons detailed below, we find that Idaho correctly withheld the names of these individuals under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6), and deny the appeal.

Background

On July 18, 2001, Mr. Cawley submitted a FOIA request to Idaho seeking the names of individuals who had worked at INEEL from 1955 to 1974 and had filed a claim for radiation illness. On July 23, 2002, Idaho issued a determination letter to Mr. Cawley that denied this FOIA request on the grounds that such information is exempt from disclosure under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6).(2)

On August 6, 2002, Mr. Cawley appealed this determination to the Office of Hearings and Appeals. In this appeal, Mr. Cawley indicated that he had worked at INEEL from 1955 to 1974 and was making a claim for radiation illness. Mr. Cawley also explained that he was seeking the names of employees who were similarly situated because he believed that they could help each other.

Analysis

It is well settled that the purpose of Exemption 6 is to protect individuals from clearly unwarranted invasions of their personal privacy. Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of such information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. Ripskis v. Department of HUD, 746 F.2d 1, 3 (D.C. Cir. 1984) (Ripskis). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. See Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee); Hopkins v. Department of HUD, 929 F.2d 81, 88 (2d Cir. 1991). In determining whether release of the document would further the public interest, the Supreme Court has held that the personal interest of the requester is irrelevant. Reporters Committee, 489 U.S. at 772-773. Finally, the agency must weigh the privacy

interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. Reporters Committee; see also Frank E. Isbill, 27 DOE ¶ 80,215 (1999).

Applying these standards to the facts of this case, we conclude that Idaho properly withheld this information under Exemption 6. First, we find that individuals have a significant privacy interest in the fact that they have filed a claim for radiation illness. We have long held that a federal employee has a privacy interest in his or her name when it is linked to personally sensitive information. See The Cincinnati Enquirer, 25 DOE ¶ 80,206 at 80,768-69 (1996); William H. Payne, 25 DOE ¶ 80,190 at 80,726-27 (1996); The News Tribune, 25 DOE ¶ 80,181 at 80,699-700 (1996). The fact that an individual has filed a claim for radiation illness is sensitive information, and it is obvious that disclosure of this information may cause the individual to suffer embarrassment or unwarranted attention. Moreover, an individual might suffer financial harm if this information were disclosed because of the bias against people with disabilities. An individual thus has a privacy interest which will be invaded by the disclosure of such information. See Ripskis.

Second, we also find that release of the names of individuals who filed a claim for radiation illness would not further the public interest because such information would not shed light on the operations and activities of the government. We recognize that the public has a significant interest in knowing about the number of individuals who worked at INEEL and filed a claim for radiation illness.(3) Amongst other things, disclosure of this information would conceivably shed light on the hazards of radiation exposure, working conditions at INEEL, and the workings of a government compensation program. However, we also find that disclosure of the names of the affected individuals would reveal little or nothing about the operation and activities of government. See Reporters Committee, 489 U.S. at 773. See also Michael A. Grosche, 26 DOE ¶ 80,146 at 80,644 (1996) (release of names not in the public interest because names would not advance the public's understanding of government). Moreover, in determining the public interest, we may not consider the fact that Mr. Cawley would like to obtain the names of other individuals who worked at INEEL and filed a claim for radiation illness because he is similarly situated. Reporters Committee at 771- 772. As such, we must conclude that release of the requested information would not further the public interest.

As we have found that there is a substantial privacy interest at stake in this case and that release of the requested information would not further the public interest, we conclude that Idaho properly withheld the names of individuals who worked at INEEL and filed a claim for radiation illness under Exemption 6 of the FOIA.

It Is Therefore Ordered That:

(1) The portion of the Freedom of Information Act Appeal filed by Michael P. Cawley on August 6, 2002, that seeks information concerning the number of individuals who worked at INEEL and filed a claim for radiation illness is dismissed as moot, and the remainder of Mr. Cawley's appeal is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 3, 2002

(1)In his appeal, Mr. Cawley also indicated that Idaho had failed to respond to his request for information concerning the number of people who had worked at INEEL and had filed a claim for radiation illness. As Idaho provided this information to Mr. Cawley in a letter dated July 30, 2002, we will dismiss this portion of the appeal as moot.

(2)The determination letter also indicated that the names of such individuals would also be protected from disclosure under the Privacy Act, 5 U.S.C. § 552a. As stated in that letter, absent the express written consent of the individuals, Mr. Cawley has no right to access under the Privacy Act to records concerning other individuals. 5 U.S.C. § 552a(b).

(3)Idaho has already provided Mr. Cauley with information concerning the number of individuals who had been employed by INEEL and filed a claim for radiation illness.

Case No. VFA-0766

October 25, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: David H. Murphy

Date of Filing: October 1, 2002

Case Number: VFA-0766

On October 1, 2002, David H. Murphy filed an Appeal from a determination issued to him on August 5, 2002, by the Nevada Operations Office (Nevada) of the National Nuclear Security Administration (NNSA). That determination responded to a request for information he filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. Mr. Murphy asks that Nevada conduct an additional search for documents responsive to his request.

I. Background

Mr. Murphy filed a request for information in which he sought records regarding possible radiation exposure in 1956 and records which may connect him with the 93rd Fighter Squadron of Kirtland Air Force Base in Albuquerque, New Mexico. On August 5, 2002, Nevada issued a determination which stated that it conducted a search for responsive documents, but located no records pertaining to the Appellant.

In addition, with respect to records regarding the 93rd Fighter Squadron, Nevada stated that it conducted a search for records at its Coordination and Information Center in North Las Vegas, Nevada, but was unable to locate any responsive documents. Nevada informed the Appellant that records regarding the 93rd Fighter Squadron are under the jurisdiction of the Department of Defense, U.S. Air Force. It further informed the Appellant that it would transfer his request to the Department of Defense which would then respond directly to the Appellant.

On October 1, 2002, Mr. Murphy filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Murphy challenges the adequacy of search conducted by Nevada and asks that the OHA direct Nevada to conduct another search for responsive documents.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Hideca Petroleum Corp.*, 9 DOE ¶ 80,108 (1981); *Charles Varon*, 6 DOE ¶ 80,118 (1980). In cases such as these, "[t]he issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In reviewing the present Appeal, we contacted officials at Nevada to ascertain the extent of the search that had been performed and to determine whether any documents responsive to Mr. Murphy's request might exist. Upon receiving Mr. Murphy's request for information, Nevada conducted a Master File search of its dosimetry records but located no nuclear weapons testing dosimetry records pertaining to Mr. Murphy. *See* Determination Letter at 1. This search was conducted by using Mr. Murphy's last name and his social security number. *Id.* Nevada further advised Mr. Murphy that records may exist with the Air Force Medical Operations Agency and/or the Defense Threat Reduction Agency and that Mr. Murphy must contact those agencies himself. *Id*. With respect to Mr. Murphy's request for information regarding the 93rd Fighter Squadron, Nevada indicated that it conducted a search for records at its Coordination and Information Center (CIC) in North Las Vegas, Nevada. An official at Nevada informed us that the CIC is a repository for historical data on the United States' nuclear weapons testing program and that it maintains more that 370,000 historical records. *See* Record of Telephone Conversation between Michael Brown, NNSA/Nevada, and Kimberly Jenkins-Chapman, OHA (October 8, 2002). In conducting this search, an official at Nevada stated that information is listed on an open-net database. Upon entering relevant words on this database such as "93rd" or "Squadron," various documents surfaced, but none were responsive to Mr. Murphy's request. Nevada provided Mr. Murphy with a copy of its search results in its Determination Letter. In addition, Nevada determined that records regarding the 93rd Fighter Squadron are under the jurisdiction of the Department of Defense, U.S. Air Force, and therefore transferred Mr. Murphy's request to that office to respond directly to him.

Given the facts presented to us, we find that Nevada conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Murphy's request. Accordingly, Mr. Murphy's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by David H. Murphy, OHA Case No. VFA-0766, on October 1, 2002, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 25, 2002

Case No. VFA-0768

November 6, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Marlene Kangas

Date of Filing: August 16, 2002

Case Number: VFA-0768

On August 16, 2002, Marlene Kangas appealed a determination issued by the Richland Operations Office (Richland) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In her appeal, Ms. Kangas contends that Richland had failed to conduct an adequate search for documents that were responsive to a FOIA request that she had filed. For the reasons detailed below, we find that Richland conducted an adequate search for responsive documents and will deny the appeal filed by Ms. Kangas.

I. Background

Ms. Kangas filed a FOIA request with Richland in which she requested the Hanford Site employment record for her deceased father, Reuben Kangas. In this letter, Ms. Kangas indicated that her father had been a member of Local Union 598, Plumbers & Steamfitters, and worked for Standard Plumbing & Heating Company, a sub-contractor to J.A. Jones Construction Company. On January 28, 2002, Richland issued a determination letter in response to Ms. Kangas' FOIA request which indicated that it was denying the FOIA request because it had been unable to locate any employment records.

On March 13, 2002, Ms. Kangas appealed this determination to the Office of Hearings and Appeals (OHA) on the grounds that Mr. Kangas had worked at Hanford, Minnesota, and New Mexico and that Richland has failed to conduct an adequate search for her father's records. When an official at Richland became aware of the appeal, she contacted Ms. Kangas and informed her that the DOE sometimes had other types of records on members of union halls and subcontractor employees even when no employment records could be located, and asked whether she would like to amend her original FOIA request to include her father's medical and radiation exposure records. Ms. Kangas amended the request and soon thereafter Richland provided 58 pages of radiation exposure records. Ms. Kangas also received 125 pages of medical records, provided directly from the Hanford Environmental Health Foundation. Ms. Kangas appealed this determination because she believes that there should be more records which indicate that her father was exposed to radiation. She bases

this belief on the fact that she and her brothers remember that her father worked in "hot spots" and he would often tell his children that he had only worked for a short time before his badge indicated that he had too much radiation exposure. Her father also related that he would also be scrubbed down and not permitted to work until his radiation exposure level had decreased. Ms. Kangas indicated that she and her brothers had reviewed the records that had been provided and the records do not reflect the events that they remember. Ms. Kangas thus concludes that if an adequate search has been performed, Richland would have located additional radiation exposure records.

II. Analysis

We have held that a FOIA request deserves a thorough and conscientious search for responsive documents. When we have found that a search was inadequate, we have consistently remanded the case and ordered a further search for responsive documents. *E.g. Eugene Maples*, 23 DOE ¶ 80,106 (1993); *Marlene R. Flor*, 23 DOE ¶ 80,130 (1993); *Native Americans for a Clean Environment*, 23 DOE ¶ 80,149 (1993). However, the FOIA requires that a search be reasonable, not exhaustive. "The standard of reasonableness that we apply to the agency search procedures does not require absolute exhaustion of files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985).

In reviewing the present Appeal, we contacted officials at Richland to ascertain the extent of the search that had been performed. Upon receiving Ms. Kangas' amended Request for Information, Richland conducted a search of its radiation exposure and medical records in two separate record groups. According to Richland, all of its radiation exposure records are centrally located at the Pacific Northwest National Laboratory and all of its medical records are held at the Hanford Environmental Health Foundation. Both of these databases were searched by inputting Mr. Kangas' name and Social Security number. Richland provided Ms. Kangas with all materials identified by this information and has indicated that there are no other locations that are reasonably likely to possess responsive documents. *See* Record of Telephone Conversation between Sarah Prein, Richland and Kimberly Jenkins-Chapman, OHA (October 23, 2002).

Given the facts presented to us, we are convinced that Richland conducted an adequate search which was reasonably calculated to uncover documents responsive to Ms. Kangas' request. Accordingly, Ms. Kangas' Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Marlene Kangas, OHA Case No. VFA-0768, on August 16, 2002, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the

agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 6, 2002

Case No. VFA-0769

October 15, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph H. Blair

Date of Filing: September 9, 2002

Case Number: VFA-0769

This Decision and Order concerns an Appeal that Joseph H. Blair filed from a determination issued to him by the Department of Energy's (DOE) Savannah River Operations Office (SR). The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require the SR to release a specific document to Mr. Blair.

I. Background

Mr. Blair, an employee of Bechtel Savannah River Site, filed a request in which he sought copies of all information in files concerning him that are in the possession of "Nurse Nancy [Bolin]," the Bechtel Savannah River Company's Safety nurse. The one document that forms the basis for his appeal pertains to a workman's compensation claim.

On August 1, 2002, the Savannah River Operations Office (SR) issued a determination letter regarding Mr. Blair's request. Savannah River's determination letter stated that a search had been conducted and no documents responsive to Mr. Blair's request could be found. See Determination Letter. On September 9, 2002, Mr. Blair filed his Appeal with the Office of Hearings and Appeals. In the Appeal, Mr. Blair challenges the adequacy of the search conducted by SR. He alleges that Ms. Bolin allowed him to see the workman's compensation document, but did not allow him to make a copy. Mr. Blair was informed that the document was an Intra-Office Memorandum addressed to Ms. Bolin. See September 19, 2002 Memorandum of Telephone Conversation between Nancy Bolin, Nurse for Bechtel, and Toni Brown, OHA. On Appeal Mr. Blair seeks a copy of the document. We have determined that the document he seeks does exist. However, the issue before us is whether the document should be released to Mr. Blair pursuant to the FOIA.

II. Analysis

The FOIA applies to "records" that are maintained by "agencies" within the executive branch of government. 5 U.S.C. § 552(f). Consequently, the FOIA is applicable only where the requested document may be considered an "agency record."

The language of the FOIA does not define the term "agency records," but merely lists examples of the types of information agencies must make available to the public. 5 U.S.C. § 552(a). In interpreting the phrase "agency records," we have applied a two-step analysis for determining whether documents created by non-federal organizations, such as Bechtel, are subject to the FOIA. See, e.g., Los Alamos Study Group, 26 DOE ¶ 80,212 (1997). That analysis involves a determination (i) whether the organization is an

"agency" for purposes of the FOIA and, if not, (ii) whether the requested material is nonetheless an "agency record." Los Alamos Study Group, 26 DOE at 80,841.

The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . or any independent regulatory agency." 5 U.S.C. § 552(f). Bechtel, as a public corporation, does not fit into any of the Section 552(f) categories. However, the courts have found that some outside entities should still be considered agencies for FOIA purposes. The Supreme Court has held that an entity will not be considered a federal agency for purposes of the FOIA unless its operations are subject to "extensive, detailed, and virtually day-to-day supervision." Forsham v. Harris, 445 U.S. 169, 190 & n.11 (1980) (citing United States v. Orleans, 425 U.S. 807 (1976)). In the present case, although Bechtel was a contractor for DOE, the DOE did not conduct extensive, detailed, and day-to-day supervision of Bechtel's operations. We therefore conclude that Bechtel is not an "agency" within the meaning of the FOIA.

Although Bechtel is not an agency for the purposes of the FOIA, records relevant to Mr. Blair's request could become "agency records" if the DOE obtained them and they were within the DOE's control at the time Mr. Blair made his FOIA request. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-46 (1989) (Tax Analysts). In this case, the document at issue was not in the DOE's control or possession at the time of the request. See September 5, 2002 Memorandum of Telephone Conversation between Pauline Conner, SR's FOIA Representative, and Toni Brown, OHA. Rather, it was found in Bechtel's files. Based on these facts, the document does not qualify as an "agency record" under the test set forth in Tax Analysts.

Even if contractor-acquired or contractor-generated records fail to qualify as "agency records," they may still be subject to mandatory release if the contract between the DOE and that contractor provides that the document in question is the property of the agency. The DOE regulations provide that "[w]hen a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)." 10 C.F.R. § 1004.3(e)(1).

We therefore next look to the contract between the DOE and Westinghouse Savannah River Company, LLC,(1) to determine the status of the requested record.

Contract No. DE-AC09-96SR18500 (republished as Modification No. M068), Section I.88, Paragraph (b) of the contract states that the "following records are considered the property of the contractor . . .

(1) Employment-related records (such as workers' compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

The document at issue is an employment-related record. It is not contained in any Privacy Act system of records. *See* Contract No. DE-AC09-96SR18500. Consequently, it is a contractor-owned record, and not "the property of the Government." We therefore find that the record sought by Mr. Blair is neither an "agency record" within the meaning of the FOIA nor subject to release under the DOE regulations.

III. Conclusion

As stated above, SR stated in its determination letter that it did not have the document sought by Mr. Blair. Nothing raised in Mr. Blair's Appeal causes us to question SR's determination. Based on our findings above, we conclude that this document is not an agency record within the meaning of the FOIA, and is not

considered DOE property by the relevant contract. Consequently, we conclude that the document is not subject to release pursuant to the FOIA or DOE regulations. We will accordingly deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Joseph H. Blair, Case No, VFA-0769, is hereby denied.

(2) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 15, 2002

(1)This contract defines “the Contractor” as the following parties, which form the performing entity on which this contract was based: Westinghouse Savannah River Company, Bechtel Savannah River, Inc., BWXT Savannah River Company and BNFL Savannah River Corporation.

February 3, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Howard R. Larson
Date of Filing:	August 19, 2002
Case Number:	VFA-0770

On August 19, 2002, Howard R. Larson (Larson) filed an Appeal from a determination issued to him by the Richland Operations Office in response to a request for documents that Larson submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. 1/ The determination was issued on July 1, 2002, by the Office of Intergovernmental, Public and Institutional Affairs of the Richland Operations Office (Richland). This Appeal, if granted, would require that Richland perform an additional search.

I. Background

This Appeal concerns a FOIA request that Congressman Brian Baird submitted to Richland on May 23, 2002, on behalf of Larson. Congressman Baird requested medical, radiation exposure and employment records relating to Larson's employment at the Hanford site while serving in the armed forces. Letter from Richland to Congressman Brian Baird (July 1, 2002) (Determination Letter). He also requested well reports from the 1950s for the 200 and 300 areas on the Hanford Site. *Id.* Richland searched by name and Social Security number for employment and medical records related to Larson, but found none. In addition, there was no indication that Larson was ever monitored for radiation exposure at Hanford. *Id*. Richland informed Congressman Baird that records pertaining to military personnel stationed at Hanford are not archived with the DOE, and suggested that he contact the National Archives and Records Administration for service records. *Id.*

Richland also conducted a search of its archive databases using the key word "well," and released a list with the results of those searches. In the Determination Letter, Richland informed Congressman Baird that he or Larson could request copies of any of the documents on the listings. Determination Letter at 2.

1/ The Appeal was not filed properly, but the deficiency was corrected in December 2002.

However, neither the congressman nor Larson asked for any of the well reports. In his Appeal, Larson stated that "the information regarding a well report relating to the 200 and 300 areas was classified secret." Letter from Larson to Director, OHA (August 19, 2002). He explained that the Veterans Administration requires information about the wells in order to correctly assign a dose assessment in his claim for radiation exposure, and asks OHA to order Richland to release the well information to him. Letter from Larson to Director, OHA (August 19, 2002).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See*, *e.g.*, *Glen Milner*, 17 DOE ¶ 80,102 (1988).

Larson informed this office that he was unable to use the list of well reports released by Richland because the list contained an excessive amount of information. He had requested information on the years 1951 and 1952 only. In addition, some of the material was identified as classified or marked "not available under the FOIA." Memorandum of Telephone Conversation between Larson and Valerie Vance Adeyeye, OHA (January 15, 2003).

This office has analyzed the search conducted by Richland and we find that the search was adequate. Richland used Larson's name and Social Security number to search for personal information, even though his service records were not likely to be found at Hanford since he was a member of the military and not a DOE employee. Richland also searched for information about the wells in Area 200 and Area 300, and found responsive material in its database. Memorandum of Telephone Conversation between Sarah Prein, Richland and Valerie Vance Adeyeye, OHA (December 13, 2002). However, Larson has not availed himself of Richland's offer to send him any of the non-exempt material on the list. *Id.* As for Larson's remark that the list was not user-friendly due to its length, Richland admitted searching for a broader time period than Larson requested. However, it did so in order to identify all responsive material. Memorandum of Telephone Conversation between Sarah Prein, Richland, and Valerie Vance Adeyeye, OHA (January 22, 2003). The reports are dated, and those dates appear on the list so that Larson should be able to identify the reports pertaining to 1951 and 1952. 2/ According to Richland, only one document

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2/ Some of the reports could not be dated because they fell within a time range that Richland could not narrow. Memorandum of Telephone Conversation between Sarah Prein, Richland, and Valerie Vance Adeyeye, OHA (January 22, 2003).

was classified and, as stated in the determination, Larson can request the documents he wants through the FOIA or through Richland's reading room. 3/ Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Howard Larson on August 19, 2002, OHA Case Number VFA-0770, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the
District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 3, 2003

3/ The classified report was not actually a well report. It was a report about plutonium, but it matched the search criteria because the title contained the phrase "as well as." Memorandum of Telephone Conversation between Sarah Prein, Richland, and Valerie Vance Adeyeye, OHA (Jaunary 22, 2003).

Case No. VFA-0771

November 29, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:Andrew T. Stahr

Date of Filing:August 19, 2002

Case Number: VFA-0771

Andrew T. Stahr (Stahr) filed this Appeal from a determination issued to him by the Oak Ridge Operations Office (OROO) of the Department of Energy (DOE). The determination responded to a request for information Stahr filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) at 10 C.F.R. Part 1004. In his Appeal, Stahr challenges the adequacy of OROO's search for documents responsive to his request.

I. Background

Stahr submitted a request to OROO for copies of x-rays taken of his father, David Stahr. David Stahr formerly worked at a Paducah, Kentucky, site that is under the jurisdiction of OROO. In his request, Stahr specified the date of each x-ray and the body area included in the x-ray.

OROO responded with a Determination Letter stating that it had conducted a search of the files at the Paducah Site Office and found no records responsive to Stahr's request. Stahr appealed this determination.

II. Analysis

The FOIA generally requires federal agencies to release material to the public upon request. Following an appropriate request, agencies must search their records for responsive documents. We have often stated that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where we believe the search conducted was inadequate. *E.g., Ashok K. Kaushal*, 27 DOE ¶ 80,189 (1999); *Hobart T. Bolin, Jr.*, 27 DOE ¶ 80,124 (1998).

In a case involving the adequacy of the agency's search, "the issue is not whether any further responsive documents might conceivably exist but rather whether the government's search for responsive documents was inadequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). To determine whether an agency's search was adequate, we therefore examine its actions under a "standard of reasonableness." *McGehee v. CIA*, 697 F.2d 1095, 1100-01, *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Furthermore, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979).

In our review of Stahr's Appeal, we contacted personnel in the medical department of the Paducah Site Office, and spoke with a long-time employee of the medical records department who had been involved in

the search for the x-rays. He recalled that a similar request for David Stahr's x-rays had been filed about twenty-five years earlier. The x-rays had not been found at that time, and the employee remembers being told that a member of David Stahr's family had checked out the x-rays in the early 1970's, and the x-rays were never returned.

III. Conclusion

We believe that OROO conducted a search that was reasonably calculated to find the x-rays requested by Stahr. Moreover, based on the information provided by the employee in the medical records department, we have no reason to believe that a further search would locate responsive records. We will therefore deny this Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Andrew T. Stahr, Case No. VFA-0763, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 29, 2002

October 3, 2002

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Martin Salazar

Date of Filing: September 5, 2002

Case Number: VFA-0773

On September 5, 2002, Martin Salazar (the Appellant) filed an Appeal from a final determination that the Savannah River Operations Office (Savannah River) of the Department of Energy (DOE) issued on August 21, 2002. That determination concerned a request for information the Appellant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. Documents were located, redacted, and released to the Appellant in response to his request. In his Appeal, the Appellant asserts that Savannah River misinterpreted the standards under which it can withhold information. If granted, this Appeal would require Savannah River to release the documents in full.

Background

On April 8, 2002, the Appellant requested complete copies of all his "EEO files and any other disciplinary records in possession of [Savannah River]." Privacy Act Request dated April 8, 2002. On May 7, 2002, Savannah River released a number of redacted documents to the Appellant. He appealed to this Office on June 12, 2002. After discussions with Savannah River, it withdrew its May 7, 2002 determination letter, intending to issue a corrected letter. We dismissed the Appeal. Dismissal Letter dated September 4, 2002, from Thomas O. Mann, Deputy Director, Office of Hearings and Appeals (OHA), to Martin Salazar. On August 21, 2002, Savannah River issued the corrected determination letter, releasing redacted copies of the documents the Appellant requested. On September 5, 2002, the Appellant appealed a second time, claiming that Savannah River "misinterpreted the standards for which they seek exemption or has not established relevancy to the standards which they have cited." Appeal Letter dated August 27, 2002, from Martin Salazar to Thomas O. Mann, Deputy Director, OHA.

Analysis

The withheld information is personally identifiable information that specifically concerns the Appellant and is contained in a system of records from which records are retrieved. 5 U.S.C. § 552a(a)(5). The Privacy Act and the FOIA mandate its release to the Appellant unless the agency can show that it can be withheld under (a) an applicable exemption to the Privacy Act disclosure provisions, **and** (b) an applicable exemption to the FOIA disclosure provisions. Therefore, we will consider the present appeal under both acts.

The Privacy Act

Savannah River withheld the information which identifies investigative sources under Privacy Act Exemption (d)(5), which provides that "[n]othing in this section shall allow an individual access to information compiled in reasonable anticipation of a civil action and proceeding." 5 U.S.C. § 552a(d)(5)

(Exemption (d)(5)). We agree with the Appellant that Savannah River did not "establish relevancy to the standards which they cited." However, in our discussion with Savannah River, we determined that the documents released to the Appellant by the August 21, 2002 Determination Letter are part of a Privacy Act system of records, called DOE-41. DOE-41 contains legal records. In this particular case, these legal records were compiled during the past ten years in response to complaints filed by the Appellant. Memorandum of Telephone Conversation between Janet Fishman, Attorney- Examiner, OHA, and Pauline Conner, Savannah River. In addition, the Appellant currently has a law suit pending in federal district court against Savannah River. Electronic Mail Message dated September 9, 2002, from Lucy Knowles to Janet Fishman.

Rather than remand the matter to Savannah River again, we will review the application of Exemption (d)(5). In *Smeirtka v. Department of Treasury*, 447 F. Supp. 221, 227-28 (D.D.C. 1978), the court found that Exemption (d)(5) covers documents prepared by and at the direction of lay agency staff personnel during a period prior to the plaintiff's firing. Further, the court in *Government Accountability Project v. Office of Special Counsel*, 1988 WL 21394, at *5 (D.D.C. Feb. 22, 1988), found that the exemption applies to any records compiled in anticipation of civil proceedings whether prepared by attorneys or not. We believe that Exemption (d)(5) applies to the documentary information at issue in this case. The relevant records were compiled by Savannah River personnel in response to complaints filed by the Appellant. Since the withheld information is part of DOE-41, a Privacy Act system of records, and was compiled in response to complaints filed by the Appellant, it may properly be withheld under Exemption(d)(5).

The FOIA

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *See Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). Exemptions 5 and 6 are at issue in this case.

Exemption 5 exempts from mandatory disclosure documents that are "inter-agency memoranda or letters, which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts documents normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Redacted portions of one document released to the Appellant contained the handwritten notes of an attorney, which were redacted prior to its release to the Appellant. Attorney work-product is a privilege commonly cited in the civil discovery context. We agree that the handwritten portions of this document were properly withheld.

Exemption 6 exempts from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6); 10 C.F.R. 1004.10(b)(6). This includes legal files. In order to apply this exemption, an agency must weigh the privacy interests involved against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this case, Savannah River properly found that withholding the names of witnesses and complainants would eliminate the possibility of harassment, and release of that information would not shed any light on the operations and activities of the government. August 21, 2002 Determination Letter at 3. Therefore, we find that Savannah River properly applied Exemption 6 in withholding the names of complainants and witnesses in these documents.

Conclusion

The information withheld is the handwritten notes of an attorney and the names of the complainants and the witnesses. Since we find the information was properly withheld by Savannah River under FOIA Exemptions 5 and 6 and Privacy Act Exemption (d)(5), the present Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 5, 2002, by Martin Salazar, Case No. VFA-0773, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1). Judicial review may be sought in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 3, 2002